

D O N A T E D

By

**PANDIT SHAMBOO NATH DAR,
(1901 — 1969)**

ADVOCATE,

and former President

SRINAGAR MUNICIPAL COUNCIL

DATE LABEL

| | | | |
|--|--|--|--|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

Call No. _____

Date _____

Acc. No. _____

K. UNIVERSITY LIBRARY



This book should be returned on or before the last date stamped above. An over-due charge of **.06 P.** will be levied for each day if the book is kept beyond that day.

BORROWER'S
NO.

ISSUE
DATE

BORROWER'S
NO.

ISSUE
DATE

S. N. DAR, B.A., LL.B.
Vakil High Court,
SRINAGAR (Kashmir)

THE ALL INDIA DIGEST

SECTION II (CIVIL)—1811-1911

BY

T. V. SANJIVA ROW

First Grade Pleader, Trichinopoly

WITH THE HELP OF

P. RAMANATHA IYER, B.A., B.L.

AND

P. HARI RAO, B.A., B.L.

First Grade Pleaders, Trichinopoly.

VOL. VII

Mortgage—Pre-emption.

PUBLISHED BY

T. A. VENKASAWMY ROW

AND

T. S. KRISHNASAWMY ROW

Proprietors, The Law Printing House, Madras, and The Lawyer's
Companion Office, Trichinopoly and Madras.

1913

[Copyright Registered]

Books
Checked
2/50

PRINTED AT
THE LAW PRINTING HOUSE
MOUNT ROAD, MADRAS

| | |
|-------------------|---------|
| K UNIVERSITY LIB. | |
| K. DIVISION | |
| Acc No | 76116 |
| Date | 25.2.70 |

SV102

ABBREVIATIONS EXPLAINED.

REPORTS.

| | | | | | |
|----------------|-----|-----|-----|-----|--|
| A. | ... | ... | ... | ... | Indian Law Reports, Allahabad Series. |
| A. L. J. | ... | ... | ... | ... | Allahabad Law Journal. |
| A. W. N. | ... | ... | ... | ... | Allahabad Weekly Notes. |
| B. | ... | ... | ... | ... | Indian Law Reports, Bombay Series. |
| B. H. C. | ... | ... | ... | ... | Bombay High Court Reports. |
| B. L. R. | ... | ... | ... | ... | Bengal Law Reports. |
| Bom. L. R. | ... | ... | ... | ... | Bombay Law Reporter. |
| Bur. L. R. | ... | ... | ... | ... | Burma Law Reports. |
| C. | ... | ... | ... | ... | Indian Law Reports, Calcutta Series. |
| C. L. J. | ... | ... | ... | ... | Calcutta Law Journal. |
| C. L. R. | ... | ... | ... | ... | Calcutta Law Reports. |
| C. W. N. | ... | ... | ... | ... | Calcutta Weekly Notes. |
| C. P. L. R. | ... | ... | ... | ... | Central Provinces Law Reports. |
| Cor. | ... | ... | ... | ... | Coryton's Reports. |
| I. A. | ... | ... | ... | ... | Law Reports. Indian Appeals. |
| Ind. Cas. | ... | ... | ... | ... | Indian Cases. |
| L. B. R. | ... | ... | ... | ... | Lower Burma Rulings. |
| M. | ... | ... | ... | ... | Indian Law Reports, Madras Series. |
| M. H. C. | ... | ... | ... | ... | Madras High Court Reports. |
| M. L. J. | ... | ... | ... | ... | Madras Law Journal. |
| M. L. T. | ... | ... | ... | ... | Madras Law Times. |
| M. W. N. | ... | ... | ... | ... | Madras Weekly Notes. |
| Marsh. | ... | ... | ... | ... | Marshall's Reports. |
| M. I. A. | ... | ... | ... | ... | Moore's Indian Appeals. |
| Moo. P. C. C. | ... | ... | ... | ... | Moore's Privy Council Cases. |
| N. L. R. | ... | ... | ... | ... | Nagpur Law Reports. |
| N. W. P. H. C. | ... | ... | ... | ... | North-West Provinces High Court Reports. |
| O. C. | ... | ... | ... | ... | Oudh Cases. |
| P. R. | ... | ... | ... | ... | Punjab Record. |
| P. L. R. | ... | ... | ... | ... | Punjab Law Reporter. |
| P. W. R. | ... | ... | ... | ... | Punjab Weekly Reporter. |
| S. L. R. | ... | ... | ... | ... | Sind Law Reporter. |
| U. B. R. | ... | ... | ... | ... | Upper Burma Rulings. |
| W. R. | ... | ... | ... | ... | Sutherland's Weekly Reporter. |

OTHER ABBREVIATIONS.

| | | | | | |
|----------------|-----|-----|-----|-----|-----------------|
| Appl. | ... | ... | ... | ... | Applied. |
| Appr. | ... | ... | ... | ... | Approved. |
| Cons. | ... | ... | ... | ... | Considered. |
| D. or Dstd. | ... | ... | ... | ... | Distinguished. |
| Disc. | ... | ... | ... | ... | Discussed. |
| Diss. | ... | ... | ... | ... | Dissented from. |
| Exp. | ... | ... | ... | ... | Explained. |
| F. | ... | ... | ... | ... | Followed. |
| (F. B.) | ... | ... | ... | ... | Full Bench. |
| Obs. | ... | ... | ... | ... | Observed on. |
| (P. C.) | ... | ... | ... | ... | Privy Council. |
| R. or Refd. to | ... | ... | ... | ... | Referred to. |
| Rel. on | ... | ... | ... | ... | Relied on. |
| (S. B.) | ... | ... | ... | ... | Special Bench. |

N.B.—In the Punjab Record and the Punjab Law Reporter, the cases are known by their numbers and not by the pages where they are printed; (e.g.) 4 P. R. 1910 would mean Case No. 4, in the Punjab Record of 1910. The same explanation applies to the Punjab Law Reporter also. It has also to be remarked that the Punjab Record and the Punjab Law Reporter have been divided into two sections, Civil and Criminal.

[illegible]

TABLE OF HEADINGS, SUB-HEADINGS AND CROSS-REFERENCES.

The headings and sub-headings under which the cases are arranged are printed in this table in Capitals and Small Capitals respectively. The Cross-references are printed in ordinary type.

| | | | | | |
|--|-----|-----|---|-----|-----|
| MORTGAGE | ... | 1 | Muktear | ... | 731 |
| 1.—GENERAL | ... | " | Mulgainidar | ... | " |
| 2.—ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE... | 189 | | Mulgeni-holding | ... | " |
| 3.—CONDITIONAL SALE | ... | 209 | Mulgeni Kabuliyat | ... | " |
| 4.—CONSTRUCTION OF MORTGAGE DEEDS | ... | 219 | MULGENI LEASE | ... | " |
| 5.—FORECLOSURE | ... | 246 | Mulgeni Tenant | ... | 732 |
| 6.—FORM OF MORTGAGES | ... | 303 | Mulki Papers | ... | " |
| 7.—MARSHALLING | ... | 319 | Mul Raiyat | ... | " |
| 8.—POSSESSION UNDER MORTGAGE | ... | 326 | MULTIFARIOUSNESS | ... | 733 |
| 9.—REDEMPTION | ... | 333 | Municipal Bye-laws | ... | 747 |
| 10.—SALE OF MORTGAGED PROPERTY | ... | 545 | Municipal Commissioner | ... | " |
| 11.—SUBROGATION | ... | 618 | MUNICIPAL COMMITTEE | ... | 748 |
| 12.—TACKING | ... | 619 | MUNICIPAL COURTS, JURISDICTION OF | ... | " |
| 13.—USUFRUCTUARY | ... | 621 | Municipal Funds | ... | 749 |
| 14.—MISCELLANEOUS | ... | 642 | Municipal Act, Bombay | ... | " |
| Mortgagees' and Trustees' Powers | ... | 723 | Municipal City of Bombay | ... | " |
| Mortgagor | ... | " | Municipal Act, Bombay District | ... | " |
| Mosque | ... | 724 | Municipal, Bombay District Amendment Act | ... | " |
| MOTAP | ... | " | Municipal Act, Burma | ... | " |
| MOTHER | ... | 725 | Municipal Act, Calcutta | ... | " |
| MOURUSI HOLDING | ... | " | Municipal Consolidation, Calcutta | ... | 750 |
| MOVEABLE PROPERTY | ... | 726 | Municipality, Calcutta (Amending Ben. Act, IV of 1876) | ... | " |
| MUAFI | ... | 729 | Municipal Act, Bengal | ... | " |
| Muafidar | ... | 730 | Municipal Amendment Act, Bengal | ... | " |
| Muchilka | ... | " | Municipal Improvement, District | ... | " |
| Muddata Kriyam | ... | " | Municipal, Central Provinces | ... | " |
| Mofussil Small Cause Courts, References by | ... | " | Municipal Act, City of Madras | ... | " |
| Muhtarafa | ... | " | Municipal Act, Madras | ... | " |
| Muhunt | ... | " | Municipalities, Madras District | ... | " |
| Mujawar | ... | " | Municipality, Punjab | ... | " |
| Mukadam | ... | " | Municipalities, United Provinces | ... | " |
| Mukararidar | ... | " | Municipalities (Amending Acts, XV of 1873 and XV of 1883) | ... | " |
| Mukarari Istemrari | ... | " | MUNICIPALITY | ... | " |
| Mukbi | ... | 731 | Municipal Limits | ... | 762 |
| Mukhtars and Revenue Agents, Pleders Act | ... | " | Municipal Officer | ... | " |
| | | | Municipal Orders | ... | " |

| | | | | | |
|--|-----|-----|---|-----|-----|
| Municipal Secretary | ... | 762 | Native Passenger Ships Act | ... | 780 |
| Municipal Tax | ... | " | Native Prince | ... | " |
| MUNICIPAL TRIBUNAL JURISDICTION OF | ... | " | NATIVE STATE | ... | 781 |
| MUNSARIM | ... | 763 | Natra | ... | 783 |
| MUNSIFF | ... | " | Nattimaigar | ... | " |
| MURDER | ... | 766 | NATURAL RIGHTS | ... | " |
| Murli | ... | 767 | Natural Stream | ... | 784 |
| Murray's Dictionary | ... | " | Navigable River | ... | " |
| Murshidabad | ... | " | Navigation | ... | " |
| Mushaa, Doctrine of | ... | " | Nawab Nizam's Debts Act | ... | " |
| Musical Festival | ... | " | Nawab of Carnatic Act | ... | " |
| Mustagbraq | ... | " | NAWAB OF SURAT | ... | " |
| Mustagir | ... | " | Nawab of Surat Act | ... | 785 |
| MUTATION OF NAMES | ... | " | NAWAB OF TANK | ... | " |
| MUTATION OF NAMES IN REVENUE REGISTER OF HOLDINGS... | ... | 768 | NAZIR | ... | " |
| MUTATION PROCEEDINGS | ... | " | Nazrana | ... | 787 |
| Mutiny | ... | 769 | Nazul Land | ... | " |
| MUTINY ACT, 1857 | ... | " | NECESSARIES | ... | " |
| MUTT | ... | 773 | Necessity | ... | 789 |
| Mutual Accounts | ... | 775 | Neg | ... | " |
| Mutual Assurance Company | ... | " | NEGLIGENCE | ... | " |
| Mutual Benefit Society | ... | " | NEGOTIABLE INSTRUMENTS | ... | 799 |
| Mutual Credits | ... | " | 1.—GENERAL | ... | " |
| Mutuality | ... | " | 2.—BILL OF EXCHANGE | ... | 801 |
| MUTWALI | ... | " | 3.—CHEQUE | ... | 809 |
| Nadi Bharati | ... | 776 | 4.—HUNDIS | ... | 810 |
| Nagar Vissa Sect | ... | " | I.—General | ... | " |
| Naib Nazir | ... | " | II.—Acceptance of Hundis | ... | 821 |
| Naikins | ... | " | III.—Endorsement of Hundis... | ... | " |
| Nala | ... | " | IV.—Liability on Hundis | ... | 823 |
| NAMBUDRI BRAHMINS | ... | " | V.—Notice of Dishonour of Hundis | ... | 824 |
| Nambudri Illam | ... | 777 | VI.—Presentation of Hundis | ... | 825 |
| Nambudri Widow | ... | " | VII.—Miscellaneous | ... | " |
| Name | ... | " | 5.—PROMISSORY NOTES | ... | 826 |
| Nanakshahi Gaddi | ... | " | I—General | ... | " |
| NANKAR | ... | " | II.—Assignment | ... | 840 |
| Narvadari Land | ... | " | III.—Consideration | ... | 844 |
| Narva Tenure | ... | " | IV.—Form | ... | 845 |
| Narva Village | ... | " | V.—Miscellaneous | ... | 847 |
| Narvadari and Bhagdari Tenures | ... | " | NEGOTIABLE INSTRUMENTS ACT, 1881 | ... | 850 |
| Naslan-bad-naslan | ... | " | NEGOTIABLE INSTRUMENTS, SUMMARY PROCEDURE ON | ... | 876 |
| Nationality | ... | 778 | NEGOTIATION | ... | 877 |
| Native | ... | " | Negotiation of Government Securities | ... | " |
| Native Camp Followers | ... | " | Nelson's Manual | ... | 878 |
| Native Chief | ... | " | New Lands, Amending Act IX of 1847, Assessment of | ... | " |
| NATIVE CHRISTIANS | ... | " | Newspaper | ... | " |
| Native Converts Marriage Dissolution Act | ... | 780 | NEW TRIAL | ... | " |
| Native Labourers, Emigration of, Act | ... | " | NEXT FRIEND | ... | 880 |
| Native Labourers, Transport of, Act | ... | " | New Lands, Assessment of, Amending Act IX of 1847 | ... | 881 |
| Native Law Officers Act | ... | " | | | |
| NATIVE LAWS | ... | " | | | |

TABLE OF HEADINGS.

iii

| | | | | | |
|---|-----|-----|--|-----|-----|
| Next of kin | ... | 881 | Octroi Duty | ... | 924 |
| Nihangs | ... | " | OFFENCE | ... | " |
| NIMAK SAYAR MEHAL | ... | " | OFFENCE BEFORE PENAL CODE | ... | " |
| Nisprahi Gosains | ... | " | CAME INTO OPERATION | ... | " |
| Nis-Santhana | ... | 882 | Offences, State Act | ... | " |
| NOABAD MEHAL | ... | " | Offer | ... | " |
| Non-appearance | ... | " | Offer and Acceptance | ... | " |
| Non-delivery | ... | 883 | Offerings | ... | " |
| Non-feasance | ... | " | OFFICE | ... | " |
| NON-JOINDER OF PARTIES | ... | " | Office Brocade Contract | ... | 925 |
| Non-negotiable Instrument | ... | 887 | Office Inspection | ... | " |
| NON-PROPRIETOR | ... | " | Office of Staff Corps | ... | " |
| Non-Registration | ... | " | OFFICER | ... | " |
| Non-Regulation Districts, Agra Act | ... | " | Officers, Bombay Joint Police | ... | " |
| Non-resident | ... | " | Officers, Hereditary, Bombay | ... | " |
| NON-SUIT | ... | 888 | Officers, Madras Uncovenanted | ... | " |
| Northern India Ferries Act | ... | " | Officers, Native Law | ... | " |
| Northern Indian Canal and Drain Act | ... | " | Officers Trading, Supreme Courts | ... | 926 |
| N.W.P. Acts | ... | " | Offices, Bombay Hereditary Act | ... | " |
| Notarial Protest | ... | " | Offices, Hereditary (Amending Bom. Act, III of 1874) | ... | " |
| Notary Public | ... | " | Offices, Madras Hereditary Village | ... | " |
| Notes | ... | " | OFFICIAL ASSIGNEE | ... | " |
| NOTES OF JUDGMENT | ... | 889 | Official Liquidator | ... | 928 |
| NOTICE | ... | " | OFFICIAL RECEIVER | ... | " |
| Notice of Dishonour | ... | 908 | OFFICIAL TRUSTEE | ... | " |
| NOTICE OF SUIT | ... | " | Official Trustees Act | ... | 929 |
| NOTICE TO QUIT | ... | " | Official Trustees and Administrators-General, Act | ... | " |
| NOTICE TO SHOW CAUSE | ... | 910 | Omission | ... | " |
| Notifications | ... | 911 | Opium | ... | " |
| Notification of Sale | ... | " | Opium Act | ... | " |
| NOVATION | ... | " | Opium License | ... | " |
| NUISANCE | ... | 912 | Onus of Proof | ... | 930 |
| Nuisances Act, Local | ... | 917 | Onus Probandi | ... | " |
| Numbudris | ... | " | Oodhastoo Land | ... | " |
| NUNCUPATIVE WILL | ... | " | Opinion | ... | " |
| Nunc Pro Tunc | ... | 918 | Oral Agreement | ... | " |
| OATH | ... | " | Oral Application | ... | " |
| Oaths Act | ... | 921 | Oral Contract | ... | " |
| OBITER DICTUM | ... | " | ORAL EVIDENCE | ... | " |
| Objection by Respondents | ... | " | Oral Will | ... | " |
| OBJECTION TO JURISDICTION | ... | 922 | Orasa Child | ... | " |
| Objects and Reasons, Statement of, for Acts | ... | " | Orchard Land | ... | " |
| OBSOENE SONGS | ... | " | ORDER | ... | " |
| OBSTRUCTION | ... | " | Order Absolute | ... | 932 |
| Occasional Residence | ... | 923 | Order in Council | ... | " |
| Occupancy | ... | " | Order in Council of the 13th June 1853 | ... | 933 |
| Occupancy Holding | ... | " | Order Sheet | ... | " |
| Occupancy Rights | ... | " | Ordinance VI of 1838 | ... | " |
| Occupancy Tenant | ... | " | ORIGINAL CIVIL JURISDICTION | ... | " |
| Occupant | ... | " | Original Side of High Court | ... | " |
| Occupation | ... | " | ORIGINATING SUMMONS | ... | " |
| OCTROI | ... | " | ORNAMENTATION | ... | " |

| | | | | | |
|--|-----|-----|--------------------------------------|-----|------|
| Ornaments | ... | 933 | Pardons and Reprieves | ... | 962 |
| Orphan | ... | " | Paricharaka | ... | " |
| Orthamulyani Lease | ... | " | Parliament | ... | " |
| " Other Relief " | ... | " | Parol Contracts | ... | " |
| OTTI | ... | 934 | Parol Evidence | ... | " |
| Oudh Acts | ... | " | Parsi Charities | ... | " |
| Oudh Civil Courts Act | ... | " | Parsi Intestate Succession | ... | 963 |
| Oudh Civil Digest | ... | " | Parsi Law | ... | " |
| Oudh Courts Act | ... | " | Parsi Marriage and Divorce | ... | " |
| OUDH ESTATES | ... | " | PARSIS | ... | " |
| Oudh Estates Act | ... | 935 | Parsis Succession to Immoveable Pro- | ... | |
| Oudh Judicial Calendar | ... | " | perty | ... | 968 |
| Oudh, King of, Act | ... | " | Parties | ... | " |
| Oudh Land-Revenue Act | ... | " | PARTIES TO SUIT | ... | " |
| Oudh Lands | ... | " | 1.—GENERAL | ... | " |
| Oudh Laws | ... | " | 2.—ADDING PARTIES TO SUITS | ... | 1026 |
| Oudh Laws Act | ... | " | 3.—SUBSTITUTION OF PARTIES | ... | |
| Oudh, Lese Loci of | ... | " | TO SUIT | ... | 1050 |
| Oudh, Limitation of Certain Suits, Act | ... | " | 4.—SUIT BY REPRESENTATIVES | ... | |
| Oudh Loans | ... | 936 | OF A CLASS | ... | 1060 |
| Oudh Local Rates Act | ... | " | 5.—TRANSPOSITION OF PARTIES | ... | |
| Oudh Rent Act | ... | " | TO SUIT | ... | 1067 |
| Oudh Rent, 1886, Amendment Act | ... | " | 6.—MISCELLANEOUS | ... | " |
| Oudh Revenue Courts Act | ... | " | PARTITION | ... | 1070 |
| OUDH SETTLEMENT | ... | " | 1.—GENERAL | ... | 1071 |
| Oudh Sub Settlement Act | ... | " | 2.—EFFECT OF PARTITION | ... | 1098 |
| Oudh Talukdar | ... | 937 | 3.—FORM OF PARTITION | ... | 1103 |
| Oudh Taluqdars Relief Act | ... | 938 | 4.—PARTITION, HOW EFFECTED | ... | 1105 |
| Ouster | ... | " | 5.—PRIVATE PARTITION | ... | 1111 |
| Out-Caste | ... | " | 6.—RIGHT TO PARTITION | ... | 1115 |
| Outer Door | ... | " | 7.—SUITS FOR PARTITION, AND | ... | |
| Overruling | ... | " | JURISDICTION OF CIVIL | ... | |
| Owerty-money | ... | 939 | COURTS IN | ... | 1130 |
| OWNER | ... | " | 8.—MISCELLANEOUS | ... | 1145 |
| OWNERSHIP | ... | " | Partition-deed | ... | 1155 |
| Pachis Sawal | ... | 944 | Partition Estate | ... | 1156 |
| Pachotra | ... | " | Partition of Revenue-paying Estates | ... | " |
| Paddy Cultivation | ... | " | Partitions, Remuneration of Amins, | ... | |
| Paguand | ... | " | effecting | ... | " |
| Paimaish Accounts | ... | " | Partition Suit | ... | " |
| Pakki Adat | ... | " | PARTITION WALL | ... | " |
| Palanquin Allowances | ... | " | PARTNERS | ... | " |
| Palayam | ... | " | PARTNERSHIP | ... | " |
| Palla Money | ... | " | 1.—GENERAL | ... | 1157 |
| Palmyra Trees | ... | 945 | 2.—DISSOLUTION OF PARTNER- | ... | |
| PANCHAYAT | ... | " | SHIP | ... | 1176 |
| Panch Devasthan | ... | " | 3.—PARTNERSHIP, WHAT CON- | ... | |
| PANCHINAMA | ... | " | STITUTES | ... | 1178 |
| Paper Book | ... | " | 4.—RIGHTS AND LIABILITIES | ... | |
| Paper Currency | ... | 946 | OF PARTNERS | ... | 1182 |
| Paper Currency and Coinage | ... | " | 5.—SUITS RELATING TO PART- | ... | |
| Paraphrase | ... | " | NERSHIP | ... | 1191 |
| Parcel | ... | " | 6.—MISCELLANEOUS | ... | 1206 |
| PARDANASHIN WOMAN | ... | " | PART-PAYMENT | ... | 1212 |

TABLE OF HEADINGS.

v

| | | | |
|-----------------------------------|----------|---------------------------------------|----------|
| Part Performance of Contract | ... 1212 | Permanent Tenant | ... 1278 |
| PARTY WALL | ... " | PERMANENT TENURE | ... " |
| PASS-BOOK | ... 1213 | Perpetuity | ... 1279 |
| Passengers | ... " | Person | ... " |
| Passenger Ships, Native Act | ... " | Personal Action | ... " |
| Past Services | ... " | Personal Attendance in Court—Exemp- | |
| PASTURAGE, RIGHT OF | ... 1214 | tion from | ... " |
| Pasture Lands | ... " | Personal Injuries | ... 1280 |
| PASWAL GUJARS | ... " | PERSONAL INSULT | ... " |
| Pat | ... 1215 | Personal Law | ... 1281 |
| Patelki Vatan | ... " | PERSONAL LIABILITY | ... " |
| PATENT | ... " | Peruarthum Mortgage | ... " |
| Patil | ... 1216 | Petition | ... " |
| Patnidar | ... " | Photograph | ... " |
| PATNI TALUK | ... 1217 | Physical Weakness | ... 1282 |
| PATNI TENURE | ... " | Physician | ... " |
| Patta | ... 1224 | Pilgrimage | ... " |
| Pattadar | ... " | Pilgrims' Tax | ... " |
| Pattidari Estates, Bengal Act | ... " | Pilot | ... " |
| PATWARI | ... 1225 | Pin-money | ... " |
| PATWARI PAPERS | ... " | Pious Purposes | ... " |
| PATWARIS AND KANUNGOS ACT | ... " | Piratlavaru Cess | ... " |
| PAUPER APPEALS | ... " | Place of Business | ... " |
| PAUPER SUITS | ... 1230 | Place of Performance | ... " |
| PAWN | ... 1249 | Place of Suing | ... " |
| Pawnee | ... 1250 | Plague | ... " |
| PAYMENT | ... " | PLAINT | ... 1283 |
| PAYMENT INTO COURT | ... 1251 | 1.—GENERAL | ... " |
| Payment of Money | ... 1257 | 2.—ADMISSION OF PLAINT | ... 1288 |
| Payment out of Consideration | ... " | 3.—AMENDMENT OF PLAINT | ... 1289 |
| PAYMENT OUT OF COURT | ... " | 4.—CONSTRUCTION OF PLAINT | ... 1329 |
| PEDIGREE | ... " | 5.—FORM AND CONTENTS OF | |
| Peint Laws | ... 1260 | PLAINT | ... " |
| Peishcush | ... " | 6.—REJECTION OF PLAINT | ... 1341 |
| Peishwa | ... " | 7.—RETURN OF PLAINT | ... 1350 |
| Penal Assessment | ... " | 8.—VERIFICATION AND SIGNA- | |
| PENAL CODE | ... 1261 | TURE | ... 1361 |
| PENALTY | ... 1268 | 9.—MISCELLANEOUS | ... 1372 |
| Pendency of Suit | ... 1271 | PLAINTIFF | ... 1375 |
| Pending Proceedings | ... " | Plantain Trees | ... 1376 |
| PENDING SUITS | ... 1272 | Planter | ... " |
| Pension Fund | ... " | Play | ... " |
| PENSIONS | ... " | PLEA | ... " |
| PEON | ... 1273 | Pleader | ... 1378 |
| Periodical Returns and Statements | ... 1274 | Pleader's Clerk | ... " |
| Perishable Property | ... " | Pleader's Fees | ... " |
| PERJURY | ... " | PLEADERSHIP EXAMINATION | ... " |
| Permanent Advance | ... 1275 | Pleadership Rules | ... 1379 |
| Permanent Lease | ... " | Pleaders, Lower Provinces | ... " |
| Permanently-settled Estate | ... " | Pleaders, Mukhtars and Revenue Agents | ... " |
| Permanent Occupancy Right | ... " | PLEADINGS | ... " |
| PERMANENT SETTLEMENT | ... " | PLEDGE | ... 1412 |
| Permanent Structure | ... 1277 | Plene Administravit | ... 1414 |
| Permanent Tenancy | ... 1278 | Plunder | ... " |

| | | | |
|---------------------------------------|----------|---------------------------------------|----------|
| Po-Brahman | ... 1414 | POSSESSION— <i>concluded.</i> | |
| PODDAR OF THE BANK OF BENGAL | .. | 6.—SUITS FOR POSSESSION | ... 1523 |
| Poems | ... 1415 | 7.—MISCELLANEOUS | ... 1587 |
| Poggalika Gift | ... .. | Possessory Title | ... 1595 |
| POLICE | ... .. | Post | ... .. |
| Police Commissioner | ... .. | Postage | .. .. |
| POLICE OFFICER | ... 1416 | Postage Stamps | ... 1596 |
| Police Officer, Joint Bombay Act | ... .. | Post-diem Interest | ... .. |
| Police Patel | ... .. | Posthumous Chela | ... .. |
| Police, Presidency Towns Amending Act | .. | Posthumous Child | ... .. |
| Police Superannuation Funds | ... .. | Posthumous Son | ... .. |
| Policy | ... .. | POST OFFICE | ... .. |
| POLICY OF INSURANCE | ... .. | Postponement | ... 1597 |
| POLIEM | ... 1417 | POSTPONEMENT PETITION | ... .. |
| Poligar | ... .. | POTTAH | ... .. |
| Political Act | ... .. | Poundage | ... 1604 |
| POLITICAL AGENT | ... .. | Poundage-fee | ... .. |
| Political Pension | ... 1419 | Poverty | ... .. |
| POLITICAL PRISONER | ... .. | POWER OF APPOINTMENT | ... .. |
| Political Tenure | ... 1420 | Powers, Advocate General's | ... 1605 |
| Poll | ... .. | POWER OF ATTORNEY | ... .. |
| Polliaput | ... .. | POWER OF COURT | ... 1617 |
| POLLUTION | ... .. | Power of Sale | ... .. |
| Polygamy | ... .. | Powers, Trustees' and Mortgagees' Act | ... 1618 |
| Ponnas | ... .. | PRACTICE AND PROCEDURE | ... .. |
| PORAMBOKE | ... .. | Prayaschittam | ... 1728 |
| Port Improvement, Calcutta | ... .. | Preamble | ... .. |
| Portions, Double | ... 1421 | Precatory Trusts | ... .. |
| PORT OF CALCUTTA | ... .. | Precedents | ... .. |
| Port Rules, 1856 | ... .. | Precept | ... .. |
| Ports | ... .. | Preceptor | ... .. |
| Ports and Ports dues | ... .. | PRE-EMPTION | ... .. |
| Port Trust | ... .. | 1.—GENERAL | ... 1729 |
| Port Trust Act, Bombay | ... .. | 2.—CONSTRUCTION OF WAJIB- | |
| Port Trusts Act, Karachi | ... .. | UL-ARZ | ... 1766 |
| PORTUGUESE | ... .. | 3.—LOSS OF RIGHT TO PRE-EMPT | |
| POSSESSION | ... .. | BY WAIVER, ETC | ... 1825 |
| 1.—GENERAL | ... 1422 | 4.—NECESSARY FORMALITIES | ... 1837 |
| 2.—ADVERSE POSSESSION | ... 1436 | 5.—PURCHASE MONEY | ... 1839 |
| 3.—EVIDENCE OF POSSESSION | | 6.—RIGHT TO PRE-EMPT | ... 1857 |
| AND TITLE | ... 1495 | 7.—SUBJECT OF PRE-EMPTION | ... 1941 |
| 4.—NATURE OF POSSESSION | ... 1510 | 8.—MISCELLANEOUS | ... 1952 |
| 5.—PROOF OF POSSESSION | ... 1522 | Pre-emption (Punjab) | ... 1994 |

THE ALL INDIA DIGEST 1811-1911.

SECTION II.—CIVIL.—VOL. VII.

Mortgage.

- 1.—GENERAL.
- 2.—ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE.
- 3.—CONDITIONAL SALE.
- 4.—CONSTRUCTION OF MORTGAGE DEEDS.
- 5.—FORECLOSURE.
- 6.—FORM OF MORTGAGES.
- 7.—MARSHALLING.
- 8.—POSSESSION UNDER MORTGAGE.
- 9.—REDEMPTION.
- 10.—SALE OF MORTGAGED PROPERTY.
- 11.—SUBROGATION.
- 12.—TACKING.
- 13.—USUFRUCTUARY.
- 14.—MISCELLANEOUS.

See BURDEN OF PROOF—MORTGAGE.

See CHARGE.

See CIV. PRO. CODE, 1908, O. XXXIV.

See TRANSFER OF PROPERTY ACT, 1882.
SS. 58 TO 101.

—1.—General.

See MALABAR LAW—MORTGAGE.

See VENDOR AND PURCHASER—PURCHASE OF MORTGAGED PROPERTY.

(1)—“Mortgage,” meaning of the term.—The term “mortgage” in Indian law, means simple as well as usufructuary mortgage, and the one is as much the transfer of an interest in specific immoveable property as the other. *SHEORATAN KUAR v. MAHIPAL KUAR*, 7 A. 258, F.B. = A.W.N. 1885, 8.

(2)—Limitation Act, 1877, arts. 134, 148—Mortgagee, meaning of.—The term “Mortgagee” in the article includes an assignee of a mortgage. *BHAGWAN SAHAI v. BHAGWAN DIN*, 9 A. 97. [Appr., 15 M. 331.]

(3)—Mortgage, a temporary transfer, though it may result in permanent transfer.—A mortgage is a temporary transfer and the fact that it may

Mortgage—continued.

—1.—General—continued.

result in a permanent transfer cannot be deemed to make it a permanent transfer. So, where a *wazib-ul-arz* provided that the tenant should have power to sub-let or otherwise temporarily provide by mortgage or any other like manner for the occupation and management of his land a usufructuary mortgage by the tenant for 50 years certain and thereafter till the repayment of the principal money was a temporary provision within the meaning of the clause. *TARACHAND MARWARI v. JAIKISAN MADNAJI*, 3 C.P.L.R. 154. [R., 15 C.P.L.R. 175, 11 C.P.L.R. 22.]

(4)—“Mortgage” and “Charge”—Transfer of Property Act, 1882.—The distinction, clearly drawn for the first time between “Mortgage” and “charge” in the Transfer of Property Act is basent in the Limitation Act. *GIRWAR SINGH v. THAKUR NARAIN SINGH*, 14 C. 730, F.B.

(5)—Charge and simple mortgage, distinction between.—A charge differs from a mortgage not only in form, but also in substance. A plea of purchase for value without notice, for instance, although it may be perfectly good against a charge, will be wholly unavailing against a mortgage. *KISHAN LAL v. GANGA RAM*, 13 A. 28 = A.W.N. 1890, 216. [R., 33 C. 985 = 4 C.L.J. 219, 11 C.W.N. 1005, P.C. = 17 M.L.J. 444 = 4 A.L.J. 625 = 6 C.L.J. 379 = 2 M.L.T. 333 = 9 Bom. L.R. 1104 = 30 M. 426, 35 C. 837 = 7 C.L.J. 492 = 12 C.W.N. 849.]

(6)—Purchaser at judicial sale, right of mortgagee without possession as against private purchaser and purchaser at Court-sale, distinction between.—Possession or registration is necessary to validate a mortgage in the Deccan or elsewhere in the Presidency of Bombay, except Gujarat, against a private purchaser for valuable consideration without notice. In the case of a judicial sale, however, the purchaser at such a sale takes only that which the judgment-debtor could honestly dispose of, and so, a mortgage without possession which would be binding on the mortgagor himself would also be binding on the purchaser in execution of a

Mortgage—continued.**—1.—General—continued.**

decree obtained against the mortgagor. *BAPUJI BALAL v. SATYABHAMABAI*, 6 B. 490. [F., 6 B. 495, 62 P. R. 1908=7 P.W.R. 1908; R., 13 A. 28=A.W.N. 1890, 216, 27 B. 452.]

(7)—*Document—Interpretation—‘Muakhiza,’ meaning of—Transfer of Property Act (IV of 1882), ss. 58, 100.*—In order that there may be a simple mortgage, there must be: (a) a transfer of an interest in specific immoveable property; (b) a personal undertaking by the mortgagor to pay the mortgage money; and, (c) an agreement, express or implied, that, in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold. Where, therefore, a deed opened with a recital that the executant had borrowed a sum of money followed by a promise to pay the amount with interest at 2 per cent. per month within a certain time, and then provided: “*muakhaza asl o sud ta yomul-wasul upar* (description of the share) *haqiyat min muqir...qaim rahega...lihaza...batarik tamasuk muakhaz-ai-jaidad ka likhadya.*” Held that they did not create a mortgage. The word *muakhiza* was not a word commonly employed to denote a simple mortgage, the root meaning of the word being ‘taking’ and the word being generally used in the sense of taking satisfaction or calling to account. *DALIP SINGH v. BAHADUR RAM*, 9 A.L.J. 550=34 A. 446=15 Ind. Cas. 435.

(8)—*Essentials of.*—In order to constitute a mortgage, the property, the subject of the mortgage, must belong to the mortgagor and he must transfer it to the mortgagee. The plaintiff passed an agreement to the defendant whereby he acknowledged to have received Rs. 500 stipulating that if he paid the assessment on the land for 25 years, the defendant should return to the plaintiff the land which he bought from the plaintiff some years ago: Held, that the agreement was not a mortgage, but was an agreement to sell or convey on certain conditions; and that the plaintiff could not bring a suit to redeem, but could only sue on the agreement for specific performance, if, upon the completion of the term and the fulfilment of the conditions, the defendant failed to return the land as he promised. *NARAYAN v. MAHADU*, 2 Bom. L. R. 21.

(8-a)—*Essentials of a simple mortgage—S. 31, Limitation Act, 1908.*—A covenant to pay is an essential element of a simple mortgage and it is not necessary that there should be a formal transfer of interest and an express power of sale. Where a charge is created by act of parties on specific immoveable property and it is for a debt, and there is a covenant to pay, the instrument is a mortgage within the meaning of s. 31 of the Limitation Act. *RAMA BRAHMAM v. VENKATANARASU PUNTULU*, 23 M.L.J. 131=M.W.N. 1912, 1124=16 Ind. Cas. 209. (30 M. 426, 9 M. 218, 10 M. 511, 21 M. 562, Cons.)

Mortgage—continued.**—1.—General—continued.**

(8-b)—*Bond—Mortgage—What constitutes it.*—An instrument, in order to constitute a mortgage, must specify the property mortgaged. *RAMNARAIN v. PURTAL*, 20 P.R. 1866.

(8-c)—*Mortgage—Contract to pay debt out of moveable or immoveable property—Property not specified.*—A contract to pay a debt out of moveable and immoveable property without any specification of the property does not constitute a mortgage. *MULLICK KURREEM BUKSH v. UMMEE*, 17 P.R. 1866.

(8-d)—*Mortgage with condition not to alienate—Subsequent mortgage invalid.*—Plaintiff advanced money to A on a mortgage of his property with a condition not to alienate. A short time afterwards, A sold the property to the defendants. On plaintiff suing the defendants to obtain a cancellation of the deed of sale in their favour, the latter pleaded a mortgage of the same property prior in date to that of the plaintiff and with a condition against alienation. On appeal, the Commissioner reversed the decree, in favour of the defendants passed by the Assistant Commissioner, on the ground that the sale to the defendants after the mortgage to the plaintiff was one with reservation of the plaintiff's rights, in consequence of the restriction upon alienation in the plaintiff's deed of mortgage. The Chief Court, however, was of opinion that the plaintiff's deed of mortgage contained no stipulation reserving the rights of the defendant under his mortgage, and that, therefore, the position taken up by the Commissioner could not be maintained. Under the circumstances, the mortgage to the plaintiff would be invalid if the defendants' mortgage deed and covenant were established, and, the defendants being entitled to have the genuineness of the latter decided in the present suit, the Chief Court reversed the decision of the Commissioner and remanded the case for fresh decision after enquiry regarding the defendants' deed and covenant. *SHUNKER DASS v. PRIBHU DYAL*, 35 P. R. 1869.

(9)—*Mortgage—Subject-matter, distinct definition of—Deeds relating to land, how to be described—Sub-mortgagee, suit by—Parties—Original mortgagors not necessary parties—Document—Interpolation—Interest at bond rate up to what period—Civ. Pro. Code (Act V of 1908), O. XLI, R. 20—Adding respondent—Interested in the result of appeal—Cross-objection—Limitation.*—A mortgage must define its subject-matter with distinctness. Where the mortgaged property consists of deeds relating to land, they are sufficiently described by setting out the sums of money with which they are concerned, the dates of execution and the names of the persons bound by them. Although a sub-mortgagee can join the original mortgagors, when suing on his sub-mortgage, yet it is not necessary for him to do so, and his suit will not fail if he does not make the original mortgagors parties to it.

Mortgage—continued.**—1.—General—continued.**

When a document with certain additions or interpolations is admitted by all the executants before the Registrar, the interpolations cannot be considered to be such as to avoid the document. A mortgagee is entitled to interest at the bond rate up to the date fixed in the decree for payment, and after that at the Court-rate. (34 C. 150, P.C., 4 A.L.J. 109, 11 C.W.N. 249, 5 C. L. J. 106, 17 M.L.J. 43, 9 Bom. L. R. 304, 2 M. L. T. 75, *F.*) A Court of appeal is competent to add a respondent at the hearing of an appeal under O. XLI, r. 20 of the Civ. Pro. Code, if the presence of such respondent is necessary for the purpose of properly deciding the appeal and cross-objection, provided such respondent is interested in the result of the appeal as brought and the cross-objection so far as the original appellants are concerned. (15 W. R. 26, 25 C. 565, 2 C.W.N. 42, 26 C. 109, 3 C.W. N. 76, 26 C. 114, 31 C. 64, 35 C. 538, 2 C. W. N. 720, *R.*) A respondent can be brought on the record even after the period of appealing against him has run out. (9 C. 355, 11 C.L.R. 430, *F.*; 12 C.W.N. 625, *R.*) Where the plaintiff wanted to make defendants Nos. 5 and 10 liable also on the bond sued upon, but the Court below made a decree against the other defendants and exonerated defendants Nos. 5 and 10, and those other defendants appealed but did not make defendants Nos. 5 and 10 parties to it, and the plaintiff filed cross-objections in due course, and at the hearing of the appeal made an application under O. XLI, r. 20, for making defendants Nos. 5 and 10 respondents on the ground that they were interested in the result of the plaintiff's cross-objection: *Held*, that the defendants Nos. 5 and 10 could not be added as respondents. *BHONESWAR RAM v. RAM KHELAWAN SAHOO*, 5 Ind. Cas. 654 = 12 C.L. J. 137.

(10)—*Indistinct or vague document—Oral evidence—Indian Evidence Act*, ss. 92, 95.—Where a mortgage bond does not indicate by name the property mortgaged, evidence may be adduced to prove what property was mortgaged. (Evidence Act ss. 92 and 95.) *RAM LAL v. HARRISON*, 2 A. 832.

(11)—*Auction sale in execution of a decree of immoveable property subject to a mortgage—Remedy of the mortgagee—His inability to get the sale set aside—Sale of right, title and interest of the judgment-debtor—Security bond hypothecating property as security for integrity—Its construction—Civ. Pro. Code (Act XIV of 1882)*, ss. 278, 282, 283 and 311, etc.—*Held*, hypothecating or giving a lien on immoveable property to the extent of any amount as security for integrity is a mortgage of that property for that amount. *Held*, also, that where a property subject to a mortgage is sold by public auction in execution of a decree, the mortgagee, whether with or without possession and whether his incumbrance be notified in the proclamation of sale or not, can follow the mortgaged property in the hands of the auction purchaser, whether he came to know about the encumbrance or not at the time of the

Mortgage—continued.**—1.—General—continued.**

sale, but he (the mortgagee) has got no cause of action to get the sale set aside. *Held*, further, that an executing Court cannot sell what the judgment-debtor himself is unable to alienate privately. *RUP CHAND v. SETH KASTUR CHAND*, 7 P.W.R. 1908 = 62 P.R. 1908. (12 M.I.A. 366, 6 B. 193, 490, 22 B. 624, 29 B. 234, *F.*)

(12)—*Contemporaneous deed—Sale and agreement to reconvey—Transaction whether mortgage—Intention—Date of repayment—Mortgage by conditional sale—Transfer of Property Act (IV of 1882)*, s. 58 (c).—On the construction of two contemporaneous documents, one of which purported to be a deed of sale, and the other provided that, on the vendor repaying the purchase-money mentioned in the deed of sale, with costs, within a fixed period, the vendee would return the land, and in case he did not do so, the vendor would deposit the money in Court, and take possession: *Held*—that the two documents together did not constitute a mortgage (12 A. 387, *F.*; 4 C.W.N. 153 = 22 A. 149, *Diss.*) A certain date of payment is an essential element of a mortgage by conditional sale. *KINURAM MONDOL v. NITYE CHAND SIRDAR*, 11 C.W.N. 400 = 6 C.L.J. 208. [*F.*, 2 Ind. Cas. 930.]

(13)—*Mortgage—Incomplete transaction.*—When the part of the mortgage-money remaining unpaid by the mortgagee consisted of a sum which the mortgagor had agreed should be withheld by the mortgagee till mutation of names, and a small sum out of that promised for expenses of the deed, and the mutation of names did not take place at all.—*Held*, that the mortgage could not be held as incomplete for default in payment of the mortgage money. *MANGLADHA v. LAL CHAND AND GHULAM*, 60 P.L.R. 1908 = 26 P.W.R. 1908.

(14)—*Mortgage—Bye-bil-wafa—English mortgage.—Mortgagor and mortgagee—Subsistence of relation—Payment of interest—Adverse possession—Permissive possession—Suit to recover possession—Cause of action.*—The transaction of mortgage effected by a *bye bil wafa* was under the Regulations essentially the same in regard to the relations between the mortgagor and mortgagee as an English mortgage. [*R.*, 12 C. 614.] Although the mortgagee has, on the occurrence of the default named in the *bye-bil-wafa* or the mortgage-deed, a cause of action to recover possession of the property provided it is then withheld from him adversely, he has no cause of suit of the possession of the property by the mortgagor is from that time held and continued with his permission, and so long as the relation between the mortgagor and the mortgagee created by the *bye-bil-wafa* can be said to be subsisting, it would probably be right to infer that the possession of the mortgaged property by the mortgagor, if it be so held, was bad with the permission of the mortgagee, unless some act was done by the mortgagor or some claim advanced by him which was inconsistent with the subsistence of

Mortgage—continued.**—1.—General—continued.**

that relation. It would be reasonable to infer from the payment of interest that the possession on behalf of the mortgagor was permissive. But the possession of the mortgagor ought not to be treated as adverse so long as the mortgagor asserts a title to redeem and advances no other title inconsistent with it. It must be treated at any rate as perfectly reconcilable with, and not adverse to, the title of the mortgagee and the continuance of his lien on the thing, pledged. **MANKEE KOOER v. SHEIK MUNNOO**, 14 B.L.R. 315=22 W.R. 543. [R., 12 C. 614, 7 Bom. L.R. 772; D., 6 C. 564=7 C.L.R. 583; F., 17 P.W.R. 1908]

(15)—*Mortgage—What does not amount to.*—On 25th January 1875, the respondent executed a mortgage-deed in appellant's favour, in which he agreed to give the latter possession of a village as security for the re-payment of certain moneys, and for the re-payment of the balance paid by the appellant out of the sale-proceeds of a house on account of a certain debt, it being stipulated that the appellant should sell the house under the powers of a mukhtarnama which the respondent undertook to execute. No such instrument was executed by the respondent, and such house was not sold. The appellant sued the respondent for possession of the village, according to the terms of the mortgage, alleging that he had satisfied the debt. *Held* that, as no part of the sale-proceeds of the house had been or could be applied to the liquidation of such a debt, the appellant was not entitled to retain the village as security for the re-payment of a balance which had not and could not be paid by him on account of such debt. **KRISHNA ROW v. APA SHASTRI**, A.W.N. 1881, 13.

(16)—*Alienation by mortgagor—Antecedent covenant.*—A transfer of mortgaged property in breach of a condition against alienation is valid, except in so far as it encroaches upon the rights of the mortgagee, and, with this reservation, such a condition does not bind the property so as to prevent the acquisition of a valid title by the alienee. **POHKAR DAS v. RAM PRASAD**, A.W.N. 1887, 231. (4 A. 518, R.)

(17)—*Acquisition of larger interest by the mortgagor after the date of the mortgage—Mortgagee not entitled to such larger interest.*—Reg. XVI of 1827, ss. 19 and 20—*Transfer of Property Act* (IV of 1882), s. 43.—A mortgagee of Deshbat Vatan knew that the property which was being made over to him in mortgage, was land appurtenant to an hereditary office and was therefore inalienable beyond the life of the incumbent under ss. 19 and 20 of Reg. XVI of 1827. Subsequent to the mortgage, the mortgagor became entitled to enlarged estate. The mortgagee claimed to hold the enlarged estate against the mortgagor. *Held*, that the mortgagee took merely such estate as the mortgagor was capable of conveying at the date of the mortgage. **GANGABAI v. BASVANT BALLAPPA**, 12 Bom. L.R. 143=34 B. 175=5 Ind. Cas. 866.

Mortgage—continued.**—1.—General—continued.**

(18)—*Mortgage-bond, Construction of—Promise to pay—Personal liability, intention—Balance of unsatisfied debt, application for—Properties other than mortgaged, liability of.*—Where a debtor has pledged his property as security for the loan, the creditor should have a personal remedy, unless the deed makes it clear that the intention of the parties was that the remedy of the mortgagee should be restricted to the lands mortgaged. Every mortgage contains within itself, so to speak, a personal liability to repay the amount advanced; in other words, where there is in a mortgage nothing to the contrary, there is an implied promise to pay presumed in law, from the fact of the acceptance of the loan; the mortgage merely giving the mortgagee an additional security in the shape of the pledged property. (19 W. R. 281, 12 C. 389, 14 A. 513, R.; 11 I.A. 83=10 C. 740, 16 C. 540, D.) *Per Mookerjee, J.*—Although a mere recital of a debt may not be, by itself, and apart from the context, sufficient to imply a contract to pay and thus create a personal obligation, a provision in a mortgage-deed, that the money will be repaid on a certain day, imports a covenant for repayment on that day for the breach of which, an action would lie against the mortgagor, the judgment in which action could be satisfied out of his general property. **PARBATI CHARAN ROY v. GOBINDA CHANDRA KUNDU**, 4 C.L.J. 246. [F., 9 C.L.J. 5=13 C.W.N. 138=1 Ind. Cas. 442; R., 4 C.L.J. 510, 6 C.L.J. 639.]

(18-a)—*Mortgage—Construction—Securing future advances upon mortgaged property—Validity of—Transfer of Property Act, s. 58.*—There is no law which prevents a party from securing future payments by a charge or mortgage upon immoveable property. A mortgage deed provided: "He (mortgagee) shall enjoy the profits of the mortgaged lands in lieu of interest. I, the executant, shall continue to pay to the mortgagee every year the deficiency in the amount of interest; and in case of default of payment of the same in any year, the Mahajan shall in that year have power to recover it from a nine anna zemindari share, the proprietary title and other moveable and immoveable property." *Held*, that the document must be held to amount to a mortgage in respect of the deficiency in interest on the mortgage money. **BHOLA DAS v. BISHNATH LAL**, 10 A.L.J. 162.

(18-b)—*Mortgage—Covenant to pay money within a year—Construction—Mortgagor's benefit—Right to redeem and right to foreclose, co-extensive—Effect of contract to the contrary—No time fixed for re-payment—Effect.*—Where the parties to a mortgage covenant that the mortgagor shall pay the amount of principal and interest within the term of one year, *held*, that the covenant cannot be construed as providing that the mortgagor was not to pay the amount of principal and interest before the

Mortgage—continued.**—1.—General—continued.**

expiry of one year, and that the clause was inserted for the benefit of the mortgagor, so that he might be at liberty to pay the principal with interest before the expiry of one year. (23 M. 33, *Rel. on.*) Unless there is an agreement to the contrary, the right of foreclosure and the right of redemption must be deemed co-extensive. In each particular instance, therefore, it must be determined, upon the terms of the contract between the parties, whether there is any provision in the contract which takes the contract out of the general rule. (14 S. I. M. 427, 8 A. 95, D.; 5 B. 22, 7 M.I.A. 323, 16 M. 486, 29 A. 47, 20 B. 677, R.) Where no time is fixed in a mortgage-deed for the repayment of the mortgage amount, the position is that the mortgagor can claim redemption whenever he pleased. PURNA CHANDRA SARMA v. PEARY MOHAN PAL DAS, 39 C. 828 = 15 Ind. Cas. 287 = 17 C.W.N. 149. (1892) 1 Ch. 385, 34 L.J. Ch. 13, R.)

(19)—*Document — Interpretation of — Sale subject to agreement executed on the same day — Reserving right to vendor to repurchase — Documents to be read together — Mortgage.*—Where a document purporting to be an out and out sale is made "subject to the terms of the deed of agreement executed by the vendee" on the same day, and the latter document promises to reconvey the property to the vendor or his representatives upon payment of the purchase money within a certain time, held that the two deeds must be read together as constituting a mortgage by way of conditional sale. WAJID ALI KHAN v. SHAFKAT HUSSAIN, 7 A.L.J. 998 = 7 Ind. Cas. 911. (12 A. 387, D.)

(20)—*Construction of mortgage deed — Deed partly of the nature of a usufructuary and partly of a simple mortgage — Right to bring the property to sale — Presumption of English Law as to satisfaction of mortgage debt, whether applicable in British India — Attachment of mortgaged property in execution of money decree — Right to sue for sale in satisfaction of this claim and of any claim under the mortgage — Transfer of Property Act, ss. 99 and 67.*—The intention of the parties is to be looked to in construing mortgage-deeds, and where a deed is partly of the nature of a usufructuary and partly of a simple mortgage, the mortgagee is entitled to bring the mortgaged property to sale under the conditions set out in the deed. (21 A. 4, F.; 28 A. 157, 10 Bom. L.R. 126, R.) Words of hypothecation have always been understood to import the right of the mortgagee to bring the property to sale for the satisfaction of the claim (12 C.P.L.R. 26, R.) It is only a usufructuary mortgage "as such" that is debarred from suing for sale by s. 67 of the Transfer of Property Act. Where there were a distinct hypothecation of property and also a distinct personal covenant to pay the mortgage-debt, though the mortgage itself was described as one with possession, held, the

Mortgage—continued.**—1.—General—continued.**

mortgage would be entitled to bring the property to sale in satisfaction of the debt for which it was hypothecated. The presumption of English law that, over twenty years having elapsed since the execution of the mortgage-deed, it should be deemed to have been satisfied, does not apply to mortgages in British India. A mortgagee, who attaches the mortgaged property in execution of a money decree against the mortgagor, but is precluded by s. 99 of the Transfer of Property Act from bringing it to sale save by a suit under s. 67 of the Act, can sue for sale of the property in satisfaction of such claim, as well as of any claim under the mortgage, in respect of which he has a right to sue for sale. FIDA ALI v. ISMAILJI, 6 N.L.R. 20 = 5 Ind. Cas. 701. (10 C.P.L.R. 21, 29 M. 424, F.; 16 A. 415, 17 A. 520, Not F.)

(21)—*Mortgage-deed — Construction — Presumption — Interest — Prior mortgagee, right of.*—Under ordinary rules of construction, every man's grant should be construed strongly against him. Where an absolute owner mortgages his property, he shall be presumed to have mortgaged his absolute right in the property, and not only a subordinate interest therein, unless there be an express indication to the contrary. A prior mortgagee purchasing the mortgaged property from the mortgagor is entitled to interest on the amount of the mortgage up till the date of sale, and not up till the date when he subsequently obtains possession of the property. CHIRANJEE LAL v. BHAGWAN SINGH, 8 Ind. Cas. 826.

(22)—*Mortgage bond — Construction — Personal decree, suit for — Mortgaged properties, if must be first proceeded against.*—Held, on the construction of the mortgage bond in this case, that it contained an express promise to pay the amount secured, so that the mortgagee was entitled to sue for a personal decree only. Held further—That a stipulation that "if the debt be not paid off by the hypothecated properties," the mortgagee "will be able to realise the money" by sale of the mortgagor's other moveable and immoveable properties, did not imply that the parties agreed to postpone the remedy against the person and other properties to that against the mortgaged properties. BENOY KRISHNA DEB v. DEBENDRA KISHORE NANDY, 15 C.W.N. 722 = 9 Ind. Cas. 660.

(23)—*Mortgagee in possession prior to confiscation of Oudh estate — Dispossession on re-settlement with talukdar — Claim to sub-settlement.*—Where, at the date of Lord Canning's confiscation proclamation of 1858, an estate in Oudh was in the plaintiff's possession as mortgagee "with birt zemindari rights" under a conditional deed of sale and was subsequently, the plaintiff being dispossessed, re-settled with the defendant as Talukdar, it was held, in a suit by the plaintiff in 1870 for possession as mortgagee, that the mortgage created only a subordinate zemindari interest and that the plaintiff's claim to a sub-settlement was valid.

Mortgage—continued.**—1.—General—continued.**

Quære - (a) Whether the sub-settlement might not be supported even if the interest created by the mortgage was not strictly sub-proprietary? (b) Whether, under U P. Act XX of 1866, the defendant, as Talukdar, was entitled to malikana? **GOURI SHUNKER v. THE MAHARAJA OF BULRAMPORE, 4 C. 839, P.C. = 6 I.A. 1 = 3 Sar. 873. [R., 13 A. 108.]**

(23-a)—*Damages—Breach of contract—Mortgagee failing to discharge prior incumbrances with money left in his hands, effect of—Set-off—Court-fee.*—Where a mortgagor, at the time of the execution of the mortgage, left money in the hands of the mortgagee to pay off a prior incumbrance, which the mortgagee did not pay off, the mortgagor is entitled in law to recover from the mortgagee the damages resulting from his failure. A plea of *set off* is quite distinct from the plea of payment and should not be entertained until Court-fee with respect to it has been paid by the defendant in the Court of first instance, nor should it be entertained if the claim is not within the jurisdiction of the Code. **MUHAMMAD RAZA v. KUBRA BIBI, 15 Ind. Cas. 526.**

(24)—*Payment by third person of money due under mortgage-bond—Intention to keep mortgage alive—Priority—Mortgage-bond, document whether—Court-fee—Appeal.*—Where the money due under a mortgage-deed was paid by the money of a third person, the mere fact that the latter had paid off the mortgage-money would not, by itself, entitle him to the benefit of the bond as security for the payment. It must be shown that there was an agreement between the parties, when the payment was made, that the mortgage should be kept alive for him. The demand of a creditor, which is paid with the money of a third person and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished by the payment; whether a mortgage paid off has been kept alive or extinguished depends on the intention of the parties; the mere fact that it has been paid off is not sufficient to show whether or not it has been extinguished; express declaration of intention will cause either the one result or the other, and in the absence of such expression, the intention may be inferred either one way or the other; and the ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest. An unsecured creditor of a mortgagor, who finds himself obliged for the protection of his own interest to pay off the mortgage-debt, is entitled to have an assignment of the security. *Held*, upon the facts and circumstances of the case, that they raised a strong presumption that, in the present case, there was the intention to keep the mortgage alive, when the payment was made by the plaintiffs. That the assignment of the bond in favour of the plaintiffs, who had

Mortgage—continued.**—1.—General—continued.**

paid off the mortgage, gave to them all the rights as first mortgagees, although the assignment was made after the date of payment. A agreed to pay loans up to a certain sum, which might be paid to him by B, and admitted that if he failed to do so, B would be entitled to recover the debt by sale of a certain property of A and from his person and other properties. Further, the deed was registered as an agreement in Book I, and not as a mortgage which would have been copied in Book IV, under the Registration Rules: *Held*—That the deed did not create any special lien on the specific property mentioned in the deed; and the circumstance that the document was registered as an agreement in Book I, was evidence of the intention of the parties to the document to treat it as an agreement rather than as a mortgage. In execution of a mortgage-decree, a property was purchased for Rs. 2,500 by the mortgagee. *Held*—That for the purposes of Court-fee, Rs. 2,500 must be taken as the value of the property affected by the decree. **JAGATDHAR NARAIN PRASAD v. A. M. BROWN, 10 C.W.N. 1010 = 4 C.L.J. 121 = 33 C. 1133. [R., 36 C. 193 = 5 C.L.J. 611, 11 C.W.N. 705 = 6 C.L.J. 427.]**

(24-a)—*Mortgagee, right of, to take possession of the property mortgaged—Possessory right unaffected by subsequent mortgage—Usufructuary mortgage, right of, to resist a suit for possession by a prior mortgagee—Accrual of right to take possession—Priority.*—Certain property was first mortgaged to the defendant under a simple mortgage, the same property was then mortgaged to the plaintiff under a covenant giving him possession in certain events. The plaintiff became entitled to possession under the terms of his mortgage, but, before he could obtain actual possession, defendant took a subsequent usufructuary mortgage of the same property in lieu of the money due under his previous simple mortgage. The plaintiff now sued to recover possession under the terms of his mortgage: *Held*, that the mere fact that the defendant held a prior simple mortgage of the same property would not entitle him to resist the plaintiff's suit for possession; the mere execution of a subsequent usufructuary mortgage would not take away from the plaintiff his right to take possession which had already accrued to him prior to the execution of the usufructuary mortgage to the defendant. **JANGU SINGH v. GANESH RAM, 14 Ind. Cas. 735.**

(24-b)—*Property mortgaged different from property described—Transferee of mortgaged property not bound by the mortgage—Priority.*—In 1876, one B purported to hypothecate four plots of land situated in *mouza* Nagala. As a matter of fact, the name of Nagala was inserted in the mortgage-deed by mistake; the property was situated in *mouza* Arazi. The heirs of B sold their proprietary right in *mouza* Arazi to one K in 1910 free of all charges. In a suit

Mortgage—continued.**—1.—General—continued.**

brought on the basis of the mortgage of 1876, held, that K was not bound by that mortgage. **H. B. KINLOCK v. TOTA RAM, 15 Ind. Cas. 335.** (18 C. 556, 18 M. 364, 29 C. 654, R.)

(25)—*Limitation — Adverse possession — Puisse mortgagee redeeming earlier mortgage in the hands of plaintiff—Period of limitation for suit for declaration of title acquired by prescription.*—As long as possession can be referred to a right consistent with the subsistence of an ownership in being at its commencement, so long must the possession be referred to that right, rather than to the right which contradicts the ownership. (11 B. 422, R.) A man cannot hold a mortgage on his own property, and where a transferee of a decree for sale obtained by a prior mortgagee of certain property takes payment from the puisne mortgagees, he ought to be deemed to have acknowledged the title of the mortgagor to the equity of redemption. In a case of a co-sharer holding mortgaged property after redemption by him of the mortgage, limitation is computable only from the date when the possession becomes adverse by the assertion of an exclusive title. **JAGDIP NARAYIN SINGH v. BILAR SING, 8 A.L.J. 324=9 Ind. Cas. 572=33 A. 463.**

(26)—*Mortgage—Adverse possession—Sale of equity of redemption—Registration—Limitation Act (IX of 1908), art. 144—Registration Act (XVI of 1908), s. 17.*—Held that, a person entering into possession of land as a mortgagee is not at liberty to set up adverse possession against the mortgagor, by merely obtaining in his favour mutation of names as owner, until he succeeds in proving actual purchase by him of the equity of redemption. Held, also that a deed of sale of immoveable property mortgaged by a registered deed is not compulsorily registrable under s. 17 of Act XVI of 1908, if sale consideration minus the mortgage-money is less than Rs. 100. **LEHNA v. SANTA SINGH, 9 P.W.R. 1912=13 Ind. Cas. 852=138 P.L.R. 1912.** (17 B. 755, F., 16 P.R. 1892, F.B., F.)

(26-a)—*Pleadings—Appeal, second—Revision—Point not put in issue nor raised in grounds—Mortgage—Equity of redemption sold to one person—Subsequent sale to another—Second purchaser redeeming property by suit—Suit for possession by first purchaser—Limitation—Adverse possession—Estoppel.*—A party cannot be allowed in further appeal or revision to raise a point which was not put in issue in the first Court nor in clear terms urged as a ground of appeal in the Lower Appellate Court or in the grounds for revision or further appeal to the Chief Court. The equity of redemption of a part of certain land on mortgage with A was sold to B and C in 1890. In 1895 the vendor re-sold the equity of redemption to C and D, and C and D sued the mortgagee for redemption in 1908, obtained a decree and got possession of the property. The litigation with the mortgagee related to the whole property on

Mortgage—continued.**—1.—General—continued.**

mortgage with A, B took no part in this litigation; he was neither impleaded as a defendant nor was he called as a witness in the case. In 1909, B sued C and D for possession of the land of which he had purchased the equity of redemption in 1890: Held, (1) that the suit was not barred by time, as B had 12 years from the date when C and D obtained possession in 1908 to sue them for recovery of the property; (2) that the sale to C and D of the equity of redemption previously sold to B did not amount to adverse possession; (3) that, in this property, the vendor had no rights left to him which he could sell in 1895 to C and D; and consequently the sale of this property to them was a mere nullity in law; (4) that B was not estopped by his conduct from contesting the validity of the sale to C and D; (5) that, although B, was equitably bound to re-imburse C and D for any sum spent by them in redeeming the property for which B sued, he could not beyond this be adversely affected by the litigation between C and D and A. **LALA MOHUN LAL v. BHAGU SHAH, 14 Ind. Cas. 513=252 P.W.R. 1912.** (6 C.W.N. 601, D.)

(27)—*Mortgage—Suit on a mortgage—Plea that the mortgage was an unreal transaction—Onus of proof—Mortgage not impugned in prior proceedings where it was in evidence—Estoppel—Madras Revenue Recovery Act (II of 1864)—Purchase by benamidar, whether can be questioned by the real purchaser.*—In a suit on a mortgage, defendant pleaded that it was an unreal transaction. In a previous proceeding, where the mortgage deed was put in evidence, the defendant, who was then also impleaded as party defendant, did not adduce evidence to show that it was an unreal transaction, though he was allowed an opportunity to do so: Held, that the defendant was estopped from impugning the mortgage in the subsequent suit. Where, at a revenue sale, the property was purchased by a person *benami* for another: Held, that it was open to the real purchaser to set up and prove his title. **SULAIMAN v. PAT-TANA BIBI, 9 Ind. Cas. 136=9 M.L.T. 136.** (29 M. 473, 1 M.L.T. 234, 16 M.L.J. 505, F. B., R.)

(28)—*Fraud—Fraudulent transfer of possession—Reversioner obtaining fraudulent possession through assignee of the widow—Sale by widow—Mortgage by vendee—Suit by mortgagee for sale of property—Reversioner cannot deny the mortgagee's right—Estoppel—Mortgagor and mortgagee.*—G's widow sold certain property to G A (the father of defendants 1 and 2) in 1878. It was mortgaged by G A to D (the plaintiff's uncle) in 1892. G's widow died in 1897. After G A's death in 1901, H (defendant No. 3), slipped into possession of the property by fraudulently inducing the defendants Nos. 1 and 2 to favour his claim. In 1908, the plaintiff sued to recover his money by sale of the mortgaged property. It was contended by H, who was a reversioner

Mortgage—continued.**—1.—General—continued.**

of G, that it was not competent to G's widow to alienate the property beyond her life-time:—*Held*, (1) that H, having obtained possession of the property by colluding with defendants 1 and 2, his fraud was sufficient in law to deprive him of the right to be heard in defence to the suit that he was entitled to the property as reversionary heir of G. (2) That the defendants Nos. 1 and 2 having been in possession of the property as mortgagors of the plaintiff were bound to hold it in that capacity; and if they were threatened or obstructed by defendant No. 3, claiming as the true owner, they ought to have given him (the plaintiff) notice of threat or obstruction so as to enable him to defend his rights as mortgagee, but, instead of that, they colluded with defendant No. 3 in the fraudulent transfer of possession; that, therefore, the rule of estoppel which applied to defendants Nos. 1 and 2 applied to defendant No. 3 also. The true owner of property is entitled to retain possession even though he has obtained it from a trespasser by force or other unlawful means. This applies only where the true owner gets into possession without bringing himself within the law of estoppel. As between a mortgagor and his mortgagee neither can deny the title of the other for the purposes of the mortgage. A mortgagor cannot derogate from his grant so as to defeat his mortgagee's title, nor can the mortgagee deny the title of his mortgagor to mortgage the property. *HILLAYA v. NARAYANAPPA*, 13 Bom. L.R. 1200.

(29)—*Civ. Pro. Code (Act XIV of 1882), s. 317—Benami auction purchaser, suit for declaration against—Maintainability of suit—Mortgagee from real purchaser, right of—Transfer of Property Act (IV of 1882), s. 43—Transfer by person having no right—Property subsequently vesting in him, effect of.*—A mortgagee, who derives his title from his mortgagor, is precluded by the provisions of s. 317 of Act XIV of 1882 from bringing a suit for a declaration that the auction purchaser of the mortgaged property was the *benamidar* of his mortgagor and was not the beneficial owner. (26 A. 82, A.W.N. 1903, 199, *F.*) Where a person mortgages property, which he has no right to mortgage, representing that he is authorized to make the mortgage, and subsequently the property becomes vested in him, the mortgage will operate against him under the provisions of s. 43 of the Transfer of Property Act. *SARJU PRASAD v. BINDESHARI BAKSH PAL*, 9 Ind. Cas. 298=8 A.L.J. 184=33 A. 382.

(30)—*Acquisition of adverse titles by mortgagee—Estoppel.*—A person, who lawfully came into possession of land as mortgagee, cannot, by setting up during the continuance of such relation, any title adverse to that of the mortgagor, acquire by prescription, title as owner or any other title inconsistent with his status as mortgagee. *LAKSHMI NACHIAR v. RAMACHANDRA DORAI*, 6 M.L.J. 5. (25 M. 507, *R.*)

Mortgage—continued.**—1.—General—continued.**

(31)—*Mortgage of occupancy fields by tenants to landlord—Suit for foreclosure—Wrongful possession obtained by landlord—Liability of landlord to account for profits as mortgagee in possession.*—Plaintiff, a mulguzar, took a mortgage of the lands of his occupancy tenants and sued for a decree for foreclosure. Two years before the suit, plaintiff had wrongfully ejected the tenants and entered into possession of the lands and defendants contended in this suit that he was bound to account to them (mortgagors) for the profits he made out of the lands after he trespassed upon them and that such profits must be set off against the mortgage-debt. *Held*, that the position of a mortgagee is not adverse (6 C.P.L.R. 109, 10 C.P.L.R. 55, 18 A. 329, *R.*) to the mortgagor and that the plaintiff, who took possession, being the mortgagee, took possession as mortgagee and the fact that he was also landlord does not make his taking possession amount to an ejectment of his tenants and that he was, therefore, bound to account to the defendants for the profits of his possession. *PRABHUDAN v. BHIKULAL*, 2 N.L.R. 92. (7 W.R. 30, 16 B. 134, *F.*)

(32)—*Mortgage without possession—Subsequently possession given to mortgagee—Transaction, a sale and not mortgage—Burden of proof—Entry in Land Records Register IX, as to transfer of land—Effect of—Pyatpaing not signed by person reporting, admissibility of, in evidence—Evidence Act, ss. 161 and 3.*—When land is mortgaged without possession, and possession is subsequently given to the mortgagee, the burden of proving that the transaction in which possession was given was an outright sale lies in the first instance on the mortgagee. (11 Bur. L.R. 37, *F.*; 8 Bur. L.R. 189, 1 L.B.R. 215, 11 Bur. L.R. 253, *R.*) An entry in Land Records Register IX, regarding the transfer of land, is at its best nothing more than a report or note of a transaction which has already been effected; but the transaction to which it relates is not effected by such entry. The *pyatpaing* (outer foil of Land Records Register), not signed by the person reporting the transaction, is not admissible to prove the report (1 L.B.R. 260, *R.*) But, if the *thugyi* (person making the entry) is called and gives evidence about the oral report, he might use the *pyatpaing* to refresh his memory, and s. 161, Evidence Act, would apply. The document used in that way becomes evidence under s. 3, Evidence Act. *MA DUN v. LU O*, 5 L.B.R. 40=2 Ind. Cas. 535.

(33)—*Document, Construction of—Sale or mortgage—Condition to re-transfer.*—Where all the *indicia* of the debtor and creditor relation are present, an instrument will not operate as a sale, merely because there is a stipulation in the deed that the alienee would re-transfer the property to the alienor, if the debt would be paid up by the alienor, within a stipulated period. *MADHO KORO v. GOPA BANDHU NIPPAKO*, 6 Ind. Cas. 512=8 M.L.T. 100.

Mortgage—continued.**—1.—General—continued.**

(34)—*Estoppel—Mortgage—Prior and subsequent mortgages—Sale of part of mortgaged property to mortgagee—Redemption of previous mortgage—Prior mortgagee not setting up his purchase as defence—Right of subsequent mortgagee to possession.*—When the sub-mortgagees purchase the shares of some of the heirs of the mortgagor in the property mortgaged, and all the heirs sue for redemption of mortgage, and, pending suit for redemption, the property is mortgaged with third parties, and out of consideration for this latter mortgage the sub-mortgagees are paid up and redemption of the previous mortgage is allowed, the sub-mortgagees are estopped from setting up their purchase from some of the heirs of the mortgagor against the claim for possession made by the subsequent mortgagees. Their acceptance of the whole mortgage money constitutes an admission that the redeemed land had not been sold to them. *BALA BAKSH V. LOHRI*, 39 P.L.R. 1910=8 Ind. Cas. 229.

(35)—*Acknowledgment—Acknowledgment not made before prescribed period—No inference that it proves the existence of a subsisting mortgage.*—The acknowledgment of a mortgage, not having been made before the expiration of the period prescribed for a suit for redemption, does not by itself prove the existence of a subsisting and non-existence of a time-barred mortgage. The *factum* of an acknowledgment cannot of itself be held to conclusively prove that it was made within the period of limitation. *CHOTI-RAM V. BHAU*, 1 Bom. L.R. 2.

(36)—*Statement in a mortgage as to amount of land excepted from its operation, nature of—Admission—Evidence.*—Where a mortgage of a revenue paying mouza was effected, and there was a statement in the mortgage-deed as to the quantity of *debutter* land within the limits of the said mouza, which was exempted from the mortgage, *held*, that the statement in the deed regarding the *debutter* land was a deliberate admission imposing on the mortgagors who had made it the burden of proving that it was untrue or that they were not bound by it. *JARAS KUMARI V. LALON MONI*, 18 C. 224=17 I.A. 145, P.C.=5 Sar. 628.

(37)—*Admission by mortgagee—Effect—Limitation.*—When at a period of time within 60 years from the date of the original mortgage, the mortgagee in the course of a conveyance admitted that the mortgaged property was of the ownership of the original mortgagor, that the property had been mortgaged and that the mortgage was at the time existing, the admission amounts to an acknowledgment of an existing relationship of mortgagor and mortgagee and a suit to redeem the original mortgage can be brought any time within 60 years from the date of the admission. *VITHU V. KESHAV*, 6 Bom. L.R. 38.

(38)—*Admission by mortgagee—Effect of admission.*—Where a mortgagor describes his mortgagee as such and the latter admits in

Mortgage—continued.**—1.—General—continued.**

writing over his signature the correctness of that description, the meaning of the admission, is as plain as language can make it. Thereby the mortgagee unmistakeably affirms that he is what he is described to be a mortgagee and it is a necessary implication from the admission that he acknowledges all the legal consequences of his position as a mortgagee, one of which is his liability to be redeemed. *SHEIKH MAHOMED V. JAMALUDDIN MAHOMED*, 10 Bom. L.R. 385.

(39)—*Mortgage—Attestation by only one witness—No proof required when mortgage is admitted by the other side—Evidence Act (I of 1872), s. 58—Effect of not impeaching the informality of the mortgage in the first Court at the first hearing.*—Where the defendants in their written statements admitted that they had executed a deed of mortgage on account of an old debt due by them, and that subsequently it was arranged that a third person who was not a party to the mortgage should pay the debt and redeem the land: *Held*, that this was a clear admission that the relation of mortgagor and mortgagee was established between the defendants and the plaintiffs, and that, therefore, the production of the mortgage-deed was unnecessary under the provisions of s. 58 of the Evidence Act. The validity of the mortgage cannot be questioned in such a case, even if the deed is attested by one witness only. (U.B.R. 1897—1901, Vol. II, 379, F.) A Court can take no account of the informality of a transaction which was not put in issue. *MAUNG KAN V. MAUNG MYAT THAING*, 11 Ind. Cas. 850.

(40)—*Ancestral property—Sale—Property reverting to joint family—Mortgage.*—Where it is admitted that the property in dispute was originally the ancestral property of three brothers, and it is found on evidence that the property was not sold out and out, but mortgaged, and that subsequently to that mortgage the property reverted to the family, and was in its possession jointly, such reversion and the conduct of the parties were held to be sufficient to show that the sale was originally a mortgage. *BANESHUR DASS V. BANEE MADHUB DASS*, 18 W. R. 256.

(41)—*Burden of proof—Mortgage relied on by plaintiff, Proof of.*—Where a plaintiff, in a suit on a mortgage, fails to prove the mortgage on which he relies and which he alleges in his plaint, he cannot succeed upon the mere fact that the defendant admits that he is a mortgagee of the land. *SALIK RAM V. RAMANAND*, 3 O.C. 173.

(42)—*Mortgagor and mortgagee—Subsequent possession of mortgagee not necessarily evidence of outright sale—Burden of proving subsequent outright transfer on mortgagee—Entry in register—Possession over 13 years insufficient—Burden of proof.*—Where, after mortgaging the properties, the mortgagors remained in possession at first and subsequently made over

Mortgage—continued.**— 1.—General—continued.**

possession to the mortgagees, who alleged that possession was made over outright and not in usufruct, the burden of proving the outright transfer is on the party asserting it. (1 L.B.R. 215, *Appr.*) An entry in Register No. 1 showing an outright transfer for consideration, coupled with the fact of possession for over thirteen years, is not sufficient to shift the onus, especially where there is no entry in Register IX of the corresponding year, and the possession is as consistent with the transaction being an usufructuary mortgage as with its being an out-right transfer. *MA HNIN v. MA LE ME*, 8 Ind. Cas. 610.

(43)—*Malabar Law—Otti right—Purchase from another person setting up title as Jenmi—Does not enlarge the otti right possessed by the mortgagee.*—Where a Kanam-holder admits that he holds under an *otti* created by one Jenmi, that fact, of itself, estops him from setting up a title by adverse possession originating in a purchase of the mortgaged property from another person claiming the rights of a Jenmi in that property. *KADAKAM VELLI MAMMILI SHANARAN MOOSAD v. K.C. OTHEANAN NAIR*, 2 M.W.N. 1911, 61 = 10 Ind. Cas. 339.

(44)—*Suit on alleged mortgage against bona fide purchaser—Onus of proof of execution of bond and bona fides of transaction.*—Where, in a suit on an alleged mortgage against a bona fide purchaser for value, the genuineness of the transaction is questioned, the plaintiff is bound to prove *prima facie* both the due execution of the bond and the bona fides of the transaction and the defendant need not give affirmative evidence of fraud. *BRAJESHWARE PESHAKAR v. BUDHANUDDI*, 6 C. 268 = 7 C.L.R. 6. [*R. & Expl.*, 5 C.L.J. 653.]

(45)—*Mortgage—Suit to obtain property unencumbered by previous mortgage—Payment of mortgage money—Consent—Mortgage alleged to have been under attachment—Onus probandi—Mortgage—Waiver of mortgage rights—Personal remedy.*—Where the plaintiff sues to obtain certain property unencumbered by the previous mortgage and pays into Court the amount due under the defendant's lien as previous mortgagee, and on being questioned by the Court, states that he has no objection to this sum being appropriated to the payment of the defendant's lien, he has no cause of action as against the defendant. Where plaintiff alleges that an attachment subsists and that consequently the mortgage under which the defendant claims is invalid, he is bound to prove this allegation and he is not discharged of this burden merely by showing that the attachment was made some years previous to the alienation. Simply because a mortgage-deed provides that, in the event of the mortgaged premises being sold, and not being sufficient to meet the debt, the person and other property of the mortgagor would be liable, it cannot be held that the mortgagee

Mortgage—continued.**— 1.—General—continued.**

must be considered to have waived his right under the mortgage and that he cannot follow that property into whosoever hands it may have passed. *TOOLSEE DUTT MISSER v. BROJO MOHUN THAKOOR*, 9 W.R. 332.

(46)—*Estoppel—Mortgage of entire property by owner of half share—Purchase by defendant of entire property pending mortgage suit—Sale and purchase by mortgagee in presence of defendant—Defendant if estopped from proving title to the other half—Ignorance of plaintiff of real fact and misleading by defendant's conduct, to be proved.*—F, who owned a half share in a property, purported to mortgage the whole. After a preliminary decree had been passed in favour of the mortgagee in his suit against F brought on the mortgage, N purchased the interest of F and his co-sharer and was brought on the record as the successor in interest of F. The mortgage decree was thereafter made absolute and the property put up to sale and purchased by the mortgagee. In a suit by the latter against N to establish his title to the entire mortgaged property, held—That N would not be estopped from showing that the mortgage sale passed only F's half share in the property to the plaintiffs, unless it was established that the mortgagee was not aware that F had only a half share in the property which he purported to mortgage and that he was misled by some representation by conduct of N into believing that F had full title. *KAMAL KUMAR NANDI v. KALI MEAH*, 15 C.W.N. 572 = 9 Ind. Cas. 662.

(47)—*Deed—Consent of a person to the deed without previous title in the mortgage—Effect of consent.*—A usufructuary mortgage for a period of ten years was passed to one K by defendant 1 of certain lands as his own on receipt of the whole consideration. At the foot of this deed, plaintiff added his consent with a remark that he was owner of half of the said lands, that he received half of the consideration and that he consented to the mortgage. The lower Courts held that the possession of the mortgagee for twelve years under this deed created a title in favour of the plaintiff to the extent of a half, the mortgagee's possession being adverse to defendant 1 in favour of plaintiff: Held, that in a suit by plaintiff to recover his half share in, or to be put in joint possession of, the mortgaged property he must show that at the date of the mortgage he was joint owner or owner of half the property independently of the mortgage deed. The consent in the deed operated merely as a piece of evidence and did not by itself alone create any title in favour of plaintiff. *SUBBAN v. JIVANBHAT*, 4 Bom. L.R. 25.

(48)—*Usufructuary mortgage followed by sale—Revival of mortgage by cancellation of sale.*—When a sale, made to a mortgagee in possession, is cancelled, the mortgage is revived, and the possession of the property becomes one under the mortgage. *BASANT RAI v. KAN-AUJI LAL*, 2 A. 455.

Mortgage—continued.**—1.—General—continued.**

(49)—*Mortgage of moveable property—Delivery of possession of moveable property to mortgagee.*—A mortgage of moveable property is a valid transaction, and delivery of the property to the mortgagee is not essential to its validity. **ROCHAN LAL v. UMRAO, 6 O.C. 230.**

(50)—*Mortgage of grain.*—Where certain boats containing grain were assigned by the owners thereof in consideration of an advance of money by a Firm on condition that the owners of the boats were to work the boats for the Firm and be responsible for the safe custody thereof and that, if the advance should not be re-paid on demand by the Firm, the latter were to take possession of, and sell the boats, *held*, that the deed containing the stipulations was a mortgage and liable to stamp duty as such and not a pledge. **KO SHWAY AUNG v. STRANG STEAL AND CO., 21 C. 241.**

(51)—*Mortgage of personal property not in existence—When valid.*—A mortgage of personal property, which is not in existence at the time of the mortgage, is valid, provided the mortgagor has a potential interest in that out of which the property may arise. **SIVA SON OF SABHA v. BISANDAS, 2 C.P.L.R. 193.**

(52)—*Mortgage—Future crops—Agreement to assign—Vague and uncertain bond cannot be enforced.*—Future crops can be hypothecated. A mortgage of future crops operates as an agreement to assign. Such an agreement, in order to be enforceable, must be an agreement which a Court of Equity would enforce. An agreement, the terms of which are vague and uncertain, cannot be enforced. **DIP CHAND v. RADHA, 5 Ind. Cas. 373.**

(53)—*Mortgage of property to come into existence in future—Creditor paying consideration—Mortgagor, trustee on property coming into existence—Subsequent mortgage—Salvage lien—Mortgage of indigo cakes to be manufactured in future—Nature.*—A mortgage of property which is to come into existence in the future is a valid transaction, which Courts of Equity will enforce. (*Clements v. Mathews*, 11 Q.B. 8, 808; *Holroyd v. Marshall*, 10 H.L. 191, 13 C. 262, 10 A. 133, R.) On a creditor paying the consideration, the mortgagor becomes a trustee of the property for the creditor as soon as the property comes into existence. The creditor as *cestui que trust* acquires an equitable estate or interest in the property. Any subsequent mortgagee of the property, even though he obtains possession of it, will have no rights. *Held* also, that the lien claimed by the subsequent mortgagee had nothing in common with a salvage lien. (2 C. 58, R.) [R., 11 O.C. 301.] A mortgage of indigo cakes to be manufactured hereafter from the crops to be grown on the lands of a particular factory, from the date of the execution of the mortgage up to the date of its being paid off, being neither vague nor uncertain, is not bad in law. **BALDEO PARSHAD SAHU v. MILLER, 31 C. 667.**

Mortgage—continued.**—1.—General—continued.**

(54)—*Pardanashin lady—Execution of document—Attesting witnesses outside parda—Transfer of Property Act (IV of 1882), ss. 68 (b), 73—Sale of mortgaged property for arrears of Government Revenue—Charge on surplus sale proceeds—Suit for them—Limitation Act (XV of 1877), sch. II, art. 132—Sub-mortgagee—Right to sue mortgagor of mortgagor—Mortgagee—Apportionment of debt—Loss of mortgaged premises for mortgagee's default.*—When a deed was executed by a *pardanashin* lady, the attesting witnesses were on one side of the *parda* and the lady on the other, and her son took the deed behind the *parda* and came back with it signed, and then the witnesses attested the deed, and it was not suggested that the lady did not in fact sign the deed: *Held*, that the deed was properly attested, although the witnesses did not see the executant sign (13 C. W.N. 40, 3 Ind. Cas. 309, F.) Where a mortgaged property was sold for arrears of Government Revenue for no default of the mortgagee, and the surplus sale proceeds were withdrawn by the mortgagor: *Held*, that the mortgagee had a right to sue for the amount, and the period of limitation that applies to such a suit is 12 years from the date when the surplus proceeds were realised. (27 C. 180, 31 C. 45, F.) A mortgagee taking an assignment of a debt by way of mortgage should be specially protected against obligation, which would otherwise attach to him to get in the debt in due course, under penalty of being charged with the loss, in case any should arise through his default. A sub-mortgagee is entitled to sue the mortgagor of his mortgagor as well as his own mortgagor; and this is so whether a mortgaged debt or a simple debt is mortgaged. (20 M. 35, F.) A mortgagee cannot claim to throw the entire burden upon a portion of the mortgaged premises, because, by reason of his own laches, he has lost his remedy against the remainder. **ISRI PROSAD v. RAI GUNGA PROSAD SINGH BAHADUR, 3 Ind. Cas. 311 = 14 C.W.N. 165. (10 C.W.N. 551, 3 C.L.J. 576, 33 C. 613, F.)**

(55)—*Attesting witness—Evidence Act (I of 1872), s. 68—Transfer of Property Act (IV of 1882), s. 59—Writer of the deed.*—A person who is present and witnesses the execution of a (mortgage) deed and whose name appears on the document, though he is therein described merely as the writer of the deed, is a competent witness to prove the execution of the deed. He need not be described in the deed as an attesting witness. **RAJ NARAIN GHOSE v. ABDUR RAHIM, 5 C.W.N. 454. (20 A. 532, R.)**

(56)—*Illiterate mortgagor—Signing of mortgagor's name by scribe—Validity of signature.*—Where the mortgagor's name is signed by the scribe of the document at the request and in presence of an illiterate mortgagor the signature is a good signature. **RAMANATH KEDARNATH v. SONBA SHETIA, 16 C.P.L.R. 45. (24 A. 319, F.)**

Mortgage—continued.**—1.—General—continued.**

(57)—*Unregistered mortgage bond—Divisibility of bond.*—The defendant took a loan of of Rs. 120 from plaintiff and executed a bond mortgaging certain immoveable property as collateral security for the re-payment of the loan with interest. The bond was not registered. In a suit upon the bond, the plaintiff prayed "to obtain a decree directing the sum of Rs. 120 with interest to be recovered from the defendant and from the mortgagor's property." It was contended that the document was not admissible in evidence, because it was registered. *Held* that the document was divisible in its nature, it being in the nature of a bond where defendant agreed to pay a certain sum of money, with a provision that, as collateral security for the loan, certain property should remain hypothecated, and that it was, therefore admissible in evidence. *GOUR CHURN SURMA v. JINNUT ALI*, 11 C.L.R. 166. (4 C. 83=2 C.L.R. 428, 5 C. 611=5 C.L.R. 42, 3 A. 229, F.B., R.) [R., 4 C.L.J. 510.]

(58)—*Mortgage—Assignment—Suit by assignee—Mistake as to date of mortgage in assignment-deed—Right of plaintiff to prove that suit mortgage was assigned and also the mistake in date.*—Where a deed assigning a mortgage contains a mistake as to the date of the mortgage-deed, it is open to the assignee, suing on the mortgage to show that what he purchased is the mortgage sued on, and that the date mentioned in the assignment-deed is a misdescription. *NATESA PILLAY v. MUNU-SAWMY NAICKEN*, 13 Ind. Cas. 313. (A.W.N. 1882, 133, 9 M.L.T. 319, 9 Ind. Cas. 729, F.)

(59)—*Share in joint holding—Mortgage—Validity.*—A mortgage of part of an undivided holding, where the mortgagor's interest is ascertained and unlike the interest of the member of an undivided family, would be valid, if it is also for valuable consideration and necessity. *TEHLA RAM v. ATAR SINGH*, 149 P.R. 1884.

(60)—*Joint holding, mortgage by one sharer—How far other sharers bound.*—In the absence of anything in the decree or proceedings to show that a sharer in a joint holding was being sued in a representative character, the decree must be held binding upon him alone, and the Court is incompetent to enquire into the circumstances which resulted in the decree. *MANIA SHAH v. MOHNA SHAH*, 78 P.R. 1885. (70 P.R. 1893, F.)

(61)—*Joint family property—Co-owners, two out of several—Want of family necessity—Validity of mortgage—Personal decree barred—Mortgage, decree against mortgagors if available.*—When two out of several co-owners of a joint family property execute a mortgage of such property not for family necessity but for meeting their own debts, and without the consent of the other co-owners, the mortgage is not a valid mortgage of the family property; and if, in such a case, the mortgagee allows the

Mortgage—continued.**—1.—General—continued.**

personal remedy against his mortgagors to be barred by time, a mortgage-decree cannot be allowed even as against them. *PALUKDHARY JHA v. BALJIT CHOWDHRY*, 4 C.L.J. 543.

(62)—*Mortgage of joint property—Liability of share of mortgagor—Partition—Effect of.*—Out of six houses belonging jointly to R. J. and R. D. five were mortgaged by R. J. to the predecessors in interest of the plaintiff. The remaining house was subsequently sold by R. J. to the defendant. On partition, the house sold to the defendant was allotted to the share of R. J. and the five mortgaged houses were allotted to the share of R. D. The defendant contended that the house sold to him could not be sold to satisfy the mortgage on the suit of the plaintiff. *Held*, that the contention was not valid, for the sale of the house by the mortgagor did not prejudicially affect the rights of the mortgagees and their representative in interest, the plaintiff. *ALLAH BAKHSI v. GOBIND RAM*, 10 P.L.R. 1906=2 P.R. 1906. (12 W.R. 233, R.)

(63)—*Mortgage of share of joint holding—Partition—Suit by co-sharer for recovery of land in mortgagee's possession.*—Where some co-sharers mortgage a portion of their joint estate to a mortgagee with possession and in the subsequent partition, a portion of the land thus mortgaged falls to the share of a co-sharer who has not joined in the mortgage, such co-sharer may sue for and obtain recovery of such portion in mortgagee's possession. *SIKANDAR v. NUR MAHI*, 81 P.R. 1883.

(64)—*Joint property mortgaged—Subsequent partition—Property mortgaged not falling to mortgagor's share—Mortgagor becoming entitled to other properties—Substitution of securities—Mortgagee's right—S. 64 (a), Transfer of Property Act, 1882.*—A mortgagee of an undivided share in common property, or of one of the joint properties before partition from one of the sharers, is only entitled to proceed against the substituted property which falls to the share of the mortgagor at the partition, unless the partition has been unfair or is in fraud of the mortgagee. *MUTHIA RAJA v. APPALA RAJA*, 20 M.L.J. 393=8 M.L.T. 133=6 Ind. Cas. 991. (23 B. 395, D.; 13 A. 106, 20 C. 533, 35 C. 388, 6 C.L.J. 46, R.)

(65)—*Personal liability of the mortgagor—"Such other relief as the Court thinks fit," meaning of—Contract Act, s. 74, explanation, effect of—Powers ejaman of the family.*—A deed provided for payment of interest at 7 p.c., per annum, with a further provision that, on default, interest at 12 p.c., shall be payable on the arrears of interest. The deed also provided for the payment of the principal, on a certain date, in any year, after five years from the date of the deed, with a further provision that, on default, interest at 12 p.c., should be payable "on the responsibility of the mortgaged property." *Held*, that the deed contained a

Mortgage—continued.**—1.—General—continued.**

personal covenant to repay, notwithstanding the words "on the responsibility of the mortgaged property." The deed cannot be construed as excluding the personal liability of the mortgagor, which exists in the case of a simple mortgage, unless there is a specific contract to the contrary. (22 A. 453, R.) The plaintiff is not precluded from claiming, under this covenant, by reason of the fact that there is no specific prayer in the plaint with reference thereto. The fact of his asking for "such other relief as the Court may think fit" is enough to enable the Court to give him the appropriate relief, if he is otherwise entitled to it. (2 M.I.A. 353, 27 A. 325, R.) Where a person is not a party to the mortgage transaction, the plaintiff is not entitled to a personal decree against him, in respect of the money alleged to be in his hands. The fact that plaintiff delayed in instituting the suit is no ground for holding that there never had been any intention to enforce the enhanced rate. The explanation to s. 74, Contract Act, as amended by Act VI of 1899, provides that a stipulation for increased interest from the date of default may be a stipulation by way of penalty. This explanation (25 M. 343, 8 A. 185, 10 M. 203, R.) is introduced to meet the decisions to the effect that, when the higher rate of interest is payable as from the date of default, and not as from the date of contract, the contract rate is enforceable. The explanation, read by the light of the illustrations, shows that it is for the Court to decide, on the facts of the particular case, whether the stipulation is or is not a stipulation by way of penalty. Even in the view that the stipulations are by way of penalty, and that s. 74 applies, it is open to the Court, under that section, to award to the plaintiff the penalty stipulated for, so long as it is not in excess of the reasonable compensation, to which he is entitled. It is within the scope of the authority of the *ejaman* of the family to make a contract, and the family are bound by it. **ABBAKKE HEGGADTHI v. KINHIAMMA SHETTY**, 29 M. 491. [R., 11 O.C. 307.]

(66)—*Personal liability—Covenant to pay—Liability of son for mortgage by father—Mitakshara family.*—If a person promises to pay a certain sum of money with interest and hypothecates certain property as security without any covenant that he would be personally liable or without stating any mode of payment not even the mode indicated in the Transfer of Property Act as to sale of the mortgaged property, he is personally liable, and if the right is not barred by limitation, a decree under s. 90 should be passed. After the death of the mortgagor, father and manager of a joint Hindu family, his son would be liable only so far as he might be in possession of the assets left by his deceased father. **RAM KISHORE GIR v. SURAJ DEO PRASAD**, 9 C.L.J. 5 = 13 C.W.N. 138 = 1 Ind. Cas. 442. (4 C.L.J. 246, F.; 10 C. 740, 16 C. 540, D.; 34 C. 642, Rel. on; 13 C.W.N. 138, R.)

Mortgage—continued.**—1.—General—continued.**

(67)—*Mortgage by manager of a joint estate—Appointment of the manager subsequently declared illegal, effect of—Validity of actions of such manager, when for the benefit of the estate—Acquiescence of major co-sharer—Estoppel—Non-liability of the minor's estate.*—When a person agrees to the appointment of a manager of his estate and that of a minor co-sharer of his, of whom he himself was the duly appointed guardian, and when such manager borrows money on the security of the joint-estate for the purpose of paying off the liabilities of such person: *Held*, that, although the appointment of the manager was not lawfully made, and his actions cannot affect the estate of the minor co-sharer, the major co-sharer cannot be heard to repudiate the actions of a manager, to whose appointment he fully agreed, in some of which he himself joined, and by which he only was benefited. The estate of the major co-sharer must be held liable for the debt incurred by such manager for its benefit. **GENDAN SINGH v.INDER NARAIN SINGH**, 3 C.L.J. 537.

(68)—*Mitakshara Law—Mortgage debt—Mortgage, Validity of.*—A Hindu father governed by the Mitakshara contracted a mortgage debt on April 4, 1887. This was discharged, after his death, with the consideration of a subsequent mortgage made on October, 28, 1892, by his two sons, one of whom was a minor. *Held*, that the mortgage was, as regards the minor executant, absolutely void. [R., 18 M.L.J. 599 = 4 M.L.T. 277, 31 A. 176, F.B. = 6 A.L.J. 263 = 1 Ind. Cas. 479; D., 29 A. 544 = 4 A.L.J. 424 = A.W.N. 1907, 159, 30 A. 156 = A.W.N. 1908, 61 = 5 A.L.J. 175.] *Quære*:—Whether the subsequent mortgagee can hold up not merely as a shield but as a weapon of attack, the earlier mortgage discharged by means of moneys advanced by him? **MAHARAJ SINGH v. RAJA BALWANT SINGH**, 3 A.L.J. 274 = A.W.N. 1906, 117 = 28 A. 508.

(69)—*Mortgage suit—Paramount title, when may be investigated—Hindu Law—Direction for accumulation—Direction not perpetual—Present gift—Bequest to wife of son when married, whether valid.*—The rule that the question of paramount title cannot be properly investigated in a mortgage suit is subject to exceptions. Where the defendant is the legal representative of the mortgagor, and if the property really belonged to the mortgagor, she, the defendant, would be the proper person to be sued, it is open to her, when sued by the mortgagee upon that assumption, to set up her own title to the mortgaged property. The substance of a disposition by will was that D, the eldest son of the testatrix, would take possession of the estate upon the death of the testatrix, that he would get his brother S married in the course of ten years, that, if S married within this period, the estate would be taken by his wife, but that if S did not marry within ten years, upon the expiry of that period, D would sell the properties and apply the proceeds for certain specified religious purposes. The will

Mortgage—continued.**—1.—General—continued.**

concluded with a statement that D would be the executor till the marriage of S, when his wife would succeed to the office of executor: *Held*, that the true position of D was no higher than that of an executor who had clearly no power to spend the income; that he was to accumulate the income for a period which might extend to ten years or might be shorter, if S should be married in the meanwhile, that this trust for accumulation, not being one for perpetual accumulation, was good as there was a present gift to support the direction for accumulation; that the bequest to the wife of S was valid in Hindu Law; and that the estate vested in the wife of S as soon as she was married. Therefore, a mortgage of the estate by S before his marriage did not pass any title to the mortgagee. **NAFAR CHANDRA KUNDU v. RATNAMALA DEBI, 7 Ind. Cas. 921.**

(70)—*Mortgage by managing member—How far binding on others.*—Certain land was mortgaged by a person who managed the affairs for his mother who was blind. She authorized the writing of her name at the foot of the document, and accompanied the mortgagor to the mortgagee for the money: *Held*, that the mortgage was binding on her and her heirs. **MA NGWE v. MAUNG PO SAN, 11 Ind. Cas. 775.**

(70-a)—*Joint Hindu family—Mortgage—Suit by subsequent mortgagee—Making prior mortgagee party—Prior mortgagee then in jail—Son of the prior mortgagee not a party—Effect of the decree against the son—Pre-emption.*—A mortgaged to R certain property in 1887. In 1892, he mortgaged to B the same property and again in 1893 he mortgaged it to R, part of the consideration being the amount due on the mortgage of 1887. In 1899, B's heirs sued for the recovery of the amount due on the mortgage of 1892 making R who was then in jail a party. He did not make R's son, who was then living, a party to his suit. R did not enter appearance and the suit was decreed. In execution of this decree, the property was sold and purchased by B, whose heirs subsequently transferred it to A. In a suit, brought by R's son upon the mortgage of 1893, it was held that the decree obtained against R by B was not binding upon R's son, and R under the circumstances of the case could not be presumed to have represented his son in the previous litigation. **PRAG v. RAM NIRANJAN, 11 A.L.J. 36.**

(71)—*Ala and adna malik—Mortgage by sonless adna malik—Adna malik dying without heirs—Mortgage not binding on ala malik.*—A mortgage created by an adna malik of "adna milkiat" will not, after his death without heirs, be binding on the "ala malik," to whom the property will pass, relieved of all incumbrance. **SURJAN v. LALU, 175 P.R. 1888. (79 P.R. 1878, Appr.) [R., 72 P.R. 1907.]**

(72)—*Mortgage—Alienation for necessity—Assent of next reversioner—Right of subsequent mortgagee to contest previous mortgage.*—*Held*,

Mortgage—continued.**—1.—General—continued.**

that a mortgage by a female is valid, if the next heir assents to it at the time when the mortgage is made or afterwards. But when a subsequent mortgage has been effected by the next heir, the subsequent mortgagee does not acquire the right of an heir to contest an alienation by a female on the ground that the alienor was not a full owner and could not alienate save for necessity and that there was no necessity for the alienation. **MAULADAD v. RAM GOPAL, P.L.R. 1900, p. 186.**

(73)—*Son-in-law managing mother-in-law's property—Property ample to meet liabilities—Mortgage to son-in-law—Consideration found to be paid out of estate—Validity of such mortgage—Colourable transaction.*—Where a son-in-law was managing his mother-in-law's property, which was ample to meet the liabilities, that, after all, were not of a pressing nature, and the consideration for the mortgage to the son-in-law was found to have been supplied from the income of the estate: *Held*, that the mortgage was a colourable transaction entered into by the mother-in-law and son-in-law with a view to saddle the estate with this debt for the benefit of the son-in-law, at the expense of the reversioners. **TIRUVA GOUNDAN v. KUPPA GOUNDAN, 3 M.L.T. 285.**

(74)—*Accredited agent—Mortgage by creditor from—Undisclosed interest in property.*—It is impossible for a creditor taking a mortgage from an accredited agent to prove that no other person had an undisclosed interest in the property. If a person allows property to be purchased for him in the name of another and takes no steps to show to the world that he is the owner, he must make out a clear right to relief against any one who purchases *bona fide* from the ostensible owner. **NIDRA DASSEE v. ABDOL WAHEED, 25 W.R. 532.**

(75)—*Part payment of consideration—Effect of transaction.*—If there is only a part-payment of consideration under a deed of mortgage, the transaction is incomplete and would not create a mortgage and the mortgagee could not enforce his debt against the property. **GOPAL SAHAI v. MUSST. HUSAIN BIBI, 100 P.R. 1889. (16 P.R. 1884, D.; 153 P.R. 1882, 27 P.R. 1886, R.) [R., 59 P.R. 1907, 96 P.R. 1894.]**

(76)—*Mortgage—Inequitable, fraudulent and grossly oppressive—Taking of accounts—Contract—Consideration, inadequacy of—Fraud, misrepresentation, etc.*—In a case, in which money-lenders, dealing with ignorant illiterate peasants, unable even to sign their own names, have made use of the necessity of those peasants, who were seeking to raise a sum of money for the purpose of stocking and tilling their lands, to impose upon them a contract by which they agreed, in default of punctuality of payment of the half produce, and in other events, to sell their lands at a gross undervalue (*viz.*) one-third of the amount of the debt, which in itself was not more than equal to half the

Mortgage—continued.**—1.—General—continued.**

value of the annual produce of the land, and to remain liable for the remaining two-thirds of the debt with interest; and even if no default occurred on their part in payment of the moiety of the annual produce or the performance of their other covenants, and notwithstanding full payment of the principal, to continue for 15 years to pay the half-produce of the lands to the mortgagees. *Held* that the mortgage-deed must be treated as security for payment of the principal and interest thereon at 9 per cent. and that in other respects it must be set aside as inequitable, fraudulent and grossly oppressive. *Held*, further, that, even if the lands had been made over to the mortgagees as per decree of the lower Courts, they must be forthwith restored to the mortgagors and an account be taken of the rents, profits and produce of the said lands whilst in the mortgagee's possession, and received by them or for their use or by their order. [R., 4 B.H.C. A.C. 202, 9 B.H.C. 69, 13 C.P.L.R. 43, 12 Bom. L. R. 795.] Mere inadequacy of consideration, unless it be so great as to amount to evidence of fraud, is not sufficient ground for setting aside a contract or refusing to decree specific performance of it. Inadequacy of consideration when found in conjunction with any other such circumstance as suppression of the true value of property, misrepresentation, fraud, surprise, oppression, urgent necessity for money, weakness of understanding, or even ignorance, is an ingredient which weighs powerfully with a Court of equity in considering whether it should set aside contracts or refuse to decree specific performance of them. *Quære*.—Whether a mortgage of future crops is valid under the Hindu Law? Whether, under the Hindu law, a creditor is entitled to receive on any one occasion an amount of interest exceeding the principal and how far Act XXVIII of 1885 affects this principle? *KEDARI bin RANU v. ATMARANABHAT bin NARAYANBHAT*, 3 B.H.C. A.C. 11. [Appr., 32 B. 37=9 Bom. L. R. 1164; R., 25 B. 126.]

(77)—*Consideration, Failure of—Mortgage effected in consideration of an assignment by mortgagee—Assignment not made—Mortgage unenforceable*.—Rupees 1,800 on account of rent, were due to A, from his tenants. B agreed to pay Rs. 1,235 to A, reserving to himself the balance as *haq-i-tahsil*, i.e., as collection charges, and as a security for payment of the promised amount mortgaged his property to A. Though the real consideration for the mortgage and the promise to pay Rs. 1,235 to A, was an intended assignment by A to B of his (A's) right to recover the rents due from the tenants, yet A gave no authority to B to collect the rents, and consequently B could recover nothing. A sued B on the basis of the mortgage. *Held*, that the mortgage was without consideration and, therefore, unenforceable. *PARBHU NARAIN SINGH v. DEORAJ SINGH*, 11 Ind. Cas. 4.

Mortgage—continued.**—1.—General—continued.**

(77-a)—*Burden of proof—Consideration, proof of, where a portion left in the hands of the mortgagee—Presumption as to receipt of consideration*.—Where, according to the terms of a mortgage-deed, a portion of the consideration is left with the mortgagee to make payments to certain creditors, the burden of proving such payments lies in the first instance upon the mortgagee. The execution of the mortgage-deed and the proceedings which take place at its registration involve no admission by the mortgagor that the mortgagee has made such payments. *BHIKHAM SINGH v. RADHA KUNWAR*, 14 Ind. Cas. 136.

(78)—*Widow mortgaging property—Part only of consideration for necessity—Suit for possession by mortgagee against reversioner—Mortgagee's right to proportionate possession—Incomplete contract*.—In the case of a mortgage by a widow, if only a part of the consideration is proved to have been for necessity, the mortgagee is not entitled to recover possession of the mortgaged property from the reversioner after the death of the widow. A reversioner against whom part only of the mortgage consideration is binding is in the position of a mortgagor to whom part only of the consideration has passed and he can resist, on the ground of partial absence of consideration, the mortgagee's suit for possession. He is affected by so much only of the consideration as was for necessity and is not affected by the fact that the balance of the consideration, not for necessity, passed to the widow mortgagor, and must be treated as a party to a contract which has not been completed by the other party. The mortgagee is not even entitled to possession of a fraction of the mortgaged property in proportion to the amount of the mortgage-money proved to have been for necessity. *KHAIRA v. MAULA*, 49 P.R. 1911=136 P.W.R. 1911=212 P.L.R. 1911=11 Ind. Cas. 191.

(79)—*Consideration money paid by mortgagee to alleged creditors of mortgagor—No consultation with mortgagor—No payment to mortgagor*.—Where the consideration-money for a mortgage-bond was paid by the mortgagee into the hands of a banker, not in the name of the mortgagor, and, out of the money thus deposited, debts of the mortgagor were paid without consulting him, it could not be said that the consideration-money was paid to the mortgagor. *R.B. BALAPRASAD v. BIDUR RAM*, 4 C.P.L.R. 120. [D., 1 N.L.R. 146.]

(80)—*Non-payment of consideration agreed, effect of*.—Failure or delay in payment of full consideration, either to the mortgagor or to a prior incumbrancer, after such payment has been demanded by the mortgagor, avoids the mortgage and destroys the mortgagee's lien and right to possession even on subsequent tender of the unpaid consideration, in the absence of a specific contract postponing payment, it being immaterial whether the failure

Mortgage—continued.—1.—**General**—continued.

or the delay has or has not caused inconvenience or loss to the mortgagor. In the absence of express stipulation postponing payment, it will be presumed that payment is intended to be made immediately or within a reasonable time, according to the circumstances of each case. *GOKAL CHAND v. RAHMAN*, 59 P.R. 1907, F.B. (16 P.R. 1884, Diss.; 153 P.R. 1882, 27 P.R. 1886, 100 P.R. 1889, 103 P.R. 1906, R.)

(81)—*Suit for possession by mortgagee—Partial failure of consideration—Effect.*—A suit by mortgagee for possession of the mortgaged property is not sustainable if there is a partial or total failure of consideration and if there is no offer by the plaintiff to pay up such amount as is found to be due. But a mortgage would not on that account be invalid. *MANGAL SINGH v. JINDAN*, 27 P.R. 1886. (153 P.R. 1882, R., 16 P.R. 1884, D.) [R., 100 P.R. 1889, 59 P.R. 1907.]

(81-a)—*Burden of proof—Mortgage-bond—Proof of execution and payment of consideration—Evidence—Recital in instrument.*—G executed a mortgage-deed in favour of R. G sold the property to L. The mortgage-deed contained an admission of the receipt of consideration which consisted of old debts. The heirs of R brought a suit upon their mortgage, and impleaded G and L admitted execution, but denied receipt of consideration, but L denied both; *Held*, whether the admission of G contained in the deed was evidence against L or not, nevertheless the burden of proof was primarily on the plaintiffs to establish payment of consideration, and as against the transferee, who was no party to the bond and had no sufficient knowledge of the circumstances under which the document was executed, that admission was of very little value and was insufficient to shift the burden of proof on to the transferee. *LALAK SINGH v. AJUDHIA PRASAD*, 10 A.L.J. 108 = 15 Ind. Cas. 121.

(81-b)—*Mortgage—Consideration—Part real and the remainder sham—Intention to defraud creditors—Parts inseparable—Whole transaction voidable.*—Where, out of the sum of Rs. 900 and odd secured by the mortgage executed by one in favour of his divided brother, it was found that Rs. 540 were debts really due by the mortgagor and Rs. 400 odd represented nothing really due by the mortgagor, but was a fictitious sum arranged in order apparently to make the amount secured by the mortgage equal or more than equal to the whole value of the property mortgaged, and that this was done in order that the mortgagee might hold the surplus amount for the mortgagor in order to save it from his creditors. *Held* that the whole mortgage was voidable as against the creditors. (30 M. 6, F.; 1911, 2 M.W.N. 152, 7 C.L.J. 586, D.) *Per Sadasiva Iyer, J.*—The two parts of such a single transaction are not separable and ought not to be separated, in order to favour a creditor who has been guilty of fraud

Mortgage—continued.—1.—**General**—continued.

against his fellow creditors. *SAMA ROW v. DORASWAMI CHETTIAR*, 13 M.L.T. 266 = 24 M.L.J. 266. (34 C. 999, Appr.; 7 C.L.J. 586, not Appr.)

(82)—*Payment of Government revenue by mortgagee—Lien.*—When a mortgagee in possession pays the Government revenue to save the estate, he has a claim on the mortgagor who is bound under the mortgage-deed to pay the revenue. *GOUR CHAND SHAH v. JUMAL REZA*, W.R. 1864, 209.

(83)—*Mortgagee protected from loss—Payment by him to prevent rent sale not voluntary.*—The payment of moneys by the mortgagee of a patni taluk, for the prevention of its sale for arrears of rent, was not voluntary, notwithstanding that the mortgage-deed had insured him against loss by such sale. The provision of such protection by the mortgagee would not deprive him of the benefit of the equitable consideration, for which authority is derived from 11 M.L.A. 258. *MOHESH CHUNDER BANERJEE v. RAM PROSONNO CHOWDHRY*, 4 C. 539 = 6 C.L.R. 23.

(84)—*Mortgagee liable to pay Government revenue, in the absence of a contract to the contrary.*—Under the general law, the mortgagee is liable to pay the Government revenue, unless there is a contract to the contrary. If the revenue is enhanced, the burden falls on the mortgagee. *NATUWATH PAPPU v. KOLLI VALAPPIL KALATHILE VITTIL*, 2 M.W.N. (1911) 236 = 10 M.L.T. 571 = 12 Ind. Cas. 140. (14 M.L.J. 488, R.)

(85)—*Assessment—Payment of assessment by mortgagee—The amount so paid can be added to mortgage money.*—Apart from special stipulation a mortgage is under no liability to pay assessment as between himself and his mortgagor; and if he does pay it for the purpose of preserving his security, then he is ordinarily entitled to add that amount to his mortgage-money, and to require that he should be paid it before he can be redeemed. When the mortgagee agrees to pay a certain sum as assessment and the assessment is subsequently increased, he is entitled to add the amount of the excess payments so made to his mortgage security. *NILAWA v. KRISHNAPPA*, 8 Bom. L.R. 350.

(86)—*Covenant in a usufructuary mortgage for payment of kist by mortgagee—Subsequent enhancement of kist—Suit by mortgagor for excess kist paid, maintainability of.*—Under a usufructuary mortgage obtained from the plaintiff, defendant was to pay the Government revenue payable on the land mortgaged to him and to take the profits in lieu of interest without reference to whether the profits were more or less in particular years. The revenue on the land was subsequently enhanced and plaintiff had to pay the excess over the original kist, to recover which excess he instituted the present suit against the defendant. *Held*, that the revenue payable under the

Mortgage—continued.**—1.—General—continued.**

settlement in force on the date of the mortgage was all that the mortgagee undertook to pay, the ultimate responsibility in respect of any addition to land revenue devolving on the mortgagor. **KRISHNIER v. ARAPPULI IYER, 16 M.L.J. 28.** (22 B. 440, 9 I.A. 68, 69, F.)

(87)—*Mortgage—Mortgagee in possession, a trustee—Duty to repair—Right to cost of repair.*—A mortgagee in possession of the mortgaged premises is in the position of a trustee. The mortgagee must use the mortgaged premises as liable to become the property of the mortgagor, and must not do anything to diminish the security upon which the money was lent. To allow the mortgaged premises to fall out of repair, and to become uninhabitable, would be diminishing the value of the security on which money was advanced, and preventing the mortgagor from paying off the debt from the usufruct. It is the bounden duty of the mortgagee in possession to keep the premises in necessary repair, and he will be allowed to charge for the same with interest. **JOGENDRONATH MULLICK v. RAJ NARAIN PALOOYE, 9 W.R. 488.** [Expl. & D., 8 B. H.C. A.C. 236; R., 10 Ind. Cas. 994 = U.B.R. 1910 75]

(88)—*Mortgage—Mortgagees' right to make improvements—Further appeal—Rule IV framed under s. 9, Suits Valuation Act, 1887.*—Plaintiff sued for a declaration that the mortgagee was not entitled to improve the house mortgaged and that he be enjoined not to prevent the plaintiff from doing so. Held, that the mortgagee, whose mortgage had 17 years to run, was entitled to improve the mortgaged property, if he did not claim the cost of improvements from the mortgagor. Held, further, that the suit comes under Rule IV of the rules framed under s. 9 of the Suits Valuation Act, 1887, and that a further appeal lies. **LAKHU v. SUNDAR DAS, P.L.R. 1900, p. 135.**

(89)—*Part satisfaction, if mortgagee bound to accept.*—A mortgagee is not bound to accept any sum in part-satisfaction of his decree. **RAM KAMLESSURI PERSHAD SINGH v. SUKHAN SINGH, 7 C.W.N. 172.** [R., 10 C. L.J. 91.]

(90)—*Rights of mortgage—Liability of mortgagor—Personal covenant.*—The promise to repay the mortgage money carries with it a personal obligation. Where there was no express or implied covenant that the mortgage money should be realised from the mortgaged property alone, nor was there any distinct provision in the deed, as to the precise remedy of the mortgagee, if the mortgagor failed to repay the amount as promised: Held, the remedy of the mortgagee was not restricted to the mortgaged property only. **BHUGWAN DAS MARWARI v. PARMESHWARI PRASAD SINGH, 5 C.L.J. 287.** (10 C. 740 = 11 I. A. 82, 16 C. 540, R.)

(90-a)—*Mortgage—Stipulation to pay interest in kind—Subsequent sale of mortgaged land—*

Mortgage—continued.**—1.—General—continued.**

Suit against vendees for enforcement of stipulation—Covenant running with the land.—By the terms of a mortgage-deed, the mortgagor agreed to pay by way of interest, a certain quantity of grain annually. Subsequently, the mortgagor sold the mortgaged land to other persons. The mortgagee sued the vendees claiming performance of the agreement to pay interest in kind. Held that, the mode of payment of interest by the mortgagor was a personal agreement between him and the mortgagee, and that as the produce of the land, by the terms of the deed, was not absolutely pledged to the mortgagee, the purchasers of the land were not bound by such promise which was not a covenant running with the land. **SUNDRA v. CHAINO, 66 P.R. 1876.**

(91)—*Mortgage—Power of sale—Mortgage—Validity.*—Held, that there is nothing in the law of mortgage in force in Karachi to prevent a mortgagor giving a mortgagee a power without the intervention of Court. **NARUMAL HARUMAL v. KHEMCHAND CHANDIRAM, 2 S. L.R. 90.** (12 A. 539, 22 C. 931, D.; 8 B.H.C. 142, 2 B. 252, R.)

(92)—*Mortgagor and mortgagee—Assignment of mortgage—Notice to mortgagor.*—The transfer by a mortgagee of his rights under a mortgage deed is valid, even where the mortgagors have not received, notice of the transfer. **MUNG KYAW YWE v. RANGANATHAM CHETTY, 11 Ind. Cas. 778.**

(93)—*Usufructuary mortgage—No personal liability undertaken by mortgagor—Stipulation for mortgagor to redeem at pleasure—Absence of provision for mortgagee suing for principal.*—Under the terms of the usufructuary mortgage deed in this case, the mortgagor undertook no personal liability for the money and there was no stipulation that the mortgagee might sue for the principal whenever he chose, while, on the other hand, there was a stipulation securing to the mortgagor the right to redeem at pleasure. Held, that the mortgagee could not sue for the principal, his proper remedy being to sue for the produce of the land. **GIAN SINGH v. MAHAN SINGH, 127 P.R. 1881.** (15 P.R. 1870, 57 P.R. 1873, Cited & F.)

(94)—*Incomplete transaction—Mortgagee failing to redeem previous mortgages—Contract Act (IX of 1872), ss. 39, 64—Recission of contract—Compensation for breach of contract.*—When a mortgagee by the terms of his mortgage agreed to redeem previous mortgages immediately or within a reasonably short period and failed to perform his promise—Held, that, owing to his default, the mortgagee was not entitled to recover from the mortgagor possession of the mortgaged property or the amount advanced to him. **SAUDAGAR SINGH v. SANT RAM, 87 P.L.R. 1906 = 103 P.R. 1906.** [R., 59 P.R. 1907.]

(95)—*Transfer of mortgage by unstamped endorsement—Re-transfer by return of deed—*

Mortgage—continued.**—1.—General—continued.**

Validity—Effect of award on transfer by endorsement.—Where a mortgagee transferred his interest in the mortgage, by means of an unstamped endorsement, to another person who subsequently purported to re-transfer it by returning the mortgage-deed to him:—*Held by Straight, J.*, that the transfer by endorsement, though not stamped according to law, effected a valid transfer of the mortgagee's interest, which could be re-transferred only by means of a formal deed stamped according to law; that the effect of the transfer by endorsement could not be altered by the circumstance that the return of the mortgage-deed was in pursuance of an award made by arbitrators to whom the disputes between the parties had been referred; that such award could not confer on the re-transfer by return of the deed, a validity which was wanting in it, owing to the absence of a formal stamped deed of assignment, and that the original mortgagee's suit to enforce the terms of the mortgage, based on his title by re-transfer, was not maintainable. *Held by Mahmood, J.*, that both the transfer by endorsement and the re-transfer by return of the document being ineffective in law, the mortgagee's rights remained as before the transfer by him, and he could sue to enforce the terms of the mortgage. **SANKAR LAL v. SUKHRANI, 4 A. 462 = A.W.N. 1882, 106.**

(96)—*Suit on mortgage bond before expiry of term for payment of principal—Intention of parties.*—A mortgagee cannot sue on his bond before the expiry of the term fixed for re-payment of the principal, unless the intention of the parties as evidenced by the document has been to the contrary. **KAMOD SINGH v. RAJA RAGHOJI RAO BHONSLEY, 15 C.P.L.R. 78. (16 W.R. 246, 14 M. 477, R.)**

(97)—*Mortgagor and mortgagee—Mortgaged properties sold in execution of decree—Purchase by mortgagee.*—On a mortgagee purchasing property sold under a decree held by him on his mortgage, the mortgagor need not join in the conveyance of the mortgaged property to the mortgagee. **JALEERAM v. CHUNDER COOMAREE DOSSEE, 12 B.L.R. App. 7.**

(98)—*Mortgagor having no title—Bona fide mortgagee without notice—Whether entitled to decree.*—A bona fide mortgagee without notice, whose mortgagor had no title because the sale to him, i.e., mortgagor was collusive, is entitled to a decree on his mortgage. **SRI RAJAH BOMMADEVARA VENKATA NARASIMHA NAIDU BAHADUR, ZEMINDAR v. GUNDU SASTRULU, 9 M.L.T. 365 = 9 Ind. Cas. 504.**

(99)—*Mortgage of occupancy holding—Void mortgage—Mortgagee put in possession—Mortgagor's right to recover possession without paying the mortgage money.*—Where a mortgagee of an occupancy holding has been put in possession of the holding by the mortgagor, the mortgagor cannot recover possession, without paying the mortgage money, on the ground that the

Mortgage—continued.**—1.—General—continued.**

transfer is void. **DIRGPAL SINGH v. SURAT UPADHIA, 7 Ind. Cas. 738. (A.W.N. 1888, 128, 11 Bom. L.R. 695, 3 Ind. Cas. 761, F.; 7 A.L.J. 330, 32 A. 383, 5 Ind. Cas. 557, D.)**

(100)—*Same property under two different deeds to same mortgagee—Portion sold to satisfy earlier mortgage—Released from the obligation of the later mortgage—Purchases by mortgagees—Effect of.*—Where sixteen villages were mortgaged to the same mortgagees under two deeds of mortgage of different dates, and the mortgagees brought a suit for sale on the earlier mortgage, sold 10 of those villages and purchased them themselves, *held* that those 10 villages must be deemed to be withdrawn from the operation of the mortgage by title paramount. The remaining villages were, therefore, liable to satisfy the whole of the subsequent mortgage. The fact that the mortgagees themselves purchased the 10 villages cannot be regarded as having the effect of making the property, which was included in the earlier mortgage, responsible for the satisfaction of the latter incumbrance. **RAGHUNATH PRASAD v. JAMUNA PRASAD RAWAT, 4 A.L.J. 66 = 29 A. 233 = A.W.N. 1907, 31. (A.W.N. 1906, 150, F.) [R., 11 C.L.J. 639.]**

(101)—*Transfer of Property Act (IV of 1882), s. 67 (a)—Procedure as to enforcement of mortgages executed prior to Act.*—Although a mortgage may be anterior to the passing of the Act, yet, when a person comes into Court and claims remedy under a mortgage, the new procedure of the enactment would apply. **UMDA v. UMRAO BEGAM, 11 A. 367 = A.W.N. 1889, 140. (6 A. 262, 12 C. 583, F.)**

(102)—*Mortgagee—Order absolute—Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 5—High Court, Original Side—Practice.*—Where, after an order for payment of the mortgage-money, the mortgagee dies, there should be a fresh order upon the defendants mortgagors to pay the money into Court before there is a final decree for sale. Previous practice of the High Court, original side, in these cases, *discussed*. **SARAT COOMARI DASSI v. HARI CHARAN PAL, 12 C.L.J. 596 = 8 Ind. Cas. 806.**

(103)—*Order absolute—Sale of mortgaged property—Act XIV of 1882, s. 310-A (Code of Civil Procedure)—Deposit of money by mortgagor under—Insufficient deposit—Wrong information given by officer of Court—Execution of decree for sale under Transfer of Property Act (IV of 1882)—Code of Civil Procedure, Chapter XIX.*—On 31st August, 1892, a decree nisi was passed under Act IV of 1882, s. 88, for the recovery of Rs. 546 by sale of certain property belonging to the applicant. In due course an order absolute was passed; and on the 22nd May 1896, the property was sold to the respondent for Rs. 546. The sale was conducted by the Nazir of the Court of the Deputy Commissioner. It was found that, upon the information given by the Nazir to

Mortgage—continued.**—1.—General—continued.**

the effect that the property had been sold for Rs. 500, the applicant, within the time allowed by s. 310-A of the Code of Civil Procedure, deposited Rs. 546 plus 5 per cent. on Rs. 500 instead of 5 per cent. on Rs. 546, Rs. 2-4-9 less $\frac{3}{4}$ than the amount required by s. 310-A, Civ. Pro. Code:—*Held*, that a sale held in execution of a decree for sale passed under the Transfer of Property Act is in this province governed by the provisions of Chapter XIX of the Code of Civil Procedure, and that under circumstances the applicant was entitled to have the sale set aside on his making good the deficiency. **JANG BAHADUR v. P. KUMAR KISHAN, 1 O.C. 193. [R., 8 O.C. 241.]**

(104)—*Mortgage—Property in Calcutta mortgaged—First mortgagee's suit for sale—Second mortgagee holding security of mofussil property also, added as party—Right of latter to surplus sale proceeds—Right to obtain sale of mofussil property—Whether exists—Transfer of Property Act, 1882, s. 85-A. Seq. Incorporation of, as O. XXXIV, Civ. Pro. Code, 1908—Effect—Mortgagor not appearing—Scale of costs.*—A was the first mortgagee of a certain immoveable property in Calcutta. B held a second mortgage over the same property and some other property in the mofussil. A sued on the original side of Calcutta High Court upon his mortgage and impleaded B as a defendant in his suit: B prayed for a decree in his favour for the amount of his claim, and for a direction that, in the event of the Calcutta property proving insufficient to pay the first mortgage and his own, the mofussil property may be sold by the Calcutta High Court. *Held*, that, in A's suit, B could only obtain any surplus sale proceeds of the property in that suit, and could not obtain any relief respecting the mofussil property (22 C. 100, 24 C. 190, 1 C.W.N. 106, D.) The effect of the incorporation of the sections of the Transfer of Property Act, 1882, as O. XXXIV of the Civ. Pro. Code, 1908, is to put an end to any independent practice on the original side of the High Court based on the old procedure, and that the original side should follow the provisions of the Transfer of Property Act which have been imported into the Civ. Pro. Code, as O. XXXIV. Although as a rule a decree is on scale No. 1 as against a defendant who does not appear, the first mortgagee was held entitled to obtain cost on scale No. 2. **SARAT CHANDRA ROY CHOWDHRY v. M. M. NAHAPIET, 37 C. 907.**

(101-a)—*Mortgage-decree against heirs of mortgagor—Mortgaged property not sufficient to satisfy decree—Personal decree against the heirs to the extent of assets left by mortgagor deceased—Civ. Pro. Code (Act V of 1908). O. XXXIV, r. 6.*—Where mortgaged property is found insufficient to satisfy a mortgage-decree obtained against the heirs of a mortgagor, a personal decree may be passed against the heirs to the extent of the assets of the deceased in their hands. **BARU MAL v. SHER SINGH, 14 Ind. Cas. 55.**

Mortgage—continued.**—1.—General—continued.**

(104-b)—*Money-decree obtained on hypothecation bond—Decree not executable against hypotheca in possession of bona fide purchaser—Regular suit.*—Where a person obtains a simple money decree on a bond hypothecating property as security from the debt insured, he is not entitled to follow the property hypothecated except by a regular suit against the party in possession of the property pledged to him; he cannot attach and bring to sale in execution of his decree such property in the possession of a bona fide purchaser for valuable consideration. **KHUSHALI MALL v. GOPAL MALL, 82 P.R. 1875.**

(104-c)—*Decree, Execution of—Mortgage decree—Decree providing interest up to certain date—Application for postponement of sale—Application containing provision for interest up to realization—Application praying sanction—Altered decree acted upon by parties—Effect—Civ. Pro. Code (Act XIV of 1882), s. 257-A.*—A mortgage decree was passed in 1903, which provided that interest on the principal amount would run at the bond rate up to six months. The decree was executed and a date was fixed for sale of the mortgaged property. The judgment-debtors asked for time to enable them to satisfy the decree, and the decree-holder agreed to give time for a consideration, namely, the payment of interest upon his money up to the date of realisation. The application was made on the 18th November, 1905. In that application, the judgment-debtors expressly prayed for sanction of the Court as regards payment of interest up to the date of realisation. The Court thereupon granted time, and, in accordance with the terms of the petition, postponed the sale. The decree-holder afterwards, in several successive applications for execution, claimed interest on the basis of the agreement embodied in the petition of the 18th November, 1905. The judgment-debtors, with knowledge of the claim, never disputed it, and had, on 58 successive occasions obtained adjournments on part-payments and expressly agreed to pay the balance of the entire decretal amount on the adjourned dates: *Held*, on the construction of the order on the petition, that the agreement was sanctioned by the Court under s. 257-A of the Code of 1882, as the Court deemed the consideration reasonable under all the circumstances of the case. A decree must ordinarily be executed as originally made, and the parties cannot be permitted to make a substantial alteration therein. But where the parties have acted upon the decree, as altered, for a number of years, and treated it as valid, the judgment-debtors, who have been substantially benefited thereby, cannot be permitted to take exception to its validity. **GOKHAI PADHAN v. GONES LAL PANDIT, 16 C.L.J. 404.**

(105)—*Appeal—Interlocutory order—Examination of account of Receiver—Decree—Mortgage suit—Preliminary decree made by appellate*

Mortgage—continued.**—1.—General—continued.**

Court—Application for order absolute to be made where—Receiver—Mortgagee appointed Receiver of mortgaged property—His liability to account—Moneys received to be applied towards discharge of judgment-debt before order absolute made.—An interlocutory order for the examination of the accounts of a Receiver is not a decree and is not appealable. If the preliminary decree in a mortgage-suit has been made, in modification of an order of the Court of first instance, by a Court of appeal, the application for an order absolute must be presented to the first Court, and not to the Court of Appeal (23 A. 88, 31 A. 328, 6 A.L.J. 25, 2 Ind. Cas. 120, 23 M. 521, F.; A.W.N. 1906, 203, 3 A.L.J. 828, Diss.) Where a mortgagee consents to act as Receiver of the mortgaged properties, in his suit to enforce the security, he is liable to account, and the sums if any received by him must be applied towards the discharge of the judgment-debt, before he can obtain an order absolute for sale. SHAMAL DHONE DUTT v. LAKHIMONI DEBI, 6 Ind. Cas. 323.

(105-a)—*Suit on a mortgage—Preliminary decree—Final decree passed—Appeal after the passing of both decrees—Proper course to appeal against final decree—Amendment of appeal memo for the purpose.*—Where the defendant in a mortgage suit appeals only against the preliminary decree in the suit after both preliminary and final decrees have been passed, the proper course for the appellate Court is not to dismiss the appeal but to direct him to amend the appeal memorandum by converting the appeal to one against the final decree; only one appeal is required against the decree directing a sale of the property, and the defendant has in substance appealed against the decree directing the sale of his property. SUBRAMANIA CHETTIAR v. PALACHAKRAPANI CHETTIAR, (1913) M.W.N. 140.

(105-b)—*Mortgage—Suit upon—Preliminary decree—Appeal against—Passing of final decree pending such appeal—Dismissal of the appeal—Illegality—Civ. Pro. Code (1908), s. 97, O. XXXIV, rr. 4, 5, Part VII, and O. XLI.*—In a suit upon a mortgage, a preliminary decree was passed and an appeal was preferred against that decree. Before the appeal came on for hearing, a final decree was passed against which no appeal was preferred. The lower Court dismissed the appeal against the preliminary decree on the ground that the final decree not having been appealed against, the appeal against the preliminary decree was not sustainable. Held, by the High Court, that the mere fact that a final decree was passed, is no ground for dismissing the appeal against the preliminary decree without hearing, and that there is no provision enabling the appellate Court to do so. (21 M.L.J. 1063, 22 M.L.J. 217, F.; 36 C. 762, 32 A. 225, 33 A. 528, Diss.) If the preliminary decree is reversed, the final decree, so far as it is dependent on it, falls with it and becomes inoperative. The appellant

Mortgage—continued.**—1.—General—continued.**

being bound to appeal against the preliminary decree, his appeal has to be dealt with according to the provisions of the Civ. Pro. Code. (See Part VII and O. XLI). KUPPUSWAMI IYER v. RAGUMA BAI, 13 M.L.T. 209 = 24 M.L.J. 190 = (1913), M.W.N. 173.

(106)—*Mortgage, suit for enforcement of—Sale of properties secured by several encumbrancers—Parties to litigation, if they must be—Surplus sale proceeds, how available—Court, in which the remedy is to be sought—Mortgagee, title of, denial of—Estoppel—Purchaser at execution sale, if bound by estoppel as the judgment-debtor—Purchaser at such sale, rights and liabilities of—Solicitor employed to draw up a mortgage, powers of—Solicitor, if authorised to receive payment and release property mortgaged—Mortgage-debt, apportionment of—General rule—Exceptions—Property, transmutation of—Priority.*—According to the practice which prevails on the Original Side of the High Court, it is open to the Court in a mortgage-suit to direct the sale of the properties comprised in the securities of all the encumbrancers who are parties to the litigation, and to provide for the payment of their claims according to the order of their respective securities. In other words, in a suit for sale by a first encumbrancer, where there are successive encumbrances, the puisne encumbrancers may be allowed to have their claim satisfied out of the surplus sale proceeds, if any. (1 C.L.J. 31, R.; 22 C. 100, 24 C. 190, 26 A. 407, D.) If the junior mortgagee is in a position to have his claim satisfied from the surplus sale proceeds realised at the instance of the senior mortgagee, he cannot be allowed to maintain another action to reach that very surplus, and his remedy is to follow the surplus in the Court which made the previous judgment. An order of this description, which enures to the benefit of the plaintiff—prior encumbrancer—as well as the defendant—junior encumbrancer—can be made only, if all the parties interested in the equity of redemption of both the mortgages are before the Court. In regard to the relation of mortgagor and mortgagee, when the mortgagor retains possession, a relation is created similar to that of landlord and tenant, and the mortgagor is estopped from denying the title of the mortgagee. A mortgagor must, from the very nature of the mortgage contract, preserve the property pledged for the purposes of the original security, and is therefore estopped, independently of covenants of warranty, from denying the mortgagee's title and the existence of the lien which he has created, or from defeating its enforcement against the property upon which it was placed. Although a purchaser of mortgaged premises is not estopped, by his mere acceptance of the deed, from disputing the validity of the mortgage or the amount due under it on the ground of objections which were open to the mortgagor, yet, he is limited to such objections or defences

Mortgage—continued.**—1.—General—continued.**

only as could have been pleaded by the mortgagor, himself, and he cannot even set up all of these, for he is not permitted to urge defences strictly personal to the mortgagor. The purchaser at the execution-sale is bound by the same rule of estoppel as the judgment-debtor, on the principle that the former has purchased merely the right, title and interest of the latter and does not consequently occupy a position of greater advantage. The execution purchaser of the interest of the mortgagor is as much bound by the rule of estoppel not to dispute the validity of the mortgage as the mortgagor himself. (18 C. 188, 22 C. 909=22 I.A. 129, I.A. Sup. Vol. 40=1 B.L.R. 46, R.; 24 C. 62, F.; 14 M.I.A. 101, 18 W.R. 200, 7 C. 107=8 I.A. 65, 14 C. 401, 6 W.R. 197, 16 C. 355, 20 C. 236, *Expl. & Disappr.*) The purchaser at an execution-sale may take advantage of an estoppel arising from the deed by which the debtor acquired title and is, in his turn, estopped by the deed made by the debtor before the sale; in other words, the levying creditor is bound by an estoppel against the debtor as grantor. A solicitor has no implied authority as such to receive payment of a mortgage-debt, even though he may be authorized to receive payment of the interest and permitted to have possession of the mortgage-deed; nor can he, even if authorized to receive payment of a mortgage-debt, take a cheque in lieu of cash. A solicitor employed for the purpose of the execution of the mortgage security has no authority to receive payment therefor, much less has he any authority to enter into any agreement to relinquish the mortgage lien over any portion of the mortgage premises. An agreement to release a mortgage, if made for a consideration, binds the parties to it; but it does not bind a person not a party to it, and no such party could enforce it, unless he was induced by it to purchase the property, to advance money upon it, or to do some act prejudicial to his interest. In a mortgage suit, the defendants who have purchased the equity of redemption, are not entitled to claim as a matter of right that the mortgage-debt should be apportioned between the various mortgaged properties and each of them should be allowed to redeem upon payment of his rateable share thereof. The mortgage security is entire and indivisible, and unless there are exceptional circumstances, the mortgagee cannot be compelled to break up the security. (18 C. 320, 29 M. 217, 7 C.L.J. 274, R.) The general rule is that a mortgagee cannot be required, at the instance of a purchaser of part of the premises, to apportion his mortgage-debt among the several parts into which the property has been divided, and to look to each only of its proportionate share, unless circumstances have happened, the effect of which, in fact or in law, is to create a severance of the security. But an apportionment will be directed in exceptional cases, such as, where it is necessary for the benefit of one who has taken a part of the property under necessity and for

Mortgage—continued.**—1.—General—continued.**

the protection of his own interest, or where the mortgagee himself has become the owner of a part of the equity of redemption, or where, by his own conduct, there has been a break up of the entire security. (2 C.L.J. 202, 13 M.I.A. 404, 6 C.L.J. 46, 5 C.L.J. 315, 6 C.L.J. 612, 15 B. 186, 6 C.L.J. 672, R.) The test to be applied in each case is, whether there has been a severance of the security at the instance or with the consent of the mortgagee, and an apportionment will not be enforced upon the mortgagee, unless special equitable considerations are established. The rights of a mortgagee are not destroyed by the mere transmutation of the subject-matter of the security into a different form without his consent; this rule is applicable to cases of compulsory acquisition under the Land Acquisition Act (5 M.I.A. 271, 6 C. 142, 20 C. 241, 20 C. 533, 33 C. 92, 13 M. 321, 6 C.L.J. 745, R.) Where the consideration of a security is a debt due under a previous mortgage earlier in date to that of another person, and a suit is brought by the plaintiff upon the latter mortgage which is subsequent in date to that of the other mortgagee, the plaintiff is entitled to priority to the extent of the sum covered by the earlier security, on the ground that, at the time of his later mortgage, he must have intended to keep on foot the earlier lien. *DEBENDRA NATH SEN v. MIRZA ABDUL SAMED SERAJI*, 10 C.L.J. 130=1 Ind. Cas. 264. (11 I.A. 126=10 C. 1035, 29 A. 9, 2 C.L.J. 202, R.)

(107)—S. 9 (3) of the *Punjab Alienation of Land Act—Application of, to suits on mortgage by conditional sale by a person not a member of an agricultural tribe.*—S. 9 (3) of the Act does not apply to proceedings instituted, after the Act came into force, for the enforcement of a mortgage by conditional sale effected by a person, who is not a member of an agricultural tribe. *KALU v. MONA MAL*, 64 P. R. 1906.

(108)—*Sole remedy of mortgagee extinguished by Legislature—Special Legislative remedy—Punjab Alienation of Land Act, 1900, s. 9 (2)—Refusal to accept—Right to a money-decree.*—Under the terms of the contract, the sole remedy of a mortgagee by conditional sale, for the enforcement of his right under the mortgage, was to foreclose under Reg. XVII of 1806. But this right was not enforced till the enactment of the Punjab Alienation of Land Act, 1900, which rendered the conditional sale clause in a mortgage-deed null and void. And the mortgagee afterwards applied to the Deputy Commissioner for the special remedy provided by s. 9 (3) of the Punjab Alienation of Land Act, but refused to accept a farm of the mortgaged land for eight years, which was offered to him by the Deputy Commissioner, and brought a suit for money-decree, against the mortgagor personally. *Held*, when the sole remedy given by the contract between the parties is put an end to by the intervention of the Legislature, and a special

Mortgage—continued.**—1.—General—continued.**

remedy has been substituted in lieu thereof, it is only open to the mortgagee to accept the special legislative remedy, and he is not entitled in law to a money-decree, pure and simple, for that amount. *DULA SINGH v. DIAL SINGH*, 22 P. R. 1910=29 P.W.R. 1910=5 Ind. Cas. 902. (22 C. 434, P. C., R.)

(109)—*Mortgage by conditional sale before 1858, effect of—Reg. XXXIV of 1802—Rule in Pattabiramer's Case—Applicability to mortgages executed by a Mahomedan.*—In contracts of mortgage by conditional sale executed before 1858, the title of the mortgagee becomes absolute by virtue of the terms of the contract, on default of payment within the time specified. [D., 50 P.R. 1906.] The obligation to account, imposed by the Reg. XXXIV of 1802, does not affect the absolute right of the mortgagee, when the mortgagor fails to redeem within the limited period. The decision in *Pattabhiramer's* case, does not become inapplicable by reason of the parties being Muhammadans. *MALLIKARJUNUDU v. MALLIKARJUNUDU*, 8 M. 185. (13 M.I.A. 560, R.)

(110)—*Mortgage by conditional sale—Suit to redeem—Expiry of stipulated period before Act IV of 1872—Rules in Punjab prior to Act—Strict compliance with rules necessary.*—Suit for redemption of a conditional sale. Defendant contended that the conditional sale had become absolute by the expiration of the term expressed in the deed, before Reg. XVII of 1806 acquired the force of law in the Punjab by the enactment of Act IV of 1872. *Held*, that the rules in force in the Punjab, before the passing of the Punjab Laws Act, not having been complied with in this case, the conditional sale had not become absolute when that Act was passed. The provisions of cl. 7 of s. 8 of the above rules required the mortgagee, when desirous of foreclosing the mortgage, to apply to the Court after the expiration of the period specified in the deed, that the opposite party may be called upon to pay the amount due thereon, within "one year from the date on which such notice may be issued." This the mortgagee had not done in this case. *GURMUKH SINGH v. MALLA*, 1 P. R. 1881. [R., 132 P. R. 1882; D., 171 P. R. 1882.]

(111)—*Mortgage—Reg. XVII of 1806, ss. 7, 8—Tender under protest—Foreclosure.*—A deposit of the mortgage-money, though made before the expiry of the year of grace after notice of foreclosure had been issued, if accompanied by a denial of the mortgagee's right to receive it, and with a threat of legal proceedings if he took it from the Court, is not an unconditional tender, and is vitiated by the conditions under which it is made, and could not, therefore, prevent a foreclosure. *MAKHAN KUAR v. JASODA KUAR*, 6 A. 399=8 A.W.N. 1884, 138. (7 M.I.A. 323, B.L.R. Sup. Vol. 593=6 W.R. 225, F.) [D., 4 O.C. 355.]

(112)—*Reg. I of 1798, s. 2—Mortgage—Zuripeshgee—Deposit.*—Under s. 2, Reg. I of 1798,

Mortgage—continued.**—1.—General—continued.**

the plaintiff was entitled to demand back his land immediately after making his deposit, and if by mistake or otherwise, he demanded more land than was comprised in the mortgage, that was not a matter which in any way justified the defendant in keeping his possession of land which was comprised in it. *MOHUN LAL v. SHEIKH ALI AFZL*, W.R. 1864, 219.

(113)—*Mortgage—Mortgage-money, payment of, after time fixed by Court—Mortgagor, Right of, to pay mortgage-money before application for order absolute made by mortgagee—Transfer of Property Act (IV of 1882), ss. 92, 93, 94.*—A decree was passed in favour of the mortgagors under the provisions of s. 92, Transfer of Property Act, for the redemption of a usufructuary mortgage on payment of a certain sum of money on or before the 28th February, 1898. The decree directed that, if such payment was not made on the day fixed, the mortgagee might make an application under s. 93 of that Act. The decree did not order that, if such payment was not made the property should be sold. On the 9th September, 1899, without having applied for an enlargement of the time, the mortgagors paid the money into Court. They subsequently applied under the first paragraph of s. 93, Transfer of Property Act, to be put in possession of the mortgaged property. The mortgagee objected on the ground that the mortgagors were not entitled to be put in possession of the property, as they had not paid the money on the day fixed. *Held*, that the mortgagors, having paid the amount due and the mortgagee not having said that more money had become due to him, were entitled to possession of the mortgaged property. Payment of the amount specified in the first paragraph of s. 93, Transfer of Property Act, before an order absolute has been made, entitles the mortgagors to be put, if necessary, in possession of the mortgaged property. On failure of the mortgagor to pay the amount due on the day fixed, a right to apply for an order absolute accrues to the mortgagee, but the accrual of such right does not stand in the way of payment by the mortgagor of the amount due. If the mortgagor is unable to pay the amount and desires to have the day fixed for payment postponed so as to prevent the mortgagee from applying for an order absolute, he may apply to the Court for enlargement of the time; or, he may make such an application on the mortgagee applying for an order absolute. *HARDEO BAKHSH v. SAJJAD HUSAIN*, 5 O.C. 82.

(114)—*Burden of proof—How it is shifted—Effect of waiving claim against a party—Decree.*—A sued X, Y and Z on an equitable mortgage and obtained a decree only against X and Z, waiving his claim against Y on account of her being insane. At the sale in execution of the decree, B purchased the property, the subject of the equitable mortgage. The present plaintiff then sued A, B, X, Y and Z, alleging

Mortgage—continued.**—1.—General—continued.**

that at the time A's suit was brought, the property was in his possession under a registered mortgage-deed executed by Y and praying for possession. It was found that the mortgaged property belonged only to Y and that X and Z had no interest in it: *Held*, (1) that, as B was in lawful possession of the property, having purchased it at a Court auction, it was for the plaintiff to begin and prove his title. But when he showed that he received the land in mortgage by a registered deed and had obtained possession and had been deprived of that possession in execution of a decree to which he was not a party, the burden of proof was shifted to A and B; (2) that the effect of A's having waived his claim against Y was that A obtained a decree for the sale of X's and Z's interests in the property and that was all B also bought. As Y was not a party to the suit, her interests could not be affected by the decree; (3) that, as the property belonged to Y, B did not buy any interests in the property, and the plaintiff was thus clearly entitled to recover possession. *NGA LU GYI v. PALANIAPPA CHETTY*, 12 Ind. Cas. 199.

(115)—*Puisne mortgagee obtaining a decree for sale after redeeming a prior usufructuary mortgage, effect of—Whether objection could be raised in execution.*—Where a subsequent mortgagee obtains a decree for sale upon his simple mortgage, on condition of his redeeming a prior usufructuary mortgage, which he redeems and obtains possession, the judgment-debtor is not competent to object to the sale on the ground that, being in possession of the property as a usufructuary mortgagee, he could not sell the property in execution of his simple mortgage. *JAI GOVIND TEWARI v. PATESRI PARTAB NARAIN SINGH*, 4 A.L.J. 765 = A.W.N. 1907, 286. (26 A. 14, A.W.N. 1905, 11, D.)

(116)—*Mortgage—Decree upon—Personal remedy not postponed—Execution of decree personally without proceeding against mortgaged properties—Legality.*—T obtained a mortgage-decree upon an arbitration award, which entitled him to recover the decree amount at once out of the properties mortgaged and from the defendant personally. *Held*, that, in the absence of any express provision postponing the personal remedy to the remedies against the mortgaged properties, T was entitled to proceed against the judgment-debtor personally, without proceeding against the mortgaged properties. *TOTALDAS v. UTUMAL THAKUMAL*, 4 S.L.R. 244 = 10 Ind. Cas. 975. (28 A. 295, 2 B.H.C. 36, 26 C. 1, R.)

(117)—*Non-payment of mortgage amount—Remedy of mortgagor.*—In the absence of anything in the mortgage-deed to the contrary, the only consequence of the non-payment of money due under the mortgage to the mortgagor is that he would be entitled to sue for damages for breach of agreement; the non-payment of the amount would not make the mort-

Mortgage—continued.**—1.—General—continued.**

gage null and void. *GOMESS v. MELA RAM*, 16 P.R. 1884. (153 P.R. 1882, D.) [Diss., 59 P.R. 1907; D., 100 P.R. 1889, 27 P.R. 1886.]

(118)—S. 56, *Contract Act* (1872)—*Inability of borrower to complete mortgage.*—Where, money having been advanced, a contract was made to secure repayment of it by usufructuary mortgage of certain land with possession to be given to the lender, but performance of the contract by delivery of possession was found to be impossible owing to a prior attachment of the land under decree, it was held that the lender of the money was entitled to compensation, the damage being the amount of the advance together with interest. *SETH JAIDAYAL v. RAM SAHAJ*, 17 C. 432, P.C.

(119)—*Mortgage—Covenant to compensate the mortgagee—Dispossession of mortgagee—Liability of mortgagor—Transfer of Property Act* (IV of 1882), s. 68 (a).—A executed a usufructuary mortgage in favour of G, and G in his turn executed a sub-mortgage in favour of B. G in his sub-mortgage covenanted that, if during the period of the mortgage, the property mortgaged, in any year, by any reason, should pass out of the possession of B, or the mortgage-deed for any reason should be declared to be invalid, he would be liable to pay the loss sustained by the mortgagee. A applied under the *Bundlekhand Encumbered Estates Act*. G took no steps to realize the money. B preferred a claim, but his claim was rejected. B was ejected from the property: *Held*, that it was open to B to rely upon the absolute covenant contained in his mortgage-deed, and to hold G responsible for the loss which he had sustained by reason of his dispossession. *GAYA PRASAD v. GANGA BISHUN*, 6 Ind. Cas. 838.

(120)—*Suit—Plaint—Date of mortgage—Variation of date of mortgage in the pleadings—Burden of proof—Prima facie title—Shifting of burden of proof—Admissions of mortgage.*—Where the plaintiff, in his plaint in a redemption suit, states approximately the date of a mortgage, it is open to him on the pleadings to show that the lands were mortgaged, if not in the year stated in the plaint, at any rate at sometime about that period. In a suit for redemption of a mortgage very slight *prima facie* proof that a mortgage had been originally made would serve to shift the entire burden of proof on the defendant; but this *prima facie* proof must be forthcoming and in its absence a plaintiff seeking redemption cannot be relieved of the burden which is imposed on all plaintiff of establishing the fact or facts out of which their claim to relief arises. 'This does not mean that the moment the plaintiff adduces any slight evidence, the burden is shifted. As with all evidence, the Court must appreciate it and the burden is shifted only when the Court regards the evidence as trustworthy where it is a question of its trustworthiness. Where, however, there are admissions of a mortgage, the Court ought to deal with them as evidence, for admissions are

Mortgage—continued.**—1.—General—continued.**

only evidence and not conclusive proof, and if it finds that the admissions are trustworthy and may be legally used against the defendant, then the burden would be shifted. *BALA v. SHIVA*, 5 Bom. L.R. 85=27 B. 271.

(121)—*Suit for sale on mortgage—Interest of puisne mortgagees and purchasers not set out in the plaint—Dismissal of suit*—A suit by a mortgagee for sale of the mortgaged property should not be dismissed, because the plaintiff has failed to set out in his plaint the interests of parties in possession in the mortgaged property. *SUDAILAMUTHU PILLAY v. MUTHUSAWMI PILLAY*, 7 Ind Cas. 49.

(122)—*Plaint—Plan—Suit for recovery of mortgage-money based on a mortgage-deed of house property, no plan necessary—Return of plaint when allowable*.—Held, that, in a suit for the recovery of the mortgage-money based upon a mortgage-deed of house property, no plan of the house is required by law, and that the description of the house given in the mortgage-deed in the case was quite sufficient for the purposes of the suit until the contrary was shown. Held, also, that returning a plaint before its registration is improper under any circumstances; it is the duty of the Court to register a plaint when presented, even if it is considered defective, and the Court can then pass a formal order returning it for amendment, if necessary. *SARDAR UTTAM SINGH v. KHAIR DIN*, 32 P.W.R. 1908.

(123)—*Sale under first mortgage—Surplus sale proceeds—Second mortgagee entitled to—Appeal against order awarding surplus proceeds—Practice—Appeal treated as revision—Civ. Pro. Code, s. 244*.—Two brothers, K and T, mortgaged their property to B. K then mortgaged his share to B. T's interest passed to other persons. B brought a suit for sale upon his first mortgage and obtained a decree. The sale of the property satisfied the first mortgage and left a balance. B applied for half the money so left, as a second mortgagee of K's share. The first Court adjudicated upon the rights of parties and awarded half to B and half of the money to transferees of T's share. The lower appellate Court reversed the decree. Held, that B was entitled to half of the surplus sale proceeds as a second mortgagee of K's share (18 B. 681, R.) Held, also, that the more regular procedure for the first Court would have been to refer the rival claimants of the money to a civil suit to establish their respective rights. Held, further, that there was no question relating to the execution, discharge or satisfaction of the decree within the meaning of s. 244, Civ. Pro. Code, as between the decree-holder or his representative on the one side, and the judgment-debtor or his representative on the other, and no appeal lay from the order of the Court of first instance. Appeal treated as revision and followed. *BAKHTAWAR LAL v. BARU MAL*, 4 A.L.J. 492=A.W.N. 1907, 201.

Mortgage—continued.**—1.—General—continued.**

(124)—*Suit by mortgage without making person in possession a party to suit—Purchaser in execution-sale—Suit for possession by purchaser, maintainability of*.—The plaintiff purchased certain property in execution of a mortgage decree for sale obtained by the mortgagee against the mortgagor. After the mortgage, but before the suit thereon, the mortgagor assigned all his rights in the mortgaged property to certain persons, who were not made parties to the suit on the mortgage. The purchaser at auction-sale sued for possession against the assignees of the mortgagor. Held, that the suit for possession would not lie, as the only right purchased by the plaintiff was the right of the simple mortgagee, viz., the right to enforce a sale. *KANARAN v. UNNOOLI*, 17 M.L.J. 431=30 M. 500. (19 A. 541, F.; 16 B. 486, 10 B. 88, D.)

(125)—*Suit on puisne-mortgage—Puisne mortgagee a party to the former suit on prior mortgage—Right of redemption of puisne mortgage—Extinguished when decree passed on prior mortgage*.—Certain property was mortgaged to R in January, 1892, and to R and S, in March 1892. The latter mortgage was found to have priority over the former as, with its consideration, some earlier mortgages had been discharged. This finding became final. R and S first brought a suit upon the mortgage of March, 1892, and foreclosed the property. R then brought the present suit for foreclosure of half the property in possession of L on his mortgage of January, offering to redeem the prior mortgage. Held, that, R being a party to the suit on the mortgage of March, his right of redemption was extinguished upon the foreclosure of that mortgage and the present suit was not maintainable. *RAM LAL v. LUKHPAT RAI*, 3 A.L.J. 240=A.W.N. 1906, 112.

(126)—*Premature suit—Mortgage—Different conditions of payment in several mortgage-deeds—When last supersedes the previous ones—Conditional sale—Right of suit—Mortgagee after the Punjab Alienation of Land Act has come into force—Its section 9 (2)—Cause of action—T.P. Act (IV of 1882), s. 68*.—Held, that :—(1) A plaintiff, whose right to sue had not accrued at the date of institution of suit, cannot claim a decree simply on the ground that his right to sue has become complete during the pendency of the suit. (2) That a recital in the last mortgage-deed that the mortgagor shall pay the amount due under the previous mortgage-deed at the time of redemption supersedes the stipulation made therein fixing the time of payment by the mortgagor of the mortgage-money. (3) A mortgagee's suit to recover the mortgage-money due on a mortgage-deed in which the mortgagor agrees to pay it within a certain number of years is not maintainable before expiry of those years. (4) A mortgagee of revenue paying land with conditional sale is not entitled to get its possession

Mortgage—continued.**—1.—General—continued.**

in case of mortgagor's default. The only remedy left for him is now the one provided under s. 9 (2) of Act I of 1900; the last proviso of s. 68 of Act IV of 1882 cannot help him in the least. *NANAK CHAND v. MEHR JAWATA*, 137 P.W.R. 1910=8 Ind. Cas. 576. (29 P.W.R. 1910, R.)

(127)—*Prior and puisne mortgagees—Separate suits by each of them without joining the other as a party—Mortgage-decrees—Sales in execution—Rights of purchaser at different Court-sales—Suit for possession by a purchaser at a subsequent sale against purchaser of the same property at prior sale on subsequent mortgage, whether maintainable—Relief not claimed in the plaint, granting of—Practice—Defendant not contesting plaintiff's excessive claim—Effect—Collusion.*—A was the prior mortgagee, and B the subsequent mortgagee of the same property. B got a decree on his mortgage, and sold the property in execution of his decree and C was the purchaser at Court-sale. While B's suit was pending to which A was not a party, A brought a suit on his mortgage without joining B as a party thereto, and obtained a decree, in execution of which the same property was sold to D, who then brought a suit against the previous purchaser for possession of the property and prayed for such other relief as he may be found entitled to. *Held*, (1) that, since both the mortgagees had an equal right to sell the property, and once it was sold at the instance of one mortgagee, there was no further saleable interest left in the judgment-debtor to be sold again, all the interest of the judgment-debtor passed to C, the purchaser at the first sale. (2) that, therefore, D, the purchaser at the subsequent sale of the judgment-debtor's interest in the property, took nothing, and his suit for possession was not therefore maintainable (2 M. 108, 5 C. 265, 26 M. 486, *F.*) (3) The rights of a prior or subsequent incumbrancer are unaffected by a sale in execution of a decree to which he was not a party. But any relief to which he might be entitled by reason of his charge on the property could not be enforced in the present suit for possession. (27 A. 325, 31 M. 425, 28 A. 482, *D.*) Where the plaintiff's claim was in part excessive, the mere fact that a defendant did not contest the claim is not sufficient to show fraudulent collusion between them. *KUTTI CHETTIAR v. SUBRAMANIA CHETTIAR*, 32 M. 485.

(128)—*Purchaser of mortgaged property—Mortgage-suit—Purchaser not made party—Mortgage, whether to be proved against him again.*—When a mortgagee has obtained a decree on his mortgage, the validity of the mortgage must again be proved against a purchaser who was not a party to the suit on the mortgage and who ought to be given an opportunity of redeeming it if valid. (4 C.W.N. 266, *D.*) Defendant No. 2 executed a mortgage in favour of the plaintiff. Defendant No. 1 purchased the mortgaged property and got possession of it. The plaintiff obtained a

Mortgage—continued.**—1.—General—continued.**

decree but defendant No. 1 was no party to it. In execution, the property was put up for sale and purchased by the plaintiff. Defendant No. 1 filed a claim which was successful and the plaintiff sued for confirmation of possession: *Held*, that, as the plaintiff had not proved the genuineness of the mortgage in the presence of defendant No. 1 who denied it, and had also not given him an opportunity of redeeming, the suit as framed was not maintainable. *JOTE KUMAR v. INDRA NARAIN*, 10 Ind. Cas. 137. (9 C.W.N. 728, 1 C.L.J. 371, 32 C. 891, 11 C.W.N. 403, 5 C.L.J. 315, *R. & D.*)

(129)—*Mortgage-deed—Mortgage-debt recoverable before expiry of period, if mortgagee were dispossessed—Sale in execution—Suit for recovery of debt.*—The mortgagor agreed that the mortgagee should be at liberty to sue for the recovery of the mortgage amount, before the expiry of the term prescribed by the deed, if the mortgagee were to be dispossessed of such land or of a portion of it. On a portion being sold in execution of a decree against the mortgagor, the mortgagee sued for the recovery of the mortgage-debt. *Held*, that as the sale of the portion was made subject to the right of the mortgagee no cause of action would arise until the purchaser dispossessed him. *JANKI SINGH v. SHEOMANGAL SINGH*, A.W.N. 1881, 59.

(130)—*Subsequent purchaser not made a party—Sale—Purchase by mortgagee himself—Mortgagee's right to sue for possession—Suit for sale—Limitation.*—Where a mortgagee, A brought a suit on his mortgage, without making one D, a subsequent transferee from the mortgagor, a party, although he had notice of the transfer, and, in execution of the decree obtained in the suit, purchased the property himself. *Held*—that a suit by A for the recovery of possession of the property from D does not lie, and A's only remedy is by a suit for sale. *AGHORE NATH BANERJEE v. DEB NARAIN GUIN*, 11 C.W.N. 314. (19 A. 541, 21 A. 235, *F.*)

(131)—*First and second mortgages—Sale of property in execution of decree on second mortgage—Remedy of holder of unsatisfied decree on first mortgage.*—Where a decree, enforcing a prior lien against certain property, remains unsatisfied, the property is sold in execution of a subsequent decree enforcing a subsequent lien against the same property, the only remedy open to the holder of the prior decree is a fresh suit for a fresh decree to enforce his decretal charge against the property by impleading the original judgment-debtor, the subsequent decree-holder and the auction-purchaser as defendants. (*Stuart, C. J.*) There is nothing in the law to prohibit a suit of the above description which would appear to be the most convenient and expeditious remedy. (*Straight, Brodhurst and Tyrrel, JJ.*) The prior decree, holder cannot execute his decree against the property in the hands of the auction-purchaser,

Mortgage—continued.—1.—**General**—continued.

who is not a "representative" of the judgment-debtor within the meaning of s. 244 (c) of the Civ. Pro. Code. He must, therefore, bring a fresh suit to enforce his decree. (*Oldfield, J.*) JAGAT NARAIN v. JAGRUP, 5 A. 452, F.B. = A W. N. 1883, 79. [*Disappr.*, 26 A. 447 = A. W. N. 1904, 61 = 1 A. L. J. 65; R., 13 B. 34, 15 B. 290, 7 M. L.J. 89 = 20, M. 378, 24 C. 62, F.B., 8 O.C. 370, F.B.; D., 18 M. 13.]

(132)—*Possession of mortgaged property by mortgagee—Covenant to pay by mortgagor—Decree for sale, right to sue for.*—When an instrument of mortgage gives a right to possession and also contains a covenant to pay, thus presenting a combination of a usufructuary and a simple mortgage, the two rights are independent, and the mortgagee may sue for sale, although he may have given up possession. PITAMBAR PURKAIT v. MADHU SUDAN MANDAL, 6 Ind. Cas. 153. (24 C. 677, D.; 21 M. 476, 28 A. 157, A.W.N. 1905, 226, R.; 6 C.L.J. 143, 5 Ind. Cas. 130, 11 C.L.J. 136, F.)

(133)—*Suit upon a mortgage executed by Hindu widow and reversioner—Investigation of mortgagor's title not permissible in mortgage-suit.*—In a suit upon a mortgage, where it was proved that the mortgage-deed had been duly executed by a Hindu widow and her reversioners, it is not open to the Judge to investigate the mortgagor's title, nor is it permissible to the mortgagors to deny their title, and judgment should be given for the plaintiffs with costs. GOPAL CHUNDER SHAW v. SM. JADUMONEY DASS, 15 C.W.N. 915, 11 Ind. Cas. 201.

(134)—*Suit for sale on mortgage—Interest of puisne-mortgagees and purchasers not set out in the plaint—Dismissal of suit.*—A suit by a mortgagee for sale of the mortgaged property should not be dismissed, because the plaintiff has failed to set out in his plaint the interests of parties in possession in the mortgaged property. SUDAILAMUTHU PILLAY v. MUTHUSAWMY PILLAI, 7 Ind. Cas. 49.

(135)—*Mortgage of an occupancy holding—Usufructuary—Relinquishment by mortgagor's representative—Mortgagee's suit for declaration that relinquishment void—Mortgagee dispossessed by zemindar through Revenue Court during pendency of suit—Maintainability of declaratory suit.*—Where, prior to the passing of the Tenancy Act, 1901, an usufructuary mortgage of his occupancy holding was made by a tenant, and that tenant's representative subsequently gave up cultivation and relinquished his holding in favour of the zemindar, held, a suit having been brought in the Civil Court by the mortgagee for a declaration that the relinquishment was void as against him, and the mortgagee having been dispossessed by the zemindar through the Revenue Court during the pendency of the suit upon the strength of the relinquishment, that such a suit was maintainable, that a declaratory decree could be

Mortgage—continued.—1.—**General**—continued.

made, and that it was not necessary to go into the question whether the relinquishment had been obtained by collusion between the tenant and the zemindar. SUBA BIBI v. RAGHUBIR SINGH, 7 A.L.J. 291 = 6 Ind. Cas. 284.

(136)—*Suit on, where no period for payment is fixed.*—Where a document sued on is a simple mortgage and implies a covenant to repay, it cannot be contended that the mortgagor has not the right to redeem at any time after the execution of the deed. The mortgagee's right to foreclose is co-extensive with his right. (23 M. 33, R.) So, a mortgagee can sue at any time after the execution of the bond, without a demand or a notice given before the institution of the suit. CHENGIAH v. PICHAYYA, 17 M.L.J. 177.

(137)—*Mortgagee purchasing half of the mortgaged property—Suit to recover the remaining half of the mortgage-money from the other moiety of the property—Maintainability of suit—Discharge of mortgage-debt.*—A and B mortgaged their property to C. In execution of a simple money-decree against A, the mortgagee purchased one-half of the mortgaged property. Held, that, by the purchase of one moiety of the property by the mortgagee, only one moiety of the mortgage-debt was extinguished, and that the mortgagee could recover the remainder half of the mortgage-debt from the other moiety of the property. JAGANNATH PERSHAD v. MIHIN, 10 Ind. Cas. 235. (22 A. 284, F.)

(138)—*Different suits on one mortgage only—Civ. Pro. Code (Act XIV of 1882), s. 43—Transfer of Property Act (IV of 1882), s. 85.*—It is competent to a holder of two mortgages on the same property from the same person to maintain a suit on the latter one only for sale of the property subject to the prior mortgage. KESHAVRAM v. RANCHHOD, 7 Bom. L.R. 811 = 30 B. 156.

(139)—*Suit to enforce mortgage—Scope of such suit—Parties necessary to such suit—Frame of such suit—Mortgagee if can debate title of mortgagor.*—Not only the mortgagor, but all persons deriving title from him subsequent to the mortgage and bound thereby as holders of different fragments of the equity of redemption are necessary and proper parties to a suit to enforce the mortgage. The proper scope of a mortgage suit is to cut off the equity of redemption and to bar the rights of the mortgagor and those claiming under him; the only proper persons to such a suit are the mortgagor and the mortgagee and those who have acquired interest under them subsequent to the mortgage. It is not competent for the mortgagee to make as party defendant one who claims adversely to the title of the mortgagor and mortgagee; he is a stranger to the mortgage, has no connection with the mortgagee, and, as his adverse claim of title cannot, in any way, be affected by the mortgage suit in

Mortgage—continued.**—1.—General—continued.**

which he has no interest, he cannot be made a party for the purpose of litigating such claim of title. (12 C. 414, 32 C. 746, R.; 8 C.W.N. 365, D.) The above rule of law is not merely a technical and convenient one, but is based upon perfectly intelligible and substantial grounds. *JAINESWAR DUTT v. BHUBAN MOHAN MITRA*, 3 C.L.J. 205=33 C. 425. [F., 1 Ind. Cas. 139, 30 A. 240=A.W.N. 1908, 100=5 A.L.J. 604, 31 A. 11=A.W.N. 1908, 263=5 A.L.J. 307, Note=6 A.L.J. 5=5 M.L.T. 47; R., 10 C.L.J. 470. 5 C.L.J. 95=11 C.W.N. 284, 12 C.W.N. 670=7 C.L.J. 449.]

(140) — *Mortgage-suit—Cross-objection by co-respondent—Test—Civ. Pro. Code (Act V of 1908), O. 41, r. 22, Sub-r. (1)—Party, if can question competency of cross-objection in second appeal—Mortgage-deed, execution of—Obligation, attachment of—Mortgage-deed, when operates—Registration, Act (III of 1877), s. 47—Evidence Act (I of 1872), s. 92, Proviso (4)—Deed, delivery of—Common Law deed and mortgage-deed in this country, difference between.*—O. 41, r. 22, sub-r (1) of the Code, is comprehensive enough to admit of a cross-objection by one respondent against another. As a general rule, the right of any respondent to urge a cross-objection is limited to his urging it only against the appellant; and it is only by way of exception to this general rule, that one respondent may urge a cross-objection as against another respondent. No exhaustive rule on the subject can be formulated, and the true test is, whether, for the ends of justice, it is necessary that, upon the appeal of one of the parties, the matter should be re-opened only so far as he is concerned, or the whole case should be reviewed and some of the respondents allowed the opportunity to urge a cross-objection against their co-respondent. One test of a negative character is, sometimes useful; if the party, against whom a cross-objection is sought to be urged by his fellow-respondents, is not a necessary party to the appeal, the cross-objection can hardly be allowed to be urged. But if he is a necessary and proper party respondent to the appeal, whether cross-objection can be urged or not, depends upon the circumstances of the case. The test to be applied is, whether the questions which arise between the several sets of parties are so connected that one of them ought not to be allowed to re-open matters, so far as he is concerned, without opportunity allowed, in the interests of justice, to another to protect himself by urging his objections, even though they may be directed, not against the appellant, but against a co-respondent. The plaintiff and third and fourth defendants were so far united that their common interest was to defeat the fifth defendant, who set up a heavy prior charge, which, if real, was entitled to precedence over both of them. If the fifth defendant was defeated, the question of priority as between themselves would be immaterial, as the property was of sufficient value to satisfy the claim of both of them. The first

Mortgage—continued.**—1.—General—continued.**

Court overruled the contention of the third and fourth defendants that they were entitled to priority. The fifth defendant preferred an appeal; *Held*, that the third and fourth defendants could file cross-objections against the plaintiff in the appeal of the fifth defendant. *Held*, also, that the party in second appeal could question the competency of cross-objection, although no such objection was preferred in the first appellate Court. Although a mortgage-deed has been duly executed and attested and no obligation attaches thereunder till certain conditions have been fulfilled, upon fulfilment of the conditions, the obligation attaches from the date of its execution and not from the date of registration or delivery of the deed. A mortgage in favour of the plaintiff was duly executed and attested on the 19th January, 1908. The mortgagor altered the date to the 23rd January, 1908, to the knowledge of the mortgagee, when the money was paid and the deed was registered. The mortgagee never agreed that the deed would take effect from the 23rd January; *Held*, that the mortgage-deed took effect from the 19th January, 1908. The intention of the parties was to fix the security on the title as it stood on the 19th January, and they effectively did so, even though there was a collateral agreement that no obligation should attach under the instrument till payment of money on the one hand and delivery to the registering officer on the other. The moment the conditions were fulfilled, obligation attached with effect from the date of execution and attestation, notwithstanding the execution and registration of another mortgage instrument by the mortgagor in the interval. The distinction between a Common Law deed in England and a mortgage-deed in this country pointed out. *JADUNANDAN PROSAD SINGH v. KOER KALLAYAN SINGH*, 15 C.L.J. 61=16 C.W.N. 612=13 Ind. Cas. 653.

(141) — *Prior suit by puisne-mortgagee, making prior mortgagee party defendant—Decree for sale, without providing for latter's rights—Subsequent suit by prior mortgagee—Decree in former suit—No bar.*—It is not necessary in a suit by a puisne mortgagee that the holders of prior mortgages should be made parties, and that the questions relating to their mortgages be determined. (1 C.L.J. 337, R.) Therefore, the mere fact that the decree in a prior suit instituted by a puisne-mortgagee directed the property to be sold in satisfaction of his mortgage without making any provision for the rights of the prior mortgagee, though the latter had been added as a party-defendant to that suit, cannot operate as a bar to an action by the prior mortgagee for the enforcement of his mortgage. *KATCHALAI MUDALI v. KUP-PANNA MUDALI*, 1 M.W.N. (1912) 41=13 Ind. Cas. 182. (24 A. 429, D.)

(142) — *Mortgages, successive, in favour of same mortgagee—Suit to enforce earlier mortgages without joining the claim under the latest mortgage—Maintainability.*—There is nothing

Mortgage—continued.**—1.—General—continued.**

in law to prevent a person, who has several mortgages over the same property, from bringing a suit on the earlier mortgages without joining in that suit his claim under the latest, if he does not in such a suit pray for the sale of the property subject to the latest mortgage. *GOBINDA PROSAD v. LALA HARI HAR CHARAN*, 14 C.W.N. 1053. (30 B. 156, 25 M. 108, 26 A. 14, 30 M. 353, R.)

(143)—*Suit on prior mortgage—Rights of subsequent mortgagee not impleaded—Decree awardable to subsequent mortgagee.*—The omission by the prior mortgagee to make a subsequent mortgagee party to his suit, prevents the decree and sale in the suit from binding the subsequent mortgagee, who, as such, represents the equity of redemption to the extent of his mortgage. As puisne-mortgagee, he is entitled to have an opportunity of redeeming the mortgaged premises from the prior mortgagee, and could not be deprived of that right by proceedings to which he was not a party. It is open to him, under such circumstances, to sue on his second mortgage and obtain a decree based on his said right of redemption. *DAMODAR DEVCHAND v. NARO MAHADEV KELKAR*, 6 B. 11. [F., 10 B. 224; R., 9 A. 125 = A.W. N. 1886, 318, 13 A. 432, F.B., 20 B. 390, 1 O.C. 105, 28 B. 153.]

(144)—S. 64, *Contract Act*—*Suit by mortgagee for realising securities.*—In a suit by a puisne-mortgagee, for realising his security, in which all those interested in the property, either as prior or subsequent mortgagees as well as the mortgagor's representative, are made defendants, the rights created by s. 64, *Contract Act*, would not be enforceable as between the co-defendants in such proceedings, but in a suit for the enforcement of those rights. *RAJ COOMARY DASSEE v. PREO MADHUB NUNDY*, 1 C.W.N. 453.

(145)—*Mortgage-suit—Suit by assignee of mortgage—Parties to the suit—Execution of mortgage-deed admitted—Consideration denied—Burden of proof as to consideration.*—D, the assignee of a mortgage, brought a suit on the mortgage, and made the original mortgagor and the original mortgagee, parties to the suit. The mortgagor admitted the execution of the deed, but denied the receipt of consideration: *Held*, that the original mortgagee was rightly impleaded in the suit and that the plaintiff was entitled to ask for a relief against him if he failed to obtain a decree against the mortgaged property; *Held*, further that the onus to prove the want of consideration lay on the mortgagor. *DIRG SINGH v. MANBHAR*, 7 Ind. Cas. 69.

(146)—*Joinder of parties for suits on mortgage—Transfer of Property Act, s. 85.*—S. 85, *Transfer of Property Act*, lays down that, subject to the provisions of s. 437, *Civ. Pro. Code*, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit relating to such mortgage, provided that the plaintiff has notice

Mortgage—continued.**—1.—General—continued.**

of such interest. Though this section is not in force in the mofussil in Lower Burma, it lays down a general rule of law that should be followed, in order to avoid needless litigation and multiplicity of suits. *THA KAING v. MA HTAIK*, 3 L.B.R. 241. (U.B.R. 1892—1896, Vol. II, 581, 586, 3 L.B.R. 15, 18 A. 109, R.)

(147)—*Suit for sale by prior incumbrancer—Necessary parties—Non-joinder of puisne-mortgagee—Transfer of Property Act, 1882, s. 85.*—A prior mortgagee should join the puisne-mortgagees as a party to a suit for sale against the mortgagor, if he has notice of their mortgages. He cannot in the execution of a decree against the mortgagor, attach property in the possession of a puisne-mortgagee, if the latter has not been made a party to the suit in which the decree sought to be executed against him was passed. The mere fact that the puisne-mortgagee has himself brought a suit for a declaration that the property in his possession is not liable to be attached in execution of the decree against the mortgagor will not entitle the prior incumbrancer to have the questions regarding his right decided in that case. Although the *Transfer of Property Act* is not in force in the Punjab, the principles laid down in s. 85 of that Act are the principles which apply to similar cases in the Punjab. *HUKAM CHAND v. KARAM CHAND*, 64 P.R. 1908 = 132 P.W.R. 1908. (14 M.I.A. 101, 8 B. 168, 13 A. 318, 16 A. 478, 19 A. 379, 19 C. 116, 17 A. 537, 21 M. 222, 13 A. 432, 22 C. 33, 24 C. 644, 5 C.W.N. 423, 30 C. 755, R.)

(148)—*Sub-mortgagee—Right to sell mortgaged property—Frame of suit.*—In a properly constituted suit a sub-mortgagee is entitled to a decree for the sale of the mortgaged property. The mortgagor in such a suit must be impleaded as also the mortgagees, so that the former may have an opportunity of redeeming and the latter may be able to safeguard their interests in regard to the claim put forward by the sub-mortgagee, and see that the amount claimed is due. *AHMED ALI KHAN v. BILAS RAI*, 5 A.L.J. 402 = A.W.N. 1908, 191.

(149)—*Mortgage-suit—Second mortgagee—Sale in execution of decree obtained by first mortgagee—Purchase by mortgagor in the benami of another—Lien and charge of second mortgagee, if subsisting—Purchaser, if a proper and necessary party to the suit of the second mortgagee—Party, objection as to, not taken at the trial—Estoppel.*—The effect of a sale, under a power of sale, is to destroy the equity of redemption in the land and to constitute the mortgagee exercising the power, a trustee of the surplus proceeds, after satisfying his own charge, first, for the subsequent incumbrancers, and ultimately for the mortgagor; the estate, if purchased by a stranger, passes into his hands free from all the incumbrances. (6 I.A. 145 = 5 C. 198, F.) If, upon a sale by the first mortgagee, the property is purchased by the

Mortgage—continued.**—1.—General—continued.**

mortgagor himself, the mortgagor can only acquire the estate, subject to the second mortgage, upon the principle that it is his duty to discharge the estate for the benefit of the second mortgagee; such purchase does not in any way prejudice the second mortgagee, even if the second mortgagee was a party to the suit by the first mortgagee, and had an opportunity given to him for redemption. (5 C.L.R. 227, 3 C.W.N. 323, 23 C. 397, A.W.N. 1903, 75=25 A. 371, 16 I.A. 129=17 C. 23, R.) The estate or interest in the land which is drawn within the operation of a mortgage suit, which will be affected and bound by the decree, is the estate created and passing by the mortgage, or estates or interests subsequently acquired by the mortgagor, and enuring by way of estoppel to the benefit of the mortgagee, and not only the mortgagor but all persons, deriving title from him subsequent to the mortgage and bound thereby as holders of different fragments of the equity of redemption, are necessary and proper parties to the suit to enforce the mortgage. (33 C. 425=3 C.L.J. 205, R.) The question whether the title which a third person, a purchaser in execution of the decree obtained by the first mortgagee, alleges to have acquired after the plaintiff's mortgage, is or is not a real title, which is entitled to priority over the mortgage sought to be enforced, is a question which may be tried and adjudged in a mortgage suit. The question is not one of jurisdiction, but rather of the form of the litigation, and the scope of its enquiry, or in other words, a question of multifariousness and convenience affecting the discretion only and not the jurisdiction of the Court. Having assumed the role of being a proper and necessary party defendant, having pleaded to the merits, a person cannot, after being cast in the suit, change front and insist that error occurred in making him a party defendant. Parties litigant are not allowed to assume inconsistent positions in Court; having elected to adopt a certain course of action, they will be confined to the course which they adopt. **BHAJA CHOWDHURY v. CHUNI LAL MARWARI**, 5 C.L.J. 95=11 C.W.N. 284. (8 C.W.N. 365, R.) [R., 6 C.L.J. 572, 35 C. 701=12 C.W.N. 657=7 C.L.J. 565=6 M.L.T. 255, 10 C.L.J. 538=6 M.L.T. 255=3 Ind. Cas. 346.]

(150)—*Decree on mortgage-bond—Purchaser of equity of redemption not made party to suit—Effect.*—Where a mortgagee sues on his mortgage without making the purchaser of the equity of redemption a party to the suit and obtains a decree, neither the decree nor the sale in execution thereof can affect the rights of the purchaser of the equity of redemption. **HARNAND RAI v. HAR GOLAL**, A.W.N. 1887, 188.

(151)—*Purchaser in execution of mortgage-decree—Previous purchaser of mortgagor's right not made a party to the mortgage suit, right of.*

Mortgage—continued.**—1.—General—continued.**

—A purchaser in execution of a mortgage-decree has no right to retain possession of the property, obtained through Civil Court, against a purchaser of the equity of redemption, who was not a party in the suit on the mortgage, and who had obtained and remained in possession till the sale in execution of the decree in the mortgage suit. **HABIBULLAH v. JUGDEO SINGH**, 6 C.L.J. 609. (24 W. R. 94, 8 C. 79, D.) [R., 6 C.L.J. 612.]

(152)—*Limitation—Mortgage suit—Sons of mortgagor not impleaded within limitation—Dismissal of suit even against the mortgagor.*—In a suit upon a mortgage, the sons of the mortgagor were not made parties to the suit within limitation: *Held*, that the suit could not be dismissed against the mortgagor because his sons had not been impleaded in time. **BALA PROSHAD v. PARTAB SINGH**, 13 Ind. Cas. 38.

(153)—*Mortgagee omitting to join subsequent purchaser as party—Estoppel.*—Where, at the time of filing a suit on his mortgage, the mortgagee knows or has reason to know that a third person has purchased the *hypotheca*, and fails to join the purchaser as a defendant in the suit, the mortgagee is estopped from denying that the purchaser is entitled to a declaration that the mortgage-decree is inoperative against the purchaser as regards the mortgaged property. **NGA PAW E v. NGA SIN**, U.B.R. 1911 2nd Qr., 92. (U.B.R. 1892—1896, Vol. II, 586, 3 L.B.R. 241, 12 M. 424, 12 M. 429, 15 M. 303, 15 M. 412, R.)

(154)—*Puisne mortgagee not party to suit by prior mortgagee—His right—Transfer of Property Act, ss. 85, 58, 60, 82—Discharge of mortgage—Re-conveyance—Mortgagees acquiring equity of redemption in portion of mortgaged property—Attaching creditor becoming also part-owner of equity—Suit for foreclosure—Redemption—Right of mortgagors.*—Where a mortgagee has obtained a decree for sale without impleading a subsequent mortgagee, or a party having a right of redemption, the right of redemption of the latter does not become extinct; on the contrary, such subsequent mortgagee or party is entitled to exercise it even after a sale has taken place in execution of the decree obtained on the prior mortgage. The party so entitled to redeem must be placed in the position which he would have held if he had been made party to the suit, that is, he must be placed in the position which will enable him to redeem; and he must, if he wishes to redeem, pay to the prior mortgagee the full amount due on his mortgage. (19 A. 527, 24 A. 187, R.) By a mortgage an interest in land is transferred to the mortgagee, and it is the right of the mortgagor on redemption to have a re-transfer of the mortgaged property, or such an acknowledgment in writing as is mentioned in s. 60 executed. The advantage of such a provision is obvious, as, by the observance of it, the cloud upon the mortgagor's title created by the mortgage is removed, and

Mortgage—continued.—1.—**General**—continued.

satisfactory evidence of its removal is provided. The mortgagor who does not enforce his right under the section, abandons a valuable protection. Whether or not however, an actual re-transfer is essential in case of redemption, the party redeemed ought to be in a position to transfer the entire mortgaged property to the party redeeming, so that the latter may have the full benefit of the mortgage. Where the mortgagees have acquired the equity of redemption in a portion of the mortgaged property, and an attaching creditor has also become part-owner of the equity, the simple and reasonable course is to allow the mortgagees to maintain a suit for foreclosure or sale against the attaching creditor who has so purchased for a portion of the mortgage-debt proportionate to the value which the property purchased by the latter bears to the value of the entire mortgaged property, such value to be calculated in accordance with s. 82 of the Act, and to allow the attaching creditor to redeem only the share which he has purchased. [*R.*, 26 A. 72.] The mortgagee's action for foreclosure implies an offer to re-convey on redemption, and he cannot refuse, when the estate is redeemed, to restore possession of it to the mortgagor or those claiming under him; having no right, whether the mortgagor's title be good or bad, to dispute it; or, except by virtue of his power of sale, or unless evicted by some party having a better title, to deal with the security in such a manner that upon discharge of the debt the estate cannot be recovered. A mortgagee cannot abandon part of his security to the detriment of a subsequent incumbrancer who is called upon to redeem his security. *DINA NATH v. LACHMI NARAIN*, 25 A. 446 = A.W. N. 1903, 150.

(155)—**Sale**—**Mortgaged properties**—**Order in which to be sold**—**Discretion of Court**—**Right of decree-holder to execute against any mortgaged property, wheter absolute**.—Properties A and B were mortgaged, and after the mortgage, the property A was sold to R. The mortgagee brought a suit on his mortgage against the mortgagor and R, and obtained a decree for sale. He then applied for the sale of both the properties A and B, but the Court, in the exercise of its discretion, directed that property B should be sold first. The decree-holder then applied that his petition for execution may be dismissed and it was dismissed. He again applied for the sale of property A alone: *Held*, that the decree-holder was not absolutely entitled to execute his decree against any of the mortgaged properties he pleased, for in that case it would result in this, that the inherent power of the Court conferred by law to decide in what order the mortgaged properties are to be sold would be altogether abrogated at the option of the decree-holder. (34 C. 13, 4 C.L.J. 573, *Doubt*.) The present petition should be dismissed unless amended by adding the property B to the application so as to leave it in

Mortgage—continued.—1.—**General**—continued.

the discretion of the Court to order the properties to be sold in any order it may see fit. *MAHOMED SIDDIK v. RAM LAL MANDAR*, 7 Ind. Cas. 4.

(156)—**Estoppel**—**Prior mortgagee, no party to a suit on a subsequent mortgage**—**Property advertised for sale as free from incumbrance**—**Prior mortgagee bidding for it without notifying his mortgage**.—M was a prior mortgagee of the property in dispute. R, a subsequent mortgagee brought a suit without making M a party and obtained a decree. The property was advertised for sale as without any incumbrance. M was present at the time of sale and bid for the property, but did not notify his own claims. *Held*, that he was estopped from disputing the claim of the purchaser in execution of the subsequent mortgage-decree. *MANJI RAM v. MOHAN SINGH*, 4 A.L.J. 709 = A.W. N. 1907, 278. (9 A. 413, D.)

(157)—**Lease**—**Mortgage**—**Construction of document**—**Authority coupled with interest**.—The question whether a transaction is a lease or a mortgage is one of construction, and the intention of the parties has to be ascertained, not from particular expressions to be found in the instrument, but from the provisions thereof as a whole. It is unquestionable that for a lease it is essential not only that the alleged lessee is given a right to the exclusive possession of the land, but also that he is given a right to the profits thereof in his right as lessee. *KONGATTI VALLA NAYAR v. SUBRAMANIAN PATTAR*, 9 M.L.J. 290.

(158)—**Mortgage and lease to mortgagee on same day**—**Lease and mortgage to be read together**—**Continuance of lease after mortgage is satisfied**—**Effect**—**Fetter on redemption**.—Where a mortgage and a lease to the mortgagee were executed on the same day and the lease referred to the mortgage, the two instruments are not independent transactions, but must be read together. Leases between a mortgagor and a mortgagee to last during the pendency of a mortgage are not bad in themselves. (7 Bom. L.R. 773, R.) but, where the documents expressly contemplate the continuance of the lease after the mortgage-debt, that would be a fetter on the equity of redemption which the Court ought not to enforce. *PAMURLAPATI ANKIVEDU v. SAMURLAPATI SUBBIAH*, 10 M.L.T. 256 = 21 M.L.J. 1010 = 2 M.W.N. 1911, 231. (24 M. 449, R.)

(159)—**Lease by mortgagor, effect of**.—If a mortgagor left in possession grants a lease without the concurrence of the mortgagee, the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagee may be asserted against both of them. *MACLEOD v. KISSON*, 6 Bom L.R. 995 = 30 B. 250.

(160)—**Onerous condition, Enforcement of**.—A condition in the nature of an obligation to

Mortgage—continued.**—1.—General—continued.**

accept the mortgagee as a perpetual tenant of the property was held to be invalid. **RAMZAN v. NUR ALI, 32 P.R. 1886.**

(161)—*Public charitable property.*—A lease, which is to last as long as the pendency of a mortgage, is not bad as being for an indefinite period. As regards public charitable property, long leases are *pro tanto* alienations of the property. But it is competent to mortgage or alienate portions of the public charitable property for the purpose of the preservation of the charitable property. There is no authority for the proposition that public charitable property cannot be alienated at all. Lease between a mortgagor and mortgagee, to last during the pendency of a mortgage, are not bad in themselves, though, they, like all other transactions between a mortgagor and mortgagee, are to be looked upon with certain amount of suspicion. As between a mortgagor and mortgagee, the possession of the mortgagor is presumed to be permissive and not adverse. **MAHOMED v. EZEKIEL, 7 Bom.L.R. 772.**

(162)—*Document described as lease, absence of clause for payment of rent—Possession in consideration of sum lent.*—A document styled a lease, under which, in consideration of money advanced, the claimant under it was only to enjoy certain specified lands for a certain number of years, but which contained nothing as to the repayment of the borrowed amount, nor provided for payment of any rent as such, was held to be liable to stamp duty, not as a lease, but as a usufructuary mortgage, under which the rents and profits had been estimated to be sufficient to satisfy both principal and interest, so that no subsequent accounting might become necessary on either side. **REFERENCE UNDER STAMP ACT, S. 46, 21 M. 358, F.B.**

(163)—*Lease of mortgaged property to mortgagor—Nature of the relation between the parties—Jurisdiction of Revenue Court—Remedies of mortgagee.*—Where a usufructuary mortgagee gives the mortgagor a lease of the mortgaged property, with stipulations for the payment of profits in lieu of the interest on the mortgage amount, the relation between the parties continues as mortgagor and mortgagee, and does not become one between landlord and tenant, in respect of which the Revenue Courts have jurisdiction. And the decision of a Revenue Court, in proceedings between the parties wrongly had in such Court, would not bar a suit in respect of the same matter in a Civil Court. **BAGHELIN v. MATHURA PRASAD, 4 A. 430=A.W.N. 1882, 71. [F., 19 A. 496.]**

(164)—*Math, Mahant of, dispute between rival chellas to succeed to—Mortgage of Math properties by chellas who established Will but never got possession—Compromise, chellas agreeing to manage Math properties jointly—Mortgage, if valid—Onus*—On the death of the Mahant of a Math, disputes arose between two chellas, one of whom succeeded in establishing

Mortgage—continued.**—1.—General—continued.**

a Will in his favour purporting to be that of the deceased Mahant, but could not get possession, and the other, who alleged that he had been installed by the deceased as his successor, managed to obtain and keep possession of the properties of the Math. Pending these disputes, the former executed the mortgage in disputes hypothecating Math properties. Soon after there was a compromise between the claimants, under which the survivor of the two was to be the Mahant and till the death of one of them, neither was to take the place of the deceased but both should jointly manage the properties, and the survivor would be bound to repay loans jointly raised by the claimants. No provision was made in the compromise regarding the discharge of the mortgage in suit. *Held*—That the mortgagee was aware that the property mortgaged was property of the Math and that the mortgagor had not succeeded in establishing his title as Mahant, and that this suit to enforce the mortgage should fail. **MADHO PRASAD v. MAHANT RAMRATTAN GIR, 15 C.W.N. 838. P.C.=2 M.W.N. 1911, 66=14 C.L.J. 264=13 Bom. L.R. 780=21 M. L.J. 938=10 M.L.T. 481=11 Ind. Cas. 507.**

(165)—*Mortgage—Prior mortgagee accepting a Zur-i-peshgi lease—Priority over subsequent mortgagees—Intention to keep alive the prior mortgage—Holding it up as a shield.*—Where a prior mortgagee obtains a decree upon his prior mortgage, and in lieu of the amount of that decree he obtains a subsequent mortgage of the same property from the mortgagor, the prior mortgage enures to his benefit, and he can hold it up as a shield against a puisne-mortgagee, whose mortgage is of a date subsequent to that of the prior mortgage. If it is to the benefit of the prior mortgagee to keep alive that mortgage, it would be presumed that he kept it alive. The mere fact that *Zur-i-peshgi* lease was executed does not indicate a contrary intention. **KANHAYA LAL v. CHHIDA SINGH, 7 A.L.J. 984=7 Ind. Cas. 468. (28 A. 778, Appl.) [F., 8 A.L.J. 112.]**

(166)—*Mortgage, cancellation of—Permanent lease of mortgaged lands in favour of mortgagee—Mortgagee's failure to perform his part of the contract—Jurisdiction.*—The plaintiff executed a mortgage-deed in favour of the defendants Nos. 3 and 4, defendant No. 3 being the son of defendant No. 1, and defendant No. 4 being the son of defendant No. 2, for Rs. 1,000 of which Rs. 875 were to be applied by them towards payment of the prior mortgages. Upon the same day he executed a permanent lease of the mortgaged land in favour of the defendant Nos. 1 and 2, and subsequently received a *kabuliat* from them. The defendants did not pay up the prior mortgagees but continued in possession of the lands leased to them. The plaintiff in the case sought for cancellation of the mortgage and the perpetual lease with the *kabuliat*. The Courts below found as a fact that the mortgage and the lease were part and

Mortgage—continued.—1.—**General**—continued.

parcel of one and the same transaction. *Held* that the case, being one of contract based upon reciprocal promises in which the defendants refused to perform their part of the contract, and that, the contract of lease and that of mortgage being parts of one and the same bargain, the plaintiff was entitled to be relieved of both of the deeds. **SAIYED MUHOMED BAKAR v. KEDAR NATH, 11 O.C. 89.**

(167)—*Payment—Mortgage—Sub-mortgage—Notice—Registration.*—When a mortgagor without actual notice of a sub-mortgage, makes payments to his mortgagee, the payments are not vitiated by the fact that there exists a registered sub-mortgage over the same property. Though registration may operate as notice for some purposes, it cannot operate as notice to vitiate payment so made. **SHAHDEV v. SHEK PAPA, 6 Bom. L. R. 836 = 29 B. 199.**

(168)—*Rejection of deposit by mortgagee—Relation between mortgagee and mortgagor—Accounting of profits.*—From the date of the tender or of the deposit as the case may be of the mortgage-money by the mortgagor, the mortgagee who rejects the legal tender continues as mortgagee but with a statutory liability to accounts for the profits received by him from that date. He is not then a mere trespasser but a mortgagee still holding the property as a kind of trustee for the mortgagor and as such accountable to the latter for the profits. **RUKHMINIBAI v. VENKATESH, 9 Bom. L. R. 958 = 31 B. 527.**

(169)—*Mortgage—Mortgagee tenant of mortgagor—Agreement to set off interest against rent—Non-payment of rent by mortgagee—Presumption that excess amount was in part satisfaction of debt.*—A mortgagee was the tenant in respect of the mortgaged property under the mortgagor, and it was agreed that the mortgagee, instead of paying the whole of the amount of rent, Rs. 36 a year, should retain in his hands Rs. 18 a year, which the mortgagor was liable to pay as interest on his mortgage. The mortgagee did not pay any rent at all for more than three years: *Held*, that the presumption was that the mortgagee retained the money in part satisfaction of the debt due to him, that an account should be taken of what was due to the mortgagee and that the mortgagor landlord would be entitled to credit for any rent not received and not accounted for by his mortgagee tenant. **GANGADHAR SHAGAN v. RAM PROSAD SAHU, 5 Ind. Cas. 26.**

(170)—*Mortgage—Agreement by third party to pay mortgage amount to mortgagee and interest—Part-payment of interest—Breach of other conditions of agreement—Right of suit by mortgagee on the mortgages—Whether mortgagee bound to refund the amount received from third party—Agreement to pay intending purchaser for not competing for purchase of property—Consideration.*—An agreement, whereby a person undertakes to pay money to another

Mortgage—continued.—1.—**General**—continued.

in consideration of the latter not competing for the purchase of certain property with the former, is not illegal. Second defendant executed three mortgage-bonds to plaintiffs. First defendant entered into an agreement with the plaintiffs, whereby he agreed to pay a certain portion of the principal within three months, the interest on the principal amount immediately, and to execute a fresh mortgage for the balance. The agreement was not carried out save that the first defendant paid Rs. 10,000 out of the principal and the interest on the whole liability undertaken under the agreement up to a certain date. In consequence of the breach of the agreement by first defendant, plaintiffs sued for the balance of the amount due to them under the three mortgage bonds executed by second defendant: *Held*, (1) that plaintiffs were entitled to sue on the mortgages and that they were not bound to enforce specific performance of first defendant's agreement; (2) that the first defendant was not entitled to refund of the interest he had paid in part performance of his obligations under the agreement. **RUNGIAH GOWNDEN v. FAKIR MAHOMED, 10 Ind. Cas. 627 = 10 M.L. T. 338.**

(171)—*Extinguishment of.*—Where after a mortgage of properties A, B and C, the mortgagee and mortgagor by a registered instrument extinguish the mortgage charge on property A, and subsequently the mortgagor mortgages properties B and C to a second mortgagee, such subsequent mortgagee is not entitled to say that the mortgage-debt should be apportioned rateably as between all the properties A, B and C. **RAMA v. MANAK, 7 Bom. L. R. 191.**

(172)—*Discharge—Payment to one of the heirs of the mortgage.*—Where property is mortgaged to one person and that person subsequently dies, leaving two or more heirs jointly entitled to his estate, payment made by the mortgagor of the amount due on the mortgage to one of those heirs without the concurrence of the rest, does not amount to a valid discharge to the mortgagor. **SITARAM v. SRIDHAR, 5 Bom. L. R. 91 = 27 B. 292.**

(173)—*Mortgage—Suit for specific performance of agreement to give a second mortgage over the same property—Decree for specific performance or payment of mortgage-debt—Payment by mortgagor—Additional sum found due by mortgagor in appeal—Suit by mortgagee for declaration that he is entitled to recover such additional sum by enforcement of original mortgage in priority to two subsequent mortgagees—Act I of 1877, s. 42—Act IV of 1882, s. 62.*—The plaintiff held a mortgage dated July 20th, 1883, over the property of one A. K. for Rs. 55,000. On the 12th of July, 1884, the plaintiff and A. K. entered into an agreement whereby A. K. was to execute a possessory mortgage of his property in favour of the plaintiff for Rs. 80,000, part of which was to be the amount of principal and interest due upon the mortgage

Mortgage—continued.**—1.—General—continued.**

of 1883. The plaintiff sued for specific performance of this agreement, and got a decree for payment by A.K. within a specified time of Rs. 64,970-4-8 or in default for specific performance of the agreement. The decretal money was paid within the time limited by A.K., but the plaintiff appealed, claiming a further sum of Rs. 18,125-8-10, but admitting that his right to specific performance was gone. The plaintiff succeeded in his appeal and obtained a decree, which was a simple money-decree, for payment of Rs. 18,125-8-10. The plaintiff then attempted to execute his decree for this last-mentioned amount by bringing to sale portions of the property hypothecated under the deed of the 29th of July, 1883, but was met by objections on the part of two persons who held mortgages over the property subsequent in date to 1883. The plaintiff thereupon brought a suit for a declaration that he was entitled in virtue of his decree in the above-mentioned suit for specific performance to bring to sale the property in question in priority to the claims of the two subsequent mortgagees. *Held*, that the suit brought under the circumstances above described must fail; whether for the reason that it was not a suit under s. 67 of Act IV of 1882, or that it was barred by the proviso to s. 42 of the Specific Relief Act, 1877, inasmuch as, if the plaintiff was entitled to the relief sought, he was entitled also to bring a suit for sale on his mortgage. **LAKHRAJ v. ABDUL GHAFUR KHAN, A.W.N. 1894, 205.**

(174)—*Mortgage—Re-payment of money lent by instalments—Mortgagee not bound to accept—English law*—Where no stipulation or covenant has been made between the contracting parties as to the payment of a sum borrowed, the lender is entitled to decline to receive payment of the sum due to him in instalments, and he can claim that the whole sum due be paid at one and the same time. Such is the principle which governs the payment of moneys lent in English law, and there is no opposite authority in Indian law. It is, moreover, in general accordance with the principles of contract law, and also of common sense. **BEHARI LAL v. RAM GHULAM, 24 A. 461=A.W.N. 1902, 135. [R., 1 N.L.R. 24.]**

(175)—*Joint mortgage—Further charge allowed by mortgagee in favour of one of the two co-mortgagors—Suit by the other to redeem his share—Payment can be compelled of his share of the original debt alone.*—Plaintiff, one of two co-mortgagors, brought the present suit for redemption of her one-half share of the mortgaged properties on payment of half of the mortgage-debt. Defendant declined to allow such partial redemption but offered to let plaintiff redeem the whole on payment not only of the entire mortgage-debt, but also certain other sums due to them under instrument of further charge executed in their favour by the plaintiff's co-mortgagor. Plaintiff repudiated all liability in respect of the said further

Mortgage—continued.**—1.—General—continued.**

charges. The first Court passed a decree for redemption of the whole on payment of the total amount due on account of the original mortgage and the further charge. On appeal, the Divisional Judge held that, by allowing the further charges to be created by one of the original mortgagors, the defendants had practically destroyed the indivisibility of their original mortgage-lien over the whole land for the entire mortgage debt and decreed redemption of one-half on payment of half the mortgage-debt in terms of the plaintiff's claim. Upholding the latter's decree, *held*, that cases in which the mortgagee, by his own act, has destroyed the oneness of the security *e.g.*, where he buys part of the mortgaged property himself, are exceptions to the general rule as to the usual indivisibility of a mortgage-debt. In such cases, to allow the mortgagee to throw the burden of the entire debt on the portion not purchased by him would be contrary to equity and violate an important principle of the law of mortgage, *viz.*, that, in the absence of special circumstances, the mortgage-debt is to be regarded as apportioned over the whole of the mortgaged property. These principles applying to purchases of part of the mortgaged property by the mortgagee should also be extended to cases of further charges taken by the mortgagee. The defendants, in this case, have taken such a further charge and have acquired a special interest in a part of the mortgaged property. The indivisibility of the mortgage has thus been destroyed by their own action entitling the plaintiff to redeem his share of the properties on payment of a proportionate share of the original debt. **SARAN DAS v. ATAR BIBI, 91 P.R. 1905=44 P.L.R. 1906.**

(176)—*Mortgage—Decree—Time fixed for payment of a prior mortgage—Payment not made within time, effect of—Transfer of Property Act (IV of 1882), s. 93—Civ. Pro. Code (Act V of 1908), ss. 148, 151—Extension of time fixed in a decree.*—A mortgage-decree was passed in 1898. The decree fixed a time within which the decree-holder has to pay a certain sum to a prior mortgagee. In case he failed to pay, the decree further provided that the suit would stand dismissed. The decree-holder did not pay within the time fixed. He, however, deposited the money in Court after the expiry of the time, and the Court allowed the prior mortgagee to withdraw it. Some six years after, the decree-holder applied for a decree absolute: *Held*, (1) that the action of the Court in accepting the money deposited by the decree-holder after time and giving it to the prior mortgagee was purely mechanical. It did not extend the time for payment to the prior mortgagee; (2) that the effect of non-payment to the prior mortgagee within time was, under the decree, to let the whole suit stand dismissed against all the parties, the mortgagor and the subsequent mortgagees including. **(19 M. 249, 23 I.A. 32, 13 A. 432, R.;**

Mortgage—continued.**1.—General—continued.**

A.W.N. 1902, 125, 24 A. 44, A.W.N. 1907, 137, 29 A. 481, 4 A.L.J. 447, D.) (3) that, under s. 93 of the Transfer of Property Act, 1882, the Court was not bound to extend the time fixed for payment of the decretal amount; (4) that the High Court could not extend time, under s. 148, or s. 151 of the Code of Civil Procedure, 1908, as s. 148 relates only to proceedings antecedent to the passing of a decree and was not intended to enable the Court to extend time in pre-emption and redemption cases, and s. 151 has no application to the present case. **BATUK NATH v. MUNNI**, 7 Ind. Cas. 36.

(177)—*Mortgage decree—Order absolute—Payment out of Court before and after order absolute—Civ. Pro. Code (Act XIV of 1882), s. 258—Limitation Act (XV of 1877), sch. II, art. 173-A.*—Before an order absolute has been made in a mortgage-decree, it is the duty of the Court to determine in respect of what sum the decree-holder is entitled to an order absolute. On this footing, the Court is bound to consider any allegations of payment by the defendant after the date of the decree nisi and before the date of the application for an order absolute. (8 C.W.N. 102, 29 C. 651, *Rel. on*; 1 Ind. Cas. 677, 10 C.L.J. 91, *R.*) Different considerations, however, apply when a payment or an adjustment is alleged to have been made subsequent to the order absolute in answer to an application by a mortgagee decree-holder to bring the mortgaged properties to sale. The execution Court can be invited to determine the question only under s. 258 of the Civ. Pro. Code, 1882. (4 Ind. Cas. 402, 11 C.L.J. 91, 28 M. 473, F.B., 15 M.L.J. 126, *F.*; 12 C. W. N. 485, *D.*; 7 Ind. Cas. 55, *R.*) If an adjustment has not been recorded within the period of limitation under art. 173-A of the Limitation Act, 1877, it cannot be taken notice of by the executing Court. **HIRAMONY BISWAS v. MUSA KHAN**, 7 Ind. Cas. 625.

(178)—*Prior mortgagee suing on one of his several mortgages is not bound to satisfy his claim under a subsequent mortgage out of the surplus sale-proceeds.*—A executed a mortgage in favour of B in respect of two villages S and C in 1879. He executed another mortgage in favour of D in 1892, in respect of one of the villages C only. He again executed another mortgage in 1895 in favour of B in respect of both the villages S and C. B sued on his mortgage of 1879, and obtained a decree, in execution of which the village S was sold in 1896. The sale proceeds yielded a surplus of Rs. 400 which was paid over to the mortgagor. B again brought a suit on his mortgage of 1895 and sought to obtain a decree against the village C. D contended that B ought to have applied the sum of Rs. 400 surplus in satisfaction of his second mortgage of 1895. *Held*, that B was not bound to so apply the surplus. **HULASI v. KALKA PRASAD**, 6 Ind. Cas. 150.

(179)—*Mortgage—Rights of mortgagor—Purchase of portion of equity of redemption by*

Mortgage—continued.**—1.—General—continued.**

mortgagee—Rights of purchaser.—A mortgagee is entitled to say to each of several persons who have succeeded to the mortgagor's interest that he shall not be entitled to redeem a part of the property on payment of part of the debt, because the whole and every part of the land mortgaged is liable for the whole debt. But it does not follow from this that a mortgagor who has acquired, by purchase, a part of the mortgagor's rights and interests, is entitled to throw the whole burden of the mortgage-debt on the remaining portion of the equity of redemption in the hands of one who has purchased it at a sale in execution of a decree against the mortgagor. Each has bought subject to a proportionate share of the burden, and must discharge it. **NATHOO SAHOO v. LALA AMEER CHAND**, 15 B.L.R. 303=24 W. R. 24. [*R.*, 21 B. 619; *F.*, 25 W.R. 388.]

(180)—*Mortgage—Equity of redemption—Extinguishment of—Rule in Ramji v. Chinto—Hindu Law—Joint family—Decree against co-parceners—Estoppel by conduct.*—Admissions by a mortgagor, or an understanding between him and his mortgagee that the mortgagee has become owner, cannot destroy the equity of redemption and take the case out of the rule in *Ramji v. Chinto* (1 B.H.C. 199, *R.*). The rule has no application where there has been a transaction of purchase by the mortgagee subsequent to, separate from and independent of, the mortgage. Under the Hindu Law, a decree obtained against one co-parcener does not ordinarily bind the other co-parceners, unless the former was a manager of the joint family and the decree was for a family debt. The other co-parceners may by their conduct show that it is such a decree and therefore binding upon them. **HANMANTAYAMAJI PATIL v. GOPAL SADASHIV SHIMJI**, 11 Bom. L. R. 1145=4 Ind. Cas. 264.

(181)—*Mortgage—Person acquiring interest in mortgaged estate since mortgage—Arrangement—Proportionate abatement—Mortgagee not a trustee—Equity of redemption, purchase of, by mortgagee, effect of—Debt, apportionment of—Release by mortgagee in favour of subsequent purchaser of portion of mortgaged property, effect of.*—As a general rule, the rights of persons, who have acquired an interest in the mortgaged estate since the mortgage, cannot be defeated or impaired by any subsequent arrangement to which they are not parties. If, therefore, a mortgagee, with notice that the equity of redemption in a part of the mortgaged property has been conveyed, releases any part of the mortgaged estate, he must abate a proportionate part of the mortgage-debt as against such purchaser. But this rule does not apply where the mortgagee releases a portion of the mortgaged property before the residue is transferred to third persons. If he does so release, he diminishes his own security; but, as subsequent purchasers can only take subject to the

Mortgage—continued.**—1.—General—continued.**

mortgage, the mortgagee, may throw the whole burden of the mortgage-debt on the residue. It is not open to subsequent purchasers of mortgaged property to compel the mortgagee to grant them a proportionate abatement of the mortgage-debt, unless it is established that such a defence would have been available to the mortgagors themselves. (10 C.L.J. 150, R.) The effect of the purchase of part of the mortgaged property by the mortgagee is not to extinguish his mortgage security in its entirety. (20 A. 23, R.) The relation between the mortgagor and mortgagee is not so far analogous to that between a trustee and *cestui que trust*, as to preclude a purchase of the equity of redemption by the mortgagee. This rule is subject to the qualification that the Courts, if called upon to scrutinise the transaction, will look upon it with jealousy, and will set aside a purchase made by the mortgagee, when, by the influence of his position or by constructive fraud, he has gained an unconscionable advantage and has purchased the property for such a low price as may be taken to be fairly indicative of fraud or undue influence. The effect of a transaction is to be judged by its nature. If the sale was intended to be one of the equity of redemption merely, the mortgagee acquired the property subject to his mortgage, and in such a contingency, while there is no extinguishment of his right to enforce the mortgage against the remainder, the mortgage is extinguished to the extent of the amount fairly chargeable upon the property purchased by him. If, on the other hand, the sale was of the property freed of the mortgage, and the intention of the parties was that the mortgagee should hold the portion transferred to him freed from the mortgage-debt and the purchase-money should be applied in reduction of his dues, the mortgagee will not be bound to apportion the debt. In this latter contingency, unless the purchase might be successfully impeached on the ground of fraud or undue influence, the mortgagee is not bound to allow credit for a larger sum than what was deliberately settled as the price of the portion purchased by him. Cases on the subject reviewed. A mortgagee may, at an execution sale, purchase a portion of the mortgaged property free of his mortgage. The distinction is not so much between a private sale and an execution sale, as between a purchase of the equity of redemption and a purchase of the entire interest in the property. (24 M. 97, 27 B. 297, 28 A. 593, 29 A. 233, 4 C.L.J. 317, 34 C. 13, 4 C.L.J. 573, R.) As between the mortgagor and mortgagee, the latter is entitled to release a portion of the hypothecated property and diminish his own security to that extent. It is not obligatory upon him to proceed against all the properties rateably or to exhaust them for the satisfaction of his debt. A mortgagee who has security upon two or more properties which, he knows, belongs to different persons, cannot release his lien upon one so as to increase the burden upon the

Mortgage—continued.**—1.—General—continued.**

others without the privity and consent of the persons affected. But this doctrine has no application to a case where the release took place at a time when the purchaser of the mortgaged properties had not purchased any interest in the mortgaged premises, and the mortgagors alone were affected by the release. *MIR EUSUFF ALI HAJI v. PANCHANAN CHATTERJEE*, 11 C.L.J. 639=6 Ind. Cas. 842.

(182)—*Redemption of prior mortgage by a purchaser—Keeping alive.*—Where the purchaser of the equity of redemption redeems a prior mortgage, he will be presumed to keep it alive for his own benefit and to use it against the other mortgagee. *THABAR v. SINGH RAM*, 67 P.R. 1899. [R. 32 P. R. 1903=54 P.L. R. 1903; Cited, 30 P.R. 1904=139 P.L.R. 1904.]

(183)—*Transfer of Property Act—Mortgage satisfied—Question—Extinguished or not—Depends on intention determinable with reference to circumstances—Mortgage-purchaser at sale—His title—Not necessarily merging in equity of redemption.*—The question whether the mortgage which has been satisfied is to be construed as extinguished or not for the benefit of the person who makes the payment is simply one of intention, and it is to be determined with reference to the circumstances existing at the time of the discharge of the mortgage. Where a mortgagee institutes an action to enforce his security, sells the property and buys it himself, his title under the mortgage-deed not necessarily merge in the equity of redemption. *SELLAPADI MAHALAKSHMI AMMAL v. SRIMAN MATHAVSIDHANTHA ONNAHINI NIDHI, LTD.* M.W.N. (1912) 24. (7 C.L.J. 1, 11 I.A. 126, 10 I.A. 29 I.A. 9, 62, R.)

(184)—*Purchase of equity of redemption by a co-mortgagee—Other co-mortgagee's right not extinguished.*—Where one of several co-mortgagees purchases the equity of redemption, the other co-mortgagees' right is not thereby extinguished. The mortgage still subsists for their benefit, and they can maintain a suit to recover their share of the mortgage-debt. *RAMJAS DAS v. SHEO LAL*, 9 Ind. Cas. 1026.

(185)—*Equity of redemption purchased by a mortgagee from one of the mortgagors, effect of.*—Where a mortgagor died leaving three sons who became equally entitled to the equity of redemption, and one of the sons sold his one-third share in the equity of redemption to the plaintiff mortgagee. Held, that the plaintiff was entitled in a suit to realise his mortgage-debt to give credit only for that which his vendor would have been liable to pay, namely, one-third of the mortgage-debt. *MUTTY LAL PAL v. NANDU LAL NEOGI*, 12 C. W. N. 745=8 C.L.J. 92.

Mortgage—continued.**—1.—General—continued.**

(186)—*Redemption, Suit for—Power for sale—Sale under—Inadequacy of price—No fraud or collusion alleged—Effect—Position of mortgagee with power of sale.*—The mortgagee of a property sold it by virtue of a power of sale contained in the mortgage-deed. The mortgagors brought a suit for redemption and for the cancellation of the sale, on the ground, among others, that the price fetched was a very inadequate one for the property. No allegation was made by the mortgagors charging the purchasers with fraud or collusion or bad faith or knowledge of the existence of facts which would invalidate the sale. *Held*, that the mere circumstances that the defendants failed to produce evidence as to the value of the property will not justify the Court in finding that the sale was fraudulent. A mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit to enable him the better to realize his mortgage-debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud. *HADDINGTON ISLAND QUARRY CO., LD. v. ALDEN WESLEY*, 10 M. L. T. 554, P. C. = 13 Ind. Cas. 261.

(187)—*Notice of foreclosure, who is entitled to—'Legal representative,' meaning of the term, in s. 8 of Regulation XVII of 1806—Person possessing interest in the equity of redemption at the date of the notice of foreclosure, rights of.*—Apart from special legislation, any person deriving title from the mortgagor, subsequent to the mortgage, is not entitled to notice of foreclosure, but such a person being a 'legal representative,' of the mortgagor under Regulation XVII of 1806 is entitled, as such representative, to the said notice of foreclosure. The words, 'legal representative,' in s. 8 of Regulation XVII of 1806, include any person who, at the date of the notice, possesses an interest in the equity of redemption, and a transferee from the mortgagor, subsequent to the mortgagee, whether he be a purchaser or a puisne-mortgagee, is entitled to be served with the notice of foreclosure, in order that he may have an opportunity of coming in to redeem the mortgage sought to be foreclosed, provided the transfer to him was prior to the date of the notice to the mortgagor; but, if the title of such transferee has arisen subsequent to the notice, he is bound by the notice of foreclosure to the mortgagor, and, equally with the mortgagor, would be barred and concluded by the foreclosure proceedings. *BHIMRAJ DEOKISAN v. MT. RAHI*, 2 N.L.R. 113. (11 W. R. 548, 23 W. R. 25, 15 B.L.R. 34, 23 W. R. 96, 15 B.L.R. 28, 1 A. 499, R.)

(188)—*Mortgagor and mortgagee—Mortgagee escaping payment of rent for certain years—Who is to be benefited by such escape, mortgagee or mortgagor—Rights of mortgagee.*—A executed a

Mortgage—continued.**—1.—General—continued.**

usufructuary mortgage of an occupancy-holding to B, which provided that the mortgagee was to take the profits in lieu of interest after payment of the rent to the *zemindar*. During the subsistence of the mortgage, the mortgagee escaped paying rent to the *zemindar* for several years. *Held*, that the mortgagee was entitled to the benefit of such non-payment of rent to the *zemindar* and that the mortgagor was not entitled to redeem the mortgage on payment of the principal sum after deducting the rent not so paid. *FAKIR MUHAMMAD KHAN v. ALI SHER KHAN*, 10 Ind. Cas. 113.

(189)—*Mortgage-deed containing forfeiture clause—Land situated in place to which Transfer of Property Act has not been extended—Rule of English Equity Courts clogging rights of redemption.*—The mortgage transaction in this case had been effected by a registered document according to the terms of which the relationship of mortgagors and mortgagee was first created, but it contained a clause to the effect that if the mortgagors did not redeem within two years, the creditor (mortgagee) would be entitled outright to ownership of the land. Land was situate in a part of the country to which the Transfer of Property Act had not been extended. *Held*, that the mortgagor must be held bound by the clause and that consequently he had no right to redeem the land. *MAUNG NAUNG v. MA BOK SON*, 1 L.B.R. 192. (7 B.L.R. 136, 1 M. 1. F.; L. B.R. 1872--1892, 549, 645, R.) [R., U.B.R. 1907, 3rd Qr., Mortgage 1.]

(190)—*Clog on equity of redemption—Consolidation of securities—Covenant in subsequent simple mortgage-deed not to redeem prior usufructuary mortgage without paying the subsequent advance—Interpretation of deed—Transfer of Property Act (IV of 1882), s. 61, applicability of.*—Where a person made a prior usufructuary mortgage of certain property in favour of three persons for Rs. 1,000 and, subsequently, made a simple mortgage of the same property in favour of those persons for Rs. 1,500 (i.e., Rs. 500 plus Rs. 1,000 due on a prior simple bond), stipulating, in the latter deed, that the mortgagor would not redeem the property unless he paid "the said amounts" (i.e., the sums secured by the second mortgage) with interest, and the suit was brought for redemption of the usufructuary mortgage only. *Held*, that the condition in the latter bond did not evidence an intention to consolidate the amount thereof with that of the earlier one, and the plaintiffs were not precluded from redeeming the usufructuary mortgage only. S. 61 of the Transfer of Property Act has no application to the case, because that section refers to mortgages on different properties. *BHARTU v. DALIP*, 3 A.L.J. 672 = A.W.N. 1906, 278.

(191)—*Sale of equity of redemption in portion of mortgaged property to discharge prior mort-*

Mortgage—continued.**—1.—General—continued.**

gage decree—Right of purchaser to recover purchase-money paid by him from puisne mortgagee in suit by the latter to enforce his mortgage—Revenue sale of portion of mortgaged property—Re-purchase by purchaser of equity of redemption in that portion—Rights of purchaser—Rights of puisne mortgagee in that portion—Transfer of Property Act, s. 65.—Where a portion of the mortgaged property is sold by the mortgagor to discharge a prior mortgagee decree, a puisne mortgagee can enforce his mortgage against the portion sold, and the purchaser cannot claim from the puisne mortgagee, the purchase-money paid by him. Under s. 65, Transfer of Property Act, the mortgagor must, no doubt, be taken to covenant, in the absence of contract to the contrary, to pay all public charges in respect of the mortgaged property, when the mortgagee is not in possession. Not only the mortgagee, but any one claiming through him, is entitled to the benefit of this covenant, but the purchaser of the equity of redemption from a mortgagor is not a party to such a covenant, and there is no obligation on him to pay the public charges accruing due in respect of what he has purchased, though it may be to his interest to do so and avert a revenue sale of the mortgaged property. Where a person purchased the equity of redemption in a portion of the mortgaged property, but before the revenue pattah was issued in his name in respect of the portion sold, that portion was re-sold by the revenue authorities, owing to a default in the payment of revenue in respect of the remaining portion of the mortgaged property, and purchased again by the purchaser of the equity of redemption in the portion sold, the purchaser has absolute rights over the portion purchased and is entitled to hold it free of the mortgage, and the puisne mortgagee cannot proceed upon that portion. *RENGA SRINIVASACHARI v. GNANAPRAKASA MUDALIAR*, 2 M.L.T. 36 = 30 M. 67.

(192)—*Usufructuary mortgage—Application by mortgagee for sale of equity of redemption in execution of decree for mesne profits and costs.*—Where a usufructuary mortgagee sued and obtained a decree for possession of the mortgaged property with mesne profits and costs, and, under this decree, was put in possession of the property, and he then applied for attachment and sale of the mortgaged property in execution of his decree for mesne profits and costs, *held* that the application would not lie. *MAHABIR SINGH v. SAIRA BIBI*, 17 A. 520 = A.W.N. 1895, 116. [R., 12 C.P.L.R. 26, 7 O.C. 314, 4 A.L.J. 787 = A.W.N. 1908, 1 = 3 M.L.T. 132.]

(193)—*Mortgage before Transfer of Property Act (IV of 1882)—Money-decree obtained by mortgagee—Sale of mortgaged property in execution—Title of purchaser—Transfer of Property Act, 1882, s. 99 not applicable.*—In execution of a money-decree obtained by a mortgagee on his mortgage executed prior to

Mortgage—continued.**—1.—General—continued.**

the passing of the Transfer of Property Act, 1882, the mortgaged property was sold and purchased by the mortgagee's son, whose purchase was not found to be *benami* for his father. *Held*, that the purchase conveyed an absolute title to the son and that he was not liable to be redeemed at the suit of the heirs of the mortgagor. *Semble*:—A sale to a third person purchasing *bona fide* the mortgaged property in such cases confers a good title upon the purchaser free from the mortgage lien, unless the sale is made subject to it. *HUSSEIN v. SHANKARGIRI*, 23 B. 119. [Appr., 2 N. L.R. 106; Appl., 11 C.W.N. 1011, F.B. = 35 C. 61 = 6 C.L.J. 320; Cons., 30 P.L.R. 1911 = 15 P.R. 1911 = 9 Ind. Cas. 549 = 109 P.W.R. 1911; R., 3 S.L.R. 17 = 1 Ind. Cas. 952.]

(194)—*Mortgage—Equity of redemption sold by mortgagor—Further charge created by mortgagor after sale of equity of redemption—Purchaser of equity of redemption not liable to pay such charge.*—A executed a mortgage in favour of B on 8th March, 1892. A subsequently sold the equity of redemption of the greater part of the mortgaged property to C. Subsequent to the sale, A made a further charge on the mortgaged property in favour of B, and covenanted to pay this sum along with the original mortgage. *Held*, that a mortgagor, who had sold the equity of redemption in property mortgaged, could not afterwards charge such property with a further debt, so as to render the purchaser of the equity of redemption liable to pay such debt before he could redeem. *NAURANG LAL v. PARTAP*, 3 Ind. Cas. 44. (A.W.N. 1901, 121, F.)

(195)—*Prior and puisne mortgages—Prior mortgage—Puisne mortgage—Suit by prior mortgagee in which puisne mortgagee not a party—Decree—Execution—Sale in execution—Rights of the puisne mortgagee.*—Where a prior mortgagee sues his mortgagor for sale of the mortgaged property without making a puisne mortgagee a party to the suit, the latter is in no way affected by the suit of its results. Thus, if the property is brought to sale in execution of the decree, and is brought by a third person, the puisne mortgagee has against him precisely the same rights as he had collectively against his mortgagor and the prior mortgagee. That is to say he may sue to redeem the purchaser as mortgagee, or thereafter as mortgagor to foreclose, or suffer himself to be redeemed by him. *PANDURANG v. SAKHARCHAND*, 8 Bom. L.R. 861 = 31 B. 112.

(196)—*Subsequent incumbrancer paying off prior mortgage—Effect as against intermediate charge—Toulmin v. Steere—Intention.*—When an estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course, according to the English practice, to have it assigned to a trustee for his benefit as against intermediate mortgagees, to whom he is not personally liable. But in India, the art of convey-

Mortgage—continued.**—1.—General—continued.**

ancing is simple, and a formal transfer of a mortgage is never made, nor is an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin v. Steere* is not likely to promote justice and equity, but to lead to confusion, etc. In such cases, therefore, the question to ask, in the interests of justice, equity and good conscience, is, what was the intention of the party paying off the charge? If there is no express evidence of it, the ordinary rule is that a man, having a right either to extinguish it or a right to keep it alive, shall be assumed to have acted according to his interest. *GOKAL DASS GOPAL DAS v. PURANMAL PREMSUKHDAS*, 10 C. 1035=11 I.A. 126, P.C.=4 Sar. 543. [F., 8 M. 246, 7 A. 568=A. W.N. 1885, 112, 11 M. 345, 16 C. 523, 13 A. 432, F.B., 13 A. 581, 16 M. 94, 38 P. R. 1894, 20 M. 274, 29 C. 154, P.C.=29 I. A. 9, 8 C. W. N. 690, 1 C. L. J. 531, 2 C. L. J. 202, 2 C. L. J. 288, 29 M. 37; *Rel. on*, 3 C.W.N. =153, 29 C. 25; *Appl.*, 7 A. 577=A. W. N. 1885, 115, 11 M. 452; *D.*, 17 M. 62, 18 B. 86; *R.*, 12 C. 663, A.W.N. 1896, 129, 3 O C. 254, 12 C.P. L.R. 70, 22 A. 284, F.B., 1 L.B.R. 210, 26 M. 686, F.B., 32 P.R. 1903=54 P.L.R. 1903, 139 P.L.R. 1904=30 P.R. 1904, 2 C.L.J. 574, 4 C.L.J. 121=10 C.W.N. 1010=33 C. 1133, 4 C. L.J. 79=36 C. 193=5 C.L.J. 611, 7 C.L.J. 1, 6 A.L.J. 549, 10 C.L.J. 150.]

(197)—*Mortgage—Mortgagee's omission to pay off prior incumbrances—Complete transaction—Right of mortgagor discharging the incumbrances—Appeal—Cross-objection—Civ. Pro. Code (Act XIV, of 1882), s. 561.*—A subsequent mortgagee does not lose the benefit of his mortgage, simply because he has delayed paying off prior incumbrances which he undertook to pay but within no fixed time. If the prior mortgagees proceed against the mortgagor he can call upon the subsequent mortgagee to discharge the former mortgages. And if he himself chooses to liquidate any or all of them, he is entitled to credit to that extent, but is not at liberty to plead that the mortgage is an incomplete transaction and is consequently not enforceable against him. (100 P.R. 1889, *D.*) Although an appeal fails on the ground of appellant's having no right of appeal, the respondent is still entitled to have his cross-objections heard and determined on the merits. *NANAK BAKHSI v. WAZIRSINGH*, 4 Ind. Cas. 625=67 P.W.R. 1909. (8 B. 368, *F.*)

(198)—*Mortgage—Prior and puisne-mortgagees—Sale by both mortgagees—Right of the first purchaser to be confirmed in possession—Right of puisne incumbrancer to redeem—First mortgagee purchaser impleaded in suit of puisne mortgagee—How far his right under the prior sale affected—Right of puisne-mortgagee decree-holder to sue first mortgagee decree-holder for possession—Position of prior and puisne mortgagees.*—Where there are two mortgages in favour of two persons, neither of them being usufructuary, and the first mortgagee sells the property before the puisne mortgagee, there is nothing for the latter to sell and the first mort-

Mortgage—continued.**—1.—General—continued.**

gagee is entitled to possession under his sale. The second mortgagee has the same right to sell his mortgagor's interest, but the first sale puts an end to the mortgagor's interest and conveys it to the purchaser. (2 M. 108, 26 M. 486, 5 C. 265, 4 C.L.R. 358, 5 C. 269, 32 M. 485, 19 M.L.J. 728, 4 Ind. Cas. 1077, *R.*) The right of the prior mortgagee purchaser is not lost to retain possession under his sale, merely because he was impleaded in the suit of the second mortgagee. The only right vested in the puisne mortgagee is the right to redeem the first mortgage. (17 M. 17, 24 M. 171, *R.*) After redemption, as aforesaid, the purchaser in execution of the decree on the first mortgage may redeem the two mortgages vested in the same person. (13 M.L.J. 72, 26 M. 537, 31 M. 425, 3 M.L.T. 397, 18 M.L.J. 298, *R.*) If the purchaser does not redeem the puisne-mortgagee who has obtained by redemption the right of the first mortgagee, the properties may be sold, the mortgagees paid, and the balance paid to the purchaser, as the representative of the mortgagor. (31 M. 425, 3 M.L.T. 397, 18 M. L.J. 298, 8 M.L.J. 299, *R.*) The puisne mortgagee has got a right to sell the property even after sale by the first mortgagee, but he can exercise that right only after redeeming the first mortgage. The prior mortgagee cannot be deprived of his right to require the puisne mortgagee to redeem him, and in default to enforce his rights under his instrument of mortgage by sale or foreclosure, and he may be allowed to do this even as defendant in a mortgage suit. *VENKATAGIRI IYER v. SADAGOPACHARIAR*, 10 Ind. Cas. 83. (20 M. 120, *Expl.*)

(199)—*Same property mortgaged to one person by two deeds—First usufructuary, second simple—Suit on the second for sale free of the prior encumbrance—Transfer of Property Act, ss. 97 and 99.*—Where a person, holding two mortgages on the same property, the prior mortgage being usufructuary, and the other a simple mortgage, obtains a decree on the latter mortgage, there is nothing in the Transfer of Property Act to prevent the plaintiff from applying for sale of the mortgaged property free of encumbrance, and have his prior usufructuary mortgage satisfied first out of the sale-proceeds, and the balance applied towards the satisfaction of the decree on the simple mortgage deed. (26 A. 14, *Diss.*; 29 M. 424, *F.*; 17 M.L.J. 301, *R.*) Ss. 99 and 97 of the Transfer of Property Act do not exclude an usufructuary mortgage; and so, the provisions of these sections may be applied to such a mortgage. *RANGASAMI NADAN v. SUBBARAYA AIYAR*, 17 M.L.J. 403=2 M.L.T. 346=30 M. 408. [*R.*, 31 M. 530=18 M.L.J. 564.]

(200)—*Holder of first and second mortgages—Two mortgage decrees in his favour in different Courts—Latter decree on the first mortgage silent on the prior decree on the second mortgage—Third mortgagee party to both suits—Priority.*—On the same property, the appellant

Mortgage—continued.**—1.—General—continued.**

held the first two mortgages, and the respondent held the third mortgage. The appellant obtained a decree on the second mortgage in the District Munsiff's Court making the respondent a party. He subsequently sued on the first mortgage in the District Court and obtained another decree, to which also the respondent was a party. In the latter suit, no mention was made of the prior decree on the second mortgage. *Held*, that, in execution of the latter decree, the surplus after satisfying the first mortgage should be paid to the third mortgagee, and the District Judge was not at liberty to give priority to the appellant's second mortgage, contrary to the terms of the decree. **PICHUVAIYAR v. VADIVELAN PILLAI, 17 M. L.J. 332. (25 W.R. 187, R.)**

(201)—*Mortgage security, suit to enforce—Partition, subsequent, effect of, on the securities—Mortgagee, right of, to enforce security—Purchasers of equity of redemption from mortgagors, right of—Priority—Subrogation—Substituted security, principles for ascertainment of—Release of lien by mortgagee, effect of—Release of one joint-mortgagor, effect of—Redemption of share of mortgage by other joint-mortgagor.*—The mortgagee of an undivided share in joint-property is entitled only to property allotted on partition to the mortgagor, if the partition was fair and equal and is not vitiated by fraud, and he is entitled to proceed against what may be called the substituted security. (1 I.A. 106 = 21 W.R. 233, R.) The principles on which substituted securities should be ascertained, discussed and explained. A mortgagee, who has a security upon two or more properties, which he knows to belong to two different persons, cannot release his lien upon one, so as to increase the burden upon the others, without the privity and consent of the persons affected. The purchasers of the properties not released are entitled to insist that no more than a proportionate share of the mortgage-debt shall be levied upon the properties in their hands. (15 B. 186, 5 A. 257, 1 C.L.J. 337, 2 C.L.J. 202, 33 C. 613 = 3 C.L.J. 576, 33 C. 890, R.; 25 A. 79, 28 A. 174, 29 M. 217, Diss.) Where a mortgagee has, gratuitously or otherwise, released one of the joint-mortgagors and his share of the property, the mortgage-debts is split up, and redemption of a share becomes permissible, so that the other joint-mortgagor is at liberty to redeem his share on paying a proportionate part of the mortgage-money. The principles upon which the right to claim subrogation arises explained. **HAKIM LAL v. RAM LAL, 6 C.L.J. 46. (5 C.L.J. 611, F.) [R., 12 C.W.N. 107 = 6 C.L.J. 612, 10 C.L.J. 150 = 1 Ind. Cas. 264.]**

(202)—*Mortgagee-bond—Construction—Usufructuary mortgage of two properties—Mortgage purchasing one of them in execution of a decree on a prior mortgage—Liability of the other property to pay the whole mortgage-debt—Mortgagee undertaking to pay the Government revenue—Suit to redeem the other property by*

Mortgage—continued.**—1.—General—continued.**

purchasers of equity of redemption—Mortgagee's right to tack on the amount of Government revenue paid—Laches—Equity.—Where two properties are mortgaged under a second mortgage and one of them is swallowed up by a prior mortgage, the whole burden of the second mortgage falls on the remaining property entirely. Where the second mortgage deed contained a covenant that the mortgagee should pay the Government revenue on two properties, which were separately assessed, from the rents and profits of the properties mortgaged, retain certain fixed amount for interest and pay the mortgagor a certain yearly sum as *malkana*, and if the Government revenue was enhanced the mortgagor was to be liable for the amount of the enhancement: *Held*, that the mortgagee had undertaken the duty of meeting the Government demand, and it was his duty to pay the Government revenue for both properties; that the mortgagee could not be allowed to throw the burden of his own laches on the property for which the revenue was not paid, and that any equity that might have been invoked against the mortgagor, who was not seeking redemption, did not arise against the purchaser of the equity of redemption. **BOHRA THAKUR DAS v. THE COLLECTOR OF ALIGARH, 12 C.L.J. 272, P.C. = 14 C.W.N. 1034 = 8 M.L.T. 276 = 7 Ind. Cas. 732 = 7 A.L.J. 1132 = 12 Bom. L.R. 1005 = 20 M.L.J. 890 = 32 A. 612.**

(203)—*Mortgagees—Rights of—Inter se—Sale under a third mortgage—First mortgage paid off by third mortgagee—Right of purchaser to set up first mortgage as shield.*—A property was mortgaged first to A, then to B, and then to C. C. discharged A's mortgage and then brought the property to sale. M. purchased the property. B brought this suit for sale upon his mortgage. *Held*, that M could set up A's mortgage as a shield, and B could not sell the property unless he paid off that mortgage. **MATILAL KHAN v. BANWARI LAL, 7 A.L.J. 61 = 5 Ind. Cas. 132 = 32 A. 138.**

(204)—*Mortgage—Private sale of mortgaged property—Consideration left with purchaser for discharge of two mortgages—First mortgage alone discharged—Suit by second mortgagee—Priority—Subrogation—Shield—Intention of parties—Position of purchaser.*—In all cases where a subsequent purchaser claims priority over a puisne-mortgagee by reason of his having discharged a prior mortgage, the question is always one of intention, i.e., whether it was the intention to keep the prior mortgage alive as against the puisne-mortgagee. (10 C. 1035, 1046, P.C., R.) Where the purchaser undertook to discharge not only the prior, but also the puisne mortgage, and paid off the former but not the latter, he was not entitled to hold up, as a shield, the mortgage which he had paid off, as against the debt which he undertook to pay but which he did not discharge. *Semle*:—that, where a vendor leaves the consideration for the sale with the vendee for pay-

Mortgage—continued.**—1.—General—continued.**

ment to the former's mortgagee-creditor, and the vendee makes such payment, he cannot in the matter of the payment be deemed to have acted as the agent of the vendor-mortgagor. **MUHAMMAD SADIK v. GHAS MUHAMMAD**, 7 A.L.J. 914, F.B. = 7 Ind. Cas. 200.

(205) — *Payment—Extinction—Intention of parties.*—The decision of the question whether a mortgage has been extinguished or not does not depend merely upon the fact of the mortgage being paid off; the intention of the parties, which may be expressly declared or inferred from the circumstances, will cause either the one result or the other. **MOHESH LAL v. MOHANT BAWAS DAS**, 9 C. 961, P.C. = 10 I.A. 62 = 13 C.L.R. 221 = 4 Sar. 424 [F. in principle, 29 C. 154 = 29 I.A. 9, P.C.; F., 2 C.L.J. 288; R., 19 M. 105, 8 C.W.N. 690, 2 C.L.J. 574, 7 C.L.J. 1.]

(206) — *Mortgage—Puisne encumbrancer paying off prior incumbrance—Right to stand in place of prior mortgagee—Question of intention—Intention to be clearly proved—Where old debt satisfied and different security at increased interest taken, no right.*—The mere fact that the money borrowed by the defendant from the plaintiff was used to pay off an old mortgage, cannot entitle the lender to the benefit of the discharged security; as that fact cannot give rise to a presumption that there was any intention to assign the old mortgage to the plaintiff or to keep the prior mortgage alive. (29 C. 154, D.) A puisne incumbrancer may keep alive a prior incumbrance for his own benefit, even though it has taken the form of a decree. (2 C. L.J. 202, F.) But it is a question of intention. It must be clearly proved that the person claiming the priority paid off the prior incumbrance, with the express intention of keeping it alive for his own benefit. Such an intention may be inferred from the circumstances of the case, though it is more satisfactory when it is found expressed in the subsequent mortgage-deed or other document. Where there are circumstances to indicate that the old debt was satisfied and the prior mortgage extinguished, and the lender accepted a new and different security at an increased rate of interest, the lender has no right to stand in the place of the prior mortgage. **WOOMESH CHANDRA LASKAR v. ROMA NATH BARMAN**, 1 Ind. Cas. 683. (10 I.A. 62 = 9 C. 961 = 13 C.L.R. 221, R.)

(207) — *Prior and puisne-mortgage—Decree on prior mortgage—Effect of priority—Subsequent suit on puisne mortgage—Amount payable in respect of prior mortgage.*—Where, in a suit for sale on a mortgage, the decree gave subsequent transferees a right to redeem the then plaintiff, but did not provide successive periods within which the different parties might redeem each other, it could not debar one of those puisne mortgagees from enforcing his mortgage in a subsequent suit. Where one of the subsequent transferees discharged the above decree, held, that his heirs were entitled to hold up the

Mortgage—continued.**—1.—General—continued.**

mortgage, on foot of which the decree had been obtained, as a shield against the claim of the puisne incumbrancer. (10 C. 1035, F.) Held, further, that the said heirs were entitled to be paid what was due upon the prior mortgage discharged by them, and not merely what was due on the decree in which the mortgage had merged. **KANHAI LAL v. HULAS SINGH**, 9 A.L.J. 29 = 13 Ind. Cas. 913. (21 C. 366, 19 A. 527, R.)

(208) — *Mortgage—Decree absolute for sale—Mortgagor's interest—Code of Civil Procedure (Act XIV of 1882), s. 411—Suit in forma pauperis—Court-fees—Sale of the mortgaged property in satisfaction of Government's alleged claim for Court-fees—Second sale of the mortgaged property in execution of the mortgagee's decree—Prerogative of the Crown.*—On December 17, 1895, the respondents, who were mortgagees of the property in suit, obtained the usual decree for sale. On May 16, 1896, that decree was made absolute, and the respondents commenced execution proceedings by sale of the property. In the meantime, the wife of the mortgagor brought a suit in *forma pauperis* against her husband and respondents, claiming from her husband a certain sum of money under a contract of dower, and alleging that that sum was charged on the mortgaged property in priority to the mortgages the subject of the decree of December, 17, 1895. On May 11, 1897, the suit was decreed with costs against the mortgagor, but dismissed with costs as against the respondents, and an order was made under the Code of Civil Procedure (Act XIV of 1882), s. 411, that the Court-fees payable to Government should be the first charge on the amount decreed to the mortgagor's wife and should also be recoverable from the mortgagor. The Collector on behalf of Government applied for and obtained execution of the decree of May 11, 1897, and the property was sold to the representative of the appellants. In execution of the respondent's said decree the property was again put up for sale and purchased by the respondents. The appellants disputed the respondents' claim for recovery of the property, resting the validity of the sale to their (appellants') representative on two grounds (1) on the terms of the said s. 411 and the decree of May 11, 1897, and (2) on the prerogative of the Crown. The Courts in India decreed the respondents' claim: Held, that the decree of May 11, 1897, did not create or purport to create any charge on the mortgaged property in favour of Government, who had no right to attach the property and sell it under that decree, though such interest, if any, as remained in the mortgagor from whom the Court-fees were declared to be recoverable, might have been reached by a proper proceeding; and that the order for the first sale was, therefore, without jurisdiction and the sale passed no property to the Appellant's representative, who was the person declared purchaser. Held, also, confirming the decrees of the Courts below, that it is

Mortgage—continued.**—1.—General—continued.**

only when claims of the Crown and claims of "common persons" "concur" or come into competition, that the Crown is preferred, but as it is the case here, the Crown has no more right than a "common person" to seize A's property and apply it in or towards the discharge of a debt due from B. KUNWAR RAGHO PRASAD v. LALA MEWA SAB, M.W.N. (1912) 311, P.C.=11 M.L.T. 193=16 C.W.N. 433=15 C.L.J. 327=14 Bom. L.R. 212=22 M.L.J. 457=9 A.L.J. 401=15 Ind. Cas. 177=39 I.A. 62.

(209)—*Mortgagee's security on property of others—Lien—Privity.*—A mortgagee, who has security upon two or more properties which he knows belong to different persons, cannot release his lien upon one so as to increase the burden upon the others without the privity and consent of the persons affected. IMAM ALI v. BAJI NATH RAM SAHU, 10 C.W.N. 551=3 C.L.J. 576=33 C. 613. [D., 7 C.L.J. 274; R., 6 C.L.J. 46; F., 3 Ind. Cas. 311.]

(210)—*Money advanced to discharge first mortgage—First mortgage not extinguished—Priority.*—Before a person advancing money for the purpose of discharging the debt due under the first mortgage can establish his claim to the rights of the first mortgagee, it must be shown that the first mortgage had been extinguished. Otherwise the result would be that a number of persons would be entitled to rank as first encumbrancers with reference to different sums of money advanced by them, and it would be impossible to work out the rights of the parties. HANUMANTHAIYAN v. MEENTACHI NAIDU, 10 M.L.T. 380=2 M.W.N. 1911, 158=22 M.L.J. 12=12 Ind. Cas. 412=35 M. 183. (5 C.L.J. 611, Rel. on.; 11 M. 345, 8 M. 246, Expl.; 16 M. 94, R.)

(211)—*Property sold—Third party advancing money on security of the property mortgaged—Sale set aside—Third party entitled to benefit.*—Where a mortgage-debt, for the payment of which a sale has been ordered, is satisfied by a third party on obtaining a security of the property ordered to be sold, for the advance made by him, and the proceeding for sale came to nothing, the incumbrance in respect of which the sale was ordered enures to the benefit of the party making the payment. SHYAM LAL v. BASHIRUDDIN, 3 A.L.J. 630=A.W.N. 1906, 230=28 A. 778. (31 C. 863, 29 M. 37, Appr. & F.; 27 A. 400, R.)

(212)—*Mortgage of joint property by one co-parcener—Subsequent mortgage of the same by another co-parcener—Sale of the property in execution of a money decree against the latter to whose share it had fallen on partition—Subsequent mortgagee's right to enforce his lien against the property in the hands of a bona fide purchaser at the sale.*—N and S, two undivided brothers of a joint Hindu family, owned a number of houses as their joint family property. N mortgaged one of the houses to R and subsequently all the houses were mortgaged by S to one A. On partition between the

Mortgage—continued.**—1.—General—continued.**

brothers, S got the equity of redemption of the former house, as part of his share so that, after the partition, the house stood in the hands of S subject to the mortgage to R. In execution of a certain money decree against S, the house was put up for sale and purchased by one B. Subject to the incumbrance in favour of R, B paid off the amount of that incumbrance, paid the decree-holder in full and the balance to S, the judgment-debtor. A, the other mortgagee, in pursuance of a decree obtained by him against S, had the house in question attached in execution. It was, however, released from attachment at the instance of the above-mentioned Court purchaser, B, and A, thereupon, brought the present suit for a declaration that the house was attachable and was subject to sale in execution of his decree against S. *Held*, since admittedly A was fully cognizant of B's purchase at the Court-sale, his silence and conduct towards B, a bona fide purchaser for value without notice, deprived A of his right to enforce his lien as puisne mortgagee against the property in B's hands. Equity requires that, as between A and B, it should not be that B, who purchased the house in an open Court-sale, in complete good faith must suffer while A, knowing of the whole transaction, stood by and allowed B to so purchase. AZIZ BEGAM v. MOHAN LAL, 33 P.R. 1906=132 P.L.R. 1906.

(213)—*Mortgage—Sale—Purchase by mortgagee in execution—Previous purchase in execution of money-decree—Priority of title—Lis pendens, whether applicable to ex parte decree and purchase in execution.*—A purchase of the mortgaged property by the mortgagee, in execution of an *ex parte* mortgage-decree, has priority over a previous purchase by an execution creditor in execution of a money-decree obtained against the mortgagor during the pendency of the mortgage-suit. The doctrine of *lis pendens* is applicable to *ex parte* mortgage suits and purchases in execution. RAM DOYAL DAS v. RAM TANU DAS, 11 Ind. Cas. 464=15 C.L.J. 137. (31 C. 745, 31 C. 658, 11 C.W.N. 561, 4 A.L.J. 344, 5 C.L.J. 563, 17 M.L.J. 263, 9 Bom. L.R. 656, 2 M.L.T. 191, 29 A. 339, 10 O.C. 314, R.)

(214)—*Act IV of 1882 (Transfer of Property Act), s. 53—Assignment of invalid mortgage—Rights of assignee as against mortgagor and subsequent mortgagee for consideration—Maxim—Qui prior est tempore potior est jure.*—On the 23rd October, 1897, one M.A., executed a mortgage of certain property in favour of H.A., which was registered on the 29th of October, 1897. This mortgage was found to be fictitious and without consideration, and to have been made solely for the purpose of defeating the creditors of the mortgagor. On the 15th of August, 1898, the mortgagee transferred his rights under this mortgage to his wife B, in part satisfaction of her dower debt. It was found that this was a bona fide transaction and

Mortgage—continued.**—1.—General—continued.**

that B obtained the transfer of the mortgage without any knowledge of its fraudulent character and was a transferee in good faith and for consideration. On the 29th of October, 1897, the same property was again mortgaged to one B.P., who accepted the mortgage in ignorance of the existence of the mortgage of the 23rd of October, 1897. This mortgage was registered on the 22nd of March, 1898. B.P. afterwards brought a suit for sale on his mortgage impleading B as a defendant, as well as the mortgagor and the prior mortgagee. *Held*, that B was entitled to no relief as against B.P., though as against the mortgagor she was entitled to be paid the amount of the consideration named in the deed of transfer in her favour out of the surplus sale proceeds (if any) of the mortgaged property, and that the proviso to s. 53 of the Transfer of Property Act did not apply to the case as it was intended to safeguard rights already acquired. **BASTI BEGAM v. BANARSI PRASAD, A.W.N. 1908, 116=5 A.L.J. 305=30 A. 297.**

(215)—*Mortgagor, purchase by, if and when extinguishes his mortgage—Mortgagee purchaser, rights of, to fall back upon mortgage—Mortgage, if and when kept alive—Equity—Lis pendens, doctrine of, when applies.*—Although a security is extinguished upon the actual sale of the mortgaged properties and distribution of the proceeds, yet, a mortgagee, who has purchased at a sale in execution of a decree upon his mortgage, is entitled to rely upon his mortgage as a shield against a subsequent encumbrancer. (30 C. 599, R.; 31 C. 863, Expl.) The question whether a mortgage which has been satisfied is to be construed as extinguished or kept alive for the benefit of the person who makes the payment, is simply a question of intention to be determined with reference to the surrounding circumstances as they exist at the time when the mortgage is discharged. Although, ordinarily, when the interests of the mortgagor and the mortgagee are united in the same person, it is not necessary for him to keep them distinct, equity will keep them distinct, when, from the intention of the party, either express or implied, it is for his benefit that they should be so kept; it depends upon the intention actual or presumed, of the person in whom the interests are united, and this person will be presumed to intend that which is most to his advantage. Where the mortgagee institutes an action to enforce his security, proceeds to judgment, sells the premises, and purchases them himself, it does not necessarily follow that he intends that his title under the mortgage should merge in the equity of redemption. A mortgage, however, will not be kept alive in aid of a fraud or wrong; a mortgage substantially satisfied may be kept alive in equity only when this is requisite to the advancement of justice, and this will never be allowed when the result will be, from the forms of law, to aid in perpetrating a fraud or an injury. (11 I.A. 126, 10 C. 1035, 10 I.A. 62, 9 C. 961, 29 I.A. 9,

Mortgage—continued.**—1.—General—continued.**

29 C. 154, R.) A purchaser of a share of an estate under s. 13 of Act XI of 1859 may be affected by the doctrine of *lis pendens*, if he makes his purchase during the pendency of a litigation to enforce a mortgage upon that property. (26 C. 966, R.) In the case of a mortgage suit, the *lis pendens* continues after the decree nisi, and the doctrine of *lis pendens* is applicable to proceedings to realize the mortgage after the decree for sale. (2 C. L.J. 288, R.) But where, as in the present case, the purchase at the revenue sale was effected some time after the mortgage sale had been confirmed, there was no *lis pendens* on the mortgage pending at the date of the revenue sale. **BHAWANI KOER v. MATHURA PRASAD, 7 C.L.J. 1. [D., 10 C.L.J. 590.]**

(216)—*Lis pendens—Sale of mortgaged property under a money-decree during pendency of the mortgagee's suit on the mortgage—Rights of the auction-purchaser in execution of the money-decree.*—During the pendency of a mortgagee's suit for recovery of the amount due on his mortgage, a third person obtained a money-decree against the mortgagor and had the mortgaged property sold: *Held*, that, in the absence of fraud, the sale in execution under the money-decree was a sale *pendente lite* as regards the mortgage-suit, and as the auction-purchaser bought only the equity of redemption, his title to the land would be subject to the rights of the mortgagee. **ABDUL MAJID v. ABDUL MAJID, 9 Ind. Cas. 772.**

(217)—*Subsequent mortgage for the same debt—Merger—Intention.*—It is a question of intention whether a later mortgage of the same property for the same debt merges a prior one. **KHUSHAL MAL v. MUL CHAND, 173 P.R. 1882.**

(218)—*Mortgage—Priority—Decree obtained on a prior mortgage satisfied by execution of a fresh mortgage in favour of decree-holder—Priority over subsequent mortgages.*—Where a decree-holder, prior to the actual sale of property in execution of his mortgage decree, takes from the judgment-debtor a fresh mortgage in lieu of the amount due on the decree, he is entitled to the benefit of the prior incumbrance which had been created between the original mortgage and the new security. A decree was obtained for sale upon a mortgage in 1901. The decree-holder took certain property in satisfaction of the decree in 1903, but did not certify the adjustment to the Court. He then executed the decree and sale was ordered by the Court. The judgment-debtor executed a fresh mortgage deed in 1904 in lieu of the decree, and thus the decree was satisfied. In the meantime, another mortgage had been executed. *Held*, that the mortgage of 1904 had priority over the latter mortgage. **RAHIM-UN-NISSA v. BADRI DAS, 8 A.L.J. 112=9 Ind. Cas. 205=33 A. 368. (7 A.L.J. 984, 28 A. 778, R.)**

(219)—*Suit by mortgagee for sale—Setting out a prior mortgage of one of the defendantz with-*

Mortgage—continued.**—1.—General—continued.**

out claiming any relief—Effect—Effect of disputing prior mortgage and asking for sale free of encumbrances.—In a former suit for sale on a mortgage, the then plaintiff set out the prior mortgage of one of the defendants, but did not make any allegation as to the amount, if any, then due under it, nor ask that the sale should be made subject to it or free of it. *Held*, that the decree for sale, though silent as to the prior mortgages, must not be understood to have negatived them. (29 M. 84, F.) It would be different if the plaintiff disputed the existence of the prior mortgage and asked for a sale free of all incumbrances. *ARUNACHALA REDDI v. PERUMAL REDDI*, 9 M.L.T. 90=21 M. L.J. 635=9 Ind. Cas. 285. (24 A. 429, 9 C. L. J. 78, R.)

(220)—*Prior and puisne mortgages—Estoppel.*—In 1887, B mortgaged the land in suit to K, who in the same year mortgaged his mortgage rights together with other properties to N. A further charge was created by K in 1890, by a mortgage which also included some of the lands held by K in ownership by purchase, N having sued on his mortgages of 1877 and 1890, obtained a decree in 1896 against K personally as well as against the mortgaged properties. In execution of his decree, N applied for attachment and obtained prohibitory orders under s. 268 of the Civil Procedure Code, which enjoined K from recovering the mortgage money from B until further orders. N further obtained attachment orders under s. 276 of the Civil Procedure Code. B with the leave of Court mortgaged in 1896 the land in suit to N. In 1902, K brought a suit for recovery of possession of mortgaged land in the mortgage executed in his favour in 1887. N pleaded that the suit was barred by limitation and on the ground of acquiescence and estoppel. B in his application for leave to make a private alienation of property to satisfy the decree of N, had admitted the mortgage in favour of K. *Held*, that the suit was not barred by limitation, for under s. 19 of the Limitation Act, the application for leave to mortgage made by B operate as an acknowledgment of K's right and saved limitation. *Held*, also, that K was estopped from questioning the mortgage of 1896 or setting up his prior mortgage rights as a mortgagee against N as he had led N to believe that the mortgage of 1896 was proper and acceptable to him. *KANSI RAM v. BADDA*, 23 P.L.R. 1906.

(221)—*Prior and subsequent mortgage—Sale by first mortgage and purchase by himself—Purchaser from first mortgage—Redemption of purchaser by subsequent mortgagee—Amount payable.*—A first mortgagee, who had no notice of a subsequent mortgage, obtained a decree for a mortgage-debt (amounting to about Rs. 350) in a suit in which the subsequent mortgagee was not made a party, brought the property to sale and purchased it himself for Rs. 25 and, subsequently, sold it to the plaintiff for Rs. 99. The subsequent mortgagee also obtained a decree on his mortgage and purchased the

Mortgage—continued.**—1.—General—continued.**

property at a sale held under that decree. In a suit brought by the plaintiff against the subsequent mortgagee, in which the prior mortgagee was not made a party: *Held*,—that without prejudice to the rights of the first mortgagee and as between the plaintiff and the defendant, the latter could be allowed to redeem the former only upon payment of what was now due on the first mortgage—and not merely what the first mortgagee or the plaintiff himself had paid for the property. *GIRISH CHANDRA NANDI v. KEDAR NATH KUNDU*, 10 C.W.N. 592=33 C. 590. [R., 5 C.L.J. 315=11 C.W.N. 403, 12 O.C. 133, 1 S.L.R. 172.]

(222)—*Mortgage—Prior mortgagee purchasing property in execution of his mortgage-decree—Subsequent mortgagee not party—Prior mortgagee not entitled to decree subject to redemption by puisne mortgagee with possession—Rights of puisne mortgagee discussed and pointed out—Equity of redemption—Nature of.*—A first mortgagee, who has purchased the mortgaged property in execution of a decree on his mortgage and sues for possession or in the alternative for the recovery of his money, is not entitled to a decree for possession subject to redemption by a puisne mortgagee with possession who was not a party to the first suit by the first mortgagee. (7 M.H.C. 229, 7 W.R. 5, 13 A. 432, 4 M. 213, 8 M. 246, 20 M. 120, 30 C. 599, 14 M. I.A. 144, 18 C. 164, 21 C. 70, P.C., 37 C. 239, 10 C. 1035, 2 B. 662, 8 A. 324, 4 A. 518, 4 C. 817, 9 A. 125, 10 A. 520, 13 A. 315, 21 A. 235, 19 A. 541, 23 A. 1, 26 A. 464, 26 M. 537, 10 B. 224, 20 B. 890, 28 B. 153, 8 B. 168, 32 C. 891, 5 C.L.J. 315, 6 C.L.J. 612, 13 M.L.J. 72, 17 M. 17, 26 M. 332, 25 M. 537, 31 M. 425, 30 M. 120, 8 M.L.J. 298. R.) Whatever rights the second mortgagee as such may have at the date of his mortgage, whether to possession (if his mortgage be one with possession and the previous mortgage, without it) or to sale or foreclosure under s. 67, Tr. P. Act, such rights remain altogether unaffected by the suit of the first mortgagee, without the second being a party to it and the sale in execution of his decree. He has also the right to redeem the prior mortgage, if it has not been extinguished by merger in the equity of redemption. The first mortgagee preserves his priority in spite of his purchase of the equity of redemption behind the back of the second mortgagee. The second mortgagee may, if he chooses, still redeem the first. Redemption is an equitable claim or, in India, a legal right which he may seek to enforce, and not a liability which he may be compelled to discharge. *Held*, also, (1) that a second mortgagee is entitled to the same rights as the first mortgagee with reference to his security, having regard to the nature of his mortgage; (2) that the purchaser of the equity of redemption after the first mortgage and the second mortgagee both stand on the same footing with reference to their respective rights against the first mortgagee, when they have not been impleaded in suit instituted by the

Mortgage—continued.—1.—**General**—continued.

him on his mortgage; (3) that those rights are unaffected by the suit of the first mortgagee to which they are not made parties and the decree passed therein and the sale made in pursuance thereof; and (4) that the purchaser in such a suit, whether it is a first mortgagee or a stranger, does not acquire the rights of the mortgagor as at the first mortgage, but only those that subsist in him at the date of suit. *MULLA VITTIL SEETHI v. KORAMBATH PARUTHOLI ACHUTHAN NAIR*, 21 M.L.J. 213, F.B. = 9 M.L.T. 431 = 21 M.L.J. 475.

(223)—*Marshalling*—Three properties subject to a mortgage—One of them subsequently mortgaged—The other two properties insufficient to pay off first mortgage—Liability of the subsequent mortgaged property to satisfy balance under first mortgage—*Marshalling*—Not applicable—*Transfer of Property Act*, ss. 81, 82.—Three properties A, B and C were subjected by decree to a mortgage lien. C was made thereafter subject to a subsequent mortgage. A and B were sold in execution of a decree enforcing the first mortgage and were purchased by the decree-holder. The decree-holder sought to recover the balance of his mortgage decree by sale of C. *Held*, that the principles underlying ss. 81 and 82, *Transfer of Property Act*, do not apply, and that property C is liable for the balance of the mortgage decree without regard to the burden of the second mortgage. *GUL MAHOMED v. LOTOMAL*, 4 S.L.R. 224 = 9 Ind. Cas. 725.

(224)—*Mortgages of chattel*—*Priority*—*Prior mortgagee inducing subsequent incumbrancer to advance money as first charge*.—Where a first mortgagee was an assenting party to the mortgage or charge executed in favour of a subsequent encumbrancer, and actually obtained a large portion of the mortgage money thus raised, and the subsequent mortgagee obtained an express covenant that the property mortgaged was free from encumbrances. *Held*—That the prior mortgagee, having thus concurred in inducing the subsequent incumbrancer to advance money as a first charge, could not turn round and claim priority over that charge in favour of his own mortgage subsisting from an earlier date. *RAMAN CHETTY v. STEEL, BROTHERS AND COMPANY LTD.*, 15 C.W.N. 813, P.C. = 6 L.B.R. 21 = 13 Bom. L.R. 542 = M.W.N. 1911, 413 = 14 C.L.J. 79 = 10 M.L.T. 239 = 21 M.L.J. 936 = 11 Ind. Cas. 503.

(225)—*Priority*—*Acceptance by mortgagee of fresh mortgage in satisfaction of decree obtained on first mortgage*.—Where K, a mortgagee having obtained a decree on his mortgage, did not bring the property to sale but in satisfaction of his decree accepted an usufructuary mortgage from the mortgagor (judgment-debtor) and another person jointly. *Held* that the prior mortgage was extinguished, and that in a suit against K by N. R. on a mortgage which was subsequent to K's first mortgage but prior to K's second mortgage, K, could not, for

Mortgage—continued.—1.—**General**—continued.

the purpose of obtaining priority, date back his title through his second mortgage to his first mortgage. *NAKTA RAM v. MOTI RAM*, A.W. N. 1906, 191.

(226)—*Mortgagor promising to put mortgagee in possession or authorising him to sue prior mortgagee for possession*—*Effect*—*Complete mortgage*—*Waiver of right of pre-emption*.—An *ottu* deed recited that the mortgagor would redeem and put the mortgagee in possession, or authorised the latter to sue if necessary and eject the prior mortgagee. *Held*, that the deed is a complete mortgage. *Held* also that there could be no waiver of a right of pre-emption, unless the owner gave notice to the pre-emptor how much money and on what conditions any one else was prepared to advance. *CHATHU NAIR v. SOOLAPANI VARIAR*, 9 M.L.T. 495 = 1 M.W.N. 1911, 263 = 9 Ind. Cas. 1010.

(227)—*Mortgage*—*Priority*—*First mortgagee*—*Decree for sale*—*Fresh advance*—*Fresh mortgage for amount due under first mortgage and fresh advance*—*Consolidation*—*Second mortgagee*—*No priority over the first mortgagee*—*Intention to give up security*—*Presumption*.—S was a mortgagee by deposit of title deeds. M took a subsequent mortgage of the same property expressly subject to S's mortgage. After M's mortgage, S obtained a decree on his mortgage, advanced a further sum and took another mortgage for the amount due under the mortgage decree and for the amount subsequently advanced. M claimed priority over S. *Held*, that S did not lose his priority by reason of the second mortgage under which a fresh advance of money was also made. The second mortgage cannot be construed as a surrender of S's rights as against M so as to convert M into a first mortgagee and relegate S to the position of a second mortgagee. The question whether a mortgage which has been satisfied is to be construed as extinguished or kept alive for the benefit of the person who makes the payment is simply a question of intention to be determined with reference to surrounding circumstances as they exist at the time when the mortgage is discharged. (7 C.L.J. 1, 11 I.A. 126, 10 I.A. 62, 29 I.A. 9, 20 M. 486, 16 C. 523, F.; 13 B. 348, D.; 26 M. 19, R.) The law imputes to a person an intention to act according to his interest. That presumption is made even when the mortgagee may not have been aware of the circumstances indicating what course of conduct would be for his interest. *YELLAPADI MAHALASHIAMMAL v. SRIMAN MADHWA SIDDHANTA OONAHINI NIDHI LIMITED*, 10 M. L. T. 169 = 21 M.L.J. 811 = 11 Ind. Cas. 865.

(228)—*Prior and puisne mortgagees*—*Payment by puisne mortgagee of the prior mortgage*—*Subsistence of priority for the benefit of puisne mortgagee*.—When a puisne mortgagee pays off a prior mortgage, he must, in the absence of evidence to the contrary, be presumed to

Mortgage—continued.**—1.—General—continued.**

have kept the prior mortgage alive for his benefit. *SUNDAR LAL v. AMANTAULLA*, 11 Ind. Cas. 469. (26 A. 185, 8 A.L.J. 663, 10 Ind. Cas. 556, 10 C. 1035, 11 I.A. 126, R.)

(229)—*Sub-mortgagee, right of, to a decree for sale of his mortgagor's interests—Suit by sub-mortgagee for such a decree, parties necessary for.*—Suit by a sub-mortgagee for recovery of money due on his sub-mortgage by sale of the rights of the plaintiff's mortgagor, i.e., the original mortgagee. In the Court below no objection was taken to the suit on the score of the want of necessary parties, but on appeal, it was contended that the original mortgagor should have been made a party. *Held*, that the contention could not be considered in appeal and ought to have been put forward in the Court of first instance. *Held*, also, that a sub-mortgagee is entitled to a decree for sale of his mortgagor's interest and may even obtain a decree for sale of the original mortgagor's interest. *SITA RAM v. KASHI*, 9 O.C. 233. (27 A. 511, 18 A. 113, 5 O.C. 335, 20 M. 35, F.)

(230)—*Prior and puisne mortgagee—Purchase by each at sale on his mortgage—Rights inter se—Suit for possession by prior mortgagee—Maintainability—Right of puisne mortgagee and purchasers not made parties in mortgage suit to redeem—Partial redemption—Redemption, price of—Mode of calculation—Interest, rate of—Payments made by subsequent mortgagee to save property from rent sale, if to be taken into account—Contract Act (IX of 1872), s. 69—Bengal Tenancy Act (VIII of 1885), s. 171.*—A first mortgagee obtained a decree for sale of the mortgaged properties and purchased the same in execution, but, when he proceeded to take possession, was successfully resisted (i) by a second mortgagee, who had meanwhile sued on his mortgage, obtained a decree and purchased some of the properties in execution, and (ii) by certain other persons, who had purchased some of the other properties from the mortgagor. None of these had been made parties in the first mortgagee's suit, the latter not having had notice of their interest in the mortgaged properties. *Held*—that it was not obligatory on the first mortgagee to institute a fresh suit for sale on his mortgage against these persons, and a suit for recovery of possession of the properties, on the basis of his purchase, was maintainable. (9 C.W.N. 728=32 C. 891, F.; 21 A. 301, 22 A. 394, R.) That, if the defendants wanted to retain possession, they must redeem the plaintiff, but as the plaintiff was both mortgagee and purchaser, the defendants were not bound to redeem the entire mortgage, but only to the extent of the properties purchased by them. (2 C.L.J. 202, 7 C.W.N. 723=30 C. 755, R.) That, to redeem the plaintiff, it was not sufficient for the defendants to pay a proportionate share of the purchase-money paid by him. The amount payable must be calculated on the basis of the plaintiff's mortgage. But inasmuch as the

Mortgage—continued.**—1.—General—continued.**

plaintiff had already enforced that mortgage, and the mortgage-debt had been thereby converted into a judgment-debt, he was entitled to the contract rate of interest, only up to the date of the decree in the previous suit, and interest at the Court rate subsequent thereto up to the date of payment, to be fixed by the decree in the present suit. (10 C.W.N. 592=33 C. 590, 11 C.W.N. 249=5 C.L.J. 106, F.; 8 C. 79, Not F.; 16 I.A. 129=17 C. 23, 17 I.A. 201=18 C. 164, 21 I.A. 1=21 C. 366, R.) *Held*—that, in taking accounts, credit ought not to be given to the defendants for payments alleged to have been made under s. 171, Bengal Tenancy Act, to save the properties from sale, in execution of a rent decree, inasmuch as the first mortgagee was not bound by law to pay the amount, within the meaning of s. 69 of the Contract Act. *GANGADAS BHATTAR v. JOGENDRA NATH MITTER*, 11 C.W.N. 403=5 C.L.J. 315. (22 C. 800, R.) [Diss., 31 M. 258=18 M.L.J. 344=4 M.L.T. 293; R., 6 C.L.J. 612=12 C.W.N. 107, 5 C.L.J. 611.]

(231)—*Prior and subsequent incumbrances—Sale under decree on prior mortgage—Subsequent suit for sale in satisfaction of puisne mortgages.*—*Semble* that a mortgagee, who holds several mortgages from the same mortgagor over the same property, cannot, after obtaining a decree for sale on his first mortgage, bring the mortgaged property to sale, notifying the existence of the other mortgages, and then, when the property has been sold, institute a fresh suit for sale of the same property, on the basis of the puisne mortgages. *GODHA SHUKAL v. SALAKA KUNWAR*, A.W.N. 1907, 83=4 A.L.J. 253.

(232)—*Sub-mortgagee bringing suit and purchasing the rights of his mortgagor—Suit for possession—Notice of sub-mortgage.*—The plaintiff obtained a sub-mortgage of the 2nd defendant's interest under a usufructury mortgage from the first defendant in 1892. He sued on this sub-mortgage and obtained a decree for the sale of the mortgaged property as well as a personal decree. In execution, the land mortgaged to the 2nd defendant under the mortgage of 1892 was put up for sale and purchased by the plaintiff and he obtained possession, but was dispossessed under s. 335 of the Code of Civil Procedure, 1882, at the instance of the 1st defendant who alleged that the mortgage had been redeemed. In a suit by the plaintiff to recover possession, it was *held*, that as the rights of a sub-mortgagee could not be affected by transactions between the original mortgagee and the mortgagor effected after notice of the sub-mortgage, the plaintiff was entitled to the possession of the lands, and that, he could not be met by the plea of payment of the original mortgage after the date of the sub-mortgage, when the same had not been made before notice of the sub-mortgage. *NARAYANA MUDALI v. RAGHAVAMMAL*, 18 M.L.J. 462.

Mortgage—continued.**—1.—General—continued.**

(233)—*Subsequent mortgage, effect of.*—A subsequent mortgage of the same lands with other lands for the same debt does not, in the absence of any intention to that effect, *per se*, extinguish the earlier mortgage or lower its priority. *GOLUKNATH MISSER v. LALLA PREM LAL*, 3 C. 307. [Appl., 10 B. 88; R., 13 B. 348, 16 C. 523, A.W.N. 1886, 18.]

(234)—*Effect of payment of prior mortgage by subsequent encumbrances as against intermediate charge—New relief claimed for the first time in appeal—General relief, Prayer for, Effect of.*—One of the defendants, S, the proprietor of a village, mortgaged it to G. P. After that, in January 1890, he sold the property to his mother, his wife, and D, his son's wife. In March 1890, he executed another mortgage to G. P., in substitution of the former deed. G. P. sued S. and the three women for possession of the village, and was duly placed in possession. S's mother and the wife of D died, and D became proprietor of 2/3rds of the village. In May 1893, D mortgaged 2/3rds of the village to the plaintiff. In June 1893, D, S. and S's wife sold the village to the second defendant B for Rs. 7,000 of which Rs. 3,800 were left with him wherewith to pay off G. P. In March 1894, B purchased all the rights of G. P. In October 1895, the plaintiff instituted the present suit against D, B, and S for recovery of his mortgage-money by sale of the property mortgaged to him. *Held*, that B, the vendee of the mortgagor, having acquired the right of the first mortgagee, was as much entitled to use it as a shield against the second mortgagee as is a first mortgagee who has acquired the rights of the mortgagor. *Held*, also, that, in such a case as this, the second mortgagee must redeem the first mortgage before he can put the property up for sale. The plaintiff did not in his plaint expressly ask to be allowed to redeem the defendant's mortgage, nor was the point taken in his grounds of appeal; but in the course of his argument he asked that, if the mortgaged property could not be sold subject to the first mortgage, he might be permitted to redeem the first mortgage and then put the property up for sale. *Held*, that under a prayer for general relief contained in the plaint, such permission might be granted to the plaintiff. *GUR PARSHAD v. SAH BINDRABAN DAS*, 3 O. C. 254.

(235)—*Payment of mortgage amount by third person to mortgagee—Rights of such person—Presumption of succession to all rights of mortgagee—Previous suit to recover possession of mortgaged land—Omission to plead rights as mortgagee—Subsequent suit—Res judicata—Civ. Pro. Code, s. 13, Expl. II*—Suit to recover a sum of money due on a mortgage originally entered into between the defendant and one S. It was alleged that the benefit of the mortgage had been transferred by the defendant to her brother-in-law, the present plaintiff, in consideration of his having paid to S, the amount secured by the mortgage. The lower Courts found

Mortgage—continued.**—1.—General—continued.**

as a fact that the plaintiff paid the money, out of his own funds, to S. Plaintiff contended that he held the position of an equitable mortgagee and that he succeeded to all the rights possessed by S under his mortgage. *Held* that under the circumstances of the case, as the plaintiff had paid the mortgage amount to S, there was a strong presumption that it was the intention of the parties that the plaintiff was to hold the same position as that held by S as mortgagee. [R., 32 P.R. 1903.] It was further argued on behalf of the defendant that if plaintiff had obtained the rights of a mortgagee in 1876, he would have pleaded this in a suit against him which the present defendant had brought against him in 1879 to recover possession of the mortgaged land. It was, however, held that nothing could be inferred against him from the fact that, in the former suit, he did not plead his rights as mortgagee. The contention that the present plaintiff (defendant in the former suit), not having set up his title as mortgagee as a defence to that suit, was debarred by s. 13, Civ. Pro. Code, Expl. II, from maintaining the present suit based upon the allegation that he was the mortgagee, was held by the Chief Court to be untenable. The former suit was brought by the present defendant to obtain possession of the land; the defendant (now plaintiff), never contended that he was under the terms of his mortgage entitled to possession of the land, and the defence that he was mortgagee would have been no answer to the former suit for possession unless he could have shown that, as mortgagee, he was entitled to retain possession. *SHEIKH MEHR ALI v. MUSSAMMAT AZIM BIBI*, 59 P.R. 1882. [R., 32 P.R. 1903.]

(236)—*Mortgagee accepting deed of further charge from some of the mortgagors, effect on integrity of original mortgage.*—*Held*, that the integrity of the original mortgage was not destroyed by the mortgagee's acceptance of a deed of further charge executed by some only of the original mortgagors secured on their own share of the mortgaged property. *THAKUR SINGH v. JANGI SINGH*, 11 O.C. 73. (6 O.C. 279, R.)

(237)—*Substitution of new mortgage in place of old mortgage—Interest of persons in old mortgage subsists in new mortgage.*—A mortgage was executed in the name of one of several brothers. Subsequently a partition took place amongst the brothers, by which all joint property, except the debts secured by this mortgage, was separated. After partition, the brother, in whose name the mortgage-deed stood, got it replaced by another mortgage-deed. *Held*, that the mortgage substituted for the original mortgage must be deemed to be a mortgage executed in favour of all the brothers and must enure for the benefit of all. *SAT NARAIN TEWARI v. GANGA PARSHAD alias BABAN TEWARI*, 1 Ind. Cas. 117.

(238)—*Claim by puisne incumbrancer—Prior incumbrancer party defendant—Lien of prior*

Mortgage—continued.**—1.—General—continued.**

mortgagee—Apportionment among several properties.—While the Court may, in a suit where a prior incumbrancer is a party defendant, either order that the sale of the property should be held subject to the prior mortgage or that it should be sold free from the incumbrance of that mortgage if the prior incumbrancer so consents, there is no adequate authority for holding, in a suit brought by a second mortgagee to bring to sale one out of several properties over which the first mortgagee holds a lien, that the first mortgagee can be compelled to assent to an apportionment of his lien among the different properties. *MA KYAW v. MA SHWE ME*, 1 L.B.R. 210. (25 W.R. 388, 9 C. 406, 22 C. 33, D.)

(239)—*Prior and puisne mortgagees—Third mortgagee advancing money to pay off first mortgage—Preferential right of third mortgagee over the second mortgagee—Money advanced to pay off prior mortgage—Presumption.*—The presumption, generally speaking, in the absence of any evidence to the contrary, is that a person, whose money goes to satisfy a prior mortgage, intends to keep alive that prior mortgage for his own benefit. (10 C. 1035, P.C., 3 C.W.N. 153, 4 C.W.N. 469, F.) So where a third mortgagee advanced some money, which was devoted to paying off the first mortgage, *held*, he would have a preferential right over the second mortgagee, and he would be entitled to a mortgage lien on the property in respect of the amount advanced by him. *SOOBAMANIAN CHETTY v. AGA RAJAT ALLY KHORASANI*, 5 L.B.R. 138.

(240)—*Mortgage — Joint mortgagors — Co-mortgagor, satisfaction by—Subrogation, extent of, right of—Interest—Tender—Part-payment—Deposit in Court—Appellate Court determining a larger sum to be due—Interest.*—When one of several mortgagors redeems the whole mortgage, he acquires a charge on the share of each of his co-mortgagors for his proportion of the expenses properly incurred in redeeming the property. He is, however, not entitled as a matter of right to claim interest on the redemption money at the mortgage rate, from the date when he makes the payment to the date of realization. The right of subrogation is founded on equitable principles, and the extent to which subrogation would be carried in any particular case must be determined on equitable considerations. The principle that a mortgagee is not bound to accept any sum in part satisfaction of his decree applies only to cases where there is no dispute as to what is due. (16 B. 141, Appl.). Where a mortgagor brought into Court the whole sum found due by the Court of first instance, and, upon an appeal by the mortgagee, the appellate Court determined a larger sum to be due: *Held*, that the sum deposited operated as a payment *pro tanto* and interest would run after deposit only upon the difference. *DIGAMBAR DAS v. HARENDRA NARAIN PANDAY*, 11 C.L.J.

Mortgage—continued.**—1.—General—continued.**

226 = 5 Ind. Cas. 165 = 14 C.W.N. 617. (28 A. 482 = 33 I.A. 81, Appl.)

(241)—*Mortgage—Purchaser from mortgagor in possession—Dispossession by purchaser under money decree against mortgagor.*—A person who has subsequently purchased a property in execution of a simple money decree against a mortgagor cannot summarily oust a prior purchaser of the rights of the mortgagor who obtained possession of the property prior to the said decree. *GOPEE MUHTOON v. JHUGOO MUHTOON*, 9 W.R. 150. [R., 6 B. 168, F.B.]

(242)—*Mortgage of joint property, by receiver, pending partition suit—Attaching creditors of certain portion of the property, if entitled to priority over mortgagee.*—The question in this case was whether the attaching creditors of the shares of certain of the co-parceners of a joint estate were entitled to priority over a mortgage executed by a Receiver pending a partition suit between the co-parceners. It was urged that the mortgage executed by the Receiver having been subsequent to the attachment, it must be held to be subject to them, and that the attaching creditors were, therefore, entitled to priority. *Held*, that it was immaterial what were the dates of the order under which the mortgage in question was executed or of the mortgage itself. The point was as to whether the suit for partition of the joint estate was pending at the time of the attachments, and, if it was, then, even if the order of the Court and the mortgage executed under that order had been subsequent to the attachment, the mortgagee would still be entitled to priority, because it would otherwise be impossible for the Court to carry into effect a partition of the joint estate, if particular creditors of particular owners could be heard to say that they are entitled to priority over persons, who have advanced money for the purpose of the partition, and on the faith of the Court's order giving them a first charge on the property to be partitioned. *HERUMBOO NATH BANERJEE v. SATISH CHANDRA MUKERJEE*, 33 C. 1175.

(243)—*Mortgage — Party paying off prior mortgagee, right of, to charge on mortgage lands.*—Where after an agreement by the owner of certain land to sell the same to the defendant, plaintiff got the lands conveyed to himself by the owner by means of an antedated conveyance and pending a suit by the above defendant for specific performance of the contract with him, plaintiff paid off certain subsisting prior mortgages on the land, plaintiff was held to be entitled to a charge on the land to the extent of the amount of the prior encumbrances discharged by him. The illegality of the plaintiff's act in getting his sale-deed antedated for the purpose of supporting his title could not vitiate the payment subsequently made by him, which was in itself legal. *SYAMALARAYUDU v. SUBBHARAYUDU*, 21 M. 143. [F., 31 M. 439 = 18 M.L.J. 306 = 3 M.L.T. 395; R., 6 M.L.T. 162, 19 M.L.J. 489.]

Mortgage—continued.**—1.—General—continued.**

(244)—*Mortgage—Right to question validity of—Auction-purchaser—Property sold subject to mortgage.*—Where, in execution of a decree, property is sold subject to mortgage, an auction-purchaser, not being the decree-holder, who purchases the right, title and interest only of the judgment-debtor, is not entitled to raise any question as to the validity or otherwise of the mortgage. **RAM CHARAN MISIR v. BHAGWAN DAS**, 7 A.L.J. 199=5 Ind. Cas. 874.

(245)—*Purchase of sub-mortgage—Rights and liabilities under.*—The purchasers of a sub-mortgage may retain possession of the mortgaged premises till the amount due under the sub-mortgage is repaid and need not look to their transferor, their original mortgagee for remedy. **CHELA RAM v. WALIDAD**, 31 P.R. 1900, F.B.

(246)—*Mortgage—Subrogation, Principle of—When applies—Covenant for discharge of prior incumbrance—Discharge of puisne incumbrance by payment out of purchase-money—Presumption of intention to keep alive—Rebuttal.*—The rule as to subrogation only applies when the purchaser has not covenanted to discharge the previous incumbrance. As the principle of subrogation by payment to the prior incumbrancer rests upon the presumption of an intention to keep alive the first mortgage as a shield against the puisne incumbrancer, it is safe to hold that that presumption is rebutted when the transaction in question contemplates the discharge of the puisne incumbrancer by payment out of the purchase-money. **Govindasami Thevan v. T. M. Doraisami Pillai**, 20 M.L.J. 380=6 Ind. Cas. 781=8 M.L.T. 132. (10 C. 1035, 2 C.L.J. 288, 6 C.L.J. 134, 17 M. 62, 30 M. 67, R.) [F., 9 M.L.T. 258=9 Ind. Cas. 139]

(247)—*Mortgage debt paid by third party—Subrogation—Third party's right—Right to stand in mortgagee's shoes—Taking mortgage bond, if necessary—Title of purchaser at auction-sale—Sale by judgment-debtor after auction sale but before issue of sale certificate—If title of auction purchaser defeated—Civ. Pro. Code (Act XIV of 1882), s. 316.*—When a mortgage debt, for the payment of which a sale has been ordered, is satisfied by a third party who, when he makes the advance to satisfy the debt, obtains a security over the mortgaged property, the security created by the original mortgage-debt is not extinguished, and the original encumbrance, in respect of which the sale was ordered, enures to the benefit of the party making the payment (28 A. 778, 3 A.L.J. 630, A.W.N. 1906, 230, 29 M. 37, Rel. on.) But if the third party, when advancing the money, fails at the time to take any charge on the mortgaged property as security for his loan, but subsequently takes a mortgage over the same property, he is not entitled to claim that the second mortgage is a mortgage in continuation of the original mortgage which he has discharged, and the result is that he is not entitled

Mortgage—continued.**—1.—General—continued.**

led to step into the shoes of the original mortgagee. And if, in the interval, that is, between the advance made by him and the taking of the security subsequently, the property is transferred, his rights must be subject to that transfer. The title of an auction purchaser cannot be defeated by any transfer made by the judgment-debtor between the date of the sale and the date of the confirmation of the sale. **Ram Saran Singh v. Khakhan Singh**, 8 Ind. Cas. 657. (15 C. 546, 24 A. 475, A.W.N. 1902, 145, R.; 2 C.W.N. 589, 7 C.L.J. 1, F.)

(248)—*Mortgage—Subrogation—Presumption of intention—Interest—Costs, if part of decree.*—Where the kobala by which mortgaged properties were sold recited certain mortgages which were paid off out of the purchase-money, and the mortgage bonds were preserved by the purchaser. Held that there was a presumption of subrogation of the purchaser to the rights of the mortgagees; Held further—that, in order to establish right by subrogation, it was not necessary for the purchaser to prove any intention or agreement to subrogate, and the presumption from the circumstances would be in his favour. Where the contract rate of interest is not proved to be a penalty or unconscionable, the Court should not disturb it. Costs form a part of the entire decree and carry Court rate of interest. **PRAYAG NARAIN KAFRI v. CHEDI RAI**, 14 C.W.N. 1093.

(249)—*Mortgage—Subrogation—Presumption of intention—Legal and equitable claim, if both may be urged together.*—The principle of subrogation is one based on a presumption of intention which may be supported by circumstances or evidence of assignment or agreement or both. Where a debt on a mortgage decree obtained by N was paid off by money paid by plaintiff, for which the defendant executed a fresh mortgage bond, at an increased rate of interest, which recited the necessity for paying off the decretal debt, and which whilst actually mentioning one of three mesne mortgages falsely stated that the property was otherwise free from encumbrance: Held—That the plaintiff stepped into the shoes of N on the principle of subrogation and had priority over the mesne mortgagees. Subrogation by intention confers an equitable right and subrogation by agreement a legal claim. It is therefore open to a party to base his claim on both intention and agreement. **TARA SUNDARI DEBI v. KHEDAN LAL SAHU**, 14 C.W.N. 1089. (5 C.L.J. 611, D.; 6 C.L.J. 134, R.)

(250)—*Mortgage—Priority—Subrogation—Lis pendens—Keeping alive earlier mortgage—Intention—Presumption.*—Where the plaintiff's mortgage was subsequent to, and taken during the pendency of, the mortgage suit instituted by defendant No. 4, but the monies lent on the plaintiff's mortgage went towards the payment of prior mortgages, which though subsequent to the mortgages of the defendant No. 4, were prior to the mortgage suit of the defendant No. 4; held that there was no new transaction nor

Mortgage—continued.**—1.—General—continued.**

dealing with the property during the pendency of the suit, that all that happened was that the plaintiff took over mortgages which had come into existence prior to the mortgage suit of defendant No. 4 and thereby become subrogated to the rights of those mortgagees, who obviously could not have been bound by the doctrine of *lis pendens*, and that the plaintiff also could not have been so bound; *Held*, also, that, in the absence of evidence to the contrary, the presumption is that the plaintiff intended to keep those earlier mortgages alive for his benefit. **TARA PROSAD MANDAL v. KRISTO PROSAD PANDA, 7 Ind. Cas. 473.**

(251)—*Co mortgagor paying off whole debt—Charge upon the other co-mortgagor's property for his proportion of the debt—Priority over mortgage by latter of subsequent date—Subrogation—Transfer of Property Act (IV of 1882), ss. 82, 95 and 100.*—One out of two co-mortgagors is under no obligation, as between himself and the co-mortgagor, to pay the latter's share of the debt. As he cannot redeem the mortgage piece-meal, he is bound to pay the whole amount of the mortgage, and if he does so, he is, by such payment, subrogated to the rights of the mortgagee and is entitled to priority over subsequent mortgagees from his co-mortgagor. A mortgagor who discharges a simple mortgage acquires a charge on the property of his co-mortgagor comprised in the mortgage for a rateable share of the debt. **HAR PRASAD v. RAGHUNADAN PRASAD, 6 A.L.J. 67=31 A. 166=1 Ind. Cas. 825=6 A.L.J. 832.** (26 A. 227, F.) [R., 11 C.L.J. 226=14 C.W.N. 617, 5 Ind. Cas. 165.]

(252)—*Mortgage—Prior mortgage, extinguishment of—Parties, intention of—Effect of payment of prior mortgage by subsequent mortgage—Subrogation.*—The appellant held a mortgage of 25th June 1889, while the respondents had a mortgage, dated the 14th April 1888. The appellant, however, had, in accordance with the terms of his mortgage-deed, satisfied two earlier mortgages, dated respectively 26th June 1886, and 28th June, 1887. In a suit for sale brought by the appellant on foot of his own mortgage, he claimed priority in respect of the amounts of these two earlier mortgages. *Held*, that the intention was that the earlier mortgages were to be kept alive for the benefit of the appellant and that he was entitled to priority. (10 C. 1035, 29 C. 154, 33 C. 1133, F.) *Held*, also that, in making the payment, the appellant did not act as the agent of the mortgagor. (27 A. 400, A.W.N. 1907, 85, Diss.) *Held*, further that the appellant was entitled to put forward in his suit the right which he had acquired by paying off the earlier mortgages. **GUR NARAIN v. SHADI LAL, 8 A.L.J. 1289=12 Ind. Cas. 607=34 A. 102.**

(253)—*Subrogation—Lien of auction-purchaser of land—Paying off mortgage-money—Purchaser in possession—Sale set aside.*—A purchaser at auction of land who, while in possession, pays off a pre-existing encumbrance

Mortgage—continued.**—1.—General—continued.**

on the property, is entitled to stand in the shoes of the mortgagee, whom he has paid off, although the auction-sale under which he purchased is subsequently set aside. **KESRI MAL v. MUBARAK HUSAIN, 8 A.L.J. 663=10 Ind. Cas. 556.**

(254)—*Decree on mortgage bond—Immoveable property.*—A decree obtained on a mortgage of immoveable property, is not immoveable property. **GOUS MAHOMED v. KHAWAS ALI KHAN, 23 C. 450.** [Rel. on, 6 C.W.N. 5; R., A.W.N. 1904, 141=26 A. 603, 18 P.R. 1909=22 P.W.R. 1909=1 Ind. Cas. 450.]

(255)—*Construction of decree—Mortgage-decree—Direction to pay—Personal liability.*—A direction that the defendant do pay a certain sum of money *prima facie* imposes a personal liability, though no doubt the words are not conclusive of the question. It may be that other clauses of the decree, if read together with such direction, might show that all was meant by what is *prima facie* a direction was to declare the amount for which the defendant was liable and the only immediate remedy intended to be given was against the mortgaged-property. A mortgage-decree, that gives concurrent remedies against the mortgaged-property and the judgment-debtor personally, is not in accordance with the Transfer of Property Act, but such a decree cannot be said to be null and void. It is only irregular in form, and if allowed to remain unimpeached cannot be called in question in execution. **THE RAJAH OF KALAHASTI v. RAJAH KUMARA VENKATA PERUMAL RAJ, 2 M.W.N. 1911, 458=10 M.L.T. 429=21 M.L.J. 1036=12 Ind. Cas. 689.**

(256)—*Mortgage, decree nisi—Application for order absolute—Receiver, appointment of plaintiff as—Accounts, examination, of receiver—Order absolute, if can be made before examination of accounts—Jurisdiction of Court which made the decree nisi which was varied on appeal to the High Court—Order absolute, if a decree and appealable as such—Transfer of Property Act (IV of 1882), s. 99—Order for the examination of accounts, interlocutory if decree—C. P. C. Act V of 1908), O. 34, r. 5, sub-rule 2—Practice—Decree, form of.*—An order granting or refusing an application for order absolute is a decree within the meaning of the C. P. C., and is appealable as such. (29 C. 651, 10 C.L.J. 91, R.) An interlocutory order for the examination of the accounts of a receiver cannot be treated as an adjudication of any right, claim or defence set up and is not a decree. An application for order absolute is to be presented to the Court which made the decree nisi sought to be made absolute, and even if the preliminary decree has been made in modification of the order of the Court of first instance by a Court of appeal, the application for order absolute may, both according to the practice of this Court and in law, be made to the Court of first instance which made the decree nisi; there is nothing in the law which requires

Mortgage—continued.**—1.—General—continued.**

that the application should be made to the Court of appeal. (23 A. 88, 31 A. 328, 23 M. 521, 25 C. 133, 12 C.W.N. 1028, R. & F.) In a mortgage suit in which a receiver of rents and profits has been appointed, the judgment ought to direct that in taking the account, the plaintiff should be charged with the amount, (if anything) paid into Court by the receiver, and with such a sum as should be in the receiver's hands, at the date of the certificate, and with such a sum (if any) as the plaintiff should submit to be charged with in respect of rents and profits to come into the receiver's hands prior to the order absolute. (11 C.L.J. 81, 155, *Expl. & Diss.*) The receiver appointed in the course of a mortgage suit should ordinarily be an indifferent person between the parties to the suit, one who has no pecuniary interest of his own, which might conflict with the duties of his office. The propriety of appointing the mortgagee himself as receiver, is extremely doubtful, and it would be prudent on the part of a plaintiff mortgagee if he does not accept the office of receiver. If, however, a plaintiff mortgagee accepts the office of receiver, he is liable to account, and the sums, if any, received by him must be applied towards the discharge of the judgment-debt, before he can obtain an order absolute for sale. If the mortgagee is himself the receiver, the sums actually realized or which with due diligence might have been realized by him, should be set off against the judgment-debt. **SHAMULDHUN DUTT v. LAKHIMONI DEBI, 18 C. L. J. 459 = 6 Ind. Cas. 323.**

(257)—*Mortgage—Decree under award upon—Choice left to proceed either against mortgaged property or against other properties and person—Execution—Right to proceed first against person—Transfer of Property Act—Non-applicability to Sind—Award—Objections to filing of—Not taken when filing—Non-maintainability before execution Court—Validity of decree—Executing Court not entitled to question.*—Where a mortgage-decree passed upon an award left it to the choice of the plaintiff to proceed first either against the person or against the mortgaged-properties—*Held*, that the judgment-debtor had no right to claim that the mortgagee should realize his security first. The mortgagee is at liberty to proceed in execution under the same decree either against the secured or unsecured property. (26 A. 25, 34 B. 540, 22 C. 813, 26 C. 166, 2 C. 213, 4 A. 497, R.) The Transfer of Property Act, 1882, has no application to Sind. (2 S.L.R. 244, *Doubt.*) Where a decree has been passed upon an award, a Court of execution can neither consider objections which might perhaps have been raised to the filing of an award nor question its validity. **GULAM MURTIZAKHAN, SON OF SERAI MAHAMED NAWAZKHAN v. CHANGOMAL BHOJRAJ, 5 S.L.R. 71. (12 Bom. L. R. 1074, 22 B. 475, F.)**

(258)—*Mortgagor and mortgagee—Final decree—Accounts—Execution—Legality—Accounts between a mortgagor and mortgagee*

Mortgage—continued.**—1.—General—continued.**

should be taken by the Court before passing a final decree. A provision in the judgment for taking account between the parties in execution is not in accordance with law. **VARID SAHAYAM FERNANDEZ v. RENCHORDIN KHEKI, 1912 M.W.N. 400 = 15 Ind. Cas. 362.**

(259)—*Mortgage decree-holder's right One of the mortgage items shown to belong to a stranger—Mortgagee not bound to attempt to sell it, before proceeding against the judgment debtor's properties.*—A mortgage decree-holder is not bound to make attempts to sell properties which are shown to belong to persons other than the judgment debtor, before he can proceed against the properties of the judgment debtor. **KASI KRISHNAMA CHARIAR v. BOGI-AMMAL, 2 M.W.N. 1911, 355 = 10 M.L.T. 525 = 22 M.L.J. 125 = 12 Ind. Cas. 439. (17 M. 509, 29 A. 369, F.)**

(260)—*Mortgage decree, whether attachment necessary for execution of—Attachment of property—Application for removing attachment Civ. Pro. Code, s. 278.*—It is not necessary for a mortgage decree-holder to attach the property which forms the subject of the mortgage. But even if such decree-holder has taken out an attachment which it is not necessary for him to do, s. 278, C.P.C., is not applicable; and so, no application will lie under that section for the removal of the attachment. **GOBALU v PO HLA, 4 L.B.R. 82 = 14 Bur. L.R. 201. (4 C. 631, R. & F.; 1 C.L.J. 42, 20 C. 682, R.)**

(261) — *Co-sharers—Mortgage of shares—Agreement to receive allowance.*—Where a Mahomedan widow, her two minor sons and six relatives were entitled by inheritance to certain property originally belonging to a paternal ancestor of the sons, and the six relatives received instead of their shares a commuted allowance, *held* that the holder of a money decree on a mortgage-bond in which the widow and the six relatives had jointly pledged their interest in the property for the payment of money, could, as against the sons, sell the seven shares in execution of his decree, it not appearing that the agreement to accept the commuted allowance was irrevocable or that that agreement had not been entered into with the widow alone. **KALLY PROSAD ROY v. SYED SARFERAZ ALLI, 1 C.L.R. 399.**

(262)—*Mortgage bond—Money decree, sale under—Lien.*—A mere money decree upon a mortgage bond gives the judgment-creditor the power of selling the mortgaged property with the lien, in the same way as a decree with express power to sell the mortgaged property. **HURRI MOHUN BAGCHI v. GRISH CHUNDER BUNDOPADHYA, 1 C.L.R. 152.**

(263) — *Mortgage decree—Execution—Purchaser—Failure to get possession—Suit to recover possession—Obstruction by person interested not made party in mortgage decree—Who is to retain possession.*—The purchaser at a sale

Mortgage—continued.**—1.—General—continued.**

in execution of a mortgage-decree, if he fails to get possession or is dispossessed, is entitled to recover possession by suit from a person interested but excluded from the mortgage-action, subject to that person's right to redeem. **SALIMUDDI HOWLADAR v. UZIR MAHOMED HOWLADAR, 13 Ind. Cas. 299.**

(264)—*Mortgage-decree—Sale for arrears of revenue pending suit—Attachment of sale-proceeds, if satisfaction.*—Where the surplus sale-proceeds, in the hands of the Collector, of a mortgaged property sold for arrears of revenue, after the preliminary decree passed in the mortgage suit, was attached in execution of that decree, and subsequently the decree was made absolute. *Held*—That, so soon as the decree was made absolute, the sum attached became available to the decree-holder, and to that extent the decree was satisfied to that date. **GOPI KRISHNA MANDOL v. RAM LAL MANDOL, 14 C.W.N. 484 = 5 Ind. Cas. 524 = 12 C.L.J. 468.** (33 C. 846, D.; 10 C.L.J. 150, R.)

(265)—*Decree on mortgage—Sale in execution—Purchase by decree-holder—Obstruction in taking possession by alleged purchaser—Fresh suit on mortgage.*—The plaintiff, a mortgagee, obtained a decree for sale on her mortgage, and in execution purchased the mortgaged-property; on coming to take possession she was opposed by the defendant on the allegation that she had purchased the mortgaged-property from the mortgagor. This was the first time the plaintiff heard of the sale and she now brought a suit on the mortgage-bond:—*Held*, that the plaintiff is entitled to sue the purchaser in possession, of whose possession she had no notice, on the mortgage as long as she is in time, and a suit for possession giving the defendant an opportunity to redeem would only be an alternative course of action involving precisely the same issues. **BADAM KUMARI DASI v. HARI DASI DASI, 11 Ind. Cas. 74 = 16 C.L.J. 38.** (14 C.W.N. 346, 5 Ind. Cas. 710, Rel. on.)

(266)—*Suit for recovery of mortgage-debt—Form of decree in use before the passing of the Transfer of Property Act—Attachment of non-mortgaged property—Effect of such attachment.*—In a suit for recovery of mortgage-debt, a decree was passed, before the coming into force of the Transfer of Property Act, 1882, in favour of the plaintiff, declaring the amount due to him and that he had a lien on the property of the mortgagee for the amount so found to be due. In execution of that decree, the judgment-creditor attached certain property of the judgment-debtor other than the mortgaged property. This property was, in due course, sold, and subsequently certain mortgagees, who had taken a mortgage thereof pending the attachment, sued to have the sale set aside. *Held*, that, owing to the form in which the original decree was passed, the judgment-creditor had full power to attach and bring to sale in execution thereof any property of his judgment-debtor. **RAM EARAN SINGH v. GOBIND SINGH, A.W.N. 1906, 7 = 3 A.L.J. 95 = 28 A. 295.** (2 C. 213, F.)

Mortgage—continued.**—1.—General—continued.**

(267)—*Decree nisi—Hypothecation of bullocks.*—On the 11th April, 1897, defendants passed to plaintiff a bond promising to return three *khandies* of paddy with an increase of 50 per cent., and hypothecated without possession two bullocks as security for the debt. The plaintiff sued to recover the value of three *khandies* of paddy (not the paddy in specie) by the sale of hypothecated bullocks. The defendants admitted the debt but prayed for instalments. *Held*, (1) that the proper decree in the case would be a decree *nisi* in the first instance, for the replacement of paddy and in case of default for the sale of existing hypothecated property with liberty to apply in case the amount is not realized: the decree to be made absolute on the expiration of six months, as an ordinary mortgage of lands; (2) that as six months were allowed for payment the question of instalments did not arise. **SHIVRAM v. BHAU, 4 Bom. L.R. 577.**

(268)—*Mortgage-decree—Interest at contract rate allowed up to date of realization.*—Interest must be allowed at the stipulated rate up to the date of realization. **GANGA RAM MARWARI v. JAIBALLA NARAIN SINGH, 30 C. 953.** (26 C. 39, P.C., 23 A. 181, F.)

(269)—*Mortgage—Interest — Whether mortgagee entitled to interest at Court rate or contract rate.*—Mortgagees are entitled to interest calculated according to the mortgage-deed, and not according to the decree. **VENKATASAMI NAICKEN v. RAMANATHAN CHETTIAR, 7 M. L.T. 194 = 5 Ind. Cas. 916.** (18 C. 164, P.C., F.; 5 C.L.J. 315, 31 M. 258, R.)

(270)—*Suit for enforcement of mortgage security—Compound interest, covenant to pay, if enforceable — Mortgage-decree — Interest after date fixed for repayment, Power of Court to grant—Civ. Pro. Code (Act XIV of 1882), s. 209—Practice of Court—Discretion of Court in matters of interest in special cases.*—When a decree has been made on the basis of a mortgage and a date for payment of whatever might be due thereupon has been fixed in the decree, the matter in controversy passes from the domain of contract into the domain of judgment. The decree decides finally the rights and liabilities of the parties, which must thenceforth be ascertained by a reference to the decree and to the decree alone. It is not open to either party to go behind the decree and rely upon the terms of the original contract. The interest to be allowed after the date fixed for payment should have regard to the aggregate sum due on that date and not merely the principal amount mentioned in the mortgage-bond. (24 C. 150, 5 C.L.J. 106, F.) According to the usual practice, interest is no doubt allowed at 6 per cent. after the date fixed for payment, and although the Court would hesitate in any ordinary case to depart from what has been the well-settled practice as to the rate of interest in mortgage suits after the date fixed in the decree for payment, there can be no question that, in any special case where the circumstances justify a

Mortgage—continued.**—1.—General—continued.**

reduction in the rate of interest, the Court would be prepared to make the necessary order in the interests of justice. *MANAGI SINGH v. SAHEB RAM SINGH*, 10 C.L.J. 203. [F., 3 Ind. Cas. 300.]

(271)—*Suit to recover interest and compound interest—Mortgage—Construction—Remand.*—The plaintiffs sued to recover from the defendants the unpaid amount of interest due to the plaintiffs from the 21st July 1898 till the 21st July 1903, on the amount payable to the latter under a registered mortgage-bond dated the 21st July 1893 passed by the defendant No. 1 for himself and as manager of his joint family to the plaintiffs' deceased father, together with another amount representing compound interest on Rs. 1,200 accruing due every year during the said period as stipulated in the bond. There were various pleas raised in defence, and the first Court after considering fourteen issues substantially decreed the suit. But on appeal the High Court dismissed it on the ground, that upon a proper construction of the mortgage bond, there was no personal covenant on the part of the mortgagor to pay interest from year to year, and that therefore, the plaintiffs were not entitled to bring the suit. *Held*, reversing the High Court, that there was a covenant in the mortgage-bond to pay interest from year to year and that the case should be remanded to the High Court so that the other issues might be dealt with. *MADAPPA HEDGE bin GANAP HEGDE v. RAMKRISHNA NARAIN BHAT*, 2 M.W.N. (1911), 1 P.C. = 13 Bom. L. R. 698 = 14 C.L.J. 243 = 15 C.W.N. 962 = 35 B. 327 = 12 Ind. Cas. 42.

(271-a)—*Mortgage—Members of Mitakshara family—Father, appointment of, as guardian ad litem, validity of—Novation of contract—Sonthal Perganas Settlement Regulation (III of 1872), s. 6—Compound interest—Voluntary agreement to pay interest or damages.*—A mortgagor is bound by the doctrine of estoppel not to question the title of the mortgagee. It is not open to him to contend that the interest which he professed to transfer to the mortgagee could not validly be transferred to the latter. A minor son of the mortgagor who was governed by the Mitakshara School of Hindu Law was no party to the mortgage, but was joined as defendant in the mortgage-suit; it was ruled that his father, one of the executants of the mortgage-deed, should not act as his guardian *ad litem*. An original contract is discharged when satisfaction has been entered upon the original bond. If the discharge has been entered, the presumption is that the old contract has ceased to exist and the new contract has been substituted in its place. To effect a novation pursuant to an agreement to accept a new contract, the contract which is substituted must be one capable of enforcement in law. Where, although no cash payment was made, an endorsement was made on the mortgage security to the effect that interest had been paid and a *rokka* was

Mortgage—continued.**—1.—General—continued.**

taken by the mortgagee for the precise sum and was included in a subsequent mortgage. *Held*, that under s. 6 of the Sonthal Perganas Settlement Regulation, the *rokka* amount should be excluded from the subsequent mortgage and the endorsement on the mortgage-bond should be ignored. If the debtor voluntarily agrees to pay interest or damages upon sums used or retained, it is not open to him to contend later that the agreement to pay such interest or damages was without consideration. *RAMJIBAN SAHA v. DHIKU SINGH*, 16 C. L. J. 264 = 16 Ind. Cas. 246.

(272)—*Mortgage-decree—Construction—Proper form of decree—Decree nisi—Decree absolute—Execution—Court executing decree, power of—"Date of realisation," meaning of—Calculation of interest on mortgage.*—A Court executing a decree is precluded from making a proper decree—a decree which should have been drawn up—it can only construe the decree without adding to or subtracting from it. The prevailing practice in the Province of Bengal in mortgage cases is to allow interest at the contract rate up to the date fixed for payment by the decree *nisi*, and thereafter interest at the usual Court rate of 6 per cent. per annum, and the "date of realisation" is understood generally to mean the date fixed for payment and not the date of actual payment by the mortgagors on realisation by execution sale, though occasionally words are imported to signify the date of actual realisation. The words "the date of realisation" in the decree mean the date fixed for payment by the decree, that is, a date within and not after the period of grace. *MAHA PERSHAD SINGH v. SURENDRA MOHAN SINGH*, 9 C.L.J. 288 = 4 Ind. Cas. 52. (34 C. 150, 29 C. 43, F.) [R., 14 C.W.N. 125]

(273)—*Rate of interest—Presumption—Malikana*—Where a mortgage-deed providing a certain rate of interest from date of due stipulates that the mortgagor might redeem at the end of a certain period, after which, if he did not redeem, he is to pay the principal and interest on demand, *held*, that this meant a contract for the continuance at the same rate of interest till payment. "Malikana" means all net proprietary income from the mortgage-land. *BHAG SINGH v. GHASITA*, 68 P.R. 1833. (101 P.R. 1880, D.)

(274)—*Decree—Order directing distribution of sale-proceeds between several mortgages, if decree—Civ. Pro. Code (Act V of 1908), ss. 2 cl. (2), 47 (1)—Distribution of sale-proceeds between prior mortgagees—Interest to run till date of confirmation—Transfer of Property Act (IV of 1882), ss. 83, 84.*—An order directing the distribution of sale-proceeds between the first mortgagee and the second mortgagee, who were made parties to a suit by the third mortgagee to enforce his security, is an order within the scope of s. 47, sub-s. (1) of the Civ. Pro. Code of 1908, and is, therefore, a decree within s. 2

Mortgage—continued.**—1.—General—continued.**

sub-s. (2) and is appealable as such. In directing the distribution of the sale-proceeds, the Court should proceed upon the assumption that each of the prior encumbrancers was entitled to interest at the contract rate up to the date of the confirmation of the sale, which was the earliest date on which money became really available for distribution amongst the different mortgagees. **BENODE LAL BANDOPADHYA v. SRIKRISTO CHUCKERBUTTY, 8 Ind. Cas. 4.**

(275)—*Mortgage — Interest — Charge.*—It is well settled that, when there is nothing in the mortgage-deed inconsistent with the interest being a charge on the mortgaged property, it becomes just as much a charge on the security as the principal debt. When a mortgagor agreed with the prior mortgagee that all the produce of the mortgaged land would go to him in lieu of interest on his loan, and within a month of the prior mortgage executed a mortgage in favour of another person, which was silent as to the first mortgage and purported to give the second mortgagee a right to possession and to recover his interest in the first place from the produce on the land, *held*, that, since there was no mention of the first mortgage in the second mortgage and the interest on the first mortgage swallowed up the entire produce of the land, it was reasonable to hold that the second mortgage was a fraud on the part of the mortgagor, and the second mortgagee was entitled to a charge on the land for both the principal and the interest. **WADHOO SHAH v. MIAN FAKIR AHAMAD, 116 P.L.R. 1909=3 Ind. Cas. 978=162 P.W.R. 1909.**

(276)—*Decree—Decree upon a mortgage—Construction—Future interest to date fixed for payment.*—Where a decree directed payment of mortgage-money and costs of the suit with future interest to the date fixed for payment, *held* that the decree-holder was entitled to interest until realization. **RAJA GOKULDAS v. SHETH GHASIRAM, 10 Bom. L.R. 144.**

(276-a)—*Mortgage-decree—Rate of interest—After the date fixed for payment.*—A mortgage decree-holder, after the date fixed for payment, is entitled only to interest at 6 per cent. per annum, and not at 18 per cent. the contract rate. **JOHYAM NARAYANIAH v. UPPU MADHAVA RAO, 13 M.L.T. 212=1913 M.W.N. 175. (34 C. 150, F.)**

(276-b)—*Interest—Realisation, date of—Unsuccessful appeal by mortgagee — Personal decree, if can be passed against purchaser of equity of redemption.*—A mortgagee is entitled to interest on the principal amount at the contract rate up to the date fixed by the Court for repayment of the mortgage-debt. The time allowed to the mortgagor will not be enlarged, merely because an appeal is preferred against the decree, whether by the mortgagor or the mortgagee, which is afterwards dismissed or withdrawn. Where the mortgagee himself preferred an unsuccessful appeal and the mortgagor did not ask for extension of time to

Mortgage—continued.**—1.—General—continued.**

enable him to redeem, it was not open to the mortgagee to demand interest at the contract rate up to the date within six months of the date of the final decree. (13 C. 13, 22 C. 467, D.) A personal decree cannot be made against the purchaser of the equity of redemption. **TARA CHAND v. BROJO GOPAL, 17 C.L.J. 120. (15 C.L.J. 68=39 I.A. 7=33 A. 352, R.)**

(277)—*Simple or anomalous mortgage—Covenant to pay—Option of mortgagee to take possession on default of payment of interest—Mortgage, if usufructuary—Decree for sale, if proper.*—*Held*, on the terms of the bond in suit, that it was a simple mortgage. A simple mortgagee is entitled to a decree for sale as a matter of course, notwithstanding that, under the terms of the mortgage-bond he has the option, on the mortgagor's default in payment of interest, "to take possession of the mortgaged properties and to enjoy the same as under a usufructuary mortgage." **LINGAM KRISHNA BHUPATI DEVU GARU v. SRI MIRZA SRI PUSAPATI VIJAYARAMA GAJAPATIRAJ MAHARAJA MANYA SULTAN BAHADUR OF VIZIANAGRAM, 15 C.W.N. 441, P.C.=9 M.L.T. 445=8 A.L.J. 594=13 Bom. L.R. 447=13 C.L.J. 584=10 Ind. Cas. 272=M.W.N. 1911, 429=21 M.L.J. 1147.**

(278)—*Custom—Alienation by father—Necessary debt—Mortgage-debt due by father—Interest for unexpired period of mortgage—Evidence—Payment of consideration—Admissions before sub-registrar.*—In a suit by a minor son to set aside a sale of ancestral land made by his father, it appeared that the vendee had paid off mortgage-debts due by the father raised on the security of the land, and the vendee charged interest for the unexpired period of the mortgages, which were for fixed terms. *Held*, that the interest could not be disallowed. *Held*, also, that, in such cases, when a sum of money is alleged to have been paid in advance to the father, and the payment is admitted by him at the time of registration, and the registration of the sale-deed is followed by mutation of names, the payment may be accepted as proved. **NIHAL SINGH v. KARTAR SINGH AND TEJU SINGH, 88 P.L.R. 1909=89 P.W.R. 1909=4 Ind. Cas. 890. (97 P.R. 1901, F.)**

(279)—*Mortgage—Interest subsequent to conditional decree for sale or foreclosure—Contract rate—Court-rate—When allowable — Extension of time for payment—Court's power to impose fair terms as to interest.*—Despite the express provision in a mortgage-bond that interest will be paid at the contract rate up to the date of re-payment, interest subsequent to the date fixed for payment by a conditional decree for sale or for foreclosure will be allowed on the whole sum due including costs, only at the Court-rate instead of at the contract rate. (23 A. 181, P.C., 34 C. 150, P.C., 4 N.L.R. 1, 5 N.L.R. 37, F.) If an extension of the time allowed for payment be granted, it is open to

Mortgage—continued.**—1.—General—continued.**

the Courts to safeguard the mortgagee's interests by imposing fair terms as to interest, and to consider the terms of the mortgage-bond in fixing such terms. *PYARELAL v. RAMRATAN*, 7 N.L.R. 14=10 Ind. Cas. 695.

(280)—*Mortgage-decree—Purchase of mortgaged property by the decree-holder—Sale by mortgagor of part of mortgaged property prior to decree—Purchaser not impleaded as party to mortgage-suit—Right of private purchaser to redeem his own share—T.P. Act (IV of 1882), s. 60—Right of mortgagee to claim interest according to mortgage-deed—Interest.*—Where, in the execution of a mortgage decree, the mortgagee decree-holder purchased in Court-sale some of the items of the mortgaged property, and one of these items was sold before the date of the decree by the mortgagor to the appellant, who was not impleaded as a party in the mortgage-suit. *Held*, (1) that the sale in Court auction must be treated as valid and that the mortgagee must be taken to have split up his security and precluded himself from objecting to an apportionment; (2) that the appellant was entitled to redeem his own share only on payment of the proportionate amount, which the item sold to him was liable to contribute rateably to the debt secured by the mortgage; (3) that on the said amount the mortgagee was entitled to interest according to the mortgage-deed and not according to the decree. *VENKATASAWMI NAICKEN v. RAMANATHAN CHETTIYAR*, 8 Ind. Cas. 153=8 M.L.T. 409. (18 C. 164=17 I.A. 201. 31 M. 258=18 M.L.J. 344=4 M.L.T. 293; *F.*, 5 C.L.J. 315=11 C.W.N. 403, *Not F.*)

(281)—*Principal—Interest—Mortgagor willing to pay money—Mortgagee delaying to accept.*—On the 3rd February, 1902, the defendants called upon the plaintiffs to pay the amount due upon the mortgage with interest within three months. The defendants, who were executors, applied on the 8th January, 1902, calling upon the Registrar of Assurances to deposit the will in Court, which was done on the 24th January, 1902. The document was sent for translation and translated on the 2nd April. The defendants applied for probate on the 17th June, 1902. In the meanwhile, plaintiffs called upon defendants several times in March and April to state if they had filed a petition for probate; and later on plaintiffs intimated to defendants that the money was ready and waiting to be paid to them: *Held*, that the interest over the principal ceased to run from the 3rd May, 1902, the time when the defendants' notice expired. *PANDURANG v. DADABHOY*, 4 Bom. L.R. 453=26 B. 643.

(282)—*Money not actually produced but ready for the purpose—Interest—Practice.*—A mortgagor repaid to the mortgagee on the due date to pay the money due on the mortgage. The money though not actually produced was ready there and then for the purpose; but the negotiations fell through because the mortgagee

Mortgage—continued.**—1.—General—continued.**

demand three months' extra interest:—*Held*, that there was a sufficient tender of the money by the mortgagor and that interest over the amount ceased to run from the date of the tender. *PESTONJEE v. HORMASJI*, 5 Bom. L.R. 387.

(283)—*Mortgage by conditional sale—Mortgagee spending money for protecting property and for improvement—Interest.*—Compound interest on sums spent by the mortgagee to protect the subject of the security, or, simple interest on money spent in improvement, will not be allowed. *KISHORI MOHUN ROY v. GANGA BAHU DEBI*, 23 C. 228=22 I.A. 183, P.C.=5 M.L.J. 261=6 Sar. 649.

(284)—*Stipulation as to payment of compound interest in default—Whether penalty—Rate of interest allowable between date of mortgage-decree and date fixed for payment—S. 86, Transfer of Property Act.*—A stipulation in a mortgage-deed as to the payment of compound interest in default is not a stipulation by way of penalty and the mortgagee is entitled to recover the compound interest. Even if s. 86, T.P. Act, does not bind the Court to award the contract rate of interest for the period between the date of the mortgage-decree and the date fixed for payment, the Court may in its discretion award that rate, especially in a case like the present where the mortgagee cannot enforce payment before the time fixed. *VEERA REDDI v. SUBBANNA SETTI*, 8 M.L.T. 387=8 Ind. Cas. 339. (21 M. 365, *F.*)

(285)—*Interest—Application of the rule of damdupat to.*—The rule of *damdupat* applies in all cases as between Hindu debtors and creditors, both in respect of simple as also mortgage-debts. The rule, however, does not apply where the mortgagee has been placed in possession, and is accountable for profits received by him as against the interest due. But where these profits are by the terms of the bond received for only a portion of the interest on the mortgage-debt, the general rule of *damdupat* will govern such mortgage accounts. *SUNDARABAI v. JAYAWANT*, 1 Bom. L.R. 551=24 B. 114.

(286)—*Mortgage—Rule of damdupat, applicability of, after the enforcement of the Transfer of Property Act—Right of mortgagee to sue for interest is a right arising from contract.*—A Hindu mortgagor can claim the application of the rule of *damdupat* when the original mortgagee is also a Hindu, notwithstanding by subsequent assignment the person who claims the principal and interest due on the mortgage is a Parsee. The Transfer of Property Act has not affected the application of the rule of *damdupat* in the case of a Hindu mortgagor. The right of a mortgagee to sue for his principal and interest is a right arising from a contract, and must be taken to be made subject to the usages and customs of the contracting parties. *JEEVANBAI v. MANORDAS LAOHMANDAS*, 12 Bom. L.R. 992=8 Ind. Cas. 649.

Mortgage—continued.**—1.—General—continued.**

(287)—*Mortgage — Interest — Rule of damdupat, applicability of*—A mortgagee is entitled to have interest added to the principal at the rate stipulated in mortgage-deed, and to appropriate the rents and profits received by him in or towards the satisfaction of such interest, but if, after such appropriation, the amount of interest now due and payable on the foot of the mortgage exceeds the amount of the principal, then, according to the rule of *damdupat*, the mortgagee's claim must be limited to double the principal amount. **SHRI GANESH DHARMIDHAR MAHARAJDEV v. KESHAVRAV GOVIND KULGAVKAR, 15 B. 625.** [Overruled, 20 B. 721; R., 20 B. 611, 24 B. 114, 15 M.C.C. R. 227.]

(288)—*Prior charge entered in registered sale-deed—Mortgagee of vendee omitting to search register, not a bona fide transferee without notice.*—Where, under the terms of a sale-deed, the vendee had agreed to pay a certain *malikana* allowance charged on the property, a subsequent mortgagee from the vendee, who, if he had searched the register, would have ascertained the terms of the deed, and would have had actual notice of the charge, was held not to be a *bona fide* mortgagee without notice, because, in not having searched the register, he must have wilfully abstained from making the search or was guilty of gross negligence. **CHURAMAN v. BALLI, 9 A. 591 = A.W.N. 1887, 121.** (2 A. 162, R.) [Disappr., 7 C.W.N. 11; R., 134 P.L.R. 1904, S.L.R. 104.]

(289)—*Assignment of mortgage, amount of consideration of, for the purposes of registration.*—The question in this case was whether the deed of assignment of the mortgage in question required to be registered. The case turned on the point whether the said assignment by one A.P. to B.P. conveyed an interest of greater value than Rs. 100. The lower appellate Court decided that the assignment did not require registration on the ground that, as the deed recited that Rs. 5 had been paid to the assignor A.P. as consideration for the assignment, that amount alone must be taken into consideration for the purposes of registration and that the benefit derived by any third persons from the transaction could not be included. The High Court reversed the decree holding that the consideration mentioned in the deed was not merely the Rs. 5 paid to the assignor, but the agreement of the assignee B.P. to withdraw the suit instituted by him against one P.D., if the assignor A.P. executed the instrument assigning the mortgage. As to the money-value to be put on this part of the consideration, the Court held that the value which the parties put upon it must be taken to have been the sum covered by the stamp used for the instrument which would be Rs. 3,300. **NAGO KANATURIA v. BABAJI KATARI, 8 B. 610.** [R., 24 B. 615.]

(290)—*Plain paper—Registration of the deed on payment of penalty—Consideration of money*

Mortgage—continued.**—1.—General—continued.**

paid in part—Mortgagee's rights.—The defendant executed to the plaintiff a mortgage-bond on plain paper. The bond recited that certain immoveable property was mortgaged as a security for Rs. 1,300; of this sum, only Rs. 775 were paid. The bond also contained a stipulation that the defendant should within fifteen days from the date of the execution give in writing a mortgage-deed on a stamped paper and get it registered. This the defendant failed to do and he did not also pay Rs. 525. The plaintiff then got the bond registered on payment of penalty; and sued the defendant for recovery of Rs. 775 from defendant by sale of the mortgaged property: *Held*, (1) that the bond created actual mortgage and was not merely an agreement to create one. It was not a document which merely created a right to demand another document but created as between the parties a charge in the nature of a mortgage; (2) That the plaintiff was entitled to hold the mortgage good for the sum of Rs. 775. **MOTICHAND v. SAGAN, 6 Bom. L. R. 690 = 29 B. 46.**

(291)—*Certificate of sale—Registration.*—An endorsement made and signed by a Judge on a deed of mortgage of immoveable property, certifying that the deed was purchased at a public sale, held in his Court, in execution of a decree, operates as a sale certificate, and, if it relates to immoveable property of the value of Rs. 100 and upwards, must be registered; and, if unregistered, is inadmissible in evidence. **KANAHIA LAL v. KALI DIN, 2 A. 392.**

(292)—*Contract Act, s. 39—Mortgage—Part of the consideration unpaid—Rescission—Conveyance—Contract.*—A registered mortgage, the consideration of which has partially failed, is enforceable at the suit of the mortgagee, inasmuch as the interest in the property mortgaged passed to him immediately upon registration. *Per Karamat Hussain, J.*—There is a fundamental distinction between a contract and a conveyance, i.e., a transfer of an interest in land, and for this reason the rights and duties of the parties to a contract are quite different from the rights and duties of the parties to a conveyance. A mortgage under the Transfer of Property Act is a transfer of an interest in the land mortgaged and not a mere contract. S. 39 of the Contract Act has no application, for the simple reason that it deals with contracts, and a mortgage when registered is not a contract but a transfer. (59 P.R. 1907, Diss.) *Qaere: (Per Chamier, J.)*—Whether a Court is bound in every case to enforce a mortgage according to the letter, where the whole of the mortgage-money has not been advanced. **RASHIK LAL v. RAM NARAIN, 9 A.L.J. 198 = 13 Ind. Cas. 573.**

(293)—*Registered mortgage—Possession not transferred to mortgagee—Effect upon property in the hands of subsequent transferee of the mortgagor—Notice.*—A registered mortgage by

Mortgage—continued.**—1.—General—continued.**

a person entitled to dispose of immovable property binds the property affected by it in the hands of subsequent transferees of the mortgagor, though the mortgagee may not have got possession. Questions of notice only arise when there is a conflict between a registered deed and an unregistered deed or oral sale, or when the transferor is not entitled to dispose of the property. **SHRIKISON v. CHATARSING, 8 N.L.R. 18=13 Ind. Cas. 904. (13 C.P.L.R. 43, D.)**

(294)—*Hindu widow—Interest provided by unregistered "rukks"—Appeal, plea taken for the first time in.*—A Hindu talukdar executed three mortgages in favour of the plaintiff, and with each mortgage gave the mortgagee a *rukka* or written promise to pay additional interest. After the talukdar's death, his widow executed a fourth mortgage for a portion of the balance due for interest including that stipulated in the *rukks*. There was no evidence that an enquiry was made into the means and circumstances of the widow, or that the account had ever been put before her or settled by her. *Held*, that the mortgage executed by the widow was invalid and could not be enforced. *Held*, that the *rukks*, being unregistered, did not affect the mortgaged property and could not fetter the equity of redemption in that property. *Held*, further, that the question that in case the mortgage executed by the widow was not upheld, a decree might be given against the estate of the deceased talukdar based on his personal liability under the *rukks*, not having been raised in the plaint, or, referred to in the pleadings or issues, it could not be dealt with in appeal. **TIKA RAM v. THE DEPUTY COMMISSIONER OF BARA BANKI, 2 O.C. 209.**

(295)—*Registered and unregistered deeds—Priority—Mortgage—Execution—sale—Auction purchaser—Conveyance.*—Where A claims title to property by purchase under a registered conveyance from the owner, and B claims title to the same property as purchaser at a sale held in execution of a decree obtained on a prior unregistered mortgage granted by the owner, A is entitled to priority, if he took without notice of the mortgage. **SARAT CHANDRA SIL v. SHEIKH MEHER, 4 C.L.J. 490. (28 C. 139, F.)**

(296)—*Transfer of Property Act (IV of 1882), s. 59—Indian Evidence Act (I of 1872), s. 68—Registration Act (III of 1877), s. 49—Personal covenant to pay debt contained in unregistered or unattested mortgage-deed—Whether a registered or unregistered mortgage not attested at all or attested by only one witness is admissible as evidence of personal covenant contained therein.*—A registered mortgage-deed, which has not been attested at all, or has been attested by only one witness, is admissible as evidence of a personal covenant to repay debt. Likewise, an unregistered deed of mortgage, which has not been attested at all or has been attested by only one witness, is admissible as evidence of a personal covenant to pay. **PULAKA VEETIL MUTHALAKULAN GARA KUNHU MOIDU v. THIRUTHIPALLI MADHAVA MENON, 1 Ind.**

Mortgage—continued.**—1.—General—continued.**

Cas. 1, F.B.=32 M. 410=19 M.L.J. 584. (18 M. 29, Overruled; 26 C. 78, 26 C. 222, 30 M. 284, Appr. & F.; 15 M. 253, 9 C. 520, 30 M. 251, R.)

(297)—*Reg. XVII of 1802, s. 3, cl. 3—Hypothecation-bond capable of registration.*—A deed of hypothecation fell under the head of mortgage capable of registration under cl. 3, s. 3, of Reg. XVII of 1802. **KADARSA RAUTAN v. RAVIAH BIBI, 2 M.H.C. 180.**

(298)—*Sulehnama hypothecating immovable property—Registration—Suit for money charged on immovable property.*—A charge, exceeding Rs. 100 in value, created upon immovable property by means of a *sulehnama* (with a half-rupee Court-fee stamp affixed) presented in Court in execution proceedings, cannot be enforced against such property, the document not being properly stamped and not being registered. Observations, by *Spankie, J.*, on previous decisions of the High Court in which *sulehnamas* were relied on as evidence of a separate oral agreement, or were held not to require registration. **SURJU PRASAD v. BHAWANI SAHAI, 2 A. 481.**

(299)—*Unregistered mortgage for less than Rs. 100—Principal and interest on date of suit aggregating to more than Rs. 100—Right to enforce mortgage lien for full amount.*—Where an unregistered deed of mortgage was executed to secure an advance of less than Rs. 100 and on the date of suit the principal and interest amounted to more than Rs. 100, a mortgage decree for the full amount of the claim could be given, though the document had not been registered. **AMRUTI TELIN v. GOVIND RAO, 10 C.P.L.R. 10. (3 A. 1, 6 C.P.L.R. 75, Diss.) [D., 4 N.L.R. 90.]**

(300)—*Registration Act (XVI of 1908), s. 17 (2) (xi)—Mortgage-deed—Endorsement of payment of mortgage money—Interest allowed up to date of realisation.*—*Held*, that an endorsement on a mortgage-deed to the effect that a certain amount was paid to the mortgagee does not require to be registered, to be admitted in evidence. The fact that the payment discharges the mortgage though suggesting redemption does not render the endorsement compulsorily registrable. In a suit on a mortgage, the mortgagee is entitled to interest up to the date of realisation. **PIRBHU DIAL v. RISAL SINGH, 111 P.L.R. 1911=37 P.W.R. 1911=10 Ind. Cas. 846.**

(301)—*Registration Act (III of 1877), s. 17—Endorsement on mortgage—Non-extinction of mortgage—Compulsory registration—Transfer of Property Act (IV of 1882), ss. 74, 85—Civil Procedure Code (Act XIV of 1882)—S. 43—Subsequent mortgage—Payment of prior mortgages—Suit on subsequent mortgage—Claim for payments of prior debts.*—A subsequent mortgagee paid off the amounts due on two prior mortgages, and obtained a receipt from the prior mortgagee. *Held*: the receipt was not compulsorily registrable, but came

Mortgage—continued.**—1.—General—continued.**

under clause (n) of s. 17 of the Registration Act. *Held*, also, in his suit to enforce his own mortgage, the subsequent mortgagee was bound to join any further claim which he had against that property, by reason of payments made by him under s. 74 of the Transfer of Property Act, the sum so paid being treated as an addition or accretion to the claim on his original mortgage. Not having done so, a subsequent suit to recover the sum so paid out of the properties was barred under s. 43, Civ. Pro. Code (1882). **HARI NARAIN BNEARJI v. SHAMA SUNDARI DASSI**, 11 C.L.J. 551=6 Ind. Cas. 159=37 C. 589.

(302)—*Registration—Value of interest passed by mortgage deed for less than Rs. 100.*—A mortgage deed, securing a loan of Rs. 95 and giving possession to the lender for a certain period at a certain rental, a portion of which being retainable by the mortgagee in lieu of interest, is not compulsorily registrable, as the interest passed under the deed ought to be valued, for purposes of registration, only at Rs. 95, the principal secured. **RAM DOOLARY KOOER v. THACOR ROY**, 4 C. 61=2 C.L.R. 547. [*F.*, 12 C.L.R. 444, 13 C.L.R. 256, 10 C. 82; *R.*, 12 C.P.L.R. 96, 23 M. 105.]

(303)—*Priority—Registration.*—Where two mortgages were effected of the same properties to two different persons, the first, in 1864, for Rs. 500 being unregistered and the second in 1868, for Rs. 1,000 being registered. 1. The mortgage of 1864 did not require registration in order to maintain its priority over that of 1868. 2. The prior mortgagee, having obtained a decree, purchased the property in auction-sale in execution of the decree and been put in possession of the property prior to the sale to the subsequent mortgagee under his decree, is entitled to retain possession. The subsequent mortgagee obtained no title against the prior mortgagee in point of law. [*F.*, 10 M.L.J. 347=24 M. 171, 26 M. 486.] 3. As the subsequent mortgagee was not a party to the prior mortgage suit, his right as mortgagee is not affected by the sale to the prior mortgagee. 4. The subsequent mortgage cannot be given effect to in this suit. **VENKATANARSAMMA v. RAMIAH**, 2 M. 108. [*F.*, 18 M. 500; *Appr.*, 16 M. 121; *R.*, 19 M.L.J. 728.]

(304)—*Unregistered mortgage—Subsequent registered purchase with notice—Priority.*—Where there is an unregistered mortgage, the registration of which is not compulsory, a purchaser of the property who has registered his deed of sale, but who has bought with notice of the unregistered mortgage purchases subject to the mortgage. **ABDOOL HOSSEIN v. RAGHU NATH SAHU**, 13 C. 70. [*F.*, 19 A. 145=A.W.N. 1897, 19; *R.*, 16 M. 148, *F.B.*, 6 C.P.L.R. 112, 27 B. 452; *D.*, 9 C.W.N. 14.]

(305)—*Unregistered mortgage-deed—Personal covenant to pay—Money decree.*—Where the

Mortgage—continued.**—1.—General—continued.**

defendant executed an unregistered but compulsorily registrable mortgage bond in favour of plaintiff, in which he admitted that he owed the money and promised repayment, and subsequently on his failure to pay on a certain date, he stipulated that the money might be recovered by the sale of the hypotheca, *held* that the two stipulations were quite separate and distinct and the plaintiff could maintain his suit on the personal covenant to pay. **NEMDHARI ROY v. MUSSUMAT BISSESSARI KUMARI**, 2 C.W.N. 591.

(305-a)—*Unregistered mortgage-deed—Suit for money decree—Admissibility of deed to prove debt.*—Where an unregistered mortgage-deed contains no admission of or promise to pay a debt which can be divided from the mortgage, and which would remain if everything relating to the mortgage were struck out of the deed, such a deed is inadmissible as evidence to prove the debt. **JAISUKH v. SYAD MUHAMMAN KHAN**, 89 P.R. 1880. [*R.*, 20 P. R. 1888; *D.*, 17 P. R. 1881, 80 P.R. 1881.]

(305-b)—*Mortgage—Unregistered receipt given acknowledging payment—Whether such receipt admissible in evidence.*—A receipt was given in the following terms: "The bond is returned. No money remains due." The receipt was unregistered. In a suit upon a mortgage, the mortgagor produced the receipt, alleging payment in full. *Held*, that the receipt, though unregistered, so far as it related to the payment of the entire sum of the money due on the mortgage on the date of the receipt, was admissible in evidence, and the words "no money remains due" did not purport to extinguish the mortgage. **PIARE LAL v. MAKHAN**, 10 A.L.J. 25=34 A. 528=16 Ind. Cas. 179.

(305-c)—*Registration—Sale of mortgagee's right by endorsement on the deed of mortgage—Purchaser of sub-mortgagee's rights—Subsequent purchase from mortgagor by registered deed after dismissal of 1st suit—Consideration—Endorsement to prove payment of purchase money—Registration Act (XVI of 1908), ss. 17 and 49.*—An endorsement on a mortgage-deed of immoveable property made by the mortgagee for selling his rights for Rs. 100 or more is compulsorily registrable under s. 17 of Act XVI of 1908; consequently a registered sale-deed confers a good title on the subsequent purchaser. When a mortgagee sells his rights by such endorsement to A, and A sells his rights to B, and B, after unsuccessfully suing A to get possession of the property on its strength, purchases the rights of the original mortgagor by registered deed, B can successfully maintain another suit for possession against A and the mortgagor or his heir, even if the latter has transferred the proprietary rights to a third person. It cannot also be said that the sale by A to B is without consideration, because A escapes liability to be sued for refund of the sale money. *Obiter*:—The endorsement is, however, admissible to prove payment of money

Mortgage—continued.**—1.—General—continued.**

mentioned therein. *HANIF SHAH v. MURAD ALI*, 102 P.W.R. 1912=132 P.L.R. 1912=16 Ind. Cas. 125.

(305-d)—*Registered mortgage deed—Mortgagee in possession—Further advance of money on unregistered document—Subsequent sale of mortgaged property—Mortgagee whether entitled to recover advance from purchaser.*—A person can derive no benefit from the fact of his possession under a duly registered mortgage, when he seeks to enforce a further charge upon the strength of an unregistered subsequent agreement against a *bona fide* purchaser whose title is perfected by a registered deed of sale, as the possession of the former is not evidence of the particular limited interest under the agreement which, being inadmissible under s. 49 of the Registration Act, cannot affect any immovable property comprised therein. *RALLA RAM v. HARJI MAL*, 70 P.R. 1880. (18 P.R. 1878, F.) [Appr., 90 P.R. 1885, F.B.; D, 2 P.R. 1885.]

(305-e)—*Alienation—Custom—Hindu Jats—De facto guardian mortgaging minor nephew's property—Suit for possession—Right of the nephew and the sons of mortgagor to resist the claim on the ground of no necessity—Joint and several liability—Necessity—Ground of attack in the plaint but not pressed in appeal—Registered deed—Onus of proving consideration—A part of consideration for mortgage not for necessity—Incomplete mortgage—Incompetency of the mortgagee to get possession.*—Where a mortgage with possession of ancestral land has been effected by two agriculturists of their own as well as the share of their minor nephew, and on the death of one of them a suit for possession of the property has been brought by the mortgagee against one of the mortgagors and the nephew and the sons of the other mortgagor, the nephew and the sons can resist the claim on the ground of there being no necessity or consideration of the mortgage and of its not being for the benefit of the minor, without bringing a separate suit to get the mortgage set aside. In such a case, before the mortgagee can succeed, he must show (a) that the mortgage was with consideration and for necessity and (b) that the minor's share was mortgaged for his benefit. Where a minor's two uncles undertake to pay his father's just debt by including it in their own bonds, and afterwards mortgage their share as well as that of the minor in the ancestral land, in consideration of that bond-debt, the mortgage cannot be enforced so far as the minor's share is concerned as such an alienation cannot be considered for his benefit. (49 P.R. 1911=136 P.W.R. 1911, F.) Where a portion of the consideration for a mortgage by a male proprietor of his ancestral holding is not for necessity, the mortgage is incomplete so far as his reversioners are concerned, and on his death the mortgagee cannot maintain a suit for possession of the property on the strength of that mortgage against the reversioners. Where A and B jointly and sever-

Mortgage—continued.**—1.—General—continued.**

ally execute a mortgage of their shares as well as their minor nephew's share, and on the suit for possession of the property against A, the sons of B and the nephew, the mortgage is found ineffective so far as the shares of the nephew and the sons of B are concerned, the mortgagee is entitled to get possession of the share of A in consideration of the entire mortgage-money entered in the mortgage-deed. In case of registered mortgage-deed acknowledging receipt of consideration, the onus of its non-receipt lies on the person executing the deed. A ground of attack, mentioned in the plaint in respect of which no issue was drawn by the first Court, and which was not repeated either in the written grounds of 1st or 2nd appeal, cannot be raised at the time of argument before the Chief Court. *HIRA SINGH v. LAHORI MAL*, 174 P.W.R. 1912=217 P.L.R. 1912.

(305-f) — *Assignment of mortgage — False statement as to property — Registration void — Effect of Succession Certificate — Succession Certificate Act (VII of 1889), s. 16.*—Certain property situate in Basti in the district of Gorakhpur, was mortgaged to X. The heirs of X sold to the plaintiffs their mortgage rights in this property and also in certain property situate in Fyzabad. The vendees never possessed any mortgage rights in the Fyzabad property. The document was registered at Fyzabad. The transferees obtained succession certificate in respect of the debt. In a suit for sale on foot of the mortgage against the heirs of the original mortgagor, *held*, (1) that the sale-deed in favour of the plaintiffs was void for want of proper registration, and (2) that, the plaintiffs having obtained a succession certificate, under s. 16 of the Succession Certificate Act, it was conclusive against the heirs of the original mortgagor. *AZMAT ALI v. SITLA BUX PAL*, 9 A.L.J. 766=16 Ind. Cas. 108.

(306)—*Mortgage of moveable property—Prior registered mortgage—Subsequent mortgage with possession—Priority.*—A obtained a registered mortgage of certain moveable property as security for the debt advanced to B, who afterwards mortgaged the same property to C, C took possession of the property comprised under his mortgage. But, when B subsequently applied for the benefit of the Indian Insolvency Act, 1848, C handed over the property to the Official Assignee and applied to the Court to direct the Official Assignee to sell the property and pay him the sale-proceeds towards the amount due to him on his mortgage. A also put in his claim to the sale proceeds based upon his mortgage, and claimed priority by reason of his prior registered mortgage. *Held*, the creditor who completed his title by taking possession is superior to and is entitled to priority over the creditor who, although his mortgage was prior in date, did not obtain possession. *S.R.M. M. RAMAN CHETTY v. STEEL BROTHERS*, 5 L.B.R. 8=2 Ind. Cas. 351.

Mortgage--continued.**—1.—General—continued.**

(307)—*Execution of decree based on—Sale of one of several mortgaged properties—Purchase by decree-holder of one of several mortgaged properties—Contribution in execution-proceedings, not allowable.*—A judgment-creditor, in execution of a mortgage-decree which directs the sale of several properties, is entitled to execute the whole decree by sale of any of the properties, even though he himself purchased some of the properties, in execution of another mortgage-decree, against the same judgment-debtor. Any question of contribution which may arise by reason of the purchase by the decree-holder of some of the mortgaged properties, must be worked out, not in execution-proceedings, but in a separate suit properly framed, and in the presence of all the necessary parties. *AMEER CHAND v. BAKSHI SHIVA PERSAD SINGH*, 4 C.L.J. 573=34 C. 13. (4 C. L.R. 154, *Appr.*; 4 C.L.J. 195, 317, *Doubt.*)

(308)—*Mortgage—Joint mortgage—Satisfaction of mortgage-debt by sale of part only of the mortgaged property—Suit for contribution by mortgagor whose property has been sold.*—In a suit for contribution amongst co-mortgagors, even if it is a condition precedent to the institution of such a suit that the whole mortgage debts should have been satisfied by sale of mortgaged property, it is not also necessary that it should have been satisfied wholly out of the property of the plaintiff. *MUHAMMAD YAHYA v. RASHID-UD-DIN*, A.W.N. 1908, 289=6 A.L.J. 2=5 M.L.T. 46=31 A. 65=1 Ind. Cas. 5. (12 A. 110, 26 A. 407, R.)

(309)—*Contribution—Purchasers of different items of property—One paying cash and others agreeing to pay towards mortgage—Payment of whole mortgage amount by purchaser paying cash—Method of calculating amount of contribution between the purchasers—Transfer of Property Act, s. 40—Applicability.*—A mortgaged three items of property for Rs. 1,300 to S, and sold subsequently two items to the defendants for Rs. 1,200 and one item to the plaintiff for Rs. 500. Plaintiff paid cash for his purchase, but the others undertook to pay the price to the mortgagee towards the mortgage. It was not found that the property was sold to the plaintiff free of incumbrances. The assignee of S, the mortgagee, brought to sale the property purchased by the plaintiff, and the plaintiff, to save it, paid up part of what was due on the mortgage. Plaintiff now sued for contribution and contended that the other purchasers, being bound to pay Rs. 1,200 towards the mortgage, must be held liable for that amount, and that rateable distribution over all the property should be made only for the balance. *Held*, that the contribution must be calculated on the footing that all the properties were liable for the full amount. S. 40, Transfer of Property Act, will not apply, because there was no contract between the plaintiff and his vendors, that the lands sold to others should be liable for Rs. 1,200 of the mortgage money. *SESHAGIRI AIYAR v. VYTHILINGA PILLAI*, 33 M. 211.

Mortgage—continued.**—1. - General—continued.**

(310)—*Mortgage—Contribution, right to—Property purchased by different vendees—Undertaking by one vendee to discharge encumbrances—Second vendee buying free of encumbrance—Interest—Transfer of Property Act (IV of 1882 s. 82.*—Certain persons were owners of shares in properties X and Y. There were mortgages on these of different dates. X was sold to the plaintiffs, and they were left in possession of funds sufficient to discharge all the encumbrances that existed on X and Y. The vendors, however, subsequently took some money from plaintiffs, and it was agreed between them that the vendors themselves would pay off to the mortgagee the money they had taken from plaintiffs, and that the balance, the greater part of the debts, would be paid by plaintiffs. Subsequently to this, shares in Y were sold as "free of encumbrances" to the several defendants. The money due on the mortgages were not paid by either the vendors or plaintiffs. The mortgagee brought a suit for sale, and having obtained a decree, proclaimed, portions of X and Y for sale. In order to stop the sale, plaintiffs paid up the decree and sued for contribution. *Held* that, under s. 82, Transfer of Property Act, the shares purchased by the plaintiffs and defendants, respectively, were originally liable to contribute rateably to the mortgage-debts. The right to enforce contribution was essentially an equitable right, and the defendants were entitled to resist the claim on equitable grounds. It was not the intention of any of the parties concerned after the sale in favour of the plaintiffs that the shares in X and Y should contribute rateably to the mortgage-debts, and the defendants were therefore entitled to hold the property free from liability to contribute to those debts. The plaintiffs agreed to discharge the greater part of the mortgage debts, and if they had done so at the time stated in their agreement with the vendors, they would have been considered to have done so out of the funds supplied to them for the purpose, and would not have been entitled to claim contribution either from the vendors or from subsequent purchasers of the property in respect of the payments so made. The fact that the plaintiffs made the payment at a later date and under pressure of a threatened sale of the property made no difference in the rights of the parties. When contribution is ordered between different funds, each of them ought to be placed in the same position as if it had contributed its proper proportion at the time at which it ought to have done so. *MUHAMMAD ABBAS v. MUHAMMAD HAMID*, 9 A.L.J. 499=14 Ind. Cas. 179. (4 C. 369, 33 M. 211, D.)

(311)—*Contribution—Mortgage-sale—Sale set aside by consent on one of co-mortgagors paying off decree—Liability of other co-mortgagors to contribute—Equity—Contract Act (IX of 1872), s. 69—Charge.*—Where, a mortgage-decree having been passed against several persons, a sale of the mortgaged property took place, and then one of the mortgagors paid off the decree-

Mortgage—continued.**—1.—General—continued.**

holder, and by consent the sale was set aside. *Held*, in a suit by him against the other mortgagors for contribution, that, although the defendants were not liable under s. 69 of the Contract Act, the plaintiff not having paid the money to prevent the sale, the defendants, who kept the property, were bound in equity to pay their share of the money which the plaintiff had paid to release the property. The amount was declared to be a charge on the shares of the defendants. **SRI MAHARAJA PARBHU NARAIN SINGH BAHADUR v. BABU BENI SINGH, 14 C.W.N. 361 = 5 Ind. Cas. 779.**

(312)—*Mortgage—Payment to first mortgagee by second mortgagee for releasing property from first mortgage—Sale of the property—Failure of consideration for the payment—Contribution suit.*—The plaintiff, the second mortgagee, purchased the mortgaged property in execution of his mortgage decree. Subsequently, the defendant, the first mortgagee, obtained a decree on his mortgage and attempted to sell the property. Then the second mortgagee, the plaintiff, paid to the defendant, the first mortgagee, Rs. 215 for the express purpose that the property purchased by the second mortgagee should be released from all liability under the defendant's decree. The defendant was unable to release the property by reason of objections taken by persons interested in the equity of redemption. The property was, therefore, sold and purchased by a stranger. The defendant applied the sale-proceeds towards the satisfaction of his decree. The plaintiff brought this suit for recovery of the amount, Rs. 215: *Held*, that there is no answer to the claim of the plaintiff, who should not be driven to a contribution-suit to enable him to realise a proportionate amount from persons who have been benefited by the payment he made. **GULAB RAI v. RAM RAJ, 10 Ind. Cas. 571.**

(313)—*Sale by mortgagor of certain parcels of mortgaged property to different people—One purchaser forced to pay the mortgage amount—Contribution—Time of valuation—Transfer of Property Act, s. 40.*—A mortgaged to S for Rs. 1,300 certain properties of which three parcels were sold, one parcel to third defendant's father, another to fourth defendant, and a third parcel to the plaintiff. The plaintiff paid cash, but the other purchasers each undertook to pay the price to the mortgagee towards the mortgage. Subsequently, S's assignee brought the plaintiff's property to sale, and the plaintiff, to save it, paid part of what was due on the mortgage and sued for contribution against the owners of the other two parcels. It was contended for the plaintiff, that the third and the fourth defendants, being bound to pay the purchase-money in respect of their lands, towards the mortgage, must be held liable for that amount, and the rateable distribution over all the property should be made only for the balance. In dismissing the contention, *held*, that s. 40 of the Transfer of Property Act could apply only if there were found

Mortgage—continued.**—1.—General—continued.**

to be a contract between the plaintiff and his vendors that the land sold to other purchasers should be liable for that portion of the mortgage money covered by the price of the lands they purchased, and there was no such contract in this case. *Held*, also, that the plaintiff who must be taken to have purchased the land subject to the mortgage, cannot claim the benefit of an agreement between the prior purchaser and his mortgagors, but that, if the plaintiff had purchased the property free from the mortgage, then he could claim the benefit of the covenant between his vendor and the prior purchaser. *Held*, further, that the benefit of such a covenant did not pass with the title to the mortgagor's assignee, but might be accorded, if the Court should find it necessary in order to make effectual or preserve any rights of the mortgagor. *Held*, also, that as it was admitted that whatever changes have occurred in the value of the land since the date of the mortgage have equally affected all the mortgaged lands, it does not matter what date is chosen provided that the same date be chosen for all. In this case the date of the sale to the plaintiff was chosen. **SESHAGIRI IYER v. VYTHIALINGA PILLAI, 6 M.L.T. 119.**

(314)—*Consideration as recited in deed, not paid—Effect—Minor—Money and articles supplied to—Mortgage after majority—Validity—Contract Act, s. 25 (2).*—Where the mortgagor, at the time when he executed the mortgage-deed, had not actually received the full sum of consideration as recited in the deed and admitted before the Registrar to have been received, the mortgage cannot, solely on that account, be held to be voidable at his option. The rule that a mortgage would be inoperative against the mortgagor, if the mortgagee fails to carry out his promise to pay the amount of consideration in its entirety, cannot apply to a case where the consideration relates not to a future payment but to a payment in the past. (59 P.R. 1907, F.B., 103 P.R. 1906, 100 P.R. 1889, R.) Though a promise by an infant is, in law, a mere nullity and void, yet an agreement made by a person of full age to compensate wholly or in part a promisee, who has already voluntarily done something for the promisor, even at a time when the promisor was minor, falls within the purview of s. 25 (2) of the Contract Act. (16 M.L.J. 422, Diss.; 86 P.R. 1888, 11 C.W.N. 135, 10 B.H.C. 214, R.) Therefore, a mortgage executed by a person after attaining majority, to secure advances of money made or value of goods supplied to him during minority, will be valid and will bind his legal representatives to the extent of compensating the plaintiff for moneys and articles actually supplied to that person during minority and for any sums of money and articles supplied after he came of age. **KARM CHAND v. MUSSAMMAT BASSAN KART, 31 P.R. 1911 = 192 P.L.R. 1911 = 11 Ind. Cas. 321.**

(315)—*Mortgage of property of minor sons by mother—Decree against minors represented by*

Mortgage—continued.

—1.—General—continued.

guardian ad litem upon mortgage — Minor's right on attaining majority to repudiate alienation of his share by mother—Guardian—Mahomedan Law—Limitation Act, sch. ii, art. 12—Equity.—H, the owner of an 8 annas share in a village devised one-fourth thereof to his wife F and her three sons H.M., S.M., and A.M. in equal shares. He stated in his will that his 8 annas share was subject of a mortgage for Rs. 300 of which Rs. 75 should be paid by F and her three sons. When H died in February 1886 all the interest on the mortgage had been paid up to the end of December, 1885. On February 15th, 1889 H.M. who had attained majority, and F purporting to act for herself and her two sons, S.M. and A.M., who were still minors, mortgaged the 2 annas share to the defendant for Rs. 800. In September 1894 the defendant obtained a decree upon the mortgage in a suit in which F was appointed guardian *ad litem* for the minors and in execution of the decree in that suit he purchased the property himself. On October 18th, 1898, S.M. sold his rights to the plaintiff R. On June 1st 1899, the plaintiffs (A.M. & R.) sued the defendant for recovery of a one anna share, that is, six pies of A.M. and six pies of S.M. In the plaint, it was stated that A.M. attained majority on October 15th 1896, and S.M. on August 20th 1898. The defendant contended that the minors having been represented in their suit upon the mortgage by a properly appointed guardian were bound by the decree obtained therein, unless it was proved that their guardian had been guilty of fraud and negligence. He also contended that the suit was barred by art. 12, sch. ii of the Limitation Act. The Court passed a decree in favour of the plaintiffs for possession of the one anna share provided that they paid to the defendant Rs. 130 and interest thereon from July 15th 1889. This sum was made up of the proportionate amount for which the minors were liable for the mortgage debt due by their father and a sum which it was found that F had borrowed for their benefit. *Held*, that the decree obtained by the defendant did not stand in the way of the plaintiffs. *Held*, further, that F, not having at any time been appointed guardian of her minor sons or their property by any Court and under the Mahomedan law not being a near guardian, had no power to deal with the property of her minor sons and therefore the sale founded upon the mortgage effected by her conferred no title upon the defendant and did not need to be set aside by them. *Held*, therefore, that the suit was not barred by art. 12, sch. ii of the Limitation Act. *Held*, further that, considering the equities of the case, the plaintiffs should be compelled to pay the sum of Rs. 130 to the defendant before being allowed to recover their share. *MATADIN v. ALI MIRZA*, 5 O.C. 197. [R., 9 O.C. 97, 10 O.C. 321; *Appr.*, 10 O.C. 367; *D. & Rel on.*, 11 O.C. 319; *Expl.*, 11 O.C. 346; *Rel on.*, 13 O.C. 158.]

Mortgage—continued.

—1.—General—continued

(316)—*Mortgage* — Joint Hindu family — Manager—Family property — Minority.—The suit was instituted by the assignee of a mortgage dated October 23, 1892, against one S.M., and others to recover the amount due thereon. The mortgage deed purported to have been made between the said S, of the first part, the said M, the only brother of S of the second part and the mortgagee of the third part. The said S was the sole mortgagor, and by the said deed, he, declaring that he was the absolute owner in possession of the property mentioned in the deed and that there was no sharer in the said property, purported to mortgage the said property to the mortgagee as security for the re-payment with interest of the money lent to him by the mortgagee. M, was made a party to the deed in order that the fact of his having signed it might afford evidence that he had assented to the taking of the loan by S and the granting of the mortgage. By the suit plaintiff sought to make M personally liable for the mortgage debt and interest and to bring to sale M's share in the mortgaged property, which, in fact, was ancestral property of the joint Hindu family which at the date of the mortgage consisted of the said S and M, whose father died leaving debts. It was to discharge those debts and some debts which had been contracted by S, that the mortgage sued on was executed. M pleaded that at the date of the mortgage he was a minor. The plaintiff contended that in borrowing the money from the mortgagee and in making the mortgage S had acted as the manager of the family and for the benefit and protection of the estate, and, consequently, it was immaterial whether M was or was not of full age at the date of the mortgage. *Held*, that S was, at the date of the mortgage, merely a co-sharer with his brother M in the property of the joint Hindu family of which they were members; that the mortgagee made insufficient inquiries and lent the money to S, not as the manager or even as a member of the joint Hindu family, but in his assumed position as absolute owner of an impartible estate; that S, on his own behalf and in his own interest, and not as representing M, discharged the debts which their father had contracted; that the mortgage was, not made by S, as the manager of the family or in any respect as representing M; and that M was a minor at the date of the mortgage, and, consequently, the mortgage-deed as against M and his interest in the estate was not merely voidable, but was void and of no effect, and must be regarded as a mortgage-deed to which M was not even an assenting party and as a mortgage-deed which did not affect him or his interest in the estate. *RAJA BALWANT SINGH v. RAO MAHARAJ SINGH*, M.W.N. 1912, 462, P.C. = 11 M.L.T. 344 = 16 C.W.N. 577 = 15 C.L.J. 475 = 14 Bom. L.R. 422 = 23 M.L.J. 18 = 34 A. 296 = 14 Ind. Cas. 629 = 39 I.A. 109. (28 A. 508, *Affirm.*)

Mortgage—continued.**—1.—General—continued.**

(317)—*Suit to enforce a mortgage—Minor's property, mortgage of, by his natural and de facto guardian—Minor's property, if and when liable for the mortgage-debt—Benefit of the minor—Loan raised on mortgage to save ancestral property—Legal necessity—Interest, liability to pay, at the contract rate—Interest, reduction of, when allowable—Compound interest, when improper.*—The natural guardians of infant co-sharers are justified in joining with the male members of the family to raise a loan for the preservation of the family properties, even though the power of the guardians of the infants is a limited and qualified power. The loan in such a case is an absolute necessity, and not a merely voluntary act of speculation, and the mortgage of the infants' properties is binding upon the shares of the infants. (6 M.I.A. 493, R.; 20 W.R. 33, D.) It is for the creditor to show that the rate of interest charged was one of necessity or of clear expediency for the benefit of the infant's estate, and, in the absence of proof of such necessity or expediency, nothing more than the ordinary rate of interest upon loans on good security can be allowed. (12 I.A. 47, 11 C. 379, 18 I.A. 1, 18 C. 311, R. & F.) In so far as the shares of the mortgagors, other than the infants, are concerned, interest must be allowed at the contract rate. *ABHIRAM PAL v. MUKUNDA LAL DUTT*, 5 C.L.J. 542. (31 C. 233, R.) [R., 6 C.L.J. 490, 11 C.L.J. 317, 37 C. 179 = 3 Ind. Cas. 353 = 14 C.W.N. 535.]

(318)—*Mortgage—Minor's property—Remedy against such property barred—Benefit to minor—Validity.*—Where the maternal uncle of certain minors borrowed money on a pro-note and discharged with that money certain debts of the deceased father of the minors, and where, after the lapse of five years, i.e., at a time when the remedy against minors' property became barred, he executed a hypothecation bond mortgaging the minors' property in lieu of the pro-note, held that the uncle was not the legal guardian and that the mortgage was not for the minors' benefit and was not binding upon them. *PERUMAL NAICKER v. KADIR IBRAHIM ROWTHER*, 8 M.L.T. 444 = 8 Ind. Cas. 306.

(319)—*Act XL of 1858—Mortgage by administrator.*—The mortgage, by an Administrator appointed under Act XL of 1858, of the ward's property, without Court's sanction, is invalid. [F., 4 C. 33 = 2 C.L.R. 249, 2 A. 902, 11 C.L.R. 345; R., 15 C. 40, 6 C.L.J. 448.] Where in execution of a decree obtained on such a mortgage against an administrator, as representing the ward, the mortgaged property is sold, neither the purchaser nor a vendee from him will be protected from a suit by the ward for recovery of the property. *DEBI DUTT SAHOO v. SUBODRA BIBEE*, 2 C. 283 = 25 W.R. 449.

(320)—*Act XXXV of 1858—Mortgage of joint family property by Committee in Lunacy.*—When, consequent on the father and head of a joint Hindu family governed by the Mitakshara

Mortgage—continued.**—1.—General—continued.**

school becoming insane, a Committee in Lunacy is appointed under the provisions of Act XXXV of 1858, the act of the Committee may be regarded as the act of the father and head of the family. *ABILAKH BHAGAT v. BHUKHI MAHTO*, 22 C. 864.

(321)—*Mortgage—First and second mortgages—Suit by first mortgagee for sale—Second mortgagee not made party—Transfer of Property Act (IV of 1882), ss. 78, 85, Civ. Pro. Code, s. 13—Res judicata under whom they or any of them claim—Mortgagee not representative of mortgagor—S. 13 of the Civ. Pro. Code must be interpreted as if, after the words 'under whom they or any of them claim' the words, 'by a title arising subsequently to the commencement of the former suit' were inserted.*—It is not absolutely necessary to make puisne incumbrancers parties to a suit by the first mortgagee, and a sale in enforcement of the prior mortgage would defeat the rights of the puisne incumbrancer, who is conclusively presumed in jurisprudence to take with knowledge of the prior mortgage, or at least cannot take more than his mortgagor had to give. The puisne incumbrancer could only escape the decree on the prior mortgage by proving fraud or collusion, or he might prevent the sale in execution of it by redeeming the prior mortgage (1 A. 240, 4 A. 518, R.) [R., 10 A. 520.] Therefore, after a mortgage has been duly created, the mortgagor, in whom the equity of redemption is vested, no longer possesses any such estate as would entitle him to represent the rights and interests of the mortgagee in a subsequent litigation, so as to render the result of such litigation binding upon and conclusive against such mortgagee. *SITA RAM v. AMIR BEGAM*, 8 A. 324 = A.W.N. 1886, 101. (12 W. R. 362, 224 C. 692, R.; 3 East, 346, 2 W.R. 191, 9 M.I.A. 539, W.R. 1864, 375, D.) [Appl., 12 C. P.L.R. 91, 1 C. L. J. 337; R., 22 C. 364, 4 O.C. 100 B., 6 C.L.J. 621, 5 M.L.T. 37, 8 C.L.J. 478 = 13 C.W.N. 281, 11 A. 148, 12 A. 1, F.B.]

(322)—*Usufructuary mortgage—Suit for declaration that a mortgage is nominal, fraudulent, collusive, without consideration, and inoperative—Co-defendants—Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—Appeal, Court of, not deciding a matter—Decision, effect of—Possession and mesne profits, suit for—Conversion of suit for possession into one for redemption, if and when permissible—Recital in mortgage deed as to consideration—Evidence, admissibility in—Onus.*—When the decision of a lower Court is taken on appeal to a superior tribunal, and that tribunal, for any reason, does not think fit to decide the matter, it is left an open question (8 C. 631, R.) If the appellate Court declines to decide an issue and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit, than it would be, if that judgment had been reversed by the Court of appeal. (6 B.

Mortgage—continued.**—1.—General—continued.**

110, 7 C. 381, R.) A decision does not operate as *res judicata* between co-defendants, unless it is established that there was a conflict of interest amongst the defendants, that the adjudication between the defendants was necessary to give the appropriate relief to the plaintiffs and that the judgment did define the real rights and obligations of the defendants *inter se*. (31 C. 95, 5 C.L.J. 611, R.) As against persons who were not parties to a mortgage transaction, the recital in the mortgage deed that the consideration has been paid is no evidence, and the *onus* is upon the mortgagees to prove affirmatively the reality and necessity of the transaction. (6 C. 268, 17 A. 428, R.) As against the mortgagor, on the other hand, the recital in the deed is weighty evidence, and the *onus* lies upon the mortgagor to establish that the statement contained in the deed is untrue. What a party himself admits to be true may reasonably be presumed to be so, but the party may prove the statement to have been mistaken or untrue. (34 I.A. 27, R.) Where a plaintiff has rested his case upon fraud, when the case of fraud has failed, he cannot be permitted to support it upon an entirely different and inconsistent ground. Although, therefore, a suit, brought as one for possession, may, in the discretion of the Court, where the circumstances of the case permit it, be converted into one for redemption, on the assumption that the mortgage was valid and binding, a plaintiff must ordinarily succeed on the case he has made in the plaint and, unless there are special circumstances, an action instituted for purposes absolutely inconsistent with redemption cannot be converted into an action to redeem. GHURPHEKNI v. PURMESHAH DAYAL DUBEY. 5 C.L.J. 653. (5 C.L.J. 527, 3 C.W.N. 325, 14 M.L.A. 53, R.) [R., 6 C.L.J. 659 = 3 M.L.T. 38; F., 11 C.L.J. 461.]

(323)—*Subsequent mortgagee seeking priority—Failure to plead in previous suit—Plea barred in subsequent suit—Prior mortgagee's liability to disclose.*—There were three mortgages of a property. The first in February 1894 for 16 annas in favour of the plaintiff. The second in November 1894 in favour of defendants 2 and 3. The third was in July 1900 for 8 annas of the same property as also of another property in favour of the plaintiff and was said to be for the first mortgage debt as also for a fresh loan. In April 1901, the mortgagees in the second transaction brought a suit on their bond and made the plaintiff a party on the basis of the last mortgage, obtained a decree and bought the property. The plaintiff then brought the present suit on the basis of the last mortgage, alleging that, as it kept alive the lien created by the first bond, it was entitled to priority over the second. *Held*, he was bound to appear in the previous suit and raise this defence. By omitting to do so, he was precluded from setting up such a case now. *Held*, also, plaintiff was not bound in the suit of 1901 to disclose his first mortgage. MAHABIR PERSHAD

Mortgage—continued.**—1.—General—continued.**

SINGH v. PRABHU SINGH, 9 C.L.J. 78 = 3 Ind. Cas. 686. (24 A. 429, 31 C. 428, D.)

(324)—*Mortgagor and mortgagee, rights of—Splitting up of the mortgaged property with the consent of all parties, effect of—Loss of rights in execution of a decree based on a prior mortgage.*—In 1878 A mortgaged a share in a certain village to R. In 1881 he mortgaged the same property together with another share to the plaintiff and one S. In 1885 R brought a suit upon his mortgage and obtained a decree for sale of the mortgaged property. To this suit the mortgagees of 1881 were parties. Before this decree was actually put into execution, the heirs of the mortgagors redeemed half the property mortgaged from S, in 1893. In 1906 the prior mortgagee R, put his decree into execution and got the other half of the mortgaged property sold. On a suit by the plaintiff to recover half the mortgaged property, it was held that the mortgage security had with the consent of all the parties, *viz.*, the heirs of the mortgagors and the mortgagees, been split up into two portions, and the portion redeemed in 1893 was not liable to the claim of the plaintiff, nor could the other half of the mortgaged share be recovered by the plaintiff, as whatever rights he had were lost in execution of the decree based on the prior mortgage. The plaintiff's suit was, therefore, dismissed *in toto*. BALJIT SINGH v. BAHADUR SINGH, 10 Ind. Cas. 15.

(325)—*Mortgage—Recovery of judgment for interest—Purchase of mortgaged property by mortgagee—Second suit for principal—Right to bring to sale the mortgaged property again—Order staying execution proceedings, effect of.*—A mortgagee cannot sue on his mortgage for the balance due, after he has recovered judgment for the interest and brought the mortgaged property to sale once already and himself purchased it. (35 C. 61, F.B., R.) Where the High Court ordered that certain execution proceedings should be stayed and the case struck off when the security was given, the Court cannot be taken to have deprived the decree-holder of any rights that he already had. SHAH MOSIHUDDIN v. SHEO LOGAN SAHU, 2 Ind. Cas. 265. (20 W.R. 133, P.C., 1 Ind. Cas. 341, 13 C.W.N. 521, R.)

(326)—*Mortgage—Decree for sale—Order absolute—Auction sale pending appeal against decree—Modification of decree on appeal—Prior order directing auction purchaser to be put in possession—No appeal—Res judicata.*—A decree for sale of mortgaged property was passed in 1900, and pending an appeal against this decree, an order absolute for sale was made in 1902, whereunder the property was sold in 1903 and purchased by the decree-holders, who were put into possession, under an order of the 18th April, 1904. The appeal against the original decree was disposed of on the 27th January 1904, when an order was made modifying the

Mortgage—continued.**—1.—General—continued.**

decree below and directing the judgment-debtors to pay the whole amount adjudged within six months and in case of default directing the property to be sold. *Held*, that no appeal having been brought against the order of April 18, 1904, it could not be treated as null and void, and the possession of the decree-holders, auction-purchasers, could not therefore be disturbed, the more so as the judgment-debtors had not offered to redeem. **RAM GOLAM SAHU v. BARSATI SINGH**, 6 A. L. J. 30, P.C. = 5 M. L. T. 129 = 13 C. W. N. 321 = 9 C. L. J. 158 = 11 Bom. L. R. 214 = 36 C. 336 = 19 M. L. J. 178 = 1 Ind. Cas. 124 = 36 I. A. 27.

(327)—*Civ. Pro. Code* (1882), s. 13, *expl. II* (= s. 11, *Expl. IV*, *new Code*)—*Res judicata—Mortgage—Prior mortgage not pleaded in suit on subsequent mortgage.*—It is not necessary for the application of s. 13, when *expl. II* applies, that the matter in question should have been heard and finally decided in the previous suit. (16 C. 682, P.C. = 16 I. A. 107, 20 C. 79, 24 C. 711, 24 C. 616, R.) In a suit by a subsequent mortgagee, the defendant who held three prior mortgages, omitted to rely on one of them. A suit, by the prior mortgagee, based on the mortgage omitted to be pleaded in the first suit, was *held* barred under *expl. II* to s. 13, *Civ. Pro. Code*. **SRI GOPAL v. PIRTHI SINGH**, 20 A. 110, F. B. = A. W. N. 1897, 216. [*Affirmed*, 24 A. 429, P.C.; F., 31 C. 428; *Cons.*, 1 C. L. J. 337; R., 26 M. 760, 1 C. L. J. 248, U. B. R. 1906, 3rd Qr., C. P. C., 46, 10 O. C. 145, 35 C. 979 = 8 C. L. J. 82 = 12 C. W. N. 862.]

(328)—*Mortgage—Two houses and one well mortgaged—Renewal of mortgage by mortgagor's son—Gift of moiety of the well by mortgagor to stranger—Conveyance of the houses mortgaged and the entire well by mortgagor's son to mortgagee—Prior suit between the stranger and the vendor for recovery of moiety of well—Dismissal—Subsequent suit by the vendee for declaration of title to the entire well and injunction restraining stranger from using the well—Effect of the sale—Extinguishment of the debt—Effect upon subsequent encumbrance or equity of redemption—Res judicata.*—A owned three houses, Nos. 1, 2 and 3, and a well. She mortgaged houses Nos. 1 and 2 and the well to K, the plaintiff. R, the adopted son of A, renewed the mortgage. Subsequently A made a gift of house No. 3 and a half of the well to the first defendant. K instituted a suit for recovery of certain rooms forming part of No. 2 against the 1st defendant and his tenant, and for an injunction against the latter restraining him from using the well and got a decree as prayed for. R sued the 1st defendant for recovery of the house No. 3 and the well, and his suit was dismissed. R then conveyed all his rights in houses Nos. 1 and 2 and the entire well to the plaintiff K. K now sued for a declaration of his right to the entire well and an injunction against the 1st defendant and another claiming under her. *Held*, that the 1st defendant's claim to one-half of the well became *res judicata* by reason of the

Mortgage—continued.**—1.—General—continued.**

decision in the suit between R and the 1st defendant. The plaintiff, as purchaser from R, is not in a better position than R, and is bound therefore to recognise the 1st defendant's equity of redemption in a moiety. The mortgage security came to an end by the conveyance executed by R in favour of the plaintiff who thereafter ceased to be in possession as mortgagee. *Held*, also, that the conveyance passed only a moiety of the well, and that the mortgage interest in the other moiety was extinguished by the discharge of the debt, and not transferred to R. The equity of redemption having been parted with, R would only be a trustee for the 1st defendant, a mere conduit pipe to pass the possession to him. (See s. 94, *Indian Trusts Act*). The discharge of the mortgage merely enlarges the security of the subsequent encumbrancer or adds to the interest of the owner of the equity of redemption. *Held*, that, though the 1st defendant was merely the owner of the equity of redemption in a moiety under the gift, and though the right to possession was outstanding in the mortgagee at the date of the gift, the mortgage having become discharged, she is entitled to possession of the moiety, and cannot be prevented from using the well as owner of such security. **PONNAMAL v. KALITHITTA MUDALI**, 7 M. L. T. 405 = 6 Ind. Cas. 764.

(329)—*Sale under decree of subsequent mortgagee—Suit by prior mortgagee for mere declaration of sale to be held subject to his right—Institution in Court of District Munsif—Value of prior mortgage over Rs. 2,500—Jurisdiction—Proviso to s. 42, Act I of 1877 (Specific Relief)—Bar of suit.*—Where a prior mortgagee who held a mortgage for Rs. 3,300 instituted, in the District Munsif's Court, a suit for a mere declaration that the sale under a decree obtained by a subsequent mortgagee in that Court should be subject to his mortgage: *Held*, that the suit was beyond the jurisdiction of the District Munsif's Court, as the amount claimed by the plaintiff on his mortgage was more than Rs. 2,500. *Held*, also, that the proviso to s. 42, *Specific Relief Act*, 1877, was a bar to the suit, because the plaintiff failed to ask for any consequential relief against the subsequent mortgagee in the shape of a decree for sale. **NARNA BALAYYA v. RUDRAVARAM VENKATAPPA**, 11 M. L. T. 190 = M. W. N. 1912, 414 = 15 Ind. Cas. 221.

(330)—*Res judicata—Mortgage—Second suit not maintainable for same cause—Code of Civil Procedure (Act V of 1908), O. 2, rr. 1, 2—S. 47 (2)—Personal remedy barred—Money-decree not obtainable.*—On 17th April, 1882, one J, who owned shares in three properties, mortgaged one of them to S, the debt being re-payable in nine years. On 14th August, 1883, she mortgaged the same property to the same mortgagee, the debt being re-payable in three years. On 30th April, 1885, she mortgaged the same property again to the predecessors-in-title of the plaintiffs, the debt being re-payable in nine

Mortgage—continued.**—1.—General—continued.**

years. S brought two suits on foot of his two mortgages, and the mortgagor mortgaged all her three properties to S on 31st August, 1888, the debt being repayable in twelve years. On 22nd July, 1903, the plaintiffs brought a suit for sale on foot of their mortgage and impleaded the heir of S as a puisne mortgagee. The latter set up his two mortgages of 1882 and 1883, and pleaded that the property could not be sold without these being redeemed. The plaintiffs, thereupon, amended their plaint and expressed their willingness to redeem the prior mortgages. They obtained a decree on 4th May, 1904, conditional on their paying the amount due on the prior mortgages upon doing which they could sell the property for the amount so paid and the amount due under their own mortgage. Upon the mortgagors failing to pay, the plaintiffs paid off the amount of the prior mortgages. The order absolute was passed on 26th August, 1905. One of the properties being sold, the amount realised by the plaintiffs left a balance still due to them. On a suit being brought to realise the balance on 12th February, 1909: *Held*, that the second suit was not maintainable on the principle that the defendant could not be vexed twice for the same cause: *Held*, also, that the plaintiffs were not entitled to a simple money-decree, the personal remedy on the two mortgages of 1882 and 1883 having become barred. **MUHAMMAD HUSAIN v. DHANESAR RAI, 8 A.L.J. 599=10 Ind. Cas. 336.**

(330-a)—*Mortgage—Prior and subsequent mortgage—Prior mortgagee not asserting his rights in the suit for sale by the puisne mortgagee—Res judicata—Minor.*—A prior mortgagee is precluded from setting up his mortgage or his rights under his decree on the mortgage in a subsequent suit for possession by a puisne mortgagee, when the prior mortgagee did not assert his rights in the suit for sale instituted by the puisne mortgagee in which he was impleaded. A minor, who is represented in a suit by a duly constituted guardian, is as much bound by the decree passed in that suit as if he were of full age, when there was nothing on the record to show that there was any fraud on the part of the guardian. **CHANDAR SEKHAR TEWARI v. BALAKDHAR DUBE, 10 A.L.J. 149=15 Ind. Cas. 611.**

(331)—*Mortgagee holding two mortgages over same property—Suit for sale on first mortgage—Subsequent suit on second mortgage barred—Remedy of mortgagee in such case.*—Where a mortgagee, with two mortgages on the same property, obtained a decree for sale of the mortgaged property in satisfaction of the first mortgage, he is debarred from bringing a subsequent suit for sale on the second mortgage, even though he made no mention of the second mortgage in the plaint in the former suit. But it may be open to him, when the decree in the first suit is executed, to enforce his claim on the second mortgage under s. 97 of the Transfer of Property Act, by proceeding against any surplus that

Mortgage—continued.**—1.—General—continued.**

remains after satisfying the decree. **KRISHNA. MACHARIAR v. ANANGARACHARIAR, 17 M.L.J. 301=2 M.L.T. 330=30 M. 353.** (24 A. 429, P.C., *Appl.*; 25 M. 108, R.; 20 A. 322, *Diss.*) [*R.*, 17 M.L.J. 403=2 M.L.T. 346=30 M. 408.]

(332)—*Mortgagee, when bound by mortgagor's acts in respect of mortgaged property—Res judicata—Usufructuary mortgage—First suit for mesne profits—Second suit for possession.*—The acts of the mortgagor antecedent to the mortgage by him would bind the mortgagee, but his acts subsequent to the mortgage would not bind the mortgagee unless they were done by him as the agent of the mortgagee. A member of an undivided Hindu family mortgaged his share in the joint property to the plaintiff, and it was recited in the mortgage deed that the money was borrowed for the purpose of bringing a suit for partition against the mortgagor's co-parceners. A suit for partition was brought accordingly, by the mortgagor, but judgment was allowed to go against him by default. Subsequently the mortgagee instituted the present suit for possession of his mortgagor's share in the property in question. *Held* that the mortgagor could not be considered as the agent of the mortgagee in bringing his suit for partition, and the partition suit being subsequent to the mortgage, it did not operate as *res judicata* against the present suit by the mortgagee for possession. [*R.*, 5 Bom. L.R. 3.] Where a usufructuary mortgagee brought a suit for mesne profits which was dismissed on the ground that his mortgagor was not in possession of his share in the property which belonged jointly to an undivided Hindu family, it was held that it did not operate as *res judicata* against a subsequent suit by the mortgagee for the possession of his mortgagor's share in that property. **KRISHNAJI LAKSHMAN RAJVADE v. SITARAM MURARRAV JAKHI, 5 B. 496.**

(333)—*Hindu Law—Alienation—Antecedent debt—Sons liable unless the debt tainted with immorality—Res judicata between co-defendants—Mortgage—Mortgaged property sold in execution of prior mortgage-decree—Auction-purchaser re-selling it to the mortgagor—Suit on subsequent mortgage—Property not liable to be sold—Pleading—Finding of fact not challenged in the first appellate Court cannot be agitated in second appeal—Practice.*—The first Court found certain facts against the appellants. They did not challenge it in the lower appellate Court. *Held*, that they could not challenge them in second appeal. The sons and grandsons of a Hindu are bound by the mortgage created by the father, in lieu of antecedent debts which were not contracted for immoral purposes. In a suit brought by a prior mortgagee, both the mortgagor and the subsequent mortgagee were made parties. Certain issues were decided as between the prior mortgagee and the mortgagor. *Held*, that the issues

Mortgage—continued.**—1. — General—continued.**

could not be *res judicata* as between the mortgagor and the subsequent mortgagee, in a suit brought by the subsequent mortgagee, on the strength of his mortgage. A suit was brought by a prior mortgagee, and the subsequent mortgagee was made a party. The subsequent mortgagee was given an opportunity to redeem the prior mortgagee, but he failed to do so. The property was put to auction free from all incumbrances and was purchased by a person who sold back the property to the heirs of the mortgagor. *Held*, in a suit brought by the subsequent mortgagee, that the property thus purchased by the mortgagor ceased to be security for the mortgage-debt of the subsequent mortgagee, and was, therefore, not liable for that debt. **SAHDEO RAI v. RAM SEWAK RAI, 6 Ind. Cas. 331.**

(334)—*Question of transferability of jama mortgaged—Mortgage suit—Landlord defendant not estopped from raising question.*—The question of transferability of *jama*, which was mortgaged, can be gone into in a suit upon the mortgage, and can be raised by the landlord, who, having purchased a portion of the mortgaged property, was made a defendant in the suit. (33 C. 425, D.). Where a landlord, in execution of a mortgage-decree, caused the sale of an occupancy holding and purchased it himself, he is not estopped from pleading non-transferability without his consent, in a subsequent suit brought by the mortgagee of the occupancy holding. **KUNJA BEHARY SHAHA v. MATU BIBI, 1 Ind. Cas. 661. (35 C. 904, 8 C.W.N. 365, F.)**

(335)—*Mortgage—Prior suit—Plaintiff in subsequent suit joined as representative of one mortgagor—Title paramount to that of mortgagor—Failure to set up—Whether res judicata in later suit.*—Where, in a prior mortgage-suit in which a decree for foreclosure was passed, the plaintiff in the subsequent suit was joined as a defendant, and he failed to set up, in the prior suit, a title paramount to that of the mortgagor by way of defence: *Held*, that it cannot be said that he ought to have set up such title, and his omission to set up such title will not render the question of title, in the later suit, *res judicata*. **HANUMAN SINGH v. MANNULAL, 6 N.L.R. 156. (12 C. 414, 20 C. 79, 32 C. 746, 33 C. 425, 5 C.L.J. 95, A.W.N. 1893, 432, R.)**

(336)—*Suit to recover money secured by a mortgage-deed found to be invalid—Limitation Act, arts. 97 and 116*—Where a mortgagee was dispossessed under a decree obtained by certain person, on the ground that the mortgagors were members of a joint Hindu family and had no authority to make the mortgage, and the mortgagee brought a suit for recovery of, amongst other sums, the money secured by the mortgage, *held*, that the suit was governed not by art. 116 but by art. 97 of the Limitation Act. **RAM PAL JHAN v. MAHADEO PRASAD, 13 O.C. 155=6 Ind. Cas. 1016.**

Mortgage—continued.**—1. — General—continued.**

(337)—*Mortgage-decree—Payment to decree-holder before and after order absolute—Execution—Civil Procedure Code (Act XIV of 1882), s. 251—Limitation Act (XV of 1877), sch. II art. 173-A.*—Where the mortgagee makes an application for an order absolute, and the mortgagor has previously made any payments towards satisfaction of the judgment-debt, it is open to him to urge that an order absolute ought not to be passed for the entire sum, or that an order absolute ought to be passed for a smaller sum than what is mentioned as due in the decree nisi. When a decree has once been made, it is conclusive between the parties. (8 C. W.N. 102, 29 C. 810, R.). S. 258, Civ. Pro. Code (1882), applies to proceedings in execution of mortgage decrees. Hence any payment alleged to have been made to the decree-holder and not certified by him within the time prescribed by art. 173-A. of the Limitation Act (XV of 1877) cannot be considered by the execution Court. **NISTARINI DAS v. KASIM ALI, 12 C.L.J. 65=7 Ind. Cas. 258 (7 C.L.J. 581, 25 C. 703, 8 C.W.N. 102, 24 M. 412, D.)**

(338)—*Suit to set aside sale—Mortgage to vendee—Right of plaintiff to question.*—In a suit by a reversioner to set aside a sale, it was found that there had been a mortgage to the vendee more than 12 years back. *Held*, that the reversioner could question the mortgage also, that the mortgagee had acquired no prescription, and that the mortgage, in the absence of proof to the contrary, was kept alive and did not merge in the sale. **DEVI DITTA v. PARI-MAN, 71 P.R. 1898 [R., 62 P.R. 1910, 32 P.R. 1904=122 P.L.R. 1904.]**

(339)—*Adverse possession against mortgagor—Mortgagee bound to bring suit within 12 years—Mortgagor, mortgagee and trespasser—Limitation.*—As against a person who holds mortgaged property adversely to the mortgagor, the mortgagee is bound to bring his suit within 12 years, and time begins to run when the possession of the defendant became adverse to the mortgagor. **BAIJNATH v. BHADAIYAN, 9 Ind. Cas. 990. (2 N.W.P. 223, 2 M. 226, 25 A. 35, F.)**

(340)—*Mortgage—Limitation—Suit for possession by mortgagee—Decree, form of—Lien to be left for determination in redemption suit—Mortgagor leaving a portion of money for payment to previous mortgagee—Non-payment to previous mortgagee—"Reasonable time" how to be determined—Incomplete mortgagee—Demand—Acquiescence—Payment of interest—Mortgagee's right to possession on default in payment of interest—Mortgagor pleading payment within twelve years.*—On 25th June, 1891, A mortgaged certain land to B, for Rs. 350. Out of the consideration, a sum of Rs. 147-12-0 was retained by B, for payment to a previous mortgagee C, who was in possession of a part of the land. Two years elapsed without B paying off C. On 18th July, 1893, A again mortgaged the same land to B for Rs. 600, Rs. 147-12-0 being

Mortgage—continued.**—1.—General—continued.**

as before left for payment to C. The essential conditions of both the mortgage-deeds were that A was to hold possession and pay interest at the stipulated rate; B was to pay off C and set free the land with him, on default of payment of interest in any one year, B was to be entitled to possession. It was not till 1904 that B paid off C and so secured for A the possession of the whole land. In 1907, B sued for possession on the allegation that interest for the first six years on Rs. 450 was paid by A, but nothing was paid thereafter. A pleaded that the suit must fail because of the non-payment of C's debt within a reasonable time, and further alleged that he had paid interest in full on Rs. 600 to date of suit. *Held*, that:—(1) The burden of proving non-receipt of consideration in the case of a registered deed lies on the executant or his representatives in interest. (2) In a suit by a mortgagee for possession against his mortgagor, if the right of the mortgagee to possession is established, it is sufficient to pass a decree for possession *simpliciter*, the matter of the amount of the lien being left to be decided upon redemption. (3) The suit was within time, as A himself asserted payment of interest within 12 years before date of suit. (4) By regular payment of interest A acquiesced in the continued possession by C of a portion of the land; that A acted as if the delay in paying C off was not unreasonable and made B understand that he did not intend to raise any objection on this score. (5) A could not plead that the mortgage was incomplete and ineffectual by reason of non-payment of C's debt within a reasonable time. (6) In deciding what is "reasonable time" for payment of the unpaid portion of mortgage money, the wishes and interest of the mortgagor are an important factor—in most cases they are the decisive factor. (7) The absence of a demand by the mortgagor upon the mortgagee for redemption of previous mortgage would not save the mortgagee from losing the benefit of his mortgage, by reason of the non-payment of the debt due to the previous mortgagee. *KIMAN v. SULTANI MAL*, 82 P.W.R. 1912=13 Ind. Cas. 559=148 P.L.R. 1912=66 P.R. 1912. (59 P.R. 1907=95 P.W.R. 1907, F.B., *Expl. & Diss.*)

(341)—*Mortgage suit—Remedy of mortgagee against purchaser of portion of mortgaged property, not made a party within time.*—When, in the course of a suit to enforce a mortgage, but more than 12 years after the date fixed in the mortgage-bond for repayment of the mortgage money, the Court directed that a purchaser of a portion of the mortgaged property be added as a party defendant. *Held*—that the suit as against added defendant was barred by limitation. *Quære*: Whether the portion of the mortgaged property in the hands of the added defendant was thereby exempted from liability under the mortgage. *RAMKINKAR BISWAS v. AKHIL CHANDRA CHOWDHURI*, 11 C.W.N. 350, F.B.=5 C.L.J. 242=2 M.L.T. 137=33 C. 519. [*R.*, 7 C.L.J. 251, 35 C.

Mortgage—continued.**—1.—General—continued.**

1065=13 C.W.N. 186=8 C.L.J. 286=5 M.L.T. 91; *D.*, 36 C. 675=9 C.L.J. 523.]

(342)—*Mortgage—Bona fide purchase—Possession and mutation of names—Effect—Foreclosure proceedings—Purchaser from mortgagor not made a party—English mortgage—Suit by assignee of mortgagee against purchaser from mortgagor—Limitation.*—Where a party bona fide purchased from another, as his own property, land in fact mortgaged, and obtained possession and mutation of names, his title was held to be adverse to that of the mortgagee. Foreclosure proceedings in the Supreme Court as to mofussil property, to which a purchaser from the mortgagor is not made a party, cannot affect that purchaser. [*R.*, 5 M. 184; *Expl.*, 14 B.L.R. 87=22 W.R. 90.] Where there are two mortgages, with right of entry after default, in respect of the same property, and one of the mortgagees purchased the interest of the other, a suit by the purchaser, mortgagee to recover possession of the mortgaged property against the purchaser from the assignee in insolvency in respect of the estate of the mortgagor's transferees brought more than 12 years after default, was barred. *BRAJANATH KUNDU CHOWDHRY v. KHILAT CHANDRA GHOSE*, 8 B.L.R. 104, P.C.=16 W. R. P.C., 33=14 M.I.A. 144. [*F.*, 7 C.L.J. 640; *R.*, 1 C.L.R. 296, 14 C. 464, 14 C. 730, 9 O.C. 147, 12 O.C. 45=2 Ind. Cas. 57; *Expl.*, 14 B.L.R. 315=22 W.R. 543.]

(343)—*Inherited property of one's paternal grand-mother—Rule of the Dammathats as to such property—Whether the rule is that the party by whom it is inherited has a superior right in the inherited property to the other party—and why—What is the share of the inheriting party in case of divorce by mutual consent—and why—Mortgages effected by husband of paternal grandmother after her death—Whether grandson on redeeming mortgaged property is bound to pay the whole amount due on such mortgage or only amount proportionate to his share.*—Maung Aung Mayat sued for a $\frac{3}{4}$ share of the inherited property of his paternal grandmother, Ma Ka, the said property consisting of four holdings of land shown in the maps and aggregating to 4.72 acres. The lower Courts agreed in finding that the land in suit, 4.72 acres or 17 *yaukseiks*, was all acquired by Ma Ka by inheritance during her coverture with Maung Sa. Plaintiff-respondent, who is still a minor, is the only grandson of Ma Ka and Maung Sa, who had three children, two of whom died without issue. The eldest son, Aung Pyo, had one son, plaintiff. Ma Ka died about 25 years ago; Aung Pyo died about 13 years ago and Maung Sa about 11 years ago. It was argued that the suit was barred by limitation, as it was said that Aung Pyo had 12 years within which to bring the suit from the death of Ma Ka. It was, therefore, urged that he was barred before his death and that Aung Myat was equally barred as claiming through him. *Held*, that it was not clear that Aung Pyo was time barred

Mortgage—continued.

—1.—General—continued.

before he died, as appellant, Ma Shwe Hmon, herself stated that, at her marriage with Maung Sa, Aung Pyo was only 9 years old, and that, therefore, he was a minor when his mother died; and because Ma Shwe Hmon in her written statement said that Aung Pyo died 14 years ago. It was further argued that plaintiffs' share should be $\frac{1}{4}$ and not $\frac{3}{4}$, land inherited during marriage by husband and wife being classed as *lettetpwa*. *Held*, that, throughout the *Dhammathats*, it was recognised that the party by whom it was inherited had a superior right in the inherited property to the other party, and that, in the case of divorce by mutual consent, for instance, the inheriting party takes a $\frac{2}{3}$ share, because he or she is the party through whom it was obtained. (U.B.R. 1906, 4th Quarter, 19, 13 Bur. L.R. 246, *Appr.*) *Held*, also, that the rule was clearly laid down in para. 226 of the *Attathankapa*, according to which the plaintiff was entitled to a $\frac{1}{4}$ share of his grand-mother's inherited property, namely, the 4.72 acres of land in suit. There were two mortgages effected on the land by Maung Sa after Maung Ka's death, which he was entitled to effect. One was of 2.84 acres to San Dun for Rs. 80, and the other of the remainder of the land for Rs. 50 to Maung Seik, afterwards transferred to Maung Shan Gyi. *Held*, that, as regards the mortgage for Rs. 50, plaintiff was not entitled to claim possession until he had paid off the mortgaged debt, but that he was not entitled to possession of $\frac{3}{4}$ on paying off $\frac{3}{4}$ of the debt, as the mortgage affected the whole land and was not divisible. *Held*, as regards the other mortgage, that the plaintiff had nothing to pay to any of the present defendants in respect of this land and that as against them he was entitled to the relief prayed for. *MA SHWE HMON v. MAUNG AUNG MYAT*, 14 Bur. L.R. 117.

(344)—*Pre-mortgage—Wajib-ul-arz—Mortgagee of co-sharer not a co-sharer himself.*—A co-sharer, even though he has mortgaged with possession his interest in the mahal, and so has temporarily abandoned his right to actual possession of the land, is nevertheless, a co-sharer and retains the right of pre-emption and the mortgagee does not become *ipso facto* a co-sharer. Therefore, if such mortgagee give an assignment of his mortgage or execute a sub-mortgage to one who is not a co-sharer, the same result does not ensue as in the case of an alienation by a co-sharer, i.e., it does not give rise to a right of pre-emption or pre-mortgage. Two co-sharers A and G mortgaged their proprietary interest with possession to L. The latter made either an assignment or a sub-mortgage of her interest under the mortgage for a term of twenty years to one B, with a foreclosure clause in case of non-payment. B afterwards transferred for an unexpired period of sixteen years and eleven months to X the interest in the property which he had acquired from L. One N.L., being a co-sharer in the

Mortgage—continued.

—1.—General—continued.

village, thereupon instituted a suit for pre-emption, or rather pre-mortgage, under the terms of the village *wajib-ul-arz*, which gives a right of pre-emption and of pre-mortgage when the share of a co-sharer is sold or mortgaged. It was admitted that neither L nor her assignee B nor B's assignee X, is a co-sharer in the village. It was also admitted that N.L. made no attempt to assert his alleged rights when the first or the second alienations were made. The question to decide was whether the third transfer noted above gave to the plaintiff N.L., any cause of action on which he could maintain the present suit. *Held* that A and G did not, by reason of the mortgage they executed in favour of L, lose the status of co-sharers in respect of the mortgaged property, that neither L nor her assignee (or sub-mortgagee) B became a co-sharer by virtue of their respective mortgages, that when B assigned or sub-mortgaged to X, what was transferred was not a co-sharer's interest, but an assignment of a mortgage of (or a sub-mortgage of) an interest executed by a stranger and not a co-sharer, that to such an alienation the terms of the *Wajib-ul-arz* did not apply, and that, therefore, the plaintiff N.L., was not entitled to the right claimed by him. *NAND LAL v. BANSI*, 20 A. 19, F.B. = A.W.N. 1897, 160. (A.W.N. 1887, 93, 14 A. 195, F.) [R., 25 A. 421.]

(345)—*Suit for pre-emption—Mortgage of right in the property sought to be pre-empted—Mortgagee obtains a charge—Valid mortgage—Equity treats as done what ought to have been done.*—K brought a suit for pre-emption. He borrowed money to carry on the suit and mortgaged the property, the subject-matter of the pre-emption suit. Afterwards, he obtained a decree. *Held* that, when the mortgagor acquired by pre-emption and got possession of the property, equity, treating that as done which ought to be done, gave the mortgagee a charge by way of mortgage upon the pre-empted share and placed him in the position of a mortgagee. The mortgagees, therefore, could bring the pre-empted property to sale. *GAYA DIN v. KASHI GIR*, 4 A.L.J. 57 = A.W.N. 1907, 7 = 29 A. 163. (10 A. 133, R.) [R., 7 C.L.J. 387, 11 O.C. 301.]

(346)—*Otti mortgage—Whether it connotes a right to pre-emption in South Canara—Even if it does, it cannot be pleaded as a bar to the plaintiff's suit for possession—No distinction between the incident of pre-emption attached by custom and one imposed by contract.*—Even if an otti document in South Canara connotes a right to pre-emption, that right cannot be pleaded as a defence in a suit for possession by a person in the position of plaintiff in this case. (30 M. 388, 29 M. 339, F.) The right of pre-emption as an incident attached by custom to an otti mortgage does not stand on a higher footing than a distinct contract between the parties that the mortgagee should have a right

Mortgage—continued.**—1.—General—continued.**

of pre-emption. *SUBRAMANIAN EMBRANDIRI, v. KRISHNAN EMBRANDIRI*, 2 M.W.N. (1911) 486=12 Ind. Cas. 625.

(347)—*Mortgagee with right of pre-emption—Suit by third party for specific performance of contract to sell—Specific Relief Act, s. 27 (b).*—A stipulation in or at the time of mortgage giving the mortgagee a right of pre-emption in case the mortgagor wished to sell the property should be upheld. But if in any case a stipulation for pre-emption could be shown to be fraudulent, oppressive or unfair, it would not be upheld. (22 A. 238, 2 C.W.N. 575, R.) If the mortgagee obtains a conveyance of the property before a third party who has contracted with the mortgagor for the purchase of it, the third party cannot enforce the contract against the mortgagee even although the latter knew of the mortgagor's agreement to sell to such party. *MUNG SAN NYEIN v. MAUNG TUN*, 2 L.B.R. 108.

(347-a)—*Mortgage—Onerous and unconscionable—Equitable relief—Right of assignee for value from mortgagor—Mortgage to avoid pre-emption.*—A sold certain property to B. A suit for pre-emption was brought in respect of the sale. A and B, however, cancelled the sale and substituted a mortgage, the terms of which were exceedingly onerous. The suit for pre-emption was accordingly dismissed. Subsequently, A sold his equity of redemption to C, who sued for redemption of the mortgage and contended that he should be allowed to redeem the mortgage on payment of a much smaller sum than would be due under the onerous conditions of the mortgage: *Held*, (1) that C, as an assignee by purchase from A, could not succeed in getting equitable relief against the onerous conditions of the mortgage, unless he could show that A could get such relief: (2) that under the circumstances of the case, neither A nor C was entitled to equitable relief from the conditions of the mortgage. There may be circumstances entitling an assignee for value to equitable relief in regard to an unconscionable bargain, but when Courts of equity are considering their duty in regard to giving such relief, the position of a voluntary assignee by purchase must always be a different one from that of the original transferor. The foundation for equitable relief is that the original transferor, owing to the circumstances under which he finds himself, was more or less compelled at the moment to enter into the onerous bargain from the unconscionable conditions of which he seeks relief. The position of a voluntary assignee by purchase must always have this marked distinction, that he has taken over the bargain under no such stress or compulsion. *SODHI KISHEN SINGH v. SODHI NARINDAR SINGH*, 14 Ind. Cas. 516=250 P.W.R. 1912.

(348)—*Merger of mortgage in previous money decree—Cause of action—Ss. 13, 43, Civ. Pro. Code, 1882—Relationship of landlord*

Mortgage—continued.**—1.—General—continued.**

and tenant—Jurisdiction of Civil Courts—Findings of fact—Estoppel.—B. S., a usufructuary mortgagee, sub-mortgaged to G. S. in August 1888, the terms being that the latter should be put into possession, and that the former should be personally liable for the mortgage money. In August 1900, within limitation, G. S. sued for the principal and interest alleging that he had never been put into possession. G.S. obtained a decree for the principal against the property mortgaged, and his appeal against so much of the decree, as dismissed the suit for interest, was dismissed. In consequence of the enactment of the Land Alienation Act (XIII of 1900), G.S. did not execute his decree. In 1907, G.S. brought the present suit for possession, on the ground that B.S. denied his title in 1905. The lower Courts found that G.S. had obtained constructive possession of the mortgaged property through tenants till 1905, and that there was not a new agreement between the parties in 1901, and decreed the plaintiff's claim. *Held* that G.S.'s allegations in the suit of 1900 did not estop him from alleging in this suit that he was in possession of the property up to within twelve years of the present suit, and that the suit was within limitation. *Held* also that the mortgage did not merge in the decree obtained by G. S. in 1900, and a cause of action survived on the mortgage: and that ss. 13 and 43, Civ. Pro. Code, 1882, did not bar the suit. *Held* also that the facts found did not establish the relation of landlord and tenant between the parties, and therefore the Civil Courts had jurisdiction. *Held* also that no further appeal lay, as the value of the suit and appeal for purposes of jurisdiction was less than Rs. 1,000. *BAHADUR SHAH v. RAM SINGH*, 32 P.R. 1910=50 P.W.R. 1910=6 Ind. Cas. 655=57 P.L.R. 1910. (3 P.R. 1887, 47 P.R. 1884, 66 P.R. 1884, 129 P.R. 1889, F.B., 27 M. 102, R.)

(349)—*Revision—Question of fact—Finding that mortgage was not fictitious—Fraudulent transfer—Mortgage in good faith and for consideration—Mortgagor and mortgagee related to each other—Decree obtained years before the mortgage—Transfer of Property Act (IV of 1882), s. 53.*—A finding that a mortgage is not a fictitious transaction inasmuch as the greater part of the consideration is proved to have been paid, and that the judgment-creditor has failed to prove that it was a fraudulent and collusive arrangement made between the mortgagor and mortgagee with a view to defeat the creditor, is a finding of fact, and cannot be disturbed by the Chief Court in revision. S. 53 of the Transfer of Property Act does not apply to the case of a mortgage where the mortgagee is a transferee in good faith and the mortgage is for consideration, even if the consideration be inadequate. An intention to defeat or delay the creditor cannot be inferred from the mere fact that the mortgagor and the mortgagee are related to each other, especially where the creditor obtained his decree years before the mortgage

Mortgage—continued.**—1.—General—continued.**

took place. *MUSSAMAT ISHAR KUAR v. RAM SINGH*, 114 P.L.R. 1911=9 Ind. Cas. 1018=172 P.W.R. 1911.

(350)—*Equitable mortgage by deposit of title deeds—Evidence sufficient to constitute Civ. Pro. Code, Act X of 1877, s. 43—Suit against mortgagor for money—Subsequent suit against purchaser of mortgage property to enforce lien—Suit against mortgagor for money decree—Alienation of mortgage property pending suit—Lis pendens, doctrine of, if applicable.*—Mere possession by a creditor of title deeds belonging to his debtor would not constitute an equitable mortgage, in the absence of evidence that they were deposited as security for money. If the title deeds were deposited at the time the money was advanced, that might be enough, but when it is intended to make deposit security for a prior debt, some further evidence of the intention is required. Where the terms of a bond showed that it was intended that a house should be hypothecated for a debt, it might perhaps be inferred that the subsequent deposit of title deeds was made in furtherance of that intention; but where the only reference to the house was contained in these words, "I shall sell my house anywhere, I shall first pay the above mentioned amount to the above mentioned person," (i.e., to the creditor), it was held that such words were not sufficient to constitute any mortgage of the house. Where, in a previous suit brought against the heirs of a mortgagor, for the recovery of the money due on the bond, there was merely a money-decree, which was declared to be recoverable out of the deceased mortgagor's estate in their hands, without any declaration of the mortgage lien in the decree, a suit to enforce the mortgage lien against the subsequent purchaser of the mortgaged property was held not barred by s. 43 of the Civ. Pro. Code, (Act X of 1877), as the cause of action against the subsequent alienee was different from that against the obligee of the bond to recover the money due thereon. [*F.*, 142 P.R. 1882.] Where after the institution of a suit against the heirs of a mortgagee for the recovery of the money due on the bond, without making any reference to the existence of any collateral security, the property alleged to be hypothecated is first mortgaged and then sold after decree to a third person, the doctrine of *lis pendens* will not apply, the suit being no bar to the alienation of the property as there was no claim to it in the suit then pending. *MUSSAMUT CHAND KOUR v. MUSSAMUT FAJJO*, 113 P.R. 1880. [*Appr.*, 6 P.R. 1901=P.L.R. 1900, p. 513.]

(351)—*Transfer of Property Act, s. 59—Equitable mortgage—Deposit of title-deeds—Co-existence of debt—Intention to create a security—Evidence Act, ss. 21, 32—Samadaskat book of debtor—Entries by creditor—Relevancy—Equitable mortgage in satisfaction of time-barred debt—Limitation Act, 1908, s. 19—Contract Act, s. 25.*—The mere possession of title-deeds coupled with the existence of a debt

Mortgage—continued.**—1.—General—continued.**

does not necessarily lead to a presumption of an equitable mortgage by deposit of title-deeds. To make out such a mortgage, it must also be proved that the intention of the depositor was to create a security. Entries of payments made by a creditor in the *Samadaskat* book belonging to the debtor fall within the language and intention of s. 32, Evidence Act, and although they are admissions in his own favour they are not excluded by s. 21 of the Act. Where an equitable mortgage is effected to satisfy a time-barred debt, the equitable mortgage affords a sufficient ground of action to the mortgagee to sue for the debt, even though the provisions of cl. 3 of s. 25, Contract Act, are not complied with; since, by the deposit of title-deeds as security for a time-barred debt, the equitable mortgagor virtually discharges the debt by assigning to the creditor an interest corresponding in money value with the debt due on the property mortgaged. *JETHIBAI v. PUTLIBAI*, 14 Bom. L.R. 1020.

(352)—*Decree on mortgage—Decree set aside as against one mortgagor—Second suit to recover proportionate share of the debt maintainable.*—One S executed a mortgage in favour of A. S died leaving him surviving two daughters, a brother, and an illegitimate son. A assigned the mortgage to the sons of the brother of S, and they brought a suit upon foot of the mortgage against the daughters and the illegitimate son of S for sale, which suit was decreed. Thereupon, R, one of the daughters of S, brought a suit to set aside the decree so far as she was concerned, and she succeeded in the Privy Council, her share having been restored to her under the Privy Council decree. The plaintiffs now brought a suit to recover from R's share of the mortgaged property her proportionate share of the mortgage-debt. *Held*, that the suit to recover from R's share the proportionate share of the mortgage-debt was maintainable. *RASHID-UN-NISSA v. MUHAMMAD ISMAIL KHAN*, 9 A.L.J. 738, F.B.=34 A. 474=16 Ind. Cas. 85.

(353)—*Mortgagee undertaking to pay off debt due under decree on previous mortgage—Institution of suit on his mortgage without so paying off—Subsequent payment of prior mortgage—Second suit to enforce right under prior mortgage—Maintainability—S. 74, Transfer of Property Act—Distinct causes of action—S. 11, O. II, rr. 1 & 2. Civ. Pro. Code, 1908—No bar to such suit.*—Where a mortgagee who, *inter alia*, undertook to pay off the debt due under a prior mortgage decree, instituted a suit on his mortgage without discharging that debt, and obtained a decree, and where, after paying off that debt, he again brought a second suit to enforce his rights under the prior mortgage. *Held*, that, when he discharged the prior mortgage, he became, under s. 74, Transfer of Property Act, entitled to the rights of the prior mortgagee, and that, his cause of action to enforce that right being distinct from his

Mortgage—continued.**—1.—General—continued.**

right on his mortgage bond, his second suit was not barred under s. 11, O. II, rr. 1 & 2, Civ. Pro. Code, 1908. The plaintiff's proper remedy was not to proceed in execution of the decree upon the prior mortgage, but to institute a fresh suit on the right acquired by him by paying off the prior mortgagee. **SUNDARA REDDIAR v. SUBBIAH KOUNDAN, 24 M.L.J. 28. (27 A. 325, R.)**

(254)—*Lekha mookhee mortgagee in possession, duty of, to render account as trustee—Presumption in case of default by mortgagee.*—The mortgage in this case was of the kind known as the *lekha mookhee* obtaining in Mooltan, etc., in which kind of mortgage the mortgagee is put in possession, charges the mortgagor with the interest of the mortgage debt and, at the same time, credits the mortgagor with the proceeds of the land. The Chief Court ruled that, in such a case, the mortgagee was in the position of a trustee for the mortgagor and was as such bound to render accounts to him regarding the management of the property. In this case, the mortgagee was unable to render the necessary accounts and the Chief Court, *held* that, although, on the mortgagee failing to give an account of the proceeds of the property, the Courts should place the income at the highest possible figure and to presume everything against him, yet, as both the lower Courts had agreed as to the value of the proceeds of the land, the *onus* of proving the alleged payment in cash, apart from the proceeds of the land, lay on the mortgagor who failed to discharge it. **RANJA v. MUSSUMAT PIAREE AND CHELA RAM, 99 P.R. 1869.**

(355)—*Mortgage—Purchaser without notice—Rights.*—In a suit by a mortgagee against the mortgagor and purchasers of the mortgaged property without notice of the prior mortgage, *held* that the mortgagee was entitled to a decree against the property, *i.e.*, a decree for the mortgage debt for which, if not satisfied, the property could be brought to sale. **DWARKA DASS v. RAMJI DASS, 76 P.R. 1870.**

(356)—*Civ. Pro. Code, Act VIII of 1859, ss. 2, 7—Suit by mortgagee for money lent, and for enforcement of lien—Simple money decree alone passed—Subsequent suit to proceed against mortgaged property, if maintainable.*—Though s. 7, Act VIII of 1859, requires that, if all rights arising out of the same cause of action are not sued for together, the portion abandoned cannot be separately sued for afterwards, it does not enact the same penalty for all rights under the same title or similar titles, the right to sue for which may arise under different dates and causes of action. A deed of mortgage by which a loan of money is raised, and by which the mortgagor has given a lien on the land mortgaged to the lender, creates two rights—one against the person of the borrower and the other a right to proceed against the property mortgaged, and these rights may accrue at different dates. As separate suits may be

Mortgage—continued.**—1.—General—continued.**

lodged, when there are distinct rights enforceable at different dates under the same document, the mere fact of a mortgagee having, in his plaint, sought to recover his money and to enforce his lien, the latter part of his prayer not having been put in issue and not having been heard and determined, cannot entirely alter the nature of the case and preclude his lodging a suit (ss. 2 and 7 not being a bar to such suit), for what, had he acted otherwise, he could have claimed. **DOONA v. KASHMIRI MAL, 69 P.R. 1876. [Appr., 113 P.R. 1880.]**

(357)—*Mortgage—Money decree obtained against mortgagor alone without impleading other persons interested—Purchaser at sale in execution of decree—Extent of title acquired.*—It cannot be the law that a sale in course of execution of a decree obtained by a prior mortgagee in a suit against the mortgagor alone passes an absolute title against all persons having interests in the property created by the mortgagor subsequent to the first mortgage, nor would it be just that this should be so. Further, it is no injury to any of the mortgagee's rights, to require that, if he desires the full value of his security, *i.e.*, to bring the property to sale in such a manner that the purchaser will receive an absolute title free from all encumbrances, he shall so frame his suit as to bring all the persons with interests in the property derived from the mortgagor, before the Court in the proceeding instituted by him to enforce his lien on the property. Consequently, it is only by a sale in execution of a decree made in presence of all the persons interested in the property, against which the first mortgagee seeks to enforce his charge, that an absolute title passes to the purchaser free from all dispositions made by the mortgagor subsequent to the first mortgage. **FAIZ MUHAMMAD JAN v. KAZE MUHAMMAD AMIR JAN, 10 P.R. 1879. [R., 94 P.R. 1881, 97 P.R. 1883, 2 P.R. 1886.]**

(358)—*Mortgage—Prior and subsequent mortgage—Suit by subsequent mortgagee—Relief—Amendment.*—A mortgaged his property to T on 11th August, 1865. A mortgaged the same property to J on 28th of April, 1866. T, brought a suit on the basis of his mortgage, obtained a decree and purchased the property himself on 20th of July, 1867. To this suit, J was not a party. J also instituted a suit on foot of his mortgage in April, 1867, obtained a decree and purchased a part of the property himself. T was not a party to this second suit. T and his transferees continued ever since the purchase of the property by T to be in possession of the property. In 1910, J brought another suit impleading the prior mortgagee as party to it, and in the relief he claimed that the defendants might be ordered to pay the amount which he claimed upon foot of his mortgage or in default the property might be sold: *Held*, that all that the plaintiff could do was either to redeem the prior mortgage or to sell the property subject thereto, but as no such relief was claimed,

Mortgage—continued.**—1.—General—continued.**

the suit was not maintainable. *Held*, further that, having regard to the fact that the plaintiff was seeking to disturb possession which had gone on for upwards of 40 years, no amendment of plaint could be allowed. **JUGAL KISHORE v. SHAFI UDDIN**, 14 Ind. Cas. 537. (29 A. 385, 4 A.L.J. 273, A.W.N. 1907, 97, 2 M.L.T. 248, R.)

(359)—*Mortgage—Sale certificate—Misdescription of property—Intention of parties—Subsequent sale to another party by mortgagor—Rights of subsequent vendees—Equity.*—Where the description of property comprised in a mortgage of sale certificate granted by Court is wrong either in extent or boundaries, and there is evidence as to what the document really meant to convey, the mortgagor or vendor cannot set up the misdescription against the mortgagee or vendee contrary to what has been found to be the real intention of the parties, and a subsequent purchaser can claim no better title than his vendor, in the absence of a special countervailing equity in his favour. **KARNAM NARAYANAPPA v. TANGATUR SUBBIAH**, 14 Ind. Cas. 585.

(360)—*Transfer of Property Act—Mortgage by pattadar—Subsequent relinquishment to Government—Grant by Government to a stranger—Suit on the mortgage and sale thereunder—Subsequent suit for possession by purchaser against the grantee—If maintainable—Contract Act, s. 70—Voluntary payment.*—V, the owner of land granted on pattah by the Government, mortgaged to plaintiff and then relinquished it to Government, who subsequently granted it to the defendant. Plaintiff then sued upon his mortgage, got a decree, brought the properties to sale in execution, and purchased them himself. He then induced the revenue authorities to grant a pattah to him for the land and then brought a suit against the defendant for possession thereof and for recovery of Government assessment paid by him. *Held* that, as V had executed a relinquishment in favour of the Government before the plaintiff instituted his suit, his decree and sale thereunder could give him no right to recover the land against the defendant who claimed under a title granted by Government, and that, as he paid the assessment voluntarily and not on behalf of the defendant, he could not recover it. *Quære*—Whether relinquishment to Government by the owner subsequent to a mortgage created by him extinguishes the right of the mortgagee to proceed upon the mortgaged property. **MOOLINTI VEERANNA GOWD v. DEVARINTI BHIMA REDDI**, M.W.N. 1912, 888 = 12 M.L.T. 261.

(361)—*Mortgagor and mortgagee—Mortgagee recorded in revenue papers as such but not in actual possession—Mortgagor continuing in possession—Suit for profits, whether maintainable.*—A executed a mortgage in favour of B. B's name was recorded in the revenue papers

Mortgage—continued.**—1.—General—continued.**

as mortgagee, but A, the mortgagor, who happened to be also the *lambardar*, continued in possession of the property. B instead of suing for possession sued A for profits. *Held*, that the suit was not maintainable. **HANUMAN DIN v. RAM BISAL**, 14 Ind. Cas. 260.

(362)—*Mortgagor's dealings with mortgaged property after the date of mortgage, effect of, on mortgagee's rights—Mortgagee's right to possession on default of payment not affected by subsequent lease.*—*Held* that a mortgagor cannot, by any dealings with the mortgaged property subsequent to the date of mortgage, affect the rights of the mortgagee under the contract. Where the mortgage-deed provided that the mortgagee was to get actual possession of the mortgaged property on default of payment of the mortgage-debt by a certain date, and, default being made, the mortgagee sued, for possession, *held*, that lessees claiming through the mortgagor under leases granted to them subsequent to the date of mortgage could not set up the leases so as to defeat the mortgagee's right to take possession under the mortgage. **QURBAN ALI v. SETH RAGHUBAR DAYAL**, 15 O.C. 239 = 16 Ind. Cas. 476. (30 B. 250, 2 A.L.J. 294, R.)

(363)—*Document—Alteration of date to secure registration—Mortgage-deed—Contest of mortgagee—Subsequent lessee of mortgagor—Suit upon mortgage—Mortgagor and his lessee whether competent to object to mortgage on ground of alteration—Estoppel—Fraud.*—A mortgage-deed was presented for registration more than four months after its execution, and to enable it to be registered, the date was altered by the mortgagor. The mortgagee consented to the alteration. In a suit by the mortgagee on the mortgage: *Held*, (1) that the mortgagor was estopped from setting up the alteration as an answer to the claim of the mortgagee; the mortgagor's lessee who took the lease subsequent to the alteration being equally estopped; (2) that the matter would have been different if the lessee had been defrauded. **GOPAL CHANDRA CHAKRAVARTI v. SURENDRA KUMAR ROY**, 15 Ind. Cas. 460.

(364)—*Mortgage executed during pendency of suit in which mortgagor's title to the property is in question—Lis pendens—Res judicata.*—A mortgage, executed during the pendency of a suit in which the mortgagor's title to the property is in question, is subject to the result of the suit. If the suit is decided against the mortgagor, any subsequent suit by the mortgagee on the basis of the mortgage would be barred as *res judicata*. **KOIPATI KUAR v. RAJDHARI LAL**, 13 Ind. Cas. 641.

(365)—*Execution of fresh deed on non-payment of prior loan—Subsequent-deed, effect of, on intermediate incumbrance—Purchaser at auction sale of property declared subject to prior mortgage—Purchaser of property only with a notice of a mortgage—Purchaser's right to question.*—Where a mortgagor being unable to

Mortgage—continued.**—1.—General—continued.**

re-pay a loan, an account is taken of the money due to the mortgagee and a fresh bond is executed, the priority of the original mortgage is not affected, although any fresh advance made under the subsequent deed will not have any effect as against an intermediate incumbrancer. There is a distinction between the case of a purchaser at an auction sale who buys property which is declared to be subject to prior mortgages and the case of a person who buys property not subject to a mortgage but with notice of a mortgage and subject to such risks as the notice may involve. In the former case the purchaser acquires nothing more than the right to redeem the mortgage and cannot be heard to deny the validity of the mortgage subject to which he made his purchase, nor can he be permitted to question the terms of the mortgage or to raise a plea to the effect that the said mortgage was not given for full consideration. But in the latter case the purchaser is not precluded from impeaching the validity or denying the existence of the mortgage. *RAM KUMAR v. DWARKA PRASAD, and DWARKA PRASAD v. BISHESHUR BAKSH SINGH, 15 O. C. 211=15 Ind. Cas. 5,*

(366)—*Contribution—Release of part of mortgaged property from mortgage charge—Effect on its liability to contribute.*—While mortgaged property remains in the hands of the mortgagor, the mortgagee may enforce his mortgage against any part of the property, and so long as there are no other persons interested in the property, the mortgagee may, as between himself and the mortgagor, release any part of the property from the mortgage. But when an estate subject to a mortgage belongs to or subsequently becomes the property of several co-sharers, and one of those persons pays off the debt, he can call upon the other co-sharers to contribute rateably out of their shares to the payment of debt, and when, after a mortgage has been made, another person purchases or takes in mortgage part of the property, the prior mortgagee cannot, even with the consent of the mortgagor, release any part of the property from the first mortgage to the prejudice of that person; that is to say, notwithstanding the release, the part released remains liable to contribute rateably to the payment of the mortgage debt. *JUGAL KISHORE SAHU v. KEDAR NATH, 10 A. L. J. 211=34 A. 606=16 Ind. Cas. 400.*

(367)—*Mortgagor and mortgagee—Lease by mortgagee in favour of mortgagor for the mortgaged property—Suit for rent of the mortgaged property, maintainability of.*—If the mortgagee chooses to put the mortgagor in possession of the mortgaged premises on payment of rent, the mortgagee is at perfect liberty to recover the arrears of such rent as arrears of rent through the Court from which such arrears are ordinarily recoverable, and it is not necessary for the mortgagee to include these sums in a suit upon the deed of mortgage. *MAHADEI (MUSSUMMAT) v. BHIKHAN, 15 O. C. 291. (6 O. C. 26, F.)*

Mortgage—continued.**—1.—General—continued.**

(368)—*Hypothecation—Instalments—"Due" meaning of—Failure of instalment—Right to claim whole debt.*—An instalment hypothecation bond executed by the defendant to the plaintiff contained the following stipulation:—"I agree that, if I fail to pay the said balance of purchase-money with interest thereon..... according to the terms hereinbefore contained, it shall be lawful for the said Collector on behalf of the Secretary of State to sell the said lands and apply the proceeds of such sale in or towards the payment and satisfaction in the first place of the expenses of such sale and then of the amount due or owing by me on account of the said balance of purchase money, etc., etc." *Held*, that the word "due" in the said bond meant payable, and that the creditor could, in default of any instalment, claim only the overdue instalments and not the entire balance due on the bond. *ANNAVARAPU NANCHARAMMA v. THE SECRETARY OF STATE, 15 Ind. Cas. 231.*

(369)—*Pardanashim lady—Hard terms of mortgage—New plea in further appeal not allowed—Compensation for improvements—Costs of defending a suit by third person to establish his right in the mortgaged property.*—An Indian lady, who does not ordinarily appear in public, but goes about the Bazaar to make purchases for the household, can hardly be described as *Pardanashin* in the strict sense of the term. Such a lady cannot take the advantage of her being *Pardanashin* in making a transaction, when its terms are unusually hard, particularly where she has the opportunity of taking the advice of her male relative not on bad terms with her. A party cannot be allowed to put forward a new case in appeal. A mortgagee is entitled to get compensation for improving the mortgaged property if allowed to do so by the mortgagor, and the money due to the former is a charge on the latter's interest in the mortgaged property. When a mortgagee is most likely to know at the time of mortgaging the property that a third person has interest therein, he cannot claim costs incurred by him in the litigation for opposing the claim of that person. *RAM DITTA MAL v. MUSSAMMAT KARAM DEVI, 167 P.W.R. 1912=190 P.L.R. 1912.*

(370)—*Practice—Suit for a declaration that certain mortgage documents were not binding—Equitable jurisdiction of Court.*—The plaintiffs, the junior members of a Marumakathayam family, sued for a declaration that certain mortgage documents executed by the karnavan were not binding on the tarwad. The Munsiff found some documents invalid and others partially valid, and gave a decree for possession of the items. The Sub-Judge dismissed the suit, apparently on the ground that a suit in ejectment or for a declaration cannot be converted into a suit for redemption. *Held*, reversing the decree of the Sub-Judge, that, though the mortgages are not valid as such a portion of the money secured was for the benefit of the tarwad, and that the mortgagees were entitled to

Mortgage—continued.

—1.—General—continued.

a charge for that portion; and that, by resorting to the equitable jurisdiction of Courts, where mortgages are declared invalid, Courts can declare charges to the limited extent of the amounts that are binding. *KUNHAMINA UMMA v. IBRAYAM HAJI*, M.W.N. 1912, 993 = 12 M.L.T. 264 = 16 Ind. Cas. 404.

(371)—*Mortgage—Mortgage executed in 1873, suit on—Limitation—Limitation Act (IX of 1871)—Limitation Act (1877), ss. 2 (1), 4, sch. II, arts. 132, 147—Mortgage executed prior to Transfer of Property Act—Power of sale—Limitation Act (1908), s. 31.*—A mortgage, executed when the Limitation Act of 1871 was in force and not barred when the Limitation Act of 1877 was passed, gets the benefit of the extension of the period of limitation under the latter Act, though a right to sue already barred cannot be revived. A mortgagee can also claim the benefit of s. 31 of the Limitation Act of 1908, provided he institutes his suit for sale within two years of the passing of that Act. The word 'mortgage' is not restricted, in its application, to documents executed after the passing of the Transfer of Property Act, and mortgages executed prior to the passing of the Act have the power of sale incidental to them. (23 M.L.J. 131 = 16 Ind. Cas. 209, *Appr.*; 9 M. 218, 10 M. 509, 21 M. 326, 25 M. 220, 21 M. L.J. 563 = 11 Ind. Cas. 629, 11 C.W.N. 1005 = 4 A.L.J. 625 = 6 C.L.J. 379 = 2 M.L.T. 333 = 9 Bom. L.R. 1104, P.C. = 34 I.A. 187 = 30 M. 426 = 17 M.L.J. 444, *R.*) Plaintiff, on 1st February 1909, instituted a suit for sale on a mortgage, dated 26th August, 1873: *Held*, (1) that the suit was not barred by the combined effect of ss. 2 (1) and 4 of the Limitation Act of 1877 and s. 31 of the Limitation Act of 1908; (2) that the plaintiff was entitled to sue for sale on his mortgage. *SAKKARAI AMBALAGARAN v. SUNDILAPATHI*, 16 Ind. Cas. 236.

(372)—*Payment by mortgagee to satisfy rent decree obtained by mortgagor's landlord—Mortgage-debt, addition to—Lien on mortgaged property.*—The plaintiff obtained a preliminary decree upon a mortgage. Subsequently, the mortgagor's landlord sold the mortgaged land in execution of a rent decree, and the plaintiff deposited the decretal amount to set aside the sale. Afterwards the mortgagor, defendant No. 1, sold the land to defendant No. 2, who paid into Court only the amount due to the plaintiff under the preliminary decree. The plaintiff then brought this suit to establish his right to a lien on the mortgaged land for the amount paid by him to have the sale set aside: *Held*, that the plaintiff was entitled to a decree. *AMBIKA CHARAN DATTA v. RAMGATI GUHA*, 14 Ind. Cas. 718. (31 C. 975, *Appl.*)

(373)—*Possession as mortgagee—Agreement between the mortgagor and the mortgagee that possession should be of full owner after a certain date—Binding between the parties.*—Where a mortgagee is let into possession under a mortgage, the mortgagor and mortgagee may agree

Mortgage—continued.

—1.—General—continued.

that the mortgagee should, from a certain date, hold possession as owner. Such an agreement may not be valid to confer immediate title on the mortgagee; but there is no principle of law which precludes both parties from agreeing what the character of the possession of the mortgagee should be from a certain date. The mortgagee cannot, by a mere assertion of his own or by any unilateral act of his, convert his possession as mortgagee into possession as absolute owner. This is a principle in favour of the mortgagor, preventing the mortgagee from altering the legal character of his possession by his own act or assertion. But it does not prevent an agreement between the parties that the mortgagee should hold possession as owner and not as mortgagee. *USMAN KHAN v. NAGALLA DASANNA*, M.W.N. 1912, 995 = 12 M.L.T. 330 = 23 M.L.J. 360.

(374)—*Lease—Granted after decree for sale on mortgage in ordinary course of management by mortgagor—Not void.*—Where, after the passing of a decree for sale of mortgaged property, certain leases were granted by the judgment-debtor in the ordinary course of management of his estate, and not fraudulently, and subsequently the estate was, with the permission of the Court, purchased for a sum far in excess of the decretal money which was fully discharged: *Held* that such purchaser acquired the right of the mortgagee to the extent of the mortgage, and such right in the mortgaged property as was left with mortgagor on the date of purchase, and was consequently not entitled to question the alienations made prior to his purchase. *ADANKI TELI v. MOTI CHAND*, 9 A. L.J. 759 = 16 Ind. Cas. 102.

(375)—*Simple mortgage—Estoppel—Denial of mortgagee's right by mortgagor's representatives—Capacity in which right denied—Adverse possession—Trespass against mortgagor—Whether period runs against mortgagee.*—The representatives of a mortgagor are estopped from denying the mortgagee's title, but it is open to them as *mutawallis* to plead that property was *waqf* and that the mortgage of it was void. (6 A. 24, *D.*) A simple mortgage is not merely a security for the debt, but it is a transfer of an interest in the property mortgaged. Hence a trespasser who ousts a mortgagor under a simple mortgage, after the execution of the mortgage, and holds the property adversely to him, may by prescription become the owner of the limited estate which the mortgagor had in the property; but such adverse possession cannot extinguish the right of the mortgagee. *NANDAN SINGH v. JUMMAN*, 10 A.L.J. 278 = 34 A. 640. (13 A.C. 793, 9 Ex. 562, 29 C. 518, 30 A. 119, *R.*; 21 M.L.J. 397, 12 O.C. 45, *Not Appr.*; 33 C. 1015, 21 M. L.J. 467, *F.*; 5 A. 1, P.C., *Diss.*)

See ABATEMENT OF SUIT, 20 B. 549.

See ACKNOWLEDGMENT, 1 A.L.J. 355.

Mortgage—continued.

—1.—General—continued.

Acquiescence by pre-emptor in mortgage by conditional sale—Effect of such sale becoming absolute—See ACQUIESCENCE, 11 A. 164=9 A. W.N. 48.

Deed containing no stipulation for *post diem* interest—See ACT XXXII OF 1839, 24 C. 699 =1 C.W.N. 437, F.B.

Bond—No stipulation for *post diem* interest—Liability of debtor to pay such interest—See ACT XXXII OF 1839, 5 M.L.J. 154.

Unregistered, without possession optionally registrable—Subsequent registered sale—Priority—See ACT XIX OF 1843, 4 B. 459.

Whether the mortgagor's widow after re-marriage could represent the mortgagor's estate—Effect of mortgage decree obtained against person wrongly sued as legal representative of mortgagor—See ACT XV OF 1856, 14 C.W.N. 346=5 Ind. Cas. 710.

Suit for removal of manager and for declaration of invalidity of mortgage created by him—Declaration ancillary—Manager's claim to trust property *bona fide*—Liability to dismissal—See ACT XX OF 1863, s. 14, 24 M. 243.

Seizure of property in mortgagee's possession—See ACT I OF 1875, s. 10, 7 C. 372=9 C.L.R. 390.

Expropriatory tenants mortgaging trees to Government for takavi advances—Relinquishment of their rights to zemindar—Right of Government—See ACT XII OF 1884, s. 5, 26 A. 540=A.W.N. 1904, 101=1 A.L.J. 261.

Mortgage executed after declaration for acquiring property—Mortgagee's remedy—See ACT I OF 1894, s. 16, 13 C.W.N. 350=1 Ind. Cas. 164.

Portion of mortgaged property acquired for public purposes—Mortgagee's right to compensation awarded—See ACT I OF 1894, s. 31, 17 P.R. 1907=67 P.W.R. 1907=2 P.L.R. 1908

Of share of an estate, who is also a part proprietor, depositing revenue and cesses, right of—See BEN. ACT XI OF 1859, s. 9, 30 C. 794 =7 C.W.N. 609.

Of non-existent property is operative as an executory agreement—See BEN. ACT, XI OF 1859, ss. 27, 54, 7 C.L.J. 387.

Mortgage by son of the owner of the holding while owner alive—Effect of mortgage after owner's death—See BEN. ACT VIII OF 1865, s. 6, 6 C.L.J. 43.

See BEN. ACT VI OF 1876, ss. 3, 8, 27 C. 462=4 C.W.N. 158.

See BEN. ACT VII OF 1880, s. 10, 29 C. 537 =6 C.W.N. 484.

Mortgage of non-transferable holding—Mortgagee auction-purchaser—Interest of mortgagor—Ejectment of purchaser by landlord—Re-entry—Execution-sale—See BEN. ACT VIII OF 1885, s. 87, 7 C.L.J. 72=12 C.W.N. 899

Mortgage—continued.

—1.—General—continued.

See BEN. ACT VIII OF 1885, ss. 160, cl. (g), 163, 167, 29 C. 813.

See BEN. ACT VIII OF 1885, s. 171, 24 C. 537=1 C.W.N. 519.

Of portion of bhag, illegality of—Sale in execution of decree obtained under such mortgage—Right of Collector to get order for sale quashed—See BOM. ACT V OF 1862, s. 2, 22 B. 737.

Of watan property by de facto watandar—See BOM. ACT III OF 1874, 4 C.W.N. 517, P.C. =24 B. 556=27 I.A. 86=2 Bom. L.R. 548.

Mortgagee's possession—Jurisdiction—See BOM. ACT III OF 1876, s. 15, 19 B. 289.

Suit on mortgage against agriculturist—Jurisdiction—See BOM. ACT XVII OF 1879, ss. 3, 11, 1 S.L.R. 246.

See BOM. ACT XVII OF 1879, s. 16, 5 B. 614.

See BOM. ACT XVII OF 1879, s. 20, 5 B. 604.

By agriculturist—Money decree obtained by third part against mortgagor—Execution—Sale of equity of redemption—Validity—Suit for redemption by mortgagor—Rights of purchaser—See BOM. ACT XVII OF 1879, s. 22, 18 B. 739.

See BUR. ACT II OF 1876, ss. 19, 56, 55, Proviso 1, 17, 1 L.B.R. 277.

See C. P. ACT IX OF 1883, 2 C.P.L.R. 16.

See C. P. ACT IX OF 1883, 4 C.P.L.R. 49.

By simple occupancy tenant—Right of malguzar to eject mortgagee in possession—See O. P. ACT IX OF 1883, s. 43, 1 C.P.L.R. 125.

See C.P. ACT XVII OF 1889, 6 C.P.L.R. 109.

See C.P. ACT XVII OF 1889, s. 42, 7 C.P.L.R. 101.

Of a zemindari village—Court-sale in execution of the decree—Payment by mortgagee of proportionate share of peishcush—Mortgagee-purchaser not a Zamindar to enforce acceptance of patta—See MAD. ACT VIII OF 1865, s. 3, 5 M. 145.

See PUN. ACT XXVIII OF 1868, s. 34, 138 P.R. 1883.

Mortgage of occupancy rights by tenant—Mortgagee only a tenant-at-will after the death of mortgagor-tenant—Lapse of time cannot create rights of occupancy in mortgagee—See PUN. ACT XVI OF 1887, 8 P.R. 1905 (Rev.) =67 P.L.R. 1906.

Suit against mortgagor for land revenue advanced, whether within jurisdiction of Revenue Court—See PUN. ACT XVI OF 1887, s. 77 (3), 126 P.R. 1906=98 P.L.R. 1907.

There is no right of pre-emption when the mortgagee of agricultural land becomes absolute owner thereof, on foreclosure of the mortgagor's

Mortgage—continued.—1.—**General**—continued.

right to redeem—See PUN. ACT II OF 1905, s. 4, 82 P.R. 1909=130 P.W.R. 1909=3 Ind. Cas. 600=143 P.L.R. 1909.

See U.P. ACT I OF 1869, ss. 2, 3, 7, 8, 10, 14, 20, 22, 1 O.C. Sup. 36.

See U.P. ACT XIX OF 1873, s. 241, A.W.N. 1881, 130.

Land Revenue, liability of mortgagee without possession of share in mahal for payment of—Mortgagee without possession—Person interested in payment of money which another is bound by law to pay—Contract Act, s. 69—See U.P. ACT XVII OF 1876, s. 108, 4 O.C. 369.

See U.P. ACT XII OF 1881, s. 9, A.W.N. 1892, 59.

Occupancy tenant—Mortgage of holding—Suit for ejectment—Cancellation of mortgage before suit—See U.P. ACT XII OF 1881, ss. 9, 93 (b), 149, 7 A. 691=A.W.N. 1885, 205.

Creation of a—By an ex-proprietary tenant, not an act within s. 93 (b) of U.P. Act XII of 1881—See U.P. ACT XII OF 1881, ss. 56, 93 (b), 9 A. 244=A.W.N. 1887, 29.

See U.P. ACT XXII OF 1886, s. 55, 2 O.C. 335.

See U.P. ACT XXII OF 1886, s. 108, cl (16), 3 O.C. 310.

In possession a co-sharer within the meaning of cls. (15) and (16), s. 108—Jurisdiction—See U. P. ACT XXII OF 1886, s. 108, cls. 15, 16, 2 O. C. 299.

Applicability of Agra Act II of 1901 to mortgage executed in 1894—Mortgage of Sir—Whether mortgagor obtains ex-proprietary rights—See U. P. ACT II OF 1901, s. 7, 6 A. L. J. 437=31 A. 368=2 Ind. Cas. 462.

Joint mortgagee—Payment to one—Effect—See ADMINISTRATION, 8 Ind. Cas. 837=13 C.L. J. 3.

By residuary legatee—Administration, subsequent, of testator's estate—Receiver of testator's estate pending administration—Sale by receiver before completion of administration—See ADMINISTRATION SUIT, 5 C.W.N. 408.

Agreement not to alienate property, to one without notice of agreement—Validity of mortgage—See AGREEMENT, A.W.N. 1884, 254.

See AGREEMENT, 5 W.R. 117, P.C.

Mortgage, order permitting deposit of mortgage amount after due date, ministerial nature of—Non-appealability of such order—Civ. Pro. Code, ss. 244, 588—See APPEAL—DECREES AND EXECUTION OF DECREES, 9 A. 500=A.W.N. 1887, 109.

Foreclosure suit—Subject-matter of suit—Valuation—See APPEAL TO PRIVY COUNCIL—GENERAL, 13 C.L.J. 505.

Mortgages executed on the same day—Priority—Joint tenancy or tenancy in common

Mortgage—continued.—1.—**General**—continued.

when neither proved to have been executed before the other—See APPELLATE COURT—POWERS OF APPELLATE COURT, 11 C.W.N. 732=6 C.L.J. 74.

Debt, attachment of—See ATTACHMENT—MODE OF ATTACHMENT, 15 A. 134=A. W. N. 1893, 51.

Attachment applied for—No further steps taken—Mortgage by judgment-debtor—Effect—See ATTACHMENT—SUBJECTS OF ATTACHMENT, 8 C.L.R. 157.

Ship-owner, Interest of, in mortgaged ship—Sale under prior mortgage—See ATTACHMENT—SUBJECTS OF ATTACHMENT, 1 Ind. Jur. N.S. 241.

Due attestation of a mortgage-deed, when may be presumed—See ATTESTATION, 2 N. L. R. 65.

Benami mortgage—Suit by real owner against benamidar—Recovery of money realised by benamidar—Limitation—See BENAMI TRANSACTIONS—GENERAL, 37 P. R. 1909=38 P.L.R. 1909=50 P.W.R. 1909=1 Ind. Cas. 732.

Benamidar's right to sue on mortgage assigned to him by mortgagee without consideration—Intention of putting mortgagors into difficulty—Enforceability—See BENAMI TRANSACTION—GENERAL, 12 C.W.N. 409.

Mortgage—Occupancy right—Enforceability—Forfeiture—Surrender—Berar Land Revenue Code, s. 216 (1) (d)—Rules framed under—Not affecting equities under ordinary law—See BERAR LAND REVENUE CODE, s. 56, 7 N.L. R. 2.

See BOND, 74 P.R. 1878.

Right of Buddhist wife to mortgage her interest in joint property without her husband's consent—See BUDDHIST LAW—MARRIAGE, U.B.R. 1907, 4th Quarter, Buddhist Law—Marriage—Joint Property, 1.

See BURDEN OF PROOF—CUSTOM, 85 P.R. 1902.

Burden of proof—Mortgage deed—Act III of 1877 (Indian Registration Act), ss. 59, 50—Evidence—See BURDEN OF PROOF—DOCUMENTS RELATING TO LOANS, SUITS RELATING TO, 17 A. 428=A.W.N. 1895, 93.

See BURDEN OF PROOF—HINDU LAW, 23 C. 766, P.C. =23 I.A. 57.

Execution of mortgage bond by judgment-debtors for sum due under decree—Decree also kept alive—Agreement to give time—Suit on mortgage—Maintainability—See CIV. PRO. CODE, 1882, s. 257-A, 26 M. 19=12 M.L.J. 113.

Distribution of assets—Dower debt—Mortgage debt—Priority—See CIV. PRO. CODE, 1882, s. 356 (d), A.W.N. 1884, 33.

Mortgage—continued.**—1.—General—continued.**

Money-decree given in a suit on a—Relief prayed for but not granted—Second suit for sale—See CIV. PRO. CODE, 1908, s. 11, 33 C. 849.

Suit for possession—Mortgagee party—Failure by mortgagee to deny plaintiff's title—Suit for sale by mortgagee—*Res judicata*—Ostensible owner—Creditor making no enquiry—*Bona fide* transferee—See CIV. PRO. CODE, 1908, s. 11, 8 A.L.J. 358.

Suits on mortgage—*Res judicata*—Causes of action in the two suits—Identity not necessary—See CIV. PRO. CODE, 1908, s. 11, Expl. 4, 14 O.C. 117.

Mortgages of same property in favour of one person—Suit in respect of one mortgage—*Res judicata*—See CIV. PRO. CODE, 1908, s. 11, Expl. 4, 8 A.L.J. 936.

See CIV. PRO. CODE, 1908, s. 11, Expl. 4, 31 C. 428.

See CIV. PRO. CODE, 1908, s. 16, 26 A. 603.

Decree for possession of equity of redemption—Decree-holder wrongfully obtaining possession of property instead of equity of redemption—Suit by mortgagee claiming restitution of property—See CIV. PRO. CODE, 1908, s. 47, 5 P.R. 1907=40 P.W.R. 1907=23 P.L.R. 1908.

Objection by party defendant to sale of property ordered by mortgage decree to be sold—See CIV. PRO. CODE, 1908, s. 47, 16 M.L.J. 545=30 M. 26.

Decree for sale of mortgaged property—Power of Court executing decree—Objections not entertainable as to validity of—and decree.—See CIV. PRO. CODE, 1908, s. 47, 21 A. 277=A.W.N. 1899, 64.

Second, during pendency of suit by first mortgagee—Second mortgagee representatives of mortgagor—See CIV. PRO. CODE, 1908, s. 47, 22 A. 243=A.W.N. 1900, 51.

See CIV. PRO. CODE, 1908, s. 47, 26 M. 237.

Puisne mortgagee—Surplus sale proceeds—See CIV. PRO. CODE, 1908, ss. 47, 73, 2 C.W. N. 429.

Mortgage of decree by decree-holder—Attachment of decree on same date by decree-holder's creditor—Subsequent attachments by other creditors—Priority—Rateable distribution—Rights of mortgagee—Lien—Burden of proof—See CIV. PRO. CODE, 1908, s. 47, O. XXI, 53, ss. 64, 73, 5 Ind. Cas. 92=7 M.L.T. 143=20 M.L.J. 330=33 M. 429.

Claim—Previous purchaser in execution of mortgage decree, whether competent to object to sale in execution of money decree—See CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 58, 9 Ind. Cas. 194=15 C.W.N. 542.

Mortgage—continued.**—1.—General—continued.**

Sale in execution of a decree upon mortgage—Purchase by the decree-holder—Grant of sale certificate—Whether separate suit for possession maintainable—See CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 96, 6 A.L.J. 71, F.B.=5 M.L.T. 185=31 A. 82=1 Ind. Cas. 416.

Decree for sale upon mortgage passed before 1908—Passing of Code of 1908—Effect—No curtailment of right to execute—See CIV. PRO. CODE, 1908, s. 48, 7 A.L.J. 420=6 Ind. Cas. 188=32 A. 499.

Whether mortgagor can sue for specific performance of agreement to lend the full sum promised by the mortgagee—See CIV. PRO. CODE, 1908, s. 60, A.W.N. 1908, 105=5 A.L.J. 491=30 A. 252.

See CIV. PRO. CODE, 1908, s. 64, 29 C. 154, P.C.=6 C.W.N. 209=12 M.L.J. 73=4 Bom. L. R. 238=29 I.A. 9.

Mortgage pending alleged previous attachment in execution—Subsequent application for attachment, effect of, in raising prior attachment—See CIV. PRO. CODE, 1908, s. 64, 23 A. 114=A.W.N. 1900, 214.

Removal of prior—Attachment before renewal and after mortgage—Effect of—See CIV. PRO. CODE, 1908, s. 64, 4 M. 417.

Keeping alive mortgage—Fresh mortgage pending attachment—Prior mortgagee paid by subsequent mortgagee—Effect—Intention of parties—See CIV. PRO. CODE, 1908, s. 64, 12 M.L.J. 73, P.C.=29 C. 154=4 Bom. L.R. 238=29 I.A. 9=6 C.W.N. 209.

Auction purchaser—Benami purchaser—Mortgagee of auction-purchaser—Right of mortgagee to claim protection under s. 317, Civ. Pro. Code, 1882—See CIV. PRO. CODE, 1908, s. 66, 12 Bom. L.R. 1044=8 Ind. Cas. 752.

Purchase by mortgagee under his own decree—Further execution of decree, when permissible—See CIV. PRO. CODE, 1908, s. 73, 11 C. 718.

Execution sale of property "free from mortgage" and "subject to mortgage"—Procedure—See CIV. PRO. CODE, 1908, s. 73, 3 L.B.R. 258.

Mortgaged property sold under s. 295 (b), Civ. Pro. Code (1882)—Right of mortgagee to interest on sale-proceeds—See CIV. PRO. CODE, 1908, s. 73, 10 Ind. Cas. 552.

Mortgage-decree absolute—Application for extension of time—Question affecting 'decision of the case'—Appeal—See CIV. PRO. CODE, 1908, s. 105 (1), 7 N.L.R. 162.

Suit by transferee of mortgage against mortgagor and mortgagee (transferor)—Portion of mortgage-debt discharged prior to transfer—Misjoinder of defendants—See CIV. PRO. CODE, 1908, O. I, rr. 1, 3 and 4 (a) (b), 18 M. L.J. 238=31 M. 252.

Mortgage—continued.**—1.—General—continued.**

Tenant executing conveyance of holding—Refusal to add purchaser as party—Revision—*See CIV. PRO. CODE, 1908, O. I, r. 3, 11 C.L.J. 426=14 C.W.N. 703=6 Ind. Cas. 549.*

Suit by some mortgagees against mortgagor and co-mortgagees—Misjoinder—*See CIV. PRO. CODE, 1908, O. I, r. 3, O. II, r. 3, and s. 115, 7 N.L.R. 130.*

See CIV. PRO. CODE, 1908, O. I, rr. 8 (2), 10, (2), (3), (5) and 11, 5 O.C. 94.

Omission by mortgagee to sue for one of several remedies, *Civ. Pro. Code, 1877, s. 43—See CIV. PRO. CODE, 1908, O. II, r. 2, 3 A. 857.*

Surplus collection made by mortgagee—Mortgagor's right to recover—Limitation—*See CIV. PRO. CODE, 1908, O. II, r. 2, 7 A.L.J. 1201=8 Ind. Cas. 689.*

Several mortgages to one person—Property same—Cause of action one or several—*See CIV. PRO. CODE, 1908, O. II, r. 2, 24 A. 429, P.C.=6 C.W.N. 889=4 Bom.L.R. 827=29 I.A. 118.*

Two mortgages on the same date—Suit on one mortgage whether bar to suit on the other—*See CIV. PRO. CODE, 1908, O. II, r. 2, 24 M. 96=12 M.L.J. 383.*

Several mortgages to one person—Property same—Cause of action, one or several—*See CIV. PRO. CODE, 1908, O. II, r. 2, 6 C.W.N. 889, P.C.=4 Bom. L.R. 827=29 I.A. 118=24 A. 429.*

Breach of condition of mortgage—Mortgagee entitled to arrears of kasur and possession on breach—Suit for kasur decreed—Subsequent suit for possession barred—*See CIV. PRO. CODE, 1908, O. II, r. 2 (3), 31 P.L.R. 1910=8 Ind. Cas. 224.*

Misjoinder of parties and causes of action—Parties to mortgage-suit—*See CIV. PRO. CODE, 1908, O. II, rr. 3, 6, 17 M.L.J. 515.*

Joinder of claims under two mortgage-deeds over separate properties—*See CIV. PRO. CODE, 1908, O. II, rr. 4, 5, 25 A. 229=A.W.N. 1903, 19.*

Mortgage-suits—Right of manager of joint Hindu family to represent the co-parcenary—Transfer of Property Act, s. 85—*See CIV. PRO. CODE (1908), O. XVI, r. 1, 5 N.L.R. 181.*

Personal decree against mortgagor—Court's discretion to direct payment by instalment—Second appeal—*See CIV. PRO. CODE, 1908, O. XX, r. 11, O. XXXIV, r. 6, 15 C.W.N. 1083.*

Mortgage in adjustment of decree—Adjustment not certified—Suit not maintainable to recover instalments under mortgage-deed—*See CIV. PRO. CODE, 1908, O. XXI, r. 2, 11 B. 6, F.B.*

Mortgage—continued.**—1.—General—continued.**

Consent decree on—Decree for money—*See CIV. PRO. CODE, 1908, O. XXI, rr. 10, 21, s. 48, 27 C. 285.*

Execution of decree—Assignment of mortgage-decree to one of the mortgagors—Validity—*See CIV. PRO. CODE, 1908, O. XXI, r. 16, 14 C.L.J. 639.*

Application by assignee of mortgagee decree-holder to be brought on record and for issue of notice to judgment-debtor—Nature of application—*See CIV. PRO. CODE, 1908, O. XXI, r. 22, 2 Ind. Cas. 433=8 M.L.T. 232.*

Execution of mortgage-decree—S. 104, Transfer of Property Act, s. 248, *Civ. Pro. Code, 1882—Effect—See CIV. PRO. CODE, 1908, O. XXI, rr. 22, 14, 5 Ind. Cas. 101.*

Mortgage-debt—Attachment—Nature of such debt, moveable or immoveable property—*See CIV. PRO. CODE, 1908, O. XXI, r. 46, 18 P.R. 1909=22 P.W.R. 1909=1 Ind. Cas. 450.*

Mortgage-decree, sale of, in execution, whether valid, and passes title to the purchaser—Mortgage decree how far a money decree—*See CIV. PRO. CODE, 1908, O. XXI, rr. 53, 16, s. 60, O. XXI, r. 64, 5 M.L.T. 278=1 Ind. Cas. 535.*

Decree on foot of a mortgage—Whether moveable or immoveable property—*See CIV. PRO. CODE, 1908, O. XXI, rr. 53, 54, 89, 8 A.L.J. 1327.*

See CIV. PRO. CODE, 1908, O. XXI, rr. 58, 59, 62, s. 104, O. XLIII, r. 1, s. 105, 25 M. 555=11 M.L.J. 346.

Suit by mortgagee—Impeachment by decree-holder's assignee of mortgage on grounds urged in claim proceedings and found against—*See CIV. PRO. CODE, 1908, O. XXI, rr. 58, 61, 63 8 M.L.T. 381.*

Mortgagee in possession—Attachment—Claim of mortgagor—Release of mortgagor's interest—*See CIV. PRO. CODE, 1908, O. XXI, rr. 58, 63, U.B.R. 1910, 4th Qr., 75.*

Property liable to be sold in execution is subject to mortgage—Mortgagee's right to have property sold free of mortgage—*See CIV. PRO. CODE, 1908, O. XXI, rr. 66 and 70, s. 73, O. XXI, rr. 90, 91, s. 115, 3 L.B.R. 275.*

Application of s. 291, C.P.C., 1882, to mortgage sales—*See CIV. PRO. CODE, 1908, O. XXI, r. 69, 14 C.W.N. 1019=6 Ind. Cas. 813.*

See CIV. PRO. CODE, 1908, O. XXI, r. 83, 6 M.L.J. 187.

Mortgagee of tenure or holding—Execution sale for arrears of rent—Mortgagee's right to set aside sale under s. 310-A., C.P.C. 1882—*See CIV. PRO. CODE, 1908, O. XXI, r. 89, 29 C. 1, F.B.=5 C.W.N. 821.*

Simple money-decree—Sale in execution—Decree holder also mortgagee of property sold—Whether competent to apply to set aside sale—*See CIV. PRO. CODE, 1908, O. XXI, r. 89, 8 A.L.J. 356.*

Mortgage—continued.

—1.—General—continued.

See CIV. PRO. CODE, 1908, O. XXI, r. 89, 25 C. 703, F.B. = 2 C.W.N. 353.

Auction-sale—Mortgagee's right to pay amount of decree and costs in order to release house from attachment—Order of executing Court—Appeal—Revision—See CIV. PRO. CODE, 1908, O. XXI, rr. 89, 92, O. XLIII, r. 2 (j), 178 P.W.R. 1911.

Suit on mortgage—Surety made party—Effect on suit of death of surety—See CIV. PRO. CODE, 1908, O. XXII, r. 4, s. 104, O. XLIII, r. 1, 25 A. 206 = A.W.N. 1903, 15.

Compromise decree giving mortgage-decree for debt not secured by mortgage, validity of—Public policy—Minority of some of the defendants—See CIV. PRO. CODE, 1908, O. XXIII, r. 3, 17 M.L.J. 200.

Suit on legal or equitable mortgage—Interest in arrears and property insufficient to pay incumbrances thereon—Jurisdiction to appoint a receiver—See CIV. PRO. CODE, 1908, O. XL, r. 1, 5 L.B.R. (1909), 135.

Mortgage-decree—Application for order for sale—Limitation—See CIV. PRO. CODE, 1908, O. XLI, r. 20, 16 C.W.N. 49.

Mortgage during partition suit—Right of mortgagee—See CIV. PRO. CODE, 1908, O. XLI, r. 27, 6 Ind. Cas. 196.

See COMMON LAND, 102 P.R. 1891.

Compromise, petition of, relating to immovable property—Registration Act—Judicial proceeding—Transfer of mortgagee's rights to a third party, mortgagee's right to question validity of—See COMPROMISE—GENERAL, 6 O.C. 362.

And charge—Difference between—Necessary formality of due execution wanting—Whether converts mortgage into charge—See COMPROMISE—GENERAL, 7 C.L.J. 492 = 12 C.W.N. 849 = 35 C. 837.

Money due on pro-note—Consent-decree for payment in instalments—Execution of mortgage as collateral security—Principle of election—Applicability—See CONSENT DECREE, 10 M.L.T. 187.

When no personal liability in mortgage transactions—See CONSIDERATION, 8 Ind. Cas. 302.

Bond—Time when the essence of contract—Forbearance to enforce a *bona fide* claim—Consideration for agreement—See CONTRACT—CONSTRUCTION OF CONTRACTS, 17 B. 457.

By minor—Effect—See CONTRACT ACT, 1872, s. 11, 96 P.R. 1888.

Previous indebtedness of mortgagor to mortgagee—Undue influence—See CONTRACT ACT, 1872, s. 16, 7 A.L.J. 729 = 7 Ind. Cas. 286.

Mortgage—continued.

—1.—General—continued.

Execution of mortgage deed in liquidation of money decree while under arrest—Undue influence—See CONTRACT ACT, 1872, s. 16, 51 P.R. 1908 = 101 P.W.R. 1903 = 160 P.L.R. 1908.

Unregistered sale deed—Registered mortgage bond for consideration money, validity of—See CONTRACT ACT, 1872, s. 23, 5 Ind. Cas. 581.

Gift by husband to wife—Validity—Of gifted property—Effect—See CONTRACT ACT, 1872, s. 25, 38 P.R. 1899.

See CONTRACT, s. 29, 1 A. 275.

Co-mortgagees—Mortgage debt paid to one mortgagee—Discharge of debt—See CONTRACT ACT, 1872, ss. 38, 45, 1 Ind. Cas. 219.

Part of consideration not paid—Suit for interest on sum paid—See CONTRACT ACT, s. 39, 18 M. 126.

Joint mortgagees—Effect of payment to one—See CONTRACT ACT, 1872, s. 45, 8 Ind. Cas. 416.

Subscription to the fund—Mortgage—Appropriation of payments—See CONTRACT ACT, 1872, ss. 59, 61, 1 Ind. Cas. 909.

Mortgagee agreeing to accept a certain sum of money within a fixed time, or in default of such payment, a transfer of a specified land in full satisfaction of all his claims—Default of payment within the fixed time, and refusal to give land in default as agreed upon—Right of the mortgagee, then, to sue on his original mortgages—Ss. 62 and 63 of the Contract Act, application of—See CONTRACT ACT, 1872, ss. 62, 63, 4 L.B.R. 365.

Mortgagor, after having mortgaged his property, whether allowed to plead that he had no authority to mortgage the property—See CONTRACT ACT, 1872, ss. 62, 63, 4 L.B.R. 365.

Minor seeking to set aside—By guardian, bound to make restitution—See CONTRACT ACT, s. 65, 9 A. 340 = A.W.N. 1887, 62.

See CONTRACT ACT, 1872, s. 141, 2 C.P.L. R. 193.

Marshalling between purchasers of mortgaged property—Rule of inverse order—See CONTRIBUTION, SUIT FOR—GENERAL, 31 C. 95 = 8 C.W.N. 30.

See CONTRIBUTION, SUIT FOR—PAYMENT OF JOINT DEBT BY ONE DEBTOR, 3 B.L.R. A.C. 357 = 12 W.R. 291.

Mortgage-debt—Mortgagee consenting to decree for sale of some of mortgaged properties—Purchase of properties by different persons—See CONTRIBUTION, SUIT FOR—MISCELLANEOUS, 6 C.W.N. 583.

By some co-sharers of patni taluk, liability under—See CO SHARERS—GENERAL, 4 C. 539 = 6 C.L.R. 28.

Mortgage—continued.

—1.—General—continued.

Mortgagee in possession—Whether trustee of mortgagor—See CO-SHARERS — GENERAL, 7 Ind. Cas. 772.

Hindu Law—Co-widows—Mortgage—Necessity—Costs incurred in defending husband's estate—See COSTS—SPECIAL CASES, 14 M.L.J. 139.

Provision in mortgage deed that cost of collection of rent from tenants should be deducted from revenues—Mortgagor whether personally liable—See COSTS—SPECIAL CASES, 15 B. 625.

Costs — Practice in mortgage suits—See COSTS—SPECIAL CASES, 8 C.L.R. 437.

See COSTS—SPECIAL CASES, 1 Ind. Jur. N.S. 95, 222, 3 B. 202, 5 B. 496.

Suit for sale partly decreed—Certain share exempted—Objections by mortgagee asking for sale of exempted share—*Ad valorem* fee—See COURT FEES ACT, 1870, s. 7, 7 A.L.J. 842 = 7 Ind. Cas. 315.

Portion of mortgaged lands declared not liable for mortgage debt—Appeal against such mortgage decree—Mortgage-debt greater than the value of exonerated property—Value of appeal—See COURT FEES ACT, 1870, sch. I, art. 1 and s. 7, 1 M.L.T. 311 F.B. = 16 M.L.J. 458 = 30 M. 96.

See COURT FEES ACT, sch. I, art. 11, 1 B. 118.

Suit on mortgage—Decree for sale of one item in the event of another item not satisfying decree amount—Appeal—See COURT FEES ACT, 1870, sch. II, art. 17 cl. (vi), A.W.N. 1886, 312.

Decree absolute—Memorandum of appeal—Stamp—See COURT FEES ACT, 1870, sch. II, art. 17, cl. (iii), 7 N.L.R. 41.

See CUSTOM—PUNJAB—ALIENATION, 29 P.L.R. 1902, 16 P.L.R. 1900, 75 P.R. 1897, 154 P.L.R. 1901 = 6 P.R. 1902, 59 P.R. 1909 = 86 P.L.R. 1909 = 94 P.W.R. 1909 = 2 Ind. Cas. 949, 83 P.L.R. 1909, 139 P.W.R. 1909 = 4 Ind. Cas. 997.

See CUSTOM—PUNJAB—PRE-EMPTION, P. L.R. 1900, 321, 78 P.R. 1904.

Contract assigning—Rights—Interest—Guarantee of loss—See DAMAGES—MEASURE AND ASSESSMENT 1 Agra 82.

Of property for immoral purpose—Validity—Custom among naikins, dancing girls, in Nasik—See DANCING GIRLS, 13 B. 150.

To creditors for payment of debts—Agreement by creditors to give time—Breach of agreement—Failure of consideration—See DEBTOR AND CREDITOR, 5 A. 392 = A.W.N. 1883, 75.

Cause of action—Suit for a declaration that the defendants had no right to joint property—Court-fee—See DECLARATORY DECREE, SUIT FOR—GENERAL, 50 P.L.R. 1904.

Mortgage—continued.

—1.—General—continued.

Purchaser in execution of decree for money, possession obtained by—Decree for sale on—Suit for declaration in respect of—Specific Relief Act, I of 1877, s. 42—See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 18 A. 320 = A.W.N. 1896, 86.

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLES, 21 M. 373.

See DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS, 1 Ind. Jur. N.S. 390.

Declaration of mortgagee's rights in land sold in execution of decree of third party, suit for—Amendment of plaint—Specific Relief Act, 1877, s. 42.—See DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 6 O.C. 324.

Mortgage-decree — Payment of mortgage amount before the usual six months—See DECREE—DECREE, CONSTRUCTION OF, 7 C. L.R. 267.

Decree—Construction—Charge or mortgage—Decree for sale under the Tr. P. Act—Procedure — See DECREE—DECREE, CONSTRUCTION OF, 8 A.L.J. 418.

See DECREE—DECREE, CONSTRUCTION OF, 28 C. 557, P.C. = 28 I.A. 89 = 5 C.W.N. 536, 11 B. 172, A.W.N. 1885, 308, 3 C.W.N. 8 = 26 C. 166, 19 A. 174 = A.W.N. 1897, 9, 3 C. W.N. 30.

Sale in execution of a decree—Property purchased subject to a mortgage but not mortgage executed by the judgment-debtor—Purchaser's right—See DECREE—MISCELLANEOUS, 35 C. 877.

Deed, when said to be properly attested—Signatures of Sub-Registrar and identifier on the back of the bond not sufficient to render mortgage valid—See DEED—ATTESTATION OF DEEDS, 26 C. 246 = 3 C.W.N. 84.

See DEED—ATTESTATION OF DEEDS, 26 C. 78.

Deed of sale, accompanied by deed granting right to re-purchase on payment of purchase-money — Not a mortgage — See DEED—CONSTRUCTION OF DEEDS, 12 A. 387, P.C. = 17 I.A. 98.

Government kist, enhancement of—Whether mortgagor or mortgagee bound to pay—S. 76, Transfer of Property Act — Contract to the contrary.—See DEED—CONSTRUCTION OF DEEDS, 18 M.L.J. 31.

Mortgage-deed—Stipulations apparently inconsistent—See DEED—CONSTRUCTION OF DEEDS, A.W.N. 1892, 237.

Construction of deed of mortgage—Suit upon—*Post diem* interest, principles governing the allowance of—See DEED—CONSTRUCTION OF DEEDS, 5 N.L.R. 37 = 2 Ind. Cas. 27.

Hypothecation of immoveable property—Mortgage or charge—See DEED—CONSTRUCTION OF DEEDS, 9 Ind. Cas. 828.

Mortgage—continued.**—1.—General—continued.**

See DEED—CONSTRUCTION OF DEEDS, 7 A. 258, F.B. = A.W.N. 1885, 8, 11 A. 416 = A.W.N. 1889, 165, 16 B. 172.

Title-deeds deposited with mortgage prior to execution of mortgage—Mortgage-deed left unregistered—Mortgagee, whether could claim as under equitable mortgage—See DEPOSIT OF TITLE-DEEDS, 10 B. 634.

Mortgage deed reserving right of way—Transferee—Mortgage—Right to object—See EASEMENT, 7 M.L.T. 288 = 6 Ind. Cas. 605.

See EASEMENT, 18 B. 382.

Sale of mortgaged property under decree other than that on—Effect of non-disclosure of mortgage lien—See ESTOPPEL—ESTOPPEL BY CONDUCT, 21 A. 309 = A.W.N. 1899, 87.

Selling mortgaged property in execution of money-decree obtained against mortgagor—Purchase without notice of mortgage—Subsequent enforcement of mortgage by mortgagee against purchaser—See ESTOPPEL—ESTOPPEL BY CONDUCT, 12 B. 678.

Receipt of rent from mortgagee—Denial of mortgage—See ESTOPPEL—ESTOPPEL BY CONDUCT, 2 Agra 48.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 2 C.W.N. 254, 7 A. 864 = A.W.N. 1885, 275, 12 M.L.J. 366, 7 C.P.L.R. 15.

Suit for partition—Prior mortgagee not made party—Judgment and decree not binding on mortgagee nor can such mortgagee take advantage of it—See ESTOPPEL—ESTOPPEL BY JUDGMENT, 8 C.L.J. 478 = 13 C.W.N. 281 = 4 Ind. Cas. 92.

See ESTOPPEL—ESTOPPEL BY JUDGMENT, 4 C. 692.

See ESTOPPEL—MISCELLANEOUS, 153 P.R. 1882.

Unregistered receipt for payment of, debt produced by mortgagee—Inadmissibility of, in evidence—See EVIDENCE—MISCELLANEOUS DOCUMENTS, 7 B. 123.

Sale—Admissibility of evidence of conduct to prove document to be a mortgage—See EVIDENCE—PAROL EVIDENCE, 4 B. 609, Note = P.J. 1878, 24.

Parol evidence, admissibility of, to prove a sale to be a mortgage—See EVIDENCE—PAROL EVIDENCE, 4 B. 594.

Oral evidence showing that document purporting to be a sale is a mortgage in reality—See EVIDENCE—PAROL EVIDENCE, 9 C. 528 = 12 C.L.R. 287.

Oral evidence to prove that a sale-deed was intended to operate only as—See EVIDENCE—PAROL EVIDENCE, 25 C. 603, F.B. = 2 C.W.N. 562.

Existence of mortgage—Question not between parties to mortgage—Oral evidence of mortgage, value of—See EVIDENCE—PAROL EVIDENCE, 12 C. 52.

Mortgage—continued.**—1.—General—continued.**

Proof of discharge of, bond—See EVIDENCE—PAROL EVIDENCE, 4 C.W.N. 301.

Conveyance—Or conditional sale—Oral evidence—See EVIDENCE—PAROL EVIDENCE, 28 C. 256 = 5 C.W.N. 351.

Suit for cancellation of—Deed—Denial of attestation—Presumption as to execution—See EVIDENCE—MISCELLANEOUS, A.W.N. 1884, 19.

Public record—Ancient documents—Presumption as to their genuineness—Production from proper custody—Mortgage—Acknowledgment of liability—See EVIDENCE ACT, 1872, ss. 35, 74, 80, 90, 59 P.R. 1901.

Procedure to be followed in proving mortgage-deeds—Absence of attesting witnesses not accounted for—Proof of document—See EVIDENCE ACT, 1872, ss. 60, 67, 68, 69, 11 Ind. Cas. 225.

Mortgage-deed—Attesting witness not examined—No objection taken to admissibility of mortgage—Deed in first Court—Waiver of objection—See EVIDENCE ACT, 1872, s. 68, 13 M.L.J. 143.

Attesting witness to mortgage-deed not called—Admissibility of deed in evidence to enforce personal covenant—See EVIDENCE ACT, 1872, s. 68, 2 M.L.T. 175 = 17 M.L.J. 213 = 30 M. 251.

Admissibility of an unattested—Bond to prove debt—See EVIDENCE ACT, s. 68, 18 M. 29.

See EVIDENCE ACT, 1872, ss. 91, 101, 102, 110, L.B.R. 1872—1892, 133.

Satisfaction of mortgagee's dues—Proof by oral evidence—See EVIDENCE ACT, 1872, s. 92, 2 Ind. Cas. 13 = 11 C.L.J. 39.

Absolute conveyance or mortgage—Fraudulent dealing with third person's property—Evidence of acts and conduct of parties—Admissibility—See EVIDENCE ACT, 1872, s. 92, 14 C.L.J. 276, P.C.

Mortgage by way of conditional sale—Oral agreement converting it into a usufructuary mortgage—Admissibility—See EVIDENCE ACT, 1872, s. 92, 14 O.C. 321.

Oral agreement that mortgagee should be in possession in lieu of interest—Validity—See EVIDENCE ACT, 1872, s. 92, A.W.N. 1887, 61.

Representation that sale-deed would not be enforced as sale-deed—Mortgage deed—Proof—See EVIDENCE ACT, 1872, s. 92, 12 Bom.L.R. 972 = 8 Ind. Cas. 644.

Document whether absolute conveyance or mortgage—Evidence of acts and conduct of parties—See EVIDENCE ACT, 1872, s. 92, 2 M.W.N. 1911, 30.

Oral agreement adding to the terms of a registered mortgage-deed—Admissibility in evidence—Degree of formality of document—See EVIDENCE ACT, 1872, s. 92, Proviso 2, 4 L.B.R. 240 = 14 Bur. L.R. 231.

Mortgage—continued.—1.—**General**—continued.

Evidence of conduct for showing cancelment of registered mortgage—Admissibility—Suit for portions of property mortgaged whether maintainable—Mortgagee losing possession of property mortgaged—See EVIDENCE ACT, 1872, s. 92 (4), 5 M.L.T. 84=19 M.L.J. 280=2 Ind. Cas. 612.

Parol agreement by a purchaser of mortgagee's interest to pay consideration to a third party to the credit of mortgagee—Admissibility—Right of mortgagee—See EVIDENCE ACT, 1872, s. 92 (4), 9 Ind. Cas. 340.

Money advanced to carry on litigation—Active confidence—Burden of proof of good faith—Mortgagor and mortgagee—See EVIDENCE ACT, 1872, s. 111, 8 C.W.N. 569, P.C. =31 I.A. 46=26 A. 130.

Sale of mortgaged property in execution of simple money decree—Subsequent sale in execution of mortgage decree—Rights of purchaser at the two sales—See EXECUTION OF DECREE—GENERAL, 14 O.C. 89.

Suit on—Lands situated outside jurisdiction—Court otherwise competent to try suit—Decree passed without objection—See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 27 M. 118.

Infant member of joint Hindu family born after mortgage-decree—Whether bound by the decree—See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 9 C.L.J. 485=1 Ind. Cas. 213.

Sale in execution of decree upon a—Before the Guzarat Taluqdari Act—Sanction of Government if necessary—See EXECUTION OF DECREE—EFFECT OF CHANGE OF LAW PENDING EXECUTION, 19 B. 80.

Decree giving remedy against hypotheca and against judgment-debtor personally—Option of decree-holder to proceed against person in the first instance—See EXECUTION OF DECREE—MODE OF EXECUTION, 9 A. 484=A.W.N. 1887, 101.

Decree—Execution—Properties in the hands of the Receiver—See EXECUTION OF DECREE—MODE OF EXECUTION, 26 C. 127=3 C.W. N. 90.

Sale of mortgaged property—Decree-holder's procedure for a decree for balance—See EXECUTION OF DECREE—MODE OF EXECUTION, 21 C. 26.

Decree not satisfied by sale of mortgaged property—Sale of other property—Rights of mortgagee—See EXECUTION OF DECREE—MODE OF EXECUTION, 16 C. 423.

Decree for enforcement of hypothecation—Judgment-debtor's liability—Costs—See EXECUTION OF DECREE—MODE OF EXECUTION, 10 A. 127=A.W.N. 1888, 21.

Decree—Surplus sale-proceeds—Attachment of—See EXECUTION OF DECREE—MODE OF EXECUTION, 6 C. 711=8 C.L.R. 189.

Mortgage—continued.—1.—**General**—continued.

Property subject to mortgage—Purchase in execution of money-decree—Assignment of mortgage to purchaser—Enforcement of mortgage decree against other property of the judgment-debtor—Equities—See EXECUTION OF DECREE—MODE OF EXECUTION, 5 A. 342=A.W.N. 1883, 56.

See EXECUTION OF DECREE—MODE OF EXECUTION, 22 C. 931, 8 C. 687=10 C.L.R. 609, 14 A. 513, A.W.N. 1892, 80, 13 A. 360=A.W.N. 1891, 127, 11 A. 486=A.W.N. 1889, 191, 20 C. 533, 7 A. 194=A.W.N. 1884, 332.

Attachment of property in execution of supposed decree for balance of mortgage debt—Transfer of Property Act, ss. 88, 90—Civ. Pro. Code, s. 248—See EXECUTION OF DECREE—MISCELLANEOUS, 6 O. C. 59.

Sale by mortgagee of property not mortgaged, validity of, where to be questioned—Execution proceedings or separate suit—See EXECUTION OF DECREE—MISCELLANEOUS, 7 C.L.J. 270.

Sale in execution—Purchase of undivided share in property partly incumbered—Presumption—See EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1907, 131=4 A.L.J. 434=29 A. 463.

Mortgage decree—Sale held without the representatives of a deceased defendant entitled to redeem, brought on record—Validity—See EXECUTION OF DECREE—MISCELLANEOUS, 7 M.L.T. 270=5 Ind. Cas. 339.

Execution of mortgage decree—Sale of *nij jote* lands—Judgment debtor's right to question saleability of jotes—See EXECUTION OF DECREE—MISCELLANEOUS, 7 C.L.J. 101.

Execution of mortgage-decree—Order on application for sale—Portion of property not mentioned in sale proclamation—Right of a creditor to attach it in execution of his money decree—See EXECUTION OF DECREE—MISCELLANEOUS, 5 L.B.R. 18=2 Ind. Cas. 362.

See EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1900, 95, 18 B. 522.

Mortgage from executor—Duty to enquire into necessity for loan—Mortgage executed 20 years after testator's death—See EXECUTOR, 1 Ind. Cas. 248.

By executor who is also residuary legatee to secure his private debt—Valid against creditors—Legatee's right to impeach—Legacy charged on immoveable property—Lapse of time—Priority—Notice—See EXECUTOR, 12 C.W.N. 993, P.C.=4 M.L.T. 201=18 M.L.J. 435=5 A.L.J. 661=10 Bom. L.R. 1065=8 C.L.J. 345=33 B. 1=1 Ind. Cas. 369.

See EXECUTOR, 1 A. 710, F.B., 3 C.W.N. 483, 515, 7 Bom. L.R. 407, confirmed on appeal, 10 Bom. L.R. 1065.

Mortgage—continued.**—1.—General—continued.**

Mortgage by father—Father if can be appointed guardian *ad litem* of minor son—Mortgage for legal purpose—Proper decree—See EX PARTE DECREE, 15 C.L.J. 446.

Joint mortgage decree set aside against on defendant as being *ex parte*—Re-hearing—Decree supplementing previous decree—Execution—Limitation—See EX PARTE DECREE, 15 C.W.N. 370, P.C.=8 A.L.J. 332=9 M.L.T. 380=13 C.L.J. 351=13 Bom. L.R. 367.

Infant—Mortgage—Fraudulent misrepresentation as to age—Written statement by way of replication—See FRAUD—GENERAL, 2 C.W.N. 18.

Grant of pottah—Grantor, a mortgagee—Promise to grant pottah of another village in case of redemption—Representative of grantor, if bound by promise—See GRANT—CONSTRUCTION, 6 C.L.R. 21, P.C.

See GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 7 M.L.J. 191.

Guardian's power to mortgage minor's property—Rate of interest—See GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 11 C. 379, P.C.=12 I. A. 47.

By guardian of minor's property—Previous permission of the Court of Wards not obtained—Effect of mortgagee—See GUARDIAN—DUTIES AND POWERS OF GUARDIAN, A.W.N. 1902, 192.

See GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 25 C. 909, 26 C. 820=3 C.W.N. 770, 11 C.L.J. 197=5 Ind. Cas. 334, 15 B.L.R. 353, Note.

Rights and duties of mortgagee from guardian—See GUARDIAN—MISCELLANEOUS, 2 Ind. Cas. 366.

By guardian without leave of Court—Effect—See GUARDIAN AND WARDS ACT, 1890, ss. 29, 30, 25 A. 59.

Of minor's property to secure loan sanctioned by Court—Duty of Court to specify the rate of interest—See GUARDIAN AND WARDS ACT, 1890, ss. 29, 31, A.W.N. 1908, 75=5 A.L.J. 260=30 A. 188.

Mortgage of *Hat*, if valid—Rights to purchasers at mortgage sale and certificate sale—See HAT, 13 C.W.N. 596=36 C. 665=1 Ind. Cas. 520.

Property partly within jurisdiction—One joint mortgagor not party to the deed—Equitable mortgage—See HIGH COURT, JURISDICTION OF—CALCUTTA, 33 C. 824.

Created by testator on properties given away to testator's mother for her maintenance, decree on, alienation for satisfaction of decree will not prevent the testator's widow from claiming it back on the mother's death—Effect of such a mother's transfer—See HINDU LAW—ALIENATION, 17 M.L.J. 622.

Mortgage—continued.**—1.—General—continued.**

Mortgage by a co-parcener of his undivided interest—Mortgagee's equitable rights—*Bona fide* transferee without notice, right of—See HINDU LAW—ALIENATION, 14 O.C. 295.

Mortgage by co-parcener—Decree directing property to be held in specific shares and charging mortgagor's share with the mortgagee's dues, if enforceable in execution—Separate suit to enforce lien, if necessary—See HINDU LAW—ALIENATION, 15 C.W.N. 748.

Execution of mortgage bond hypothecating property of joint family belonging to uncle and nephew, validity of—See HINDU LAW—ALIENATION, 5 A.L.J. 417=A.W.N. 1908, 192=30 A. 460.

Mortgage-deed—Money decree—Decree declaring lien—See HINDU LAW—ALIENATION, 8 C.L.R. 428.

Purdanashin lady executing a, for interest due under previous mortgages—Guardian of minor—See HINDU LAW—ALIENATION, 26 C. 707, P.C.=26 I. A. 97=3 C.W.N. 573.

Mortgage of joint ancestral property by father—Sale of property in execution of decree against father—Son's rights—See HINDU LAW—ALIENATION, 3 A. 191.

Suit upon, by father alone—Property liable as against sons, made parties—See HINDU LAW—ALIENATION, 6 C. 135=7 C.L.R. 97.

Hindu widow—Alienation for maintenance by sale or mortgage—See HINDU LAW—ALIENATION, 3 B.L.R. A.C. 375.

Hindu Law—Legal necessity—Of ancestral property—See HINDU LAW—ALIENATION, 5 B.L.R. 176=13 W.R. 457.

See HINDU LAW—ALIENATION, 18 M. 113.

Of joint property for family purposes—Liability of member of joint family though not made party to suit on—See HINDU LAW—DEBTS, 22 A. 408=A.W.N. 1900, 158.

Debt by grandfather, liability of grandson to pay with interest—See HINDU LAW—DEBTS, 19 A. 26, F.B.=A.W.N. 1896, 183.

Hindu Law—Joint family—Mortgage by father—Sons if can be made parties to suit on mortgage—See HINDU LAW—DEBTS, 24 A. 459=A.W.N. 1902, 123.

Son's liability on mortgage by father—See HINDU LAW—DEBTS, 1 A.L.J. 316.

By managing members—See HINDU LAW—DEBTS, 2 C.P.L.R. 221.

Decree in mortgage suit cannot be impeached in execution proceedings—See HINDU LAW—IMPARTIBLE ESTATES, 2 Ind. Cas. 18.

Mortgage of family property made by managing member—Decree for sale—Suit by son and other members to recover the family property—See HINDU LAW—JOINT FAMILY, 7 A.L.J. 945=7 Ind. Cas. 902.

Mortgage—continued.

—1.—General—continued.

Mortgage of undivided interest of a Hindu co-parcener—Right of mortgagee to a declaration that he has a lien over the mortgaged share—Remedy of mortgagee—See HINDU LAW—JOINT FAMILY, 10 O.C. 289.

Mortgage of undivided share by one co-parcener and purchaser in execution—Sale of share of co-sharer—Priority between—See HINDU LAW—JOINT FAMILY, 15 A. 339=20 I.A. 116, P.C.

By senior member during minority of junior members—Necessity for creditor to show that debt was *bona fide* and for benefit of family—See HINDU LAW—JOINT FAMILY, 1 M.H.C. 398.

Mortgage of ancestral property by son in absence of father—Mortgagee's rights as against purchaser in execution of decree against father—See HINDU LAW—JOINT FAMILY, 10 B. 363.

Sale in execution of mortgage decree—Purchase of entire right, title and interest of grand-father—Subsequent purchaser of property from grandsons, rights of—See HINDU LAW—JOINT FAMILY, 11 B. 42.

Usufructuary—Of share in undivided Hindu family property—See HINDU LAW—JOINT FAMILY, 5 B. 496.

Mitakshara Law—Mortgage and decree against father—*Prima facie* conclusion—See HINDU LAW—JOINT FAMILY, 14 C. 572, P.C.=14 I.A. 77.

Mortgage for legal necessity by managing member of joint family—Decree against mortgagor alone—Rights of execution purchaser and other family members—See HINDU LAW—JOINT FAMILY, 11 C. 293.

Of family property by father—Decree on mortgage—Sale of property—Rights of purchaser at Court-auction—See HINDU LAW—JOINT FAMILY, 15 B. 293.

Of joint family property by manager—Suit against manager, no bar to suit against other members—See HINDU LAW—JOINT FAMILY, 22 A. 307=A.W.N. 1900, 73.

Of undivided share—Partition, effect of, on mortgage—See HINDU LAW—JOINT FAMILY, 24 A. 483=A.W.N. 1902, 137.

See HINDU LAW—JOINT FAMILY, 15 C. 70, P.C.=14 I.A. 187, 6 C. 749=8 C.L.R. 192, A.W.N. 1884, 45, A.W.N. 1903, 41.

Hindu Law—Maintenance decree—Rights of mortgagee—See HINDU LAW—MAINTENANCE, A.W.N. 1881, 4.

Mortgage in favour of one member of undivided Hindu family—Payment of entire mortgage money to one of several members after the family became divided—Rights of other members—See HINDU LAW—PARTITION, 5 Ind. Cas. 343=7 M.L.T. 253=20 M. L.J. 709.

Mortgage—continued.

—1.—General—continued.

See HINDU LAW—REVERSIONERS, 29 C. 355=6 C.W.N. 395.

Interest to be awarded in decree for, money—Transfer of Property Act, ss. 86 and 88—See HINDU LAW—STRIDHANAM, 3 O.C. 130.

Interest exceeding principal—Mortgage transaction—See HINDU LAW—USURY, 2 Agra 394.

Damdapat—Applicability of rule to mortgages—Account current—State of account—See HINDU LAW—USURY, 20 B. 721, F.B.

Account of rent and profits not to be taken—Applicability of rule of damdupat—See HINDU LAW—USURY, 15 B. 84.

See HINDU LAW—USURY, 21 B. 85.

Hindu Law—Alienation by widow—Mortgage for necessary purposes—Money spent on other purposes—Validity of mortgage—See HINDU LAW—WIDOW, A.W.N. 1881, 14.

Mortgage by widow of husband's estate—Onus of proof—See HINDU LAW—WIDOW, 9 M.L.T. 307.

Mortgage by widow—Mortgage decree when binding on reversioner—See HINDU LAW—WIDOW, 10 Ind. Cas. 32.

Hindu Law—Hindu widow—Mortgage by Hindu widow—Legal necessity—Payment of Government revenue—Nature of proof of necessity required—See HINDU LAW—WIDOW, A.W.N. 1893, 163.

See HINDU LAW—WIDOW, A.W.N. 1899, 95.

Nature of mortgage decree—See HINDU LAW—WILL, 8 C.L.J. 20.

See HOUSE, L.B.R. 1893—1900, 603.

Foreclosure—Mortgagee's liability for rent—Mortgagee in possession—See INDIGO, 2 C.L.R. 323.

Created benami for real mortgagee—Benamidar obtaining decree—Suit by real mortgagee against, for declaration and injunction—See INJUNCTION—SPECIAL CASES, 21 M. 353=7 M.L.J. 279.

Mortgage of property subject to temporary injunction, not void—See INJUNCTION—INJUNCTION UNDER CIV. PRO. CODE, 9 A. 497=A.W.N. 1887, 107.

See INSOLVENCY—GENERAL, 12 C.L.R. 165.

Decree against insolvent judgment-debtor not entered in schedule—Right of judgment creditor to execute—Civ. Pro. Code, s. 344, &c—See INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 21 A. 227=A.W.N. 1899, 45.

Insolvency of trading partnership—Trading partnership assigning all assets by mortgage, for present and future advances—Effect—See

Mortgage—continued.—1.—**General**—continued.

INSOLVENCY — VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR, 19 C. 223 = 19 I.A. 15.

See INTEREST—GENERAL, 5 B. 181.

Suit by mortgagee on mortgage—Mortgagee entitled to interest till date of decree at stipulated date—See INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 20 B. 744.

See INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 23 M. 534, 20 M. 149 = 7 M.L.J. 18, 20 M. 371, 3 B. 202.

Debt—Interest to be allowed according to contract—See INTEREST—SPECIAL CASES, 15 A. 339 = 20 I.A. 116, P.C.

Post diem interest—Interest awarded as damages when to be charged on land—See INTEREST—SPECIAL CASES, 14 O.C. 106.

Interest on, up to what date realizable—See INTEREST—SPECIAL CASES, 33 C. 846.

Right of usufructuary mortgagee to claim interest when he does not take possession of the mortgaged land—See INTEREST—SPECIAL CASES, 9 O.C. 144.

Post diem interest on mortgage money—See INTEREST—SPECIAL CASES, 56 P.W.R. 1910 = 6 Ind. Cas. 664 = 76 P.L.R. 1910.

Award—Arbitration—Mortgage suit—Arbitrator not allowing interest on sum found due—Validity of award—See INTEREST—SPECIAL CASES, 7 C.L.R. 206.

Decree on mortgage awarding interest only up to date for payment, construction of—Power of Court to grant interest up to date of realization—See INTEREST—SPECIAL CASES, 23 A. 181 = 3 Bom. L.R. 51 = 5 C.W.N. 137 = 28 I.A. 35, P.C.

Suit on mortgage—Rate of interest to be allowed in decree—See INTEREST—SPECIAL CASES, 25 A. 159 = A.W.N. 1902, 218.

Bond—Compound interest at excessive rate—Unconscionable bargain—See INTEREST—SPECIAL CASES, 25 A. 284 = A.W.N. 1903, 44.

Interest up to date of payment—Rate of interest after date fixed for redemption—See INTEREST—SPECIAL CASES, 6 C.W.N. 769.

Mortgage by conditional sale—See INTEREST—SPECIAL CASES, 121 P.R. 1894.

See INTEREST—SPECIAL CASES, 73 P.R. 1892, 11 M.L.J. 7, A.W.N. 1891, 126.

Usufructuary mortgage—Further advance by mortgagee on same security—Money due under second mortgage payable in kind in case of default—Relief against penal provision—See INTEREST—STIPULATION IN THE NATURE OF PENALTY, 1 M.H.C. 81.

Bond—Increased interest on default—Penal clause—See INTEREST—STIPULATION IN THE NATURE OF PENALTY, 9 C. 615.

Mortgage—continued.—1.—**General**—continued.

Bond—Provision for payment of enhanced interest from date of default in payment, not relievable as penalty—Indian Contract Act, IX of 1872, s. 74—See INTEREST—STIPULATION IN THE NATURE OF PENALTY, 14 B. 200.

Covenant to give possession of mortgaged property or to pay increased rate of interest—Penalty—See INTEREST—STIPULATION IN THE NATURE OF PENALTY, A. W. N. 1882, 43.

Interest under mortgage bond payable in kind—Suit for interest—Limitation—See INTEREST—STIPULATION IN THE NATURE OF PENALTY, 2 Ind. Cas. 111.

See INTEREST—STIPULATION IN THE NATURE OF PENALTY, 9 A. 228 = A.W.N. 1887, 19.

Mortgage by executor—Plaintiff failing to show that mortgage has been validly created in that capacity—Raising fresh issue—See ISSUES—ADDITIONAL ISSUES, 3 B. L. R. O. C. 7 = 11 W. R. O. C. 21.

Redemption suit—Collective mortgage of lands situate in separate districts—See JURISDICTION—SUITS FOR LAND, 1 A. 431.

See JURISDICTION—SUITS FOR LAND, 17 A. 483 = A.W.N. 1895, 110.

Mortgagor and mortgagee—Lease of mortgaged property by mortgagee—Suit for arrears of rent—Civil Courts—Jurisdiction—See JURISDICTION OF CIVIL COURTS, 19 A. 496 = A.W.N. 1897, 128.

See JURISDICTION OF CIVIL COURTS, 14 A. 223 = A. W. N. 1892, 73.

S. 16, Civil Procedure Code, 1908—Sayer not an interest in immoveable property—Not a malikana—Jurisdiction to entertain suit to enforce a mortgage bond relating to sayer compensation—See JURISDICTION OF MUNSIFS' COURT, 19 C. 8.

Court of Revenue—Suit for rent due under lease or mortgaged property executed by mortgagee in favour of mortgagor—Landlord and tenant, relation of, between mortgagee and mortgagor—Jurisdiction—See JURISDICTION OF REVENUE COURTS, 6 O.C. 26.

Collusive relinquishment by mortgagor tenant—Effect on mortgagee—See JURISDICTION OF REVENUE COURTS, 2 Ind. Cas. 456 = 7 A. L.J. 305.

Of Khoti lands—Decree on mortgage—Execution—Sale of mortgaged property—Assignment by purchaser—Rights of assignee—Acceptance of rent by Khot—Effect—Consent to alienation—See KHOTI TENURE, 17 B. 677.

Mortgage of occupancy holding when amounts to abandonment—See LANDLORD AND TENANT—GENERAL, 13 C.W.N. 242 = 3 Ind. Cas. 560 = 10 C.L.J. 610.

Mortgage—continued.

—1.—General—continued.

Tenant attorning to mortgagee—Suit for rent against son of tenant—Liability of son on father's tenancy until notice of surrender to landlord—See LANDLORD AND TENANT—ABANDONMENT OF TENURE, 8 B. 164.

In possession of leasehold property—Liability for rent—See LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 10 C. 443.

See LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 7 O.C. 265.

Mortgage with possession of occupancy holding by tenant—See LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 12 A. 419, F.B. = A.W.N. 1890, 162.

See LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 3 C.L.R. 285.

Mortgage of land to tenant—Effect on tenancy—See LANDLORD AND TENANT—MISCELLANEOUS, 24 A. 491, Note.

Mortgage decree by landlord—Purchase by third party in execution—Rent decree by landlord—Purchase by landlord in execution of rent decree—Priority of title—See LANDLORD AND TENANT—MISCELLANEOUS, 10 Ind. Cas. 54.

Landlord mortgaging land to tenant—No merger of rights as mortgagee and tenant—See LANDLORD AND TENANT—MISCELLANEOUS, 24 A. 487 = A.W.N. 1902, 157.

Mortgage of tenant right—Acceptance of rent by landlord from mortgagee for six years—Landlord, whether can obtain possession of land, without giving mortgagee a chance to assert his being dispossessed—See LANDLORD AND TENANT—MISCELLANEOUS, 5 N.L.R. 111 = 3 Ind. Cas. 57.

Mortgagor and mortgagee—Relationship of landlord and tenant—Suit by mortgagee for possession—Jurisdiction—See LANDLORD AND TENANT—MISCELLANEOUS, 110 P.W.R. 1910 = 150 P.L.R. 1910.

See LAND TENURE—IN BOMBAY, 4 B.H.C. O.C. 1.

Lease of land—Purchase of plantain trees on land by lessee—Mortgage of plantain trees by lessee—Termination of lease—Rights of mortgagee—See LEASE—GENERAL, 11 M.L.J. 340.

Share of mortgaged property not passing at execution sale—Lien upon such share—See LIEN, 14 C. 464.

See LIMITATION—GENERAL, 6 P.R. 1901.

Possession of joint immoveable property, given in execution of money-decree by one co-sharer to decree-holder until payment of decretal amount—Sale of his own interest by another co-sharer to stranger—Suit by vendee to eject decree-holder—Limitation Act, art. 136—See LIMITATION—GENERAL, 69 P.W.R. 1908.

Mortgage—continued.

—1.—General—continued.

Stipulation for payment of whole sum due on failure to pay certain instalment of interest—Extension of time made in will executed by mortgagee—Abstention to sue on mortgage—Waiver—Acknowledgment of liability after remedy had become barred—Saving of limitation—See LIMITATION—GENERAL, 5 M.L.J. 241.

See LIMITATION—LAW OF LIMITATION, L. B.R. 1872—1892, 43.

Acknowledgment by one, two mortgagees in a deed of transfer—Acknowledgment valid as against the representatives of that mortgagee—See LIMITATION ACT, 1908, s. 19, 6 Ind. Cas. 190 = 7 A.L.J. 847.

Acknowledgment by mortgagee need not be addressed to mortgagor—See LIMITATION ACT, 1908, s. 19, 4 Ind. Cas. 579.

Reference in will by mortgagee, whether amounts to acknowledgment of—See LIMITATION ACT, 1908, s. 19, 16 M. 366 = 3 M.L.J. 191.

Entry of mortgage in Muntkhib Khewat signed by one of two mortgagees—Whether an acknowledgment—See LIMITATION ACT, 1908, s. 19, 35 P.W.R. 1910 = 39 P.R. 1910 = 5 Ind. Cas. 992 = 179 P.L.R. 1910.

Acknowledgment of mortgage contained in a plaint—Proof of its contents—See LIMITATION ACT, 1908, s. 19, 82 P.W.R. 1911.

Statement by mortgagee in a sub-mortgage—Acknowledgment—See LIMITATION ACT, 1908, s. 19, 1 Ind. Cas. 510.

See LIMITATION ACT, 1908, s. 19, 1 C.W.N. 513.

Acknowledgment, by female heir—Effect upon reversioner—Suspension of limitation by fusion of interest of mortgagor and mortgagee—See LIMITATION ACT, 1908, s. 19, arts. 120, 148, 6 A.L.J. 931 = 3 Ind. Cas. 725 = 32 A. 33 = 6 M.L.T. 348.

Redemption of—Acknowledgment by one co-mortgagee, whether saves limitation—See LIMITATION ACT, 1908, s. 19, art. 148, 18 A. 458 = A.W.N. 1896, 147.

Part payment by mortgagor after transfer of equity of redemption, whether extends time as against transferee—See LIMITATION ACT, 1908, s. 20, 11 C.W.N. 107 = 33 C. 1278.

See LIMITATION ACT, 1908, s. 20, art. 148, 26 A. 167 = A.W.N. 1903, 223.

See LIMITATION ACT, 1908, s. 28, arts. 91, 135, 147, 83 P.R. 1883.

Suit on—Limitation—Effect of change of law—See LIMITATION ACT, 1908, s. 31, 5 M.L.T. 287 = 32 M. 312 = 4 Ind. Cas. 510.

See LIMITATION ACT, 1908, art. 10, 4 C. P.L.R. 72.

Mortgage—continued.**—1.—General—continued.**

See LIMITATION ACT, 1908, arts. 10, 120, 20 A. 315, F.B. = A.W.N. 1898, 61.

See LIMITATION ACT, 1908, arts. 10, 120, 144, 24 A. 17, P.C. = 5 C.W.N. 888 = 28 I.A. 248 = 3 Bom. L.R. 707 = 8 Sar. 133.

Adverse possession as against mortgagor—Effect upon mortgagee—See LIMITATION ACT, 1908, arts. 11 and 11-A, 8 M.L.T. 377 = 8 Ind. Cas. 264.

Compensation for mortgaged land paid to mortgagee—Suit for recovery of amount—See LIMITATION ACT, 1908, art. 62, A.W.N. 1881, 41.

Void assignment of mortgage—Suit by assignor for recovery of money received by assignee—Limitation Act—Article applicable—See LIMITATION ACT, 1908, arts. 62, 120, 17 M.L.J. 452 = 30 M. 459.

By mother of minor—Suit by minor on attaining majority for possession—See LIMITATION ACT, 1908, art. 91, 107 P.L.R. 1904, 23 P. R. 1904.

Zuri-peshgi lease—Possession not delivered to mortgagee—Suit for recovery of possession dismissed—Suit for compensation—See LIMITATION ACT 1908, arts. 97, 16, 4 A.L.J. 249 = A.W.N. 1907, 108.

Suit for money by mortgagee disturbed in possession, limitation for—See LIMITATION ACT, 1908, arts. 97, 116, 120, 21 M. 242 = 8 M. L.J. 81.

See LIMITATION ACT, 1908, art. 120, 20 A. 375, F.B. = A.W.N. 1898, 78, 14 A. 405, F.B. = A.W.N. 1892, 108.

Hindu widow—Mortgage—Sale on mortgage—Suit by reversionary heirs for declaration that only widow's life interest was sold—Limitation—See LIMITATION ACT, 1908, art. 125, A.W. N. 1894, 134.

Default of payment of mortgage-money—Suit by mortgagees for possession of land mortgaged for or money due under mortgage—Art. 135, sch. II, Act XV of 1877 (Limitation)—See LIMITATION ACT, 1908, art. 135, 99 P.R. 1908 = 156 P.W.R. 1908 = 30 P.L.R. 1909.

See LIMITATION ACT, 1908, arts. 135, 147, 12 C. 614.

By Hindu father—Sale in execution—Suit by son to set aside alienation—See LIMITATION ACT, 1908, art. 144, 8 C.L.R. 428.

Mortgagee ousted by trespasser—Adverse possession by trespasser against mortgagee, when good also as against mortgagor—Onus of proof—See LIMITATION ACT, 1908, art. 144, 18 B. 51.

Possession of mortgagee for over 12 years—Sale to mortgagee—Suit attacking mortgage and sale—Limitation—See LIMITATION ACT, 1908, arts. 144, 127, 23 P.L.R. 1911 = 9 Ind. Cas. 540.

Mortgage—continued.**—1.—General—continued.**

See LIMITATION ACT, 1908, arts. 144, 148, A.W.N. 1885, 300.

Decree for possession barred—Mortgage by decree-holder out of possession—Title of mortgagee—See LIMITATION ACT, 1908, art. 147, 25 A. 35 = A.W.N. 1902, 175.

See LIMITATION ACT, 1908, art. 147, 14 B. 577.

Application for execution—Mortgage decree—Mortgagee in possession—Accounts—Limitation—See LIMITATION ACT, 1908, arts. 181, 182, 5 C.L.J. 289.

Application for decree for recovery of balance due on mortgage—See LIMITATION ACT, 1908, arts. 181, 182, 6 O.C. 114.

Applicability of s. 258, Civ. Pro. Code, to mortgage decree—See LIMITATION ACT, 1908, art. 182, 6 Ind. Cas. 43.

See LIMITATION ACT, 1908, ART. 182—STEP-IN-AID OF EXECUTION, 30 C. 761 = 8 C. W.N. 251.

Application for order absolute for foreclosure—Execution of decree—See LIMITATION ACT, 1908, ART. 182—MISCELLANEOUS, 20 A. 357 = A.W.N. 1898, 713.

Decree for account against executor—Of property of deceased—*Lis pendens*—See LIS PENDENS, 8 C. 79 = 9 C.L.R. 173 = 10 C.L.R. 113.

"Baibilwafa" mortgage—Proceedings of Settlement Officer upon award before rights of mortgagee—See LIS PENDENS, A.W.N. 1888, 246.

Mortgage suit, if a suit with respect to an interest in immoveable property—See LIS PENDENS, 8 C.L.J. 153.

Purchase during pendency of—Suit—*Lis pendens*—See LIS PENDENS, 15 C. 756, P.C. = 15 I.A. 97.

Applicability of doctrine of *lis pendens* to mortgage suits—Conversion of suit for possession into one for redemption—See LIS PENDENS, 2 Ind. Cas. 85.

Purchase of property in respect of which there is a—Decree—See LIS PENDENS, 12 C. 299.

Mahomedan Law—Minors—By widow—Right to mortgage shares of minors—See MAHOMEDAN LAW—ALIENATION, 20 B. 116.

Suit for dower amount by heir of deceased widow—Mortgage by heirs of husband pending suit—*Lis pendens*—See MAHOMEDAN LAW—DOWER, 19 A. 504 = A.W.N. 1897, 135.

See MAHOMEDAN LAW—DOWER, 25 M. 658.

Mortgage—continued.**—1.—General—continued.**

By mother—Decree against mother obtained by other heirs for their shares—Rights of mortgagee—Fraud—Collusion—See MAHOMEDAN LAW—GUARDIANSHIP, 8 A. 324=A.W.N. 1886, 101.

Of a minor's property by guardian without authority—Lease from mortgagee taken in favour of minor—Liability of minor—See MAHOMEDAN LAW—GUARDIANSHIP, 18 A. 373=A.W.N. 1896, 99.

Mahomedan Law—Mother, if guardian of minor son—Right of mother to bind minor's estate by, or otherwise—See MAHOMEDAN LAW—GUARDIANSHIP, 29 C. 473=6 C.W.N. 667.

Adverse possession by mortgagee during continuance of mortgage—See MAHOMEDAN LAW—INHERITANCE, A.W.N. 1907, 221=4 A.L.J. 521=29 A. 640.

See MAHOMEDAN LAW—PRE-EMPTION—NATURE AND EXTENT OF RIGHT, 6 B.L.R. App. 114.

Mortgage of properties comprised in a Wakf—Extent of rights of mortgagee—See MAHOMEDAN LAW—WAKF, 11 B. 492.

Money settled on husband or wife—Sum lent on mortgage by which interest was payable to both jointly—Death of husband—Widow's right of survivorship—Aliyasantana Law—See MALABAR LAW—HUSBAND AND WIFE, 25 M. 395.

Taking a mortgage with knowledge that it is unlawful for mortgagor to make a mortgage—Estoppel whether arises—See MANDADARI TENURE, 8 A.L.J. 1308.

Mortgage and perpetual lease of same property—See MERGER, 7 N.L.R. 154.

Mortgage by *Shikmi*-tenure holder—Merger of *mokarari* interest in the *Shikmi* tenure—Right of mortgagee to the merged interest—See MERGER, 33 C. 1212.

Purchasing equity of redemption—Sale set aside—Effect—See MERGER, 14 M.L.J. 485.

Mortgage by guardian without Civil Court's sanction—See MINOR—CONTRACTS BY MINORS, 3 A. 852.

Transfer of mortgage—Registration necessary—See NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 9, 43, 46 (3), 10 M.L.T. 79.

Suits concerning—Mortgagee by agent—Suit for possession—See PARTIES TO SUIT—GENERAL, 2 Agra 407.

Suit by puisne mortgagee—Necessary party—Proper party—Validity of prior mortgage, whether determinable between co-defendants—See PARTIES TO SUITS—GENERAL, 1 C.W.N. 453.

S. 85, Transfer of Property Act, 1882, suit by benamidar for, foreclosure of—Maintainability of—See PARTIES TO SUITS—GENERAL, 24 C. 644.

Mortgage—continued.**—1.—General—continued.**

Suit by co-sharer against mortgagee for share of profits—See PARTIES TO SUITS—GENERAL, 2 Agra 299.

See PARTIES TO SUITS—GENERAL, 21 A. 380, 4 A. 518=A.W.N. 1882, 118.

Of undivided share of co-sharer in joint estate, whether entitled to priority over charge created on share allotted to him in partition for owelty money—See PARTITION—GENERAL, 12 C.W.N. 373=35 C. 388.

Mortgage of undivided share—Suit for partition by mortgagor's co-sharer—If mortgagee necessary party—Rights of mortgagee—See PARTITION—GENERAL, 6 Ind. Cas. 829.

Of separate shares of joint-owners, suit for partition between, not maintainable without impleading mortgagors—See PARTITION—RIGHT TO PARTITION, 18 A. 476=A.W.N. 1896, 158.

Suit in *forma pauperis*—Property of defendant sold to realise Court-fee—Property sold subject to mortgage—Mortgagee's rights—See PAUPER SUITS, A.W.N. 1907, 157=29 A. 537=4 A.L.J. 720, F.B.

Payments by mortgagor towards interest and principal—See PLAINT—AMENDMENT OF PLAINT, 4 P.L.R. 1900.

Unconscionable bargain in—Duty of Court—See PLEADINGS, 12 Bom L.R. 795.

Adverse possession of stranger—Extinguishment of mortgagor's right—Position of mortgagee—See POSSESSION—ADVERSE POSSESSION, 9 Ind. Cas. 28=9 M.L.T. 264.

Possession adverse to mortgagor—Whether adverse to mortgagee—See POSSESSION—ADVERSE POSSESSION, 9 M.L.T. 399=21 M.L.J. 467.

Settlement of land—Mortgagor and mortgagee—See POSSESSION—ADVERSE POSSESSION, 1 Agra 15.

Equity of redemption, capable of being subject of adverse possession—Limitation—*Res judicata*—See POSSESSION—ADVERSE POSSESSION, 14 B. 176.

Adverse possession of mortgaged property—Purchaser of a sale in execution of a mortgage decree, possession of—See POSSESSION—ADVERSE POSSESSION, 12 O.C. 45 (B)=2 Ind. Cas. 57.

Possession of mortgagee not adverse—See POSSESSION—ADVERSE POSSESSION, 58 P.R. 1866.

Suit for possession under a sale deed—Sale declared invalid—Prayer for possession as mortgagee—Inconsistent reliefs—Pleading—Practice—See POSSESSION—SUITS FOR POSSESSION, 4 Ind. Cas. 37=20 M.L.J. 141.

Mortgage—continued.—1.—**General**—continued.

Suit for possession under a sale deed—Sale declared invalid—Prayer for possession as mortgagee—Validity—See POSSESSION—SUITS FOR POSSESSION, 4 Ind. Cas. 37 = 20 M.L.J. 141.

See POSSESSION—SUITS FOR POSSESSION, 59 P.R. 1873.

See POSSESSION—MISCELLANEOUS, 4 C.W.N. 297.

Mortgage—Benamidar—Assignment of mortgage—Representatives of deceased mortgagee—Is "mortgage" a thing?—See POWER OF ATTORNEY, 13 C.W.N. 1190 = 3 Ind. Cas. 859.

Mortgage by vendee after sale—Pre-emption suit—Mortgagee not a necessary party—Mortgagee bound by decree against vendee—See PRE-EMPTION—GENERAL, 55 P.W.R. 1912.

Joint mortgage of two properties—Wajib-ul-az relating to pre-emption—Suit for pre-emption in respect of both properties—Claim if divisible—Decree if can be given in respect of one property only—See PRE-EMPTION—RIGHT TO PRE-EMPT, A.W.N. 1885, 243.

Sale by joint owner of his share—Subsequent "mortgage" of the remaining property by the other joint owner—Mortgage really a sale—Whether latter joint owner has right to pre-emption—See PRE-EMPTION—RIGHT TO PRE-EMPT, 145 P.R. 1906 = 109 P.L.R. 1907.

Mortgage by conditional sale—See PRE-EMPTION—RIGHT TO PRE-EMPT, A.W.N. 1891, 134.

Pre-emption—Vendee's right to mortgage for sale consideration—Enforcement of mortgage—See PRE-EMPTION—RIGHT TO PRE-EMPT, 6 A.L.J. 966 = 32 A. 45 = 3 Ind. Cas. 782.

Property sold subject to mortgage—Redemption of mortgage by vendee—Price payable by pre-emptor—See PRE-EMPTION—SUBJECTS OF PRE-EMPTION, 43 P.R. 1912 = 13 Ind. Cas. 430.

Vendee purchasing with notice of prior unregistered—Property pre-empted—Pre-emptor takes subject to that mortgage, even if existence of mortgage concealed from him—See PRE-EMPTION—MISCELLANEOUS, 6 A.L.J. 112 = A.W.N. 1908, 42 = 3 M.L.T. 223 = 30 A. 130.

Ostensible mortgage found in reality to be a sale—Right of pre-emptor—See PRE-EMPTION—MISCELLANEOUS, 157 P.W.R. 1909.

See PRE-EMPTION—MISCELLANEOUS, 24 A. 514 = A.W.N. 1902, 149, 1 C.P.L.R. 79.

See PRINCIPAL AND AGENT—RATIFICATION OF AGENT'S ACT, 2 Agra 129.

Purchase of jote at successive rent and mortgage sale—Mortgage decree if an incumbance—See PRIORITY, 13 C.W.N. 412 = 9 C.L.J. 234 = 1 Ind. Cas. 35.

Probate under forged will—See PROBATE AND ADMINISTRATION ACT, 1881, ss. 6, 18, 19, 84, 6 C.W.N. 787.

Mortgage—continued.—1.—**General**—continued.

Power of executor to, testator's estate—See PROBATE AND ADMINISTRATION ACT, 1881, s. 90, 3 C.L.J. 260.

Will giving power to sell—Power to—See PROBATE AND ADMINISTRATION ACT, 1881, s. 90, 8 C.W.N. 362.

Mortgage executed by mother as administratrix to the estate of her father, if binding on her sons—Mortgage created without permission of Court, if voidable—See PROBATE AND ADMINISTRATION ACT, 1881, s. 90, 13 C.L.J. 447.

Mortgage by guardian—Belief of mortgagee in the existence of reasonably credited necessity—See PROBATE AND ADMINISTRATION ACT, 1881, s. 113, 2 M.L.T. 343.

Mortgage suits—Receiver when may be appointed—See RECEIVER, 15 C.W.N. 672 = 13 C.L.J. 487.

Suit by mortgagee—Appointment of receiver on application by mortgagee—High Court, powers of, with regard to appointing receivers—See RECEIVER, 14 B. 431.

Receiver when may be appointed in mortgage transactions—See RECEIVER, 13 C.L.J. 495.

Mortgagee restrained by injunction from selling property in execution of his decree—Appointment of Receiver—See RECEIVER, 6 M.L.T. 238 = 3 Ind. Cas. 437.

Partition suit—Mortgage suit—Receivers how to act—Decree for sale—Decree for foreclosure—See RECEIVER, 14 C.L.J. 526.

Mortgage suit—Mortgagor taking money from Receiver as accommodation loan—Refusal to pay—Power of Court to compel payment—See RECEIVER, 10 Ind. Cas. 893.

Possessory lien of agent of mortgagor, paramount to right of Receiver appointed the suit of the mortgage—See RECEIVER, C.W.N. 654 = 9 C.L.J. 563 = 36 C. 713 = 1 Ind. Cas. 356.

See RECEIVER, 7 C.W.N. 452.

Registered and oral mortgage—Priority—Notice—See REGISTRATION, 6 L.B.R. 184 = 8 Ind. Cas. 597.

Registered mortgage—Subsequent sale with possession—Priority—See REGISTRATION, 2 B. 662.

Registration of puisne mortgages, whether notice to prior—Suit on mortgage, subsequent mortgagees not being made parties—Rights of purchaser under decree as against puisne mortgagees—See REGISTRATION, 7 C.W.N. 11.

See REGISTRATION, 18 B. 444.

Usufructuary, below Rs. 100—Registration—See REGISTRATION ACT, 1864, ss. 13, 14, 7 B.L.R. 14 = 15 W.R. 331.

Mortgage—continued.**—1.—General—continued.**

Registered and unregistered—Priority—Decree—*See* REGISTRATION ACT, 1866, A. W. N. 1884, 184.

Deed of sale or mortgage—Priority—*See* REGISTRATION ACT, 1866, 1 B. 574.

Mortgage of future rents of value of over Rs. 100—Registration—Position of mortgagee who had taken unregistered document—*See* REGISTRATION ACT, 1908, ss. 2, 17, 6 Ind. Cas. 504=8 M.L.T. 91=20 M.L.J. 966.

Bond under Rs. 100—*See* REGISTRATION ACT, 1908, s. 17, 10 C. 82.

Deed of assignment of mortgage—Consideration—Registration—*See* REGISTRATION ACT, 1908, s. 17, 2 B. 97.

Indorsement of payment on, bonds—Registration, necessity for—*See* REGISTRATION ACT, 1908, s. 17, 9 A. 108, F.B.=A.W.N. 1886, 310.

Equitable mortgage—Agreement to—*See* REGISTRATION ACT, 1908, s. 17, 10 C. 315.

Instrument creating charge in nature of mortgage—Necessity for registration—Admissibility in evidence—*See* REGISTRATION ACT, 1908, s. 17, 20 B. 553.

Receipt for payment of—Money—*See* REGISTRATION ACT, 1908, s. 17, 91 P.L.R. 1904=39 P.R. 1904.

Receipt for payment of mortgage money—*See* REGISTRATION ACT, 1908, s. 17, 6 A. 335=A.W.N. 1884, 107.

Receipt for payment of mortgage money—Oral evidence—*See* REGISTRATION ACT, 1908, s. 17, A.W.N. 1897, 188.

Receipts passed by mortgage—Whether compulsorily registrable—*See* REGISTRATION ACT, 1908, s. 17, 4 B. 235.

Registered conveyance—Unregistered—Priority—*See* REGISTRATION ACT, 1908, s. 17, 13 C.L.R. 256.

See REGISTRATION ACT, 1908, s. 17, 2 A. 216, 2 A. 688, 12 C.L.R. 444.

See REGISTRATION ACT, 1908, s. 17 (e), 5 B. 181.

See REGISTRATION ACT, 1908, ss. 17, 19, 3 B. 312.

See REGISTRATION ACT, 1908, ss. 17, 28, 49, 29 C. 654=6 C.W.N. 856.

Endorsement releasing mortgaged property—Registration—*See* REGISTRATION ACT, 1908, ss. 17, 49, 11 Bom. L.R. 1321=34 B. 202=4 Ind. Cas. 588.

See REGISTRATION ACT, 1908, ss. 17, 49, 3 B.L.R. A.C. 310=12 W.R. 222.

See REGISTRATION ACT, 1908, ss. 17 (b), 49, 23 C. 450.

Mortgage—continued.**—1.—General—continued.**

See REGISTRATION ACT, 1908, ss. 17, cl. (2), 49, 2 A. 40.

Mortgage—Value of mortgage—Deed for purposes of registration—*See* REGISTRATION ACT, 1908, ss. 17, 50, 5 A. 447, F.B.=A.W.N. 1883, 87.

Registration of mortgage out of time by altering date—Lessee from executant if may question validity of such mortgage—*See* REGISTRATION ACT, 1908, s. 23, 16 C.W.N. 585.

Inclusion of property to which mortgagor has no title—Registration—*See* REGISTRATION ACT, 1908, s. 28, 5 Ind. Cas. 127=14 C.W.N. 532.

Registration of mortgage-deed in district in which the mortgaged property is not situate—Admissibility of document in evidence of money obligation—*See* REGISTRATION ACT, 1908, ss. 28, 49, 60, 4 A. 14=A.W.N. 1881, 105.

Sale of property mortgaged with possession—Subsequent sale by registered document—Priority—*See* REGISTRATION ACT, 1908, s. 48, P.L.R. 1900, p. 352.

See REGISTRATION ACT, 1908, s. 48, 11 C. 158.

Payment of mortgage-debt—Endorsement of payment on—Bond—Endorsement not registered—Admissibility in evidence—*See* REGISTRATION ACT, 1908, s. 49, 7 M.H.C. 1.

Mortgage deed unregistered—Admissibility of deed to prove that money was borrowed—*See* REGISTRATION ACT, 1908, s. 49, 2 Ind. Cas. 516=7 A.L.J. 71.

Unregistered mortgage bond—Evidence of—Personal liability—*See* REGISTRATION ACT, 1908, s. 49, 9 C. 520=12 C.L.R. 209, F.B.

Earlier unregistered mortgage, priority of, later registered mortgage over—Effect of notice of prior mortgage—*See* REGISTRATION ACT, 1908, s. 50, 25 M. 1.

First unregistered mortgage—Subsequent registered mortgage—Money decree on first mortgage subsequent to second mortgage—Priority—*See* REGISTRATION ACT, 1908, s. 50, A.W.N. 1881, 127.

Notice—Priority of—*See* REGISTRATION ACT, 1908, s. 50, A.W.N. 1897, 90.

Prior mortgage not compulsorily registrable—Mortgagee in possession—Subsequent registered mortgage—Priority—Evidence Act, s. 110—*See* REGISTRATION ACT, 1908, s. 50, 25 A. 366=A.W.N. 1903, 81.

Prior unregistered document, possession under, notice to subsequent registered mortgagee—*See* REGISTRATION ACT, 1908, s. 50, 9 B. 427.

Mortgage—continued.**—1.—General—continued.**

Priority—Registered mortgage—Auction-purchaser under decree on prior unregistered mortgage—*See* REGISTRATION ACT, 1908, s. 50, 13 A. 288, F. B. = A.W.N. 1891, 63.

Priority of unregistered mortgage over subsequent registered sale—Notice—Fraud—*See* REGISTRATION ACT, 1908, s. 50, 11 C. 667.

Prior unregistered mortgage with possession—Subsequent registered mortgage with notice of prior mortgage—Priority of registered over unregistered mortgage—*See* REGISTRATION ACT, 1908, s. 50, 8 C.P.L.R. 109.

Registered and unregistered mortgages—*See* REGISTRATION ACT, 1908, s. 50, A.W.N. 1881, 161.

Registration—Registered and unregistered mortgages—Priority—*See* REGISTRATION ACT, 1908, s. 50, A.W.N. 1881, 120.

San mortgage optionally registrable but unregistered—Subsequent registered mortgage—Priority—*See* REGISTRATION ACT, 1908, s. 50, 20 B. 158.

Sale of property subject to an unregistered mortgage but whose registration was not compulsory—Purchaser having notice of such mortgage before registration of sale-deed—Mortgage whether binding on purchaser—*See* REGISTRATION ACT, 1908, s. 50, A.W.N. 1908, 99 = 30 A. 238 = 5 A.L.J. 607.

Unregistered mortgage—Subsequent registered sale—Priority—*See* REGISTRATION ACT, 1908, s. 50, 10 Ind. Cas. 233.

Unregistered usufructuary mortgage—Long possession thereunder—Invalid sale to same mortgagee—Subsequent mortgage by registered document—Priority of title—*See* REGISTRATION ACT, 1908, s. 50, 26 M. 72 = 12 M.L.J. 410.

See BEN. REG. XXXIV OF 1803, ss. 9, 10, 6 C.L.R. 257, P.C.

Notice—Defects in—Demand of interest that was not due—Effect—*See* BEN. REG. XVII OF 1806, ss. 7, 8, 134 P.L.R. 1910 = 8 Ind. Cas. 555.

Foreclosure—Irregular notice when fatal—*See* BEN. REG. XVII OF 1806, ss. 7, 8, 74 P.L.R. 1906.

By conditional sale—*See* BEN. REG. XVII OF 1806, s. 8, 5 M.L.J. 261, P.C. = 23 C. 228 = 22 I A. 183.

See BEN. REG. XVII OF 1806, s. 8, 9 P.L.R. 1901 = 28 P.R. 1901.

Mortgage of tenure in possession under s. 13 of Reg. VIII of 1819—Liability for rent—*See* BEN. REG. VIII OF 1819, s. 13, 12 C. 185.

Entries in Khewats and Khatanmis, admissibility of, to prove existence of disputed mortgage—*See* BEN. REG. VII OF 1882, s. 9, 6 A.L.J. 197 = 31 A. 247 = 2 Ind. Cas. 215.

Mortgage—continued.**—1.—General—continued.**

Deed—Distinct covenant to pay interest each year—Decree for overdue interest—Subsequent suit for principal and interest whether barred by s. 43, Civ. Pro. Code—*See* RELINQUISHMENT OF PORTION OF CLAIM, 21 B. 267.

Purchase by first mortgagee of the equity of redemption—Suit to enforce lien against second mortgagee—*See* RES JUDICATA—GENERAL, 2 A. 582, F.B.

Suit for sale on mortgage—Compromise by which mortgagee accepted a simple money decree—Second suit for sale barred—*See* RES JUDICATA—ADJUDICATIONS, A W.N. 1908, 265 = 5 A.L.J. 732 = 31 A. 19 = 1 Ind. Cas. 561.

Res judicata—Suit by puisne mortgagee—Prior mortgagee's omission to plead his charge—Decree for sale—Subsequent suit on puisne mortgage not maintainable—*See* RES JUDICATA—ADJUDICATIONS, 24 A. 429, P.C. = 6 C.W.N. 889 = 4 Bom. L.R. 827 = 29 I.A. 118.

Prior mortgage of entire share with possession—Second mortgage of $\frac{2}{3}$ share—Suit for sale on second mortgage—Prior mortgagee party—No prayer for possession of $\frac{1}{3}$ —Second suit for possession—*Res judicata*—*See* RES JUDICATA—ADJUDICATIONS, 8 A.L.J. 352.

Same person holding two mortgages over same property—Suit on first mortgage without disclosing the second—Subsequent suit on second mortgage—Effect—*See* RES JUDICATA—ADJUDICATIONS, 4 S.L.R. 82 = 8 Ind. Cas. 216.

Two simple mortgages—Suit on first mortgage—Second mortgagee not impleaded—Part of hypothecated property sold—Second suit for sale of remainder not barred against second mortgagee—*See* RES JUDICATA—CAUSE OF ACTION, 7 A.L.J. 29 = 32 A. 119 = 5 Ind. Cas. 451.

Suit for declaration of title as owner—Second suit as mortgagor—*Res judicata*—*See* RES JUDICATA—CAUSE OF ACTION, 6 Ind. Cas. 696.

For balance of unpaid purchase money—Dismissal of suit on mortgage—Subsequent suit to enforce lien for balance of unpaid purchase money—Maintainability—*See* RES JUDICATA—CAUSE OF ACTION, 26 M. 645.

Money, suit for—Suit for possession—Act VIII of 1859, ss. 2, 7—*See* RES JUDICATA—CAUSE OF ACTION, 3 C.L.R. 395.

See RES JUDICATA—JUDGMENT ON PRELIMINARY POINTS, EFFECT OF, W.R. 1864, 110.

Prior mortgagee's omission to plead his charge in a suit by a subsequent mortgagee—Decree for sale—Subsequent suit by him on—Not maintainable—*See* RES JUDICATA—MATTERS IN ISSUE, 6 C.W.N. 889, P.C. = 4 Bom. L.R. 827 = 29 I.A. 118 = 24 A. 429.

Mortgage—continued.

— 1.—General—continued.

Mahomedan widow in possession in lieu of dower—By widow—Suit by heir for possession—See RES JUDICATA—PARTIES, A.W.N. 1886, 69.

Mortgagor and prior mortgagee—Co-defendants—*Res Judicata*—See RES JUDICATA—PARTIES, 6 Ind. Cas. 375.

Suit on a mortgage—Prior mortgagee added as party but remaining *ex parte*—No issue about prior mortgage—Decree not reserving rights of prior mortgagee—Subsequent suit by prior mortgagee on his mortgage barred—See RES JUDICATA—MISCELLANEOUS, 11 M.L.J. 333.

Dismissal of former suit for sale of land as no mortgage—Subsequent suit to recover land as on usufructuary mortgage, from defendants in wrongful possession—See RES JUDICATA—MISCELLANEOUS, 27 M. 102.

Mortgagee's right to plead title of the mortgagor when the latter does not appear to defend it—See REVIEW—GENERAL, 10 P.L.R. 1900.

Mortgagor agreeing to give possession of mortgaged property to mortgagee—Suit for mortgage money and rent—Cause of action—See REVISION—GENERAL, 59 P.W.R. 1912.

Occupancy holding—Mortgage—Subsequent sale of portion of holding with landlord's consent—Suit on mortgage—Purchaser if may question validity of mortgage—Estoppel—See RIGHT OF OCCUPANCY—GENERAL, 16 C.W.N. 475.

Mortgage of occupancy by tenant—Relinquishment of tenancy during subsistence of mortgage—Rights of mortgagee—See RIGHT OF OCCUPANCY—GENERAL, 9 Ind. Cas. 456.

Mortgage of occupancy—holding—Suit by mortgagor to get back possession without payment of money received from mortgagee—Maintainability—See RIGHT OF OCCUPANCY—GENERAL, 10 Ind. Cas. 248.

Occupancy holding—Non-transferability—Question if may be raised by assignee of holding pending mortgage suit—See RIGHT OF OCCUPANCY—GENERAL, 15 C.W.N. 703.

Surrender of mortgaged holding by occupancy tenant, effect of, on rights of mortgagee—See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT, 2 N.L.R. 170.

Suit to enforce mortgage of occupancy holding, purchased by landlords of non-transferable occupancy holding after its mortgage by tenants to third parties—Whether landlords estopped from setting up non-transferability of holding without their consent—See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT, 12 C.W.N. 721=8 C.L.J. 29=35 C. 904.

Mortgage by occupancy tenant—Subsequent surrender—Right of mortgagee—See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT, A.W.N. 1882, 138.

Mortgage—continued.

— 1.—General—continued.

See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT, 6 P.R. 1901, Rev.

Relinquishment of holding by mortgagor in favour of zamindar—Mortgage not affected—See RIGHT OF OCCUPANCY—MISCELLANEOUS, 6 Ind. Cas. 705.

By one of two co-tenants of forest—Mortgagee in possession—Licensees from both co-tenants, rights of—See RIGHT OF SUIT—CO-SHARERS, SUITS BY, 7 B. 336.

Payment of Government revenue by mortgagee in possession to save property—Payment of mortgage-money into Court by mortgagor—Mortgagee drawing the money and relinquishing deed and possession of property—Subsequent suit for recovery of revenue paid by sale of mortgaged property—See RIGHT OF SUIT—REVENUE SALE FOR ARREARS OF, 13 A. 195=A.W.N. 1890, 228.

See RIGHT OF SUIT—SALE IN EXECUTION OF DECREE, 12 A. 546=A.W.N. 1890, 77.

Document not amounting to a mortgage, but amounting to a sale with contract for repurchase—See SALE—GENERAL, 2 Ind. Cas. 930.

Deed of conveyance and agreement to re-sell—Construction—See SALE—GENERAL, 11 Ind. Cas. 124.

See SALE—SALE FOR ARREARS OF RENT—RIGHTS AND LIABILITIES OF PURCHASERS, 2 C.W.N. 29.

Execution sale of under-tenure—Decree-holder—Mortgagee's right to notice—See SALE—SALE FOR ARREARS OF RENT—UNDER-TENURES AND PORTIONS OF, SALES OF, 4 C. 438.

Property not comprised in the mortgage sold—Subsequent application for sale of property comprised in the mortgage cannot be allowed—See SALE—SALE IN EXECUTION OF DECREE—GENERAL, 3 Ind. Cas. 22.

Effect of mortgagee purchasing equity of redemption in a portion of hypotheca—Whether such purchase extinguishes mortgage altogether—See SALE—SALE IN EXECUTION OF DECREE—GENERAL, 10 M.L.T. 240.

See Sale—SALE IN EXECUTION OF DECREE—DECREES AGAINST REPRESENTATIVES, Marsh 509.

See SCRIBE, 5 C.W.N. 454.

See SET-OFF, 8 C.W.N. 174, A.W.N. 1883, 4.

Mortgage of right to worship—Attestation whether necessary—Turn of worship whether immoveable property—See SHEBAIT, 14 C.L.J. 369.

Suit for interest due on mortgage—Defence that debt itself was completely paid off—See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 10 B. 69.

Mortgage—continued.**—1.—General—continued.**

Enforcement of—Decree—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 4 C.L.R. 291.

Suit by mortgagor against mortgagee for account of profits and settling amount payable on mortgage security—Small Cause Court suit—Jurisdiction—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, A.W.N. 1885, 174.

Suit against lambardar by assignee of—Of share—Suit for money had and received—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 5 A. 531.

Mortgage of fruit of growing plantain trees—Mortgage of moveable property—Small Cause nature—Second appeal—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 11 M.L.J. 343.

Mortgage—Agreement to convey mortgaged property in case of default—Contract sale—Suit for specific performance—*See* SPECIFIC PERFORMANCE, 3 A. 706=A.W.N. 1881, 61.

Agreement to—Lands beyond jurisdiction—Suit for return—Of money paid thereunder—*See* SPECIFIC PERFORMANCE, 5 C. 82.

See SPECIFIC RELIEF ACT, 1877, s. 23, cl. (b), 1 L.B.R. 257.

Rights of mortgagee in possession—Cancellation of leases by mortgagor—*See* SPECIFIC RELIEF ACT, 1877, ss. 39 and 42, 1 O.C. 18.

Suit for declaration that mortgage is not valid—Plaintiff in possession of some items—Maintainability—*See* SPECIFIC RELIEF ACT, 1877, s. 42, 8 M.L.T. 358=7 Ind. Cas. 867.

Mortgagee's possession is that of mortgagor—Mortgagor can maintain a suit for declaration—*See* SPECIFIC RELIEF ACT, 1877, s. 42, 6 Ind. Cas. 166.

See SPLITTING UP CAUSE OF ACTION, 47 P.R. 1886.

See STAMP ACT, 1869, s. 3, art. 18, 2 C. 58.

Lease and usufructuary—Stamp duty—*See* STAMP ACT, 1879, s. 7, para. 2, 8 C. 254=10 C.L.R. 33.

Property sold subject to—Payment of mortgage, no part of consideration—Stamp duty—*See* STAMP ACT, 1879, s. 24, 10 C. 92=13 C. L.R. 164.

Stamp applicable to mortgage deed when a further advance is made—*See* STAMP ACT, 1879, s. 44 (b), 1 Bom. L.R. 7.

Refund of cancelled stamps used for deed, in favour of another—*See* STAMP ACT, 1879, s. 51 (d), (6), 16 M. 459, F.B.=2 M.L.J. 181.

Bond for earnest money received—Hypothecation of produce as collateral security—Stamp duty chargeable—*See* STAMP ACT, 1879, sch. I, arts. 13 and 44, 9 A. 585=A.W.N. 1887, 190.

Mortgage—continued.**—1.—General—continued.**

See STAMP ACT, 1879, sch. I, art. 44 (b), 8 B. 310, F. B.

Deed of mortgage, execution by mortgagor and surety—Stamp duty payable—*See* STAMP ACT, 1899, s. 5, sch. I, arts. 40 (b), 57 (b), 15 P. R. 1910, F.B., 16 P.W.R. 1910=4 P.L.R. 1910=5 Ind. Cas. 812.

Certificate of sale—Property sold subject to mortgage—Stamp duty leviable on purchase money—*See* STAMP DUTY, 15 B. 532, F.B.

See ST. 11 AND 12 VIC. C. 21, s. 23, 7 C.L. R. 29, 25 M. 406=12 M.L.J. 282.

Subrogation when arises—First mortgagee not necessary party in suit to enforce second mortgage—*See* SUBROGATION, 5 C.L.J. 611=36 C. 193=1 Ind. Cas. 913.

Application of principle of subrogation—*See* SUBROGATION, 6 C.L.J. 134.

Usufructuary mortgage—Suit on mortgage by adopted son of mortgagee—Succession certificate, whether necessary—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 4, 24 M. 22.

Assignee of property mortgaged not a debtor—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 4, 19 C. 336.

Suit for mortgage money, the security becoming impaired—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 4, 28 C. 246=5 C.W.N. 607.

Tender—Mortgage—Money due on a prior mortgage deposited by the mortgagor with puisne mortgagee—*See* TENDER, 115 P.L.R. 1902.

Suit for money secured by mortgage of immoveable property situate partly in the family domains of the Maharaja of Benares—*See* TRANSFER OF CIVIL CASES, 3 A. 568.

Whether Transfer of Property Act governs a case brought after the Act, on a mortgage executed before the Act—*See* TRANSFER OF PROPERTY ACT, 1882, 26 C. 39, P.C.=25 I.A. 179=2 C.W.N. 633.

Mortgages executed before T. P. Act came into force—*See* TRANSFER OF PROPERTY ACT, 1882, s. 2, A.W.N. 1884, 269.

Purchase after mortgage decree but before sale—Purchase in execution—Priority of title—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 2, 52, 9 Ind. Cas. 840.

Suit pending when Act came into force—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 2, 67, 99, A.W.N. 1884, 274.

Omission to make a puisne mortgagee party to a suit—Registration—Notice—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 3 and 85, 8 Ind. Cas. 1199.

Mortgage of impartible zemindari by holder and members of his family standing in the line of succession to the zemindari—*Spes successionis*—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 6 and 67, 2 M.L.T. 167=17 M.L.J. 201=30 M. 255.

Mortgage—continued.**—1—General—continued.**

See TRANSFER OF PROPERTY ACT, 1882, s. 41, 26 A. 490.

Mortgage of joint property by one of four brothers—Effect—Duty of mortgagee to enquire—See TRANSFER OF PROPERTY ACT, 1882, ss. 41, 123, 12 Ind. Cas. 858.

Mortgage by unauthorized person—Sale upon that mortgage—Acquisition by transferor of ownership in the property subsequent to the sale upon the mortgage—Effect—See TRANSFER OF PROPERTY ACT, 1882, s. 43, 10 Ind. Cas. 443.

Portion of property comprised in a mortgage acquired by mortgagor subsequent to decree—Mortgage—Decree-holder's right against such property—Transfer of Property Act, s. 43—See TRANSFER OF PROPERTY ACT, 1882, s. 43, A.W.N. 1908, 155.

Sale under a prior mortgage, mortgagor acquiring mortgaged property sold on a, effect of—See TRANSFER OF PROPERTY ACT, 1882, s. 43, 29 M. 113.

Rights of sub-mortgagee—Whether a sub-mortgage is transfer of immoveable property—See TRANSFER OF PROPERTY ACT, 1882, ss. 43 and 41, 14 Bur. L.R. 329.

Suits for sale and redemption are subject to the rule of *Lis pendens*—See TRANSFER OF PROPERTY ACT, 1882, s. 52, 13 O.C. 50=5 Ind. Cas. 800.

Applicability of doctrine of *Lis pendens* to mortgage transactions—See TRANSFER OF PROPERTY ACT, 1882, s. 52, 6 N.L.R. 140=8 Ind. Cas. 288.

Mortgage effected during pendency of suit, Validity of—Rights of sub mortgagee—*Lis Pendens*—See TRANSFER OF PROPERTY ACT, 1882, s. 52, 10 Ind. Cas. 16.

Mortgage decree nisi, mortgagor selling the mortgaged property after, but before decree absolute—Duty of the purchaser to apply to be made party—Subsequent purchaser in execution of the mortgage decree—Priority—See TRANSFER OF PROPERTY ACT, 1882, ss. 52, 88, 89, 13 C.W.N. 1138=3 Ind. Cas. 791.

Mortgage—Portion of consideration fictitious—Mortgage, how far valid—See TRANSFER OF PROPERTY ACT, 1882, s. 53, 10 M.L.T. 183.

Prior unregistered mortgages, subsequent registered mortgagee with notice of, not entitled to the priority under s. 50 of the Registration Act, III of 1877—See TRANSFER OF PROPERTY ACT, 1882, s. 53, 8 A. 540=A.W.N. 1886, 174.

Assignment of mortgage right pending suit on mortgage—Insufficient attestation of the mortgage deed—Discovery of this defect after assignment—Suit by assignee for refund of purchase money—Special covenant protecting assignor from liability—See TRANSFER OF PROPERTY ACT, 1882, ss. 55, 59, 1 M.L.T. 416=17 M.L.J. 167=30 M. 284.

Mortgage—continued.**—1.—General—continued.**

Property situate outside towns mentioned in s. 59, T.P. Act—Validity of equitable mortgage—See TRANSFER OF PROPERTY ACT, 1882, s. 59, 6 L.B.R. 23.

Assignment of mortgage-debt—Payment to mortgagee after assignment without notice—Validity—See TRANSFER OF PROPERTY ACT, 1882, s. 131, 13 C.L.J. 641.

See TRANSFER OF PROPERTY ACT, 1882, s. 131, 12 C. 505.

Right of mortgagee under, not actionable claim—See TRANSFER OF PROPERTY ACT, 1882, s. 135, 16 A. 313.

Usufructuary mortgagee not put in possession, transfer of rights of, by—See TRANSFER OF PROPERTY ACT, 1882, s. 135, 16 A. 315, F.B. =A.W.N. 1894, 100.

Of trust property—Sanction of Court—See TRUST, 20 B. 46.

Appeal by mortgagee on question of lien—See VALUATION OF APPEALS, Agra, F.B. 158=Ed. 1874, 119.

Suit for recovery of mortgaged property—See VALUATION OF SUITS, 1 C.W.N. 670.

Suit for cancellation and for delivery of mortgage-bond—See VALUATION OF SUITS, 27 M. 480.

Suit by mortgagee for declaration that mortgage is subsisting after his claim to attach mortgaged property is disallowed, valuation of—See VALUATION OF SUITS, 5 M.L.T. 70=19 M.L.J. 236=2 Ind. Cas. 522.

See VALUATION OF SUITS, 18 B. 696, A.W. N. 1884, 114.

Rights and position of vendee of a share in joint mortgaged property when it is redeemed in part or whole by his money—See VENDOR AND PURCHASER—GENERAL, 64 P.W.R. 1908.

Mortgage-deed of land, stipulation as to a house in—Building—Purchaser of the house without notice—See VENDOR AND PURCHASER—LIEN, 12 M. 69.

Vendor and purchaser—Mortgage for balance of consideration—Inability of vendor to put purchaser in possession of entire property—Reduction of consideration for mortgage *pro tanto*—See VENDOR AND PURCHASER—PURCHASERS, RIGHTS OF, 8 Ind. Cas. 91.

Sale under decree on puisne mortgage notifying prior incumbrances—Prior incumbrances subsequently declared invalid—Rights of mortgagor—See VENDOR AND PURCHASER—VENDOR, RIGHTS AND LIABILITIES OF, 13 C.W.N. 1143, P.C.=10 C.L.J. 313=6 A.L.J. 817=11 Bom. L.R. 1220=6 M.L.T. 277=3 Ind. Cas. 793=31 A. 583.

See VENDOR AND PURCHASER—VENDOR, RIGHTS AND LIABILITIES OF, 64 P.L.R. 1902=54 P.R. 1902.

Mortgage—continued.**—1.—General—concluded.**

Life tenant under will—Whether can mortgage the interest of devisee—See WILL—GENERAL, 6 Ind. Cas. 533=8 M.L.T. 98.

—2—Accounts between mortgagor and mortgagee.

(1)—*Redemption suit under old law—Defendant's liability to render account, notwithstanding original agreement to the contrary.*—The transaction in this case was of the nature of a usufructuary mortgage and the plaintiff substantially sued to redeem; and, the case having been one under the old law, plaintiff was held to be entitled to an account from the defendant although the terms of the original agreement exempted the defendant from such liability to account. It was also held that the smallness of the principal sum advanced could not make any difference; however trifling the amount might be, the plaintiff would be entitled to an account of the usufruct of the land held by the mortgagee. *DOORGA DEBEE v. ISSUR CHUNDER CHATTERJEE*, 10 W.R. 367.

(2)—*Liability of mortgagee in possession for not keeping proper accounts of income—Right of mortgagor in such a case—Sale—Free consent.*—Held, that it is a well established legal principle, that, when a mortgagee with possession does not keep a proper and true account of the income of the mortgaged property, the mortgagor is entitled to calculate it on the basis of the highest profits the property is capable of yielding. Held, also, that, (as in this case), where a vendor is a helpless puppet in the hands of a vendee, and the deed of sale is executed and registered under peculiar circumstances, the sale cannot be treated as a genuine transaction entered into with free consent. *RAM CHAND v. KAIM KHAN*, 10 P.W.R. 1908.

(3)—*Mortgagee in possession, duty of, to render accounts of payments towards mortgage amount.*—Plaintiff sued for possession of certain property under a right of redemption based on the allegation that the mortgage had been satisfied. The defendant denied that the mortgage-debt had been liquidated. The first Court holding that the mortgage had not been satisfied, dismissed the suit of the plaintiffs; and the lower Appellate Court reversed that decision. On special appeal the High Court held that the Judge was right in having decreed the suit, finding as he did that the defendant had received all the money he had lent on the mortgage and the plaintiff was therefore entitled to redeem. With respect to the payment not distinctly found by the Judge, the plaintiff asserted that he had paid the whole sum due amounting to something less than Rs. 11,000, the defendant admitted that he had received the sum of Rs. 15,000 from the plaintiff, but, he claimed to credit some portion of the money to other mortgages that he held from the plaintiff. He was not able to specify however what portion he had paid to each such mortgage. The defendant,

Mortgage—continued.**—2.—Accounts between mortgagor and mortgagee—continued.**

as mortgagee, was bound under the law to give an account of all payments made towards the liquidation of his mortgage, and on his refusal, failure or neglect, to furnish such account, every presumption will have to be made against him. *SIRDAR GOLAB SINGH v. RAM BUDDEN SINGH*, 6 W.R. 127.

(4)—*Accounts—Production of accounts—Beng. Reg. XV of 1793, s. 11.*—Under s. 11 of Regulation XV of 1793, a mortgagee in possession is bound to produce the accounts of collection and disbursement, and to swear to them; and a plea of "no assets" will not exempt him from acting up to those requirements. *BHEECHUCK SINGH v. LUTCHMINARAIN SINGH*, 1 Hay 182.

(5)—*Accounts—Right of mortgagor to call on mortgagee to file account—Beng. Reg. XV of 1793—Beng. Reg. I of 1798.*—A mortgagor, who has recovered possession of the mortgaged property by the deposit of the principal sum lent under Regulation I of 1798 is, in a suit subsequently brought by him for the adjustment of accounts during the period the mortgagee was in possession, entitled to force the defendant to file his accounts and swear to them according to the provisions of Regulation XV of 1793. *TUFUZZOOL HOSSEIN v. MAHOMED HOSSEIN*, 2 Hay 17.

(6)—*Mortgage—Redemption—Mortgagee's accounts—Suit for redemption—Mortgage debt not fully paid up—Decree.*—In a suit for redemption of mortgaged property, the law only requires that the mortgagee's account of receipts and disbursements shall be made out, filed in Court, and then sworn to as correct by the mortgagee. If such an account can be shown to be false or incorrect, it is open to the mortgagor to show that fact. *Per Bayley, J.*—Mortgagees are bound to exhibit the detailed items of all their actual receipts and disbursements, up to the time of accounting, verified by themselves, and accompanied by all vouchers. *Per Phear, J.*—In a suit for redemption of mortgaged property, no redemption can be decreed as long as there is any balance found due. *Per Bayley, J.*—In such a suit, the plaintiff ought to obtain a decree for re-conveyance on payment of the balance found to be due, with interest and costs of suit, within a time specified, although it has been the practice of some Courts to treat a suit for redemption as if it were a suit for ejectment, in which the plaintiff could not have any decree except by showing that every condition precedent necessary to entitle him to immediate possession had been fulfilled. *Per Phear, J.* *MOKUND LALL SOOKUL v. GOLUCK CHUNDER DUTT*, 9 W.R. 572.

(7)—*Mortgage—Mortgagee in possession—Liability to render account.*—Where a mortgagee, whether usufructuary mortgagee or not, is in possession of the mortgaged property, he is bound to give an account of the profits realized by him from the property so long as it is

Mortgage—continued.

—2.—Accounts between mortgagor and mortgagee—continued.

in his possession, whether he has taken possession with or without the consent of the mortgagor. *NILKANT SEIN v. SHEKH JAENOD-DEEN*, 7 W.R. 30. [R., 6 A. 303 = A.W.N. 1884, 92, 2 N.L.R. 92.]

(8)—Reg. I of 1798, s. 3—*Mortgage—Accounts required from mortgagee—Toujees*.—Where a mortgagor alleges that the mortgage-debt has been satisfied from the usufruct, the account required from the mortgagee is one setting forth what he has realized—from what portions of the mortgaged property—in what terms or period with what loss and gain on the several assets—with what necessary reductions—and what remains then as the net profits which can be taken as the actual realizations towards liquidating the sum due under the mortgage transaction. *Toujees*, *Mehal Melani papers*, *jaidads*, and *jumma wasil bakee papers* are not *per se* an account within the meaning of s. 3, Reg. I of 1798, but may corroborate such account. *GOLUCK CHUNDER DUTT v. MOHUN LALL SOOKUL*, 5 W.R. 271. [Re-heard after remand, 9 W.R. 572.]

(9)—*Mortgage—Suit for possession on ground of liquidation by usufruct—Necessity of production of accounts*.—This suit was instituted to recover possession of certain mortgaged property on the allegation that the debt, with interest, had been liquidated from the usufruct. The case had been remanded giving directions to the Principal Sudder Ameen as to the course he was to take in settling the accounts, and that officer had carried out those instructions, and given a decree for the plaintiffs to recover possession and the sum of money realized in excess of the debt due by him. Held that the course adopted by the Court in disposing of the case was, under the circumstances, quite proper, since the production of accounts is very essential in every case like the present where the plea of complete liquidation, has been taken as the ground for recovery of possession. *RAM LOCHUN PATUK v. BABOO KUNYA LAL*, 6 W.R. 84.

(10)—*Mortgage—Redemption—Usufructuary mortgage before Act XXVIII of 1855—Claim for mesne profits also—Objection of mortgagee to produce accounts—Proof of satisfaction of debt*.—Where a mortgagor sued for redemption of an usufructuary mortgage executed before Act XXVIII of 1855, and claimed also mesne profits, alleging that the mortgagee had been paid from the usufruct over and above the legal dues, it was the duty of the mortgagee to produce his accounts showing the actual collections made by him during his possession. If the mortgagee failed to do so, the mortgagor was not thereby absolved from the duty of showing that he was entitled to a redemption of the mortgage together with the claim for mesne profits. *SYUD HASHUM ALI v. BABOO RAM-DHAREE SINGH*, 7 W.R. 82.

Mortgage—continued.

—2.—Accounts between mortgagor and mortgagee—continued.

(11)—*Mortgage with possession—Mortgagee's rights confiscated—Suit for redemption—Account for excess of profits*.—Where a mortgagee in possession became a rebel and his property was confiscated and his rights as mortgagee in the estate, sought to be redeemed, were given to defendants, held, in a suit by the mortgagor for redemption of the mortgage, that the defendants must account for the excess of profits over interest in the years when they were in possession. *SYAD MAHOMED SALAMUT HOSSEIN v. MUSSAMUT SOOKH DAYEE*, 2 Agra 116.

(12)—*Zur-i-peshgee mortgagor, right of, to recover possession before expiry of term—Mortgagor entitled to account from mortgagee—Stipulation to the contrary inoperative*.—The special appellant in this case contended that the lower Court was wrong, firstly, in having held that the mortgagor (the person that granted a *zuripeshgee* lease) can sue to recover possession of his lands before the expiry of the term fixed by the lease, on the ground that the mortgage debt had been more than paid off by the mortgagee's receipts while in possession; and, secondly, in having held that the mortgagor was entitled to an account from the mortgagee, when it was expressly stipulated in the lease that the latter shall not be liable to account. Held that the contentions were unsustainable. With reference to the second point, the High Court observed that the contract having been entered into prior to the passing of Act XXVIII of 1855, the condition that the mortgagor should not claim an account from the mortgagee who had been in possession, did not in any degree bar the operation of the law that the lender shall account to the borrower for his receipts while in possession. *PUNJUM SINGH v. MUSST. AMEENA KHATOON*, 6 W.R. 6. [D., 14 W.R. 455.]

(13)—*Suit for redemption of mortgage—Mortgagee found to have been overpaid—Order for refund to mortgagor—Bombay Act, XVII of 1879, ss. 12, 13*.—The general practice, when the mortgagee has been found on taking the accounts to have been overpaid, is to order the payment by him, of the balance due from him with interest from the date of the institution. The application of such a rule, in a redemption suit instituted under the Deccan Agriculturists Relief Act, in cases where the provisions of the mortgage contract between the parties have been set aside for the purpose of taking the account under s. 13 of that Act, would not only lead to the redemption of the mortgaged land contrary to the terms and conditions of that contract, but would in many cases oblige the mortgagee to refund money which had rightly come into his hands under that contract. There is no express provision in the Statute either directing or enabling this to be done; and it would be going beyond the object of the Act, if it were construed to entitle the agriculturist mortgagor also to a refund of money

Mortgage—continued.**—2.—Accounts between mortgagor and mortgagee—continued.**

which had already properly come into the mortgagee's hands under the contract. *JANOJI v. JANOJI*, 7 B. 185. [F., 14 B. 19; R., 16 B. 141; D., 22 B. 520.]

(14)—*Mortgage—Suit by mortgagee for mortgage money—Mortgagee in possession—Refusal of mortgagee to give account—Nature of decree to be passed.*—A usufructuary mortgagee in possession is liable to account for the profits whether such possession be by himself or by his agent, and a suit by him to recover the mortgage money should not be dismissed merely because the mortgagee refused to give the account, but the Court should give proper directions for the mortgage account to be taken, charging the mortgagee with the amount of the ordinary annual profits if received by him or his agent, but not so charging him if the profits were received by the agent of the mortgagor. *MUSSUMAT NAWAB JAFFREE BEGUM v. MUSSUMAT UJBEE BEGUM*, 3 Agra 153.

(15)—*Mortgagee in possession cultivating by himself—Duty to account for—Profits.*—A mortgagee in possession of land, who, instead of letting it to ryots and realizing the rent in the ordinary way, cultivates it himself, is not responsible or liable to account for the whole of the profits arising to him by farming the land, but only for such profits as he would have realized had he let it to a tenant, or as the mortgagor would have realized had he let it. *RUGHONATH ROY v. BARAIK GEEREE-DHAREE SINGH*, 7 W.R. 244.

(16)—*Mortgage—Sale of equity of redemption—Payment by mortgagor to purchaser for discharging mortgage—Right of purchaser to claim accounts from mortgagee.*—Where the purchaser of the equity of redemption received from the mortgagor a certain sum for payment of the mortgage, he was not thereby precluded from claiming from the mortgagee an account of the income of the mortgaged property. *NOWAB JAFFREE BEGUM v. GUNGA RAM*, 3 Agra 91.

(17)—*Usufructuary mortgage-deed—Reservation of huk ajiri to proprietor—Mortgagee's liability to render account not affected.*—In the suit, the first Court decreed plaintiff's right to the possession of certain dams in a mouza but refused a claim made by him to a certain yearly money payment, termed *huk ajiri*, which the first Court held was cognizable only in the Revenue Court, being in the nature of rent, and was besides barred by limitation. The lower appellate Court also agreed in treating this sum as rent and did not take it into account. Plaintiff contended that he had a right under the law of usufructuary mortgage to an account from the defendant, and that the latter could not avoid the obligation of rendering the same; and that *huk ajiri* was more in the light of *malikana* or acknowledgment of the proprietor's right than of annual rent. The

Mortgage—continued.**—2.—Accounts between mortgagor and mortgagee—continued.**

circumstances were such that if the sum was to be considered as rent, the plaintiff was out of time, and the High Court came to the conclusion that the sum could not be considered as rent. *SHAIKH HYDER BUKHSH v. HOSSEIN BUKSH*, 4 W.R. 103. [R., 12 W.R. 215.]

(18)—*Suit for redemption—Suit by purchaser of equity of redemption against subsequent purchaser—Onus of proof—Actual possession.*—Where the purchaser of the original proprietor's equity of redemption sues the subsequent purchaser of the same proprietary rights, to establish his right to redeem, he is bound to prove his original deed of purchase and either actual possession or receipt of *huk ajiri* or some portion of the proceeds of the property. *SYUD FUZOOL RUHMAN v. MOULVIE ALI KUREEM*, 5 W. R. 163.

(19)—*Reg. XV of 1793, s. 11—Ascertainment of amount received by mortgagee whilst in possession—Jumma wasil-bakee papers.*—Where it is necessary for the Court to ascertain the amount received by the mortgagee whilst in possession, the mortgagee should file his *jumma wasil-bakee* papers and proceed generally in terms of Regulation XV of 1793, s. 11. *SHAH AMEEROODEEN v. RAM CHAND SAHOO*, 5 W. R. 53.

(20)—*Mortgage, accounts relating to—Evidence—Reg. XV of 1793, s. 11.*—Under s. 11, Reg. XV of 1793, mortgagees who are in actual possession should be examined as regards the truth of mortgage-accounts, excluding persons (such as females) who, according to the customs and manners of the country, are unable to appear in Court, or others who, from their position, are not likely to be acquainted with the actual state of facts. But where one of the co-sharers has a competent knowledge of the facts, he may depose to the truth of the mortgage accounts. *RAM PHUL PANDEY v. WAHED ALI KHAN*, 14 W.R. 66.

(21)—*Evidence—Income-tax return papers—Mortgage—Mortgagee in possession—Duty to keep accounts.*—Where the accounts of a mortgagee in possession are being taken, his income-tax return papers are wholly inadmissible for the purpose of showing what the collections actually were. They are admissible for contradicting the mortgagee; but they cannot be taken against the mortgagor. It is the duty of the mortgagee to keep regular accounts from the date he entered on possession; and it is on the mortgagee that the *onus* lies in the first instance. If the mortgagee has not kept proper accounts, the general presumption will be against him; but this does not mean that, because the mortgagee has neglected to keep proper accounts, all statements of the mortgagor against him must be taken as true. The Court must take the best evidence available and decide upon it. *SHAH GHOLAM NAZUF v. MUSSAMUT EMANUM*, 9 W.R. 275.

*Mortgage—continued.***—2.—Accounts between mortgagor and mortgagee—continued.**

(22)—*Reg. IX of 1833—Mortgage—Right of mortgagor to question correctness of Jumma-bundee filed by putwaree.*—A mortgagor was not precluded from questioning the correctness of the *jumabundee* annually filed by the *putwaree* in obedience to the provisions of Reg. IX of 1833 by reason of his not having brought the incorrect entries to the notice of the Collector at the time the papers were filed. **SYUD TAIG ALI v. GOLAB CHOWDHRY, 3 Agra 314.**

(23)—*Usufructuary mortgagee, rights of, dependent on contract—Right of mortgagor to accounts—Taking benamee lease, not fraud per se.*—With regard to the contention in this case that a usufructuary mortgagee in possession cannot, in any case, have a personal remedy against the mortgagor, or sell the land, it was *held* that, though in the case of a pure usufructuary mortgage, where the lender takes possession of the estate of the borrower and agrees to pay himself out of the profits, the mortgagor cannot be sued personally nor can the land be sold, yet there is no rule of law that, if a mortgagor be so minded, he may not also give his usufructuary mortgagee the power to sue him personally or to sell the land or both at any time. As to the next contention that a mortgagee in possession was bound in every case to account for the profits, and the mortgagor cannot by contract deprive himself of this right, it was *held* that, though while the usury laws were in force, a restriction in this respect did certainly exist, yet, on the abolition of those laws, the restriction ceased with them and, by s. 4 of Act XXVIII of 1855, it has been expressly enacted that an agreement that the use or usufruct of any property shall be allowed in lieu of interest, shall be binding upon parties. The mortgagor and mortgagee therefore are at liberty to make what contract they please with reference to the profits of the mortgaged estate. *Held* also that, although a *benami* transaction ought to be generally scrutinised with care, since it is frequently resorted to, to cover a fraud, yet a mere taking of a lease *benami*, unaccompanied by any other circumstances of suspicion, does not in itself constitute fraud. **MUNNOOLAL v. BABOO REET BHOOBUN SINGH, 6 W.R. 283.**

(24)—*Redemption suit—Power of Court in matters of account.*—Case where it was held in a redemption suit that it was for redemption the peculiar province of the Judge to go into and adjust the accounts between the parties. **PRO-SUNNO COOMAR DUTTA v. CHYTUNNO CHURN BIDYALUNKAR, 25 W.R. 74.**

(25)—*Mortgagee in possession—Taking of accounts—Regulation XV of 1793, s. 10.*—Under s. 10, Reg. XV of 1793, it is the duty of the Court to take an account of the receipts of the mortgagee from the property and then adjust the mortgage-account of principal and interest after ascertaining what was received by the mortgagee in possession. **SHUMBHOONATH ROY v. MONOWAR ALI, W. R. 1864, 109.**

*Mortgage—continued.***—2.—Accounts between mortgagor and mortgagee—continued.**

(26)—*Principle of taking accounts.*—Accounts between mortgagor and mortgagee should be taken in accordance with the principles laid down in Macpherson on "Mortgages," 7th Ed., p. 550. **GANDA MAL v. THAKUR HARKISHEN, 3 P.R. 1900.**

(27)—*Zur-i-peshgee—Mortgage—Account, method of taking.*—Case where the High Court specified the manner of taking accounts in a suit for possession of property the subject of a *zur-i-peshgee* mortgage, and the form of suit in such a case. **BIBEE SUYEEDUN v. SYUD ZUHOOR HOSSEIN, W.R. 1864, 44.**

(28)—*Principle of taking accounts—Mortgage decree for account and sale—Withdrawal from execution proceedings.*—Case where the Court explained and stated at length the principles of taking accounts in mortgage decrees. A mortgagee who has obtained a decree for an account and sale is not entitled to withdraw from the execution proceedings when those accounts appear to be going against him. **DOOBE CHAND v. OMDA KHANUM alias BABU SHIBBU, 6 C. 377 = 7 C.L.R. 375. [R., 5 C.L.J. 192 = 34 C. 223.]**

(29)—*Mortgagor in possession—Accounts how to be kept.*—How a mortgagee in possession should keep and maintain accounts in regard to the collections realised from the mortgaged property. **RAM KISSEN SINGH v. SHAH KUNDUN LALL, W.R. 1864, 177.**

(30)—*Receipt of interest by mortgagee—Method of calculation of interest.*—There is no law restricting a mortgagee to the receipt by way of interest of the amount of the principal lent. On this second appeal, the defendant took the objection that the calculations made by the *Sudder Ameen* were incorrect. He had taken year by year the amount of the advance, added to it interest at 12 per cent., and then deducted the value of the usufruct. On this calculation, made from the time of the advance being given, up to the date of plaintiff's dispossession, he found that defendant had still Rs. 29-2-6 to receive, and he gave him a decree, for this amount. The High Court *held* that the above procedure of *Sudder Ameen* was correct and that it was the method of calculation usually followed in such cases. **SYED ENAET ALI v. KUHUR ROY, 2 W.R. 289.**

(31)—*Accounts—Mode of taking accounts—Duty of Court on taking them—Practice.*—*Per Fulton, J.*—A mortgagor seeking to redeem must prove how much of the debt and interest has been repaid. It is the duty of a mortgagee in possession to keep a full, true and accurate account of the actual receipts and disbursements. When an account is presented the Judge of fact on whom rests the responsibility of coming to a true decision must examine it and before arriving at a conclusion as to whether it is such an account as a prudent man ought to accept, he must consider the

Mortgage—continued.**—2.—Accounts between mortgagor and mortgagee—continued.**

detail and ascertain whether it has been kept on principles which indicate that it is probably correct. Before accepting or rejecting accounts in suits between mortgagor and mortgagee it is usually necessary to examine them critically. The omission of the mortgagor to assist by criticising the items may of course be taken into consideration. In some cases such omission may be accepted as showing that the accounts cannot be attacked or in other words are known to be correct. But in other cases it may merely indicate ignorance of the proper course to take of the inability on the part of the client to give suitable instructions to his pleader. No general rule can of course be laid down. While it is true that no general rule as to the value of accounts can be laid down, still it is clear that in such a case all the circumstances must be considered such as the relative positions of the parties to each other, the trade or caste of the mortgagor and any other matters likely to be material. It is for the party who puts forward the accounts to explain them and support them in such a way as to convince the Judge that there is such a probability of their accuracy as to make it reasonable for a prudent man to accept them. **KUNDANMAL v. KASHI-BAI, 4 Bom. L.R. 42=26 B. 363.**

(32)—*Mortgage—Redemption—Usufructuary mortgage—Balance in lieu of interest after payment of rent—Breach of condition—Claim for account.*—Where, under the terms of a mortgage deed, the mortgagee was bound to pay the rent due for the mortgaged property, taking the balance in lieu of interest and the mortgagor was to redeem by payment of the principal and the mortgagee failed to pay the rent, and the mortgagor had to pay it: *Held*, that the mortgagor was not bound to pay the whole principal and bring a suit for the amount of the rent paid by him, but was entitled to claim an account and a reduction of the mortgage debt by an amount equivalent to the rent paid by him. **RAM NARAIN v. IMAMUDDIN, A.W.N. 1900, 134.**

(33)—*Usufructuary mortgage—Redemption—Mortgagor's right to an account—Express stipulation as to interest or profits—Novation of contract—Recital of a subsequent contract not a novation of a previous one—Reg. XV of 1793, ss. 3, 4, 10 and 11—Act XXVIII of 1855, s. 7—Stat. 13, Geo. III, c. 63.*—In a suit for redemption of a usufructuary mortgage, executed while Reg. XV of 1793 was in force, the plaintiff's claim to an account, on the ground that the principal and the interest had been discharged out of the usufruct, was resisted by the defendant, who pleaded that, subsequent to the repeal of the Regulation by Act XXVIII of 1855, the mortgagor had agreed not to claim an account. This agreement was said to be contained in a *wajib-ul-arz*, in which were recited the terms of a sub-mortgage of usufructuary mortgagee's rights, providing, *inter alia*,

Mortgage—continued.**—2.—Accounts between mortgagor and mortgagee—continued.**

that all the profits were to be taken towards interest and that the mortgage should be redeemable on payment of the principal. *Held*, on the true construction of the *wajib-ul-arz*, that there was no new contract or ratification of the contract, as to the application of the profits, but only a recital by way of description, and that the plaintiff was entitled to an account. Where the mortgagee has become the owner of a part of the mortgaged property, the accounts to be taken in connection with the redemption suit should be calculated only on the basis of the portion of the property to which the mortgagor is entitled. Observations by *Stuart, C.J.*, on Reg. XV of 1793 and Stat. 13, Geo. III, c. 63. **MAHTAB KUAR v. THE COLLECTOR OF SHAHJAHANPUR, 5 A. 419=A.W.N. 1883, 43. (2 B.L.R. P.C., 44, 2 A. 593, P.C.=7 I.A. 51, R.)**

(34)—*Suit by second mortgagee against the mortgagor and third mortgagee—Account.*—In a suit, by a second mortgagee against the mortgagor and a third mortgagee, for an account and sale, an account of what was due to both the second and the third mortgagee was directed to be taken. **AUHINDRO BHOOSUN CHATTERJEE v. CHUNNOLOLL JOHURRY, 5 C. 101. [F., 22 C. 100; D., 1 C.L.J. 31.]**

(35)—*Mortgage of village without specification of boundaries—Redemption of accretion.*—Where a village, without specification of boundaries, is mortgaged as a whole, the mortgagee is, on the one hand, entitled to it as security with any casual increase or decrease which may occur to it, and is, on the other hand, subject to its redemption by the mortgagor to the same extent. **SADASHIV ANANT v. VITHAL ANANT, 11 B.H.C. 32.**

(36)—*Mortgage—Division among mortgagors and apportionment of mortgage-debt—Acquiescence by mortgagee—Effect—Liability of mortgagors.*—The defendants, after mortgaging their property to the plaintiff, divided it among themselves and apportioned their liability under the mortgage-debt. In pursuance of this apportionment, defendants 2 and 3 (two of the mortgagors) passed certain bonds to the plaintiff in discharge of their shares of the mortgage-debt, which the plaintiff accepted. In a suit by the plaintiff to recover a one-third share of the debt by sale of a third share of the mortgaged property and from the first defendant (the third mortgagor) personally, *held* that the claim of the plaintiff must be decreed. Though the mortgagee was not bound to recognize the arrangement made by the defendants among themselves, yet, as the amounts paid by two of the debtors for discharging their shares of the debt had been appropriated by him, without there being any special direction to that effect from those debtors, he had a right to recover the remainder of that debt from the share of

Mortgage—continued.**—2.—Accounts between mortgagor and mortgagee—continued.**

the mortgagor-debtor by whom it was due. **MAHADAJI HARI LIMAYE v. GANPATSHET DHONDSHET**, 15 B. 257. [R., 28 M. 555 = 15 M.L.J. 442.]

(37)—*Decree in mortgage suit—Mortgagee in possession under decree—Liability to account to mortgagor for profits.*—The position of a mortgagee resting merely on his mortgage as the ground of his relation to the mortgagor is practically different from that of the mortgagee who has obtained a decree. The decree supercedes the contractual relation and the relation constituted by it stands on the same footing as ownership. In the present case, the decree, in the event which happened, of the mortgagor making default, ordered that the mortgagee should take possession, and retain it with the attendant benefits until the mortgagor should pay a definite sum which, however, was never paid. The possession and the enjoyment of the mortgagee under the decree having been under a complete title conferred by the decree, he could not be held liable to account to the mortgagor for the profits of the land. **NAVLU v. RAGHU**, 8 B. 303. [Appr., 16 B. 656 ; R., 13 B. 567, 19 B. 140 ; D., 14 B. 327.]

(38)—*Taking of accounts in suit for redemption—Onus on mortgagee to prove dues from mortgagor.*—In taking the account in a suit for redemption, it lies upon the mortgagee to prove what is due from the plaintiff in respect of principal and interest. Where, therefore, the mortgage-deed itself happens to be inadmissible in evidence owing to the refusal of the mortgagee to pay the necessary penalty and additional stamp duty thereon, he can only be credited in the account with the sum which the mortgagor admits was the amount of the principal. On the other hand, the mortgagee would have to be debited with the income derived from the property since he has been in possession, for which he must account. **GANGA MULIK v. BAYAJI**, 6 B. 669.

(39)—*Suit for redemption—Mortgagee in possession, legality of, to account for rents and profits—Mortgage-deed, construction of—Right of mortgagee to receive interest as well as rents and profits.*—The plaintiffs sued for redemption of a mortgage on the ground that the whole of the mortgage-debt had been discharged by the usufruct of the property and that a balance was due to them. Held, that, upon the true construction of the mortgage-deed, it could not be said that possession was to be given and profits were to be taken and enjoyed by the mortgagees in addition to interest. Where a mortgage-deed is silent as to possession, and there is no agreement to the contrary, a mortgagee, who takes possession, takes also the obligation upon him to account for the rents and profits during the time he is in possession. That was the obligation which was cast upon the mortgagees here. There was no condition in the document that the mortgagees

Mortgage—continued.**—2.—Accounts between mortgagor and mortgagee—continued.**

should not be liable for the rents realized by them. That being so, they must account for the rents and profits received by them during the time they had been in possession. Suit remanded for an account being taken of the amount of rents and profits and to set them off against the mortgage-debt. (*Aikman, J., dissentiente*). **MADARI v. BALDEO PRASAD**, 27 A. 351, F.B. = A.W.N. 1904, 270.

(40)—*Usufructuary mortgage—Satisfaction of debt—Suit for possession—Accounts—Effect—Interest—Stipulation to pay interest—Equity—Discharge of mortgage debt—Evidence—Onus of proof—Mortgagee not keeping accounts—Misconduct—Costs.*—In a suit to recover possession of land in the possession of the mortgagee under a usufructuary mortgage, if upon taking an account it appears that the mortgagee has been fully satisfied, the mortgagor is entitled not merely to have the property back, but the Court being a Court of equity and acting upon the principle that it is always the aim of a Court of Equity to finally determine, as far as possible, all questions concerning the subject of the suit, an account should be taken up to the time of the decree, the account so taken being considered binding, and the parties not being at liberty, except under peculiar circumstances, to re-open it in another suit. [F., 22 W.R. 269, 24 W.R. 275.] Where all that the plaintiff, mortgagor, is seeking is that which he is (by virtue of the law which prevented more than 12 per cent. interest being taken) entitled to, viz., to have the account taken and to have it ascertained whether the mortgagee has, by means of his usufructuary mortgage, obtained more than 12 per cent., and if he has, that the surplus may be applied in reduction of the principal—he is certainly not seeking that which would authorize the Court to depart from the agreement of the parties that this sum should not bear interest during those years. There is no equity in obliging him to pay interest for the period that the mortgagee had agreed that he should not receive interest for. Where the plaintiff, mortgagor, alleges that the mortgage has been satisfied and that he is entitled to have back the property, the onus is upon him to show that to be the fact; he must certainly give some evidence to satisfy the Court that what he alleges is the truth, and that he is entitled to have back the property. In suits between mortgagor and mortgagee, where a mortgagee has failed in his duty to keep accounts and has not produced proper accounts, it is regarded as misconduct which ought to be taken into consideration upon the question of costs. **BABOO KULLYAN DOSS v. BABOO SHEO NUNDUN PURSHAD SINGH**, 18 W.R. 65.

(41)—*Equity of redemption, Purchasers of—Amounts to be deducted from mortgagee's dues—Set-off.*—The only payments which purchasers of the equity of redemption can claim to

Mortgage—continued.**—2.—Accounts between mortgagor and mortgagee—continued.**

deduct from the mortgage-debt, are sums actually received by the mortgagee in reduction of the mortgage debt. The fact that the mortgagee owed money to the mortgagor on some other account would not of itself entitle the purchaser of the mortgagor's equity of redemption to set off that money against the mortgage-debt. **TARINEE KANT BHUTTACHARJEE v. GANODA SOONDUREE DEBEE, 24 W.R. 460.**

(42)—*Redemption—Zuri-peshgi lease—Possessory suit—Claim to surplus collections—Adjustment of accounts.*—In a suit to recover possession of land with surplus collections, by redemption of a mortgage created by a *zur-i-peshgee* lease, which was executed before the usury law of 1855 was passed in favour of the defendant where the lessee claimed the surplus collections as his profits. *Held* that the mortgagee should be charged in taking the account between him and the plaintiff with the actual rents and profits, receiving on the other hand interest at twelve per cent. per annum highest rate which the law, as it then stood, sanctioned. **RAJAH SAHEB PERLADH SINGH BAHADOOR v. L.P.D. BROUGHTON, 24 W.R. 275. (6 M. I.A. 393, 18 W.R. 65, F.)**

(43)—*Mortgagee in possession—Account for profits—Trees planted on mortgagor's land.*—It is the duty of a mortgagee in possession to account for profits of trees planted by himself on the mortgagor's land. A mortgagee in personal possession where nothing appears to the contrary was held liable to pay a reasonable occupation rent for buildings personally occupied by him for the purpose of residence or carrying on trade or business; and for land personally occupied or cultivated by him, he ought to pay a fair occupation rent or with the actual net profits realized from the use of the land. Profits with which the mortgagee ought to be credited in reduction of his mortgage debt with interest thereon, include his expenses in obtaining produce from the land and a moderate interest on the amount of such expenses. Method of taking an account from a mortgagee in possession discussed. **PRABHAKAR CHINTAMON DIKSHIT v. PANDURANG VINAYAK DIKSHIT, 12 B.H.C. 88. [Appr., 14 B. 113; Cited, 6 N.L.R. 109.]**

(44)—*Money decree as payment—Calculation of amount due.*—A mortgagee assented, under an arrangement with three out of five mortgagors, to take as payment a money-decree against three of them. *Held* that the amount of the decree must be considered as a sum paid in reduction of the liability of the five. **RAM KANTH ROY CHOWDHRY v. KALEE MOHUN MOOKERJEE, 22 W.R. 310.**

(45)—*Accounts—Debt assigned by mortgagors to second mortgagee—Failure of second mortgagee to recover debt so assigned—Second mortgagee debited with amount.*—At the time of a second mortgage in favour of plaintiff, who

Mortgage—continued.**—2—Accounts between mortgagor and mortgagee—continued.**

now sued to enforce the same, the mortgagors executed another deed to him (plaintiff) by which they assigned to him a debt due to them from a third person. In taking the account of what was due to the plaintiff, the Court had debited him with the amount of the assigned debt. The plaintiff contended that he ought to be debited with the amount, only if and when the amount is actually received by him. It had been found by the High Court that no serious attempt had been made by the plaintiff to recover any portion of the amount. *Held*, under the circumstances, that the plaintiff had been rightly debited with the amount. **SHYAM KUMARI v. RAMESHWAR SINGH, 32 C. 27, P.C. = 31 I.A. 176 = 8 C.W.N. 786 = 6 Bom. L.R. 754 = 8 Sar. 688.**

(46)—*Zurpeshgee mortgage—Balance becoming irrecoverable by laches of mortgagee—Right of mortgagee to retain possession of mortgaged estate.*—Under the terms of a *Zurpeshgee* mortgage the mortgagee was not entitled to demand the payment of so much of the balances as had become irrecoverable by reason of his own laches, but he was entitled to retain possession of the mortgaged estate till the balances recoverable at the time of the commencement of the redemption suit were paid by the mortgagor. **RAM PERSHAD v. MUSST. KISHNA, 3 Agra 146.**

(47)—*Transfer of Property Act (IV of 1882), s. 72—Expenses incurred by mortgagee in legal proceedings, when could be credited on taking mortgage accounts.*—Costs incurred by a mortgagee in a suit for rent due by the original mortgagor as his tenant, cannot be charged against the property as those incurred for the due management of the property and the collection of rents within the meaning of s. 72 (a) of the Transfer of Property Act. The mortgagor is not responsible for any expenses incurred by the mortgagee in attempting to recover rents from tenants put into possession by the mortgagee, and the fact that the mortgagor is himself the tenant under the mortgagee can make no difference in principle. Where, however, the mortgagor's title happens to be impeached, the costs incurred by the mortgagee in defending such title would come clearly within the rule in s. 72 (c) of the Act so as to entitle the mortgagee to charge such expenses against the estate. **POKREE SAHEB BEARY v. POKREE BEARY, 21 M. 32. [R., 11 C.W.N. 1005, P.C.]**

(48)—*Stamp duty for mortgage—Clauses in mortgage deeds not creating additional obligations.*—So long as the equity of redemption remains with the mortgagor, he is bound to indemnify the estate against expenses incurred in protecting the title. Consequently, when a mortgage bond contains stipulations under which the mortgagor engages to repay to the mortgagee any costs he may incur in suits

Mortgage—continued.**—2.—Accounts between mortgagor and mortgagee—continued.**

brought against him by the mortgagor's co-sharers, and also any debts charged upon the mortgaged property which the mortgagee may pay, such stipulations not creating any fresh obligation but only tending to maintain, in favour of the mortgagee, the original security which is the purpose of the instrument, they do not impose the necessity of any additional stamp as for an indemnity bond. **DAMODAR GANGADAR v. VAMANRAV LAKSHMAN, 9 B. 435.**

(49)—*Usufructuary mortgage—Redemption—Accounts—Annual rents—Surplus receipts—Government revenue—Wrongful payment by mortgagee—Act IV of 1882 (T.P. Act), s. 76 (c) and (h).*—Where, under the express terms of a deed of usufructuary mortgage, the mortgagee is placed in possession with the right of taking the usufruct in lieu of interest, subject to the liability of paying out of such usufruct the amount due as Government revenue on the mortgaged land. The assignee of the equity of redemption suing for redemption is entitled to take into account the amount of annual jama which he has been compelled to pay owing to the mortgagee's failure to pay it. He is entitled to avail himself of annual rents in making up the accounts. He is entitled by such calculation to claim from the mortgagee any sum which may be found due to him as surplus profits. Any payments made on account of Government revenue, by the mortgagee to the mortgagor with notice of the assignment, would be wrongful and would not relieve him of his liability to the assignee who had taken the mortgagor's place. The limitation for a suit for the surplus profits would commence to run from the date of entry by the mortgagor on the mortgaged property. **JAIJIT RAI v. GOBIND TIWARI, 6 A. 303 = A.W.N. 1884, 92.**

(50)—*Mortgagee compelled to pay Government revenue payable by mortgagor—Mortgagee's remedies.*—Where the obligation to pay the Government revenue is, under the instrument, on the mortgagor, if the mortgagor does not pay it, and the mortgagee had to pay it in order to protect the mortgaged property, the mortgagee is competent under s. 72 of the Act to add the money so paid by him to the principal money. But where the mortgagee, under such circumstances, is also entitled to sue the mortgagor on his covenant in the deed of mortgage for the amount paid for the mortgagor, and the mortgagee elects to pursue this remedy, and obtains a decree, he is no longer entitled to the remedy given to him by s. 72 of the Transfer of Property Act, the two remedies not being concurrent. **IMDAD HASAN KHAN v. BADRI PRASAD, 20 A. 401 = A.W.N. 1898, 90. (16 C. 307, R.)**

(51)—*Mortgage—Debt burdensome to mortgagor.*—A mortgagee is not bound to give credit for his receipts against a debt burdensome to the

Mortgage—continued.**—2.—Accounts between mortgagor and mortgagee—continued.**

mortgagor. **KADIR MOIDIN v. NEPEAN, 26 C. 1, P.C. = 2 C.W.N. 665 = 25 I.A. 241 = 7 Sar. 394.**

(52)—*Transfer of Property Act (IV of 1982), ss. 63, 72—Costs of repair of well on mortgaged property, right of prior mortgagee to add to mortgage-debt.*—In a suit by the puisne mortgagee to redeem the mortgage of the prior mortgagee who was under his mortgage, in possession of the mortgaged property, the latter was held entitled to add to the mortgaged amount, the cost of having, with the mortgagor's consent, repaired a necessary well, whether the improved well be looked upon as an accession to the property falling within the provisions of s. 63 of the Transfer of Property Act, or whether the outlay on the well be regarded as money necessarily spent in the management or preservation of the mortgaged property so as to come under s. 72 of the Act. **DURGA SINGH v. NAURANG SINGH, 17 A. 282 = A.W.N. 1895, 69.**

(53)—*Suit for redemption—Lower Court refusing to allow mortgagee expenses of repairs—Remand.*—In a suit for redemption, the Court below refused to allow the expenses of repairs made by the mortgagee on the mortgaged property, on the ground that the bond contained no clause respecting repairs. The High Court remanded the case for the lower Court to inquire and determine what sums had been expended by the defendant in the proper and necessary repairs of the mortgaged property and to pass a new decree allowing the same to the defendant with interest thereon. **RAGHO BAGAJI v. ANAJI MAMAJI PATUL, 5 B.H.C. A.C., 116. [R., 9 B.H.C. 69 ; D., 8 B.H.C. 236.]**

(54)—*Mortgage—Mortgagee spending money on improvement of mortgaged property—Liability of mortgagor—Repairs.*—A mortgagee is not allowed, without agreement, to charge the mortgagor with all sums he may think fit to expend in the repair or the improvement of the property mortgaged, whether such expenditure be made by him voluntarily or in pursuance of some official order which he is not legally bound to comply with. But for necessary repairs he may charge the mortgagor and the latter will be liable also for any expenditure which he may himself have sanctioned. **AMEER-OOL-LAH v. RAM DAS, 2 Agra 187.**

(55)—*Transfer of Property Act, s. 72—Improvements.*—A mortgagee in possession is not at liberty to effect improvements and charge the mortgagor therewith. The mortgagor can be made liable only for amounts the expenditure of which was necessary to preserve mortgaged premises from destruction. **ARUNACHELLA CHETTI v. SITHAYI AMMAL, 19 M. 327. [R., 9 O.C. 18.]**

(56)—*Mortgagee in possession—Waste—Damage deducted from mortgage debt.*—A mortgagee in possession is liable for waste, and if

Mortgage—continued.**—2.—Accounts between mortgagor and mortgagee—continued.**

waste is proved, the mortgagor is entitled to have an account taken and the value of the damage deducted from the mortgage debt. The circumstance, that the rights of the parties have been ascertained by a decree does not deprive the mortgagor of his equity, if the waste is committed subsequently to the decree. **RAMUNNI v. SHANKU, 10 M. 367.** [R., 20 M. 124.]

(57)—*Transfer of Property Act, s. 76—Waste by mortgagee.*—The amount of the loss caused to the mortgagor by the failure of the mortgagee to make necessary repairs is an item which must be considered in determining the accounts in settlement of the mortgage. **SHIVA DEVI v. JARU HEGGADE, 15 M. 290.**

(58)—*Mortgage—Dispossession of mortgagee—Satisfaction of mortgage-debt out of usufruct—Accounts.*—Where a mortgagee and his sub-mortgagee sue the mortgagor for recovering the mortgage-debt, alleging that they had been unlawfully dispossessed by the latter and it is found that there has been no illegal eviction, but that the property was lawfully in the possession of the defendant, the money advanced to him having all been satisfied out of the proceeds of the land received by the plaintiffs, *held* that, in such a suit, no account could be demanded from the defendant in order to show that the debt had in fact been paid, the really accounting party being the plaintiffs and not the defendant. The remedy of the sub-mortgagee, if any, in the above suit, who complains that he has not received from the mortgagee his share of the mortgage-money, is only by means of a separate suit properly framed for the purpose. **BROJO LOLL SINGH v. BYRUN SINGH, 1 W.R. 11.**

(59)—*Mortgage-money, premature suit for—Mortgage, question as to correct amount due on, when to arise.*—The defendant's predecessors in title executed a mortgage deed in favour of the plaintiff. The deed contained a condition that, if the principal money was not paid within a year, the plaintiff would be competent to take possession of the mortgaged property. The plaintiff sued the defendant for the mortgage-money with interest, and, as an alternative relief, he asked that possession might be given him over the mortgaged property. One of the questions for determination was, as to whether the plaintiff's claim, so far as it related to the settlement of accounts or any declaration of the amount due on the footing of the mortgage, was not premature. *Held*, that the suit, in so far as it referred to the amount of the mortgage-money, was premature. The question, as to the correct amount due on the footing of the mortgage, could arise only when the mortgagor was ready and willing to redeem the mortgage. **MURLI DHAR v. RAGHUBAR SINGH, 4 O.C. 171.**

(60)—*Beng. Reg. XXVI of 1814, s. 10, cl. 3—Issues—Mortgage—Foreclosure—Accounts of*

Mortgage—continued.**—2.—Accounts between mortgagor and mortgagee—continued.**

mesne profits, etc., unsatisfactory—Ben. Regs. XV of 1793, s. 12 and I of 1798, s. 3.—The provisions of Ben. Reg. XXVI of 1814, s. 10, cl. 3, directing the Court to record the points at issue, are imperative and must be strictly observed. Where, therefore, in a suit to recover lands in possession, as the plaintiff alleged, of the usufructuary mortgagees under a conditional sale, the substantial question raised by the answer was whether certain foreclosure proceedings under Ben. Reg. XVII of 1806, s. 8, taken by the mortgagees effectually barred the equity of redemption, but the Judge of the Court of first instance did not record that point; upon appeal the case was remitted by the Judicial Committee to India with directions that the question of foreclosure should be tried upon an issue regularly settled. When the account of the mesne profits and expenditure by the mortgagees in possession is unsatisfactory, an account, whether as incidental to the question of foreclosure, or redemption, is to be taken, as provided by Ben. Reg. XV of 1793, s. 11 and I of 1798, s. 3. If the interest of the mortgagor in the mortgaged estate has been sold under a decree, and the sale takes place before the notice of foreclosure was filed, such notice, to be effectual, must be served on the purchaser or decree-holder. **MOHUN LOLL SOOKOOL v. GOLUCK CHUNDER DUTT, 1 W.R. P.C. 19=10 M.I.A. 1.** [F., 22 W.R. 475; *Expl.*, 23 W.R. 96; R., 3 C. 397; D., 8 W.R. 370, 11 W.R. 544.]

(61)—*Usufructuary mortgage—Principle of calculating interest.*—In the case of a usufructuary mortgage, the principle of calculating interest on the principal sum is this:—The gross collections for each year should be taken, the necessary payments on accounts of revenue, expenses of collection, and zemindar's maintenance, should then be deducted, and the remaining sum should go to reduce, either in whole or in part, the interest; and if there be any sum over, it is to be carried to reduce the principal. **MOHUNT CHUTTOORBHOJ DOSS v. DOORGHACHURN PAHAREE, 5 W.R. 200.**

(62)—*Mortgage—Mortgagee in possession—Payment of interest.*—The fact of a mortgagee having been in possession does not necessarily lead to the inference of the mortgage debt having been, in some measure at least, paid off. If under the terms of a mortgage deed under which the mortgagee held possession, the usufruct of the property was to be enjoyed in lieu of interest, the mortgagee's having had possession would not in any way lead to an inference that any portion of the debt, save the interest, was paid off from the usufruct. **BAMA SOONDUREE DOSSEE v. BAMA SOONDUREE DOSSEE, 10 W.R. 301.**

(63)—*Usury laws—Reg. XXXIV of 1803—Mesne-profits in lieu of interest—Rendering of accounts whether and when necessary.*—Prior to,

Mortgage—continued.**—2.—Accounts between mortgagor and mortgagee—continued.**

and subsequent to, the repeal of the Usury laws, a mortgage, under which the mortgagee was to enjoy mesne profits in lieu of interest, would have constituted a valid and legal contract, and the mortgagee was not bound to account for such profits. But, under the Usury laws, the rate of interest was limited to 12 per cent., and securities might be avoided if they contracted directly or indirectly for higher rate of interest; and there were also provisions for the taking of accounts between mortgagor and mortgagee. There is nothing in Reg. XXXIV of 1803, making it compulsory for the mortgagee to file accounts, whether they are required for the purpose of determining the rights of the parties in the suit or not. Accounts would be necessary, even if there were a stipulation to the contrary, if the contract had been made in evasion of the Regulation, and as a contrivance for giving the mortgagee a higher rate of interest than he is entitled to under the law. They may be also necessary, when the profits received by the mortgagee in possession are fluctuating in amount, to enable the Court to decide on the validity of the contract for interest. Where, therefore, under the terms of a deed of mortgage, the only sum that the mortgagee was to receive, over and above the interest allowed by law, was a fixed amount found to be necessary for costs of collection of the village jama, *held*, that a clause in the deed, making the rendering of accounts unnecessary, was not improper; and that the mortgage deed was a sufficient answer to a suit based on the supposition (contrary to the terms of the agreement) that, if the accounts be taken the mortgage would be found to have been discharged by debiting the mortgagee with the balance remaining over and above the interest, or so much of the balance as he could not account for. *BADRI PRASAD v. MURLIDHAR*, 2 A. 593, P.C.=7 I. A. 51=6 C.L.R. 257=4 Sar. 100. [R., 5 A. 419=A.W.N. 1883, 43.]

(64)—*Reg. XV of 1793, ss. 10, 11—Usufructuary mortgage—Zuripeshgi lease—Interest—Account.*—R, who owned 2 mehals M and B executed a *zuripeshgi* in favour of S for 23 or 24 years, i.e., from Fusli 1263 to 1286, and R's rights in B subsequently passed to plaintiff who, alleging that from the usufruct of the property the entire debt had been paid and that he was therefore entitled to recover possession, sued calling upon the mortgagee in possession for an account of the usufruct and that he should be put in possession on payment of what might be due, if anything. No interest was specified in the original contract between the parties to the *zuripeshgi* lease. *Held* that, following the rule laid down by the Privy Council in 12 M.I.A. 190 and 191 for the interpretation of s. 10, Reg. XV of 1793, simple interest at the rate of twelve per cent. should be allowed to the lessee. (24 W. R. 275; *F.*, 16 W.R. 251, *D.*) *Held* also that, for the purpose of the suit, it was sufficient for the defendant

Mortgage—continued.**—2.—Accounts between mortgagor and mortgagee—continued.**

to tender accounts showing the collections and disbursements on account of the properties in his hands and to swear to their correctness, and it was only if the Court was not satisfied with those accounts, or the opposite party required further details, that it was incumbent on the mortgagee to put in the original account on which the accounts tendered by him were prepared, and that this was the purport of s. 11 of Reg. XV of 1793. *TASADUK HOSSAIN v. BENI SINGH AND BENI SINGH v. TASADUK HOSSAIN*, 13 C.L.R. 128.

(65)—*Mortgage—Rate of Surinjamee—Evidence of benamee holding—Interest on balance of putni rents paid by mortgagee—Sale of putnee—Abatement of rent.*—The proper sum to be allowed to a mortgagee for *surinjamee* is what he has actually spent as expenses of his management. No decree can be given against a person as being the real mortgagee, without evidence of the *benamee* holding. Interest ought to be allowed to the mortgagees on account of the sum of the *putnee* balance paid by them. Directly the sale of a *putnee* takes place, the relationship of landlord and tenant ceases to exist between the *zemindar* and the *putnee-dar*. Where no rent is receivable, there is no rent to abate. *BROJONATH SINGH ROY v. SREEMUTTY BHUGOBUTTY DASSEE*, 1 W. R. 183.

(66)—*Rights of mortgagee—Successive mortgages—Act XXVIII of 1855—Reg. V of 1827, ss. 11, 12—Arrears of rent.*—If the owner of different estates mortgaged them to one person, separately, for distinct debts, or successively to secure the same debt, or the same debt with further advances, the mortgagee may insist that one security shall not be redeemed alone; upon the principle that redemption being an equitable right, the person who redeems must on his part do equity towards the mortgagee and redeem him entirely not taking one of his securities, and having him exposed to the risk of deficiency to the other. [*Diss.*, 16 A. 295; *R.*, 25 M. 108=11 M.L.J. 373, 21 M.L.J. 562=11 Ind. Cas. 629.] Where the Court does not order an account to be taken of the interest on the one side and of the rents and profits on the other, in cases to which Reg. V of 1827 applies, that is, in cases where the contract was made before Act XXVIII of 1855 came into operation—the arrears of interest should be limited to six years. *VITHAL MAHADEV v. DAUD valad MULCHAND HUSEN*, 6 B.H.C.A.C. 90. [*Diss.*, 14 B. 113, 16 A. 295; *Appr.*, 9 B.H.C. 83; *R.*, 10 B.H.C. 441, 3 B. 312, 5 B. 127, 24 B. 114, 11 M.L.J. 373, 25 M. 108.]

(67)—*Mortgage accounts—Interest on money collected by mortgagee—Commission.*—The principle on which the mortgage account should be made up is not to charge the mortgagee with interest on the money collected by him, but to apply the money collected in payment of the interest accruing due on the mortgage-debt,

Mortgage—continued.**—2.—Accounts between mortgagor and mortgagee—concluded.**

and the surplus in reduction of the principal; the mortgagee is entitled to the usual commission of 10 per cent. on the gross amount of collections to cover the expenses, unless there is any express stipulation to the contrary or it is shown to be unreasonable. *RAGHONATH v. LUCHMUN SINGH*, 1 *Agra* 132.

(68)—*Redemption of mortgage—Mortgagee realizing in excess of debt—Rate of interest for such excess.*—An usufructuary mortgagee had realised a certain sum of money in excess of the mortgage-debt. *Held*, in a suit by the mortgagor for redemption and for the excess money, that the practice of allowing interest on such sum at the rate at which interest had been allowed to the mortgagee on the mortgage-debt was an equitable one, although such interest was not strictly claimable in virtue of any contract or under the provisions of Act II of 1839. *BECHOO SINGH v. RAI SHEO SAHOY*, 1 *N.W.P.* 111.

(69)—*Suit for possession of mortgaged property—Decree conditioned on payment of dues within reasonable time.*—Where, in a suit for possession of mortgaged property, the lower Courts did not give the plaintiff a decree conditioned upon the payment of the amount of money found due within a reasonable limited period, the High Court, in special appeal, confined its decree to a declaration that the sum found due by the plaintiff was due on a given date. *SHAH LUTAFUT HOSSEIN v. CHOWDHRY MAHOMED MOONEM*, 22 *W.R.* 269. (22 *W.R.* 172, *F.*)

See *FIDUCIARY RELATION*, 2 *N.W.P.* 217.

See *HINDU LAW—ALIENATION*, 18 *W.R.* 81 (note), *P.C.* = 6 *M.I.A.* 393.

See *HINDU LAW—WIDOW*, 8 *B.* 190.

Liability to account when mortgagee himself is a tenant—See *MORTGAGE—REDEMPTION*, 1 *C.L.J.* 531.

Purchases by prior and puisne mortgagees—Redemption—Account—See *MORTGAGE—REDEMPTION*, 8 *C.L.J.* 173.

See *MORTGAGE—REDEMPTION*, 8 *B.H.C.* *A.C.* 236.

See *PARSIS*, 5 *B.H.C. A. C.* 109.

Right of mortgagee to throw the entire debt on a portion of the mortgaged property releasing the remainder—See *RES JUDICATA—GENERAL*, 1 *C.L.J.* 337.

See *TRANSFER OF PROPERTY ACT*, 1882, s. 76, *A.W.N.* 1887, 245.

—3.—Conditional Sale.

(1)—*Sale with condition of re-purchase—Consideration money—Continuing debt—Interests.*—The plaintiff purchased a piece of land

Mortgage—continued.**—3.—Conditional Sale—continued.**

for Rs. 450, which sum he obtained from the defendant, making it the consideration for the resale by the plaintiff to the defendant on the same day. The document evidenced an out and out sale. On the same day, however, and as a part of the same transaction, another document was executed, whereby it was agreed between the parties that if the plaintiff returned Rs. 450 without interest to the defendant at any time after five years and before ten years from the date of deed the land was to be reconveyed to the plaintiff. At the same time, a rent-note was passed whereby the land was let to the plaintiff for Rs. 108 per year. The plaintiff tendered the amount within the stipulated period, but as the defendant refused to reconvey the land, he brought the present action to redeem and recover the land: *Held*, that the Rs. 450 being in the nature of a debt, the transaction between the parties amounted in fact to a mortgage, and not to sale with the right of repurchase. *Per Ranade, J.*—Where the apparent purchaser, treats the consideration money as a continuing debt, or where the deed gives him a right to recover the money with interest, or where the sum paid falls short of the value of the property, there are indications which determine the transaction to be a mortgage, though it may be described as a sale. *MARUTI v. BALAJI*, 2 *Bom. L.R.* 1058.

(2)—*Sale—Debt re-payable on certain date—Default—Sale absolute—Right to possession—Transfer of Property Act.*—A took a loan from his lessee B and entered into a contract with him by which he agreed to leave the property to be enjoyed by B as absolute owner if he (A) failed to pay the money before a certain date. *Held* that the transaction was a sale and there was no right to redeem as upon a mortgage, *Semble*.—Though the parties agreed that no further sale-deed was necessary, it may be that, in order to comply with the provisions of the *Transfer of Property Act*, a further sale-deed should have been executed after the date fixed for re-payment in order to complete B's title. *BUTCHIRAJU v. RAMALINGAMURTY*, 14 *M. L.J.* 337. [*D.*, 29 *M.* 531.]

(3)—*Conditional sale—Personal liability of mortgagor.*—It is not necessary in a mortgage by conditional sale that the mortgagor should make himself personally liable for the re-payment of the loan. *BALKISHEN DAS v. LEGGE*, 2 *Bom L.R.* 523.

(4)—*Deed executed prior to Transfer of Property Act—Special covenant to pay costs separately—Enforceability of such covenant.*—Where the defendant executed a mortgage by conditional sale, before the *Transfer of Property Act* came into force with a special covenant that the costs of the foreclosure suit shall be "separately paid by him," *held*:—(1) that there is nothing in s. 86 of the *Transfer of Property Act* to shut out the discretion of the Court in allowing costs, or in making the

Mortgage—continued.**—3.—Conditional Sale—continued.**

mortgagor personally liable for them, which is conferred by s. 220, C.P. Code (14 C. 185, 11 A. 179, 13 C.P.L.R. 74, 12 C.P.L.R. 78, *F.*), (2) that the special agreement of the parties is expressly saved by s. 2 of the Transfer of Property Act and that the parties will be bound by that agreement. *DHOUNDU PANDIT v. MAHANT DAULATPURI*, 3 N.L.R. 97.

(5)—*Absolute sale—Custom amongst Burman agriculturists—Rule of evidence—S. 110, Evidence Act.*—Amongst Burman agriculturists, at least until very recently, absolute sales of arable land were the exceptions, and mortgages by way of conditional sale or transfers as security for debt, made in the form of sales, were the rule, the idea of an absolute sale of land being foreign to the minds and habits of the people, more especially where lands were transferred for debt. Where the evidence is conflicting as to whether a transaction was an absolute sale or a transfer to secure a debt, there is no fixed standard by which evidence can be appraised; each Court in turn must weigh probabilities and be guided in so doing by general rules rather than lean upon decisions given in other cases upon other evidence. In weighing such evidence, due weight should be given to the inference arising from the prevailing usage aforesaid. In case of dispute as to the true nature of an alleged sale, therefore, it cannot be correctly said that there is no evidence at all, to rebut the inference in favour of the title of the party in possession on which s. 110, Evidence Act, is based, if it is admitted or shown that, whilst there is no proof that the transfer was for ready cash, the ostensible vendor was a Burman, and the land ancestral arable land. No hard and fast rule can be laid down as to the exact weight which should be given to the inference arising from such facts where it is contended, on the other side, that the transaction was an absolute sale. The Civil Court should endeavour to ascertain and give effect to the intention of the parties to the contract, lest mortgages made by Burman agriculturists by way of conditional sale because actually made in the form of a sale should be transformed in the majority of cases into absolute sales, without regard to what the intentions of the parties to the contract were, but by mere application of a rule of evidence. *MA IN LUN v. MA ME HLA BYE*, L.B.R. 1893—1900, 85. (L.B.R. 1872—1892, 102, 482, 494, 642, *R.*)

(6)—*Mortgage by conditional sale—Equity of redemption—Redemption after specified time.*—The doctrine of the English law with respect to the equity of redemption, after default of payment of the mortgage-money, is unknown to the ancient law of India prevailing in Madras, which, in the absence of any Regulation or Act of the Legislature altering such law, determines the interest of mortgagor, in favour of the mortgagee under a conditional sale made absolute by failure of the mortgagor to redeem

Mortgage—continued.**—3.—Conditional Sale—continued.**

at the time specified in the deed. The provisions of Bengal Reg. XVII of 1806, allowing, in respect of *bye-bil-wafa*, the mortgagor, or his representatives, to redeem at any time before the foreclosure, have not been extended to Madras. In this case, the suit to redeem was instituted in 1853, and the suit was held not maintainable after the time fixed in the deed. *PATTABHIRAMIER v. VENKATA ROW NAIKAN*, 7 B.L.R. 136, P.C. = 13 M.I.A. 560 = 15 W.R. P.C. 35. [*F.*, 3 M. 26, 8 M. 185; *Appr.*, 1 M. 1 = 2 I.A. 241, P.C.; *R.*, 22 W.R. 475, 2 B. 231, 4 M. 179, *F.B.*, 11 M. 403, 20 B. 677, 22 A. 149, P.C.; *D.*, 9 B.H.C. 69, 13 B.L.R. 205.]

(7)—*Mortgage, by conditional sale—Regulation XVII of 1806, s. 8—Notice, validity of—Error in specification of property, misleading mortgagor.*—Held, that an error in specification of property in the notice of foreclosure, mentioning the specific area of 4 ghumaons mortgaged by the deed, but not the *shamilat* land extending nearly to 12 ghumaons, to which the mortgagor was entitled as owner of the area mortgaged, was something more than a slight inaccuracy in the description of property mortgaged, as it was found to have actually misled the representatives of the mortgagor into thinking that they were in danger of losing 4 ghumaons only by non-compliance with the terms of the notice, and not 16 ghumaons; consequently that the *shamilat* land could not be taken as included in notice, nor could the mortgagor be deprived of *shamilat* area by its non-compliance. *WAZIR CHAND v. MAKHAN*, 109 P.R. 1901. (113 P.R. 1900, 5 P.R. 1901, *D.*; 42 P.R. 1897, 21 P.R. 1901, 38 P.R. 1901, *R.*)

(8)—*Foreclosure by mortgagee under Regulation XVII of 1806, suit for proprietary possession subsequent to, cause of action for, when arises limitation.*—Where a mortgage deed provided for redemption within two years, and on default, the mortgagee foreclosed the mortgage, allowing one year of grace, under Regulation XVII of 1806, on subsequent proceedings by the mortgagee for proprietary possession, it was held, that there was no time-limit for such an application made under the Foreclosure Regulation and that even assuming that he had only twelve years, from the due date within which to institute such proceedings, the period would begin to run only from the date of the expiry of the year of grace when alone the mortgagor's right to possession first determined. *TEK CHAND v. SOHEL SINGH*, 65 P.R. 1906 = 72 P.L.R. 1907. (90 P.R. 1895, *F.B. F.*; 35 P.R. 1899, *D.*) [*R.*, 57 P.R. 1908.]

(9)—*Reference by Civil Court to Collector under s. 9, sub-s. 3 of Punjab Alienation of Land Act (XIII of 1900)—Collector declined to interfere—Proper procedure—Regulation XVII of 1806—Suit by mortgagee for possession.*—By a mortgage deed, the mortgagors, agriculturists

Mortgage—continued.**—3.—Conditional Sale—continued.**

agreed that, if the total sum due, principal and interest, was not paid off on the expiry of five years from the date of the deed, the land should be deemed as sold to mortgagee. Before the five years' term expired, the Punjab Alienation of Land Act came to force. The mortgagee applied to the District Court for issue of notice of foreclosure under Reg. XVII of 1806. The Judge referred the matter to the Collector under s. 9 of Act XIII of 1900. The Collector, on the mortgagors' raising objection to the new mortgage proposed by him, decided that nothing further could be done and so returned the paper to the District Judge. The notice of foreclosure and the year of grace having expired, the mortgagee brought a suit for possession as owner. *Held*, that the Punjab Land Alienation Act had not acted as a bar for the completion of the foreclosure under Reg. XVII of 1806, and the Civil Court was not bound, under s. 9, sub-s. 3 of the Act, to refer the matter, after a suit has been filed, to the Collector, as the mortgagee had become *ipso facto* owner of the property by purchase, although he had still to sue for possession. When the Collector, acting under s. 9 (2) of the Act declines to interfere, he thereby sanctions the permanent alienation. This is specially so, when, by his non-interference, the proprietary right in the land will shortly pass to a non agriculturist mortgagee. Conditions of sale are only absolutely and necessarily null and void by the operation of the Act, if occurring in mortgages after the commencement of the Act. *BICHHA LAL v. GUMANI*, 93 P.R. 1907. [Appr., 88 P.R. 1909.]

(10)—*Mortgage by conditional sale—Foreclosure—Partition—Agreement by parties—Specific performance—Suit to recover possession—Limitation Act (IX of 1908), sch. I, art. 113.*—N and others mortgaged their rights in land, by way of conditional sale, to H, one of the village proprietors. The proprietors applied for partition of their joint holding, whereupon they entered into an agreement to the effect that, if H's mortgage was finally foreclosed, he was to give up the land and to receive a proportionate amount in respect of the portion which fell to his share. H sued for possession by foreclosure and obtained a decree. The plaintiffs in this suit, ignoring the agreement, sued H, in a Revenue Court, claiming that the mortgage by N was void as against their share of the land, and their suit was dismissed. They now sued H in a Civil Court for possession of their alleged share in the mortgaged-property in accordance with the terms of the agreement. *Held*, that the suit was one for specific performance of the agreement, and none the less so, because possession of immovable property was involved, and that, as regards limitation, the suit was governed by art. 113 of the Limitation Act (6 A. 231, F.) H, who had foreclosed his mortgage in due course of law, could not be regarded as a trespasser. *FAZAL DIN v. AMIR-UD-DIN*, 217 P.L.R. 1911 = 138 P.W.R. 1911 = 11 Ind. Cas. 299.

Mortgage—continued.**—3.—Conditional Sale—continued.**

(11)—*Mortgage—Conditional sale—Foreclosure—Notice—Adoption by widow.*—A widow succeeded to the share of her deceased husband, who died without leaving issue, and caused her mother-in-law's name to be recorded as proprietor of such share. The mother-in-law made a conditional sale of the share to the plaintiff. After her death, the widow caused the name of the defendant, a minor, to be recorded as the proprietor of such share, alleging that she had adopted him. The plaintiff applied for foreclosure of the sale, causing notice of foreclosure to be served on the defendant's father and guardian, and the sale was made absolute. After this the plaintiff sued the widow for possession. *Held* that the foreclosure proceedings were invalid, as the widow had no notice, and that the widow, if she intended anything, intended to make the defendant her heir and not her adopted son, as a widow could not at all adopt without the consent of her husband which was not proved in this case. *GANGA SINGH v. JHUMMAL LAL*, A.W.N. 1881, 72.

(12)—*Limitation—Mortgage by conditional sale—Mortgagee entitled to but not obtaining possession—Foreclosure proceedings taken after 12 years—Suit for possession barred—Reg. XVII of 1806, s. 8—Limitation Act (XV of 1877), sch. II, arts. 135, 144.*—In a mortgage by conditional sale, the mortgagee was entitled to immediate possession, but he never took possession under the mortgage. He did not take foreclosure proceedings under Reg. XVII of 1806 within 12 years of the date fixed in the date of mortgage for payment of mortgage-money. After the expiry of 12 years, he took foreclosure proceedings and then sued for possession as owner. *Held*, that the suit was barred by limitation either under art. 135, or art. 144, of sch. II, Limitation Act, 1877. *NAND LAL v. GOOJAR*, 178 P.W.R. 1912 = 15 Ind. Cas. 275 = 94 P.R. 1912 = 237 P.L.R. 1912. (35 P. R. 1899, C. S. 792 of 1908, C.A. 915 of 1906, F.; 90 P.R. 1895, 57 P. R. 1908 = 115 P. W. R. 1908, D.)

(13)—*Conditional sale—Mortgagee holding two mortgages—Right to foreclose twice—Mortgage of village—Inclusion of sir lands—Proprietary and cultivating rights—Co-extensive—s. 42, C. P. Tenancy Act (IX of 1883)—Applicability—S. 8, Transfer of Property Act—Applicability to mortgage.*—It is open to a mortgagee who holds two mortgages over the same property to foreclose twice on the same property. It cannot be said that the cultivating or occupancy right in the sir land came into existence on loss of the proprietary right, but the proprietary and cultivating rights are co-existing and component parts of the full sir right. The occupancy right now held by an ex-proprietor is the right which he held as proprietor to cultivate the sir land himself. A mortgagee is entitled to proceed against the cultivating or occupancy right in the sir land even though the proprietary right had already

Mortgage—continued.**—3.—Conditional Sale—continued.**

passed to himself or to a stranger. (11 C.P.L.R. 133, *F.*) S. 42 of the Tenancy Act 1883 applies only to sales of the three specified kinds and not to mortgages whether by conditional sale or of any other kind. (7 C.P.L.R. 25, *F.*) Though, in India, a mortgage is only a transfer of an interest in property, yet s. 8, Transfer of Property Act, 1882, applies also to mortgages. Therefore, where there is a mortgage of a village, the mortgage includes also the cultivating rights in *sir* lands of that village, in the absence of an intention to show that those rights were retained or excluded. *SHIOLAL v. NANHELAL*, 8 N.L.R. 123. (30 C. 556, P.C., *F.*)

(14)—*Foreclosure—Limitation Act* (XV of 1877), sch. II, arts. 135, 144, 147—*Limitation Act* (XIV of 1859), s. 1, cl. 12—*Limitation Act* (IX of 1908), s. 31, sch. I, art. 135.—A mortgage by conditional sale was executed in 1830 with a provision that the mortgagee would be entitled to enter into possession of the property if the mortgage-debt was not paid on a certain date in 1850. The debt was not paid on that date. No application under Reg. VII of 1806 was made for foreclosure of the mortgaged property. On 11th of July 1910, the mortgagee brought a suit for foreclosure: *Held*, that the suit was barred by limitation. The cause of action arose on the mortgagor's failure to pay the mortgage-money on the due date in 1850, and the mortgagee's right to possession of the property mortgaged was extinguished under s. 1, cl. 12 of Act XIV of 1859 as soon as twelve years had elapsed from the due date, and the subsequent creation of foreclosure suits could not revive the extinct right. S. 31 of the Limitation Act (1908) had, therefore, no application and the suit was barred by art. 135 of the Limitation Act. *RAM DAWAR RAI v. BHIRGU RAI*, 15 Ind. Cas. 240=9 A.L.J. 538. (16 C. 693, 16 I.A. 85, *F.*)

(15)—*Reg. XVII of 1806—Mortgage by conditional sale—Application to foreclose—Suit to redeem—Application to Settlement Court.*—The law and procedure in respect of mortgages by conditional sale or *bye-bil-wafa*, and the foreclosure or redemption thereof explained. The mortgage in this case was executed in 1853 and was of the nature of a conditional sale. It was stipulated that if the loan be not re-paid in four years, the mortgagees should be considered absolute owners and a deed of sale would be executed by the mortgagors. Twelve years after, the mortgagees applied to the Settlement Court to have their names recorded as absolute owners, and on 28th September, 1865, the Court gave the mortgagors one year's grace to redeem the mortgage. This order was confirmed by the appellate Courts. The mortgagors sued for redemption after the expiry of the year of grace. *Held* that the mortgagors could not maintain the action. The mortgagees must bring a regular suit for declaration of their title as absolute proprietors. In that suit, the mortgagors might raise any plea they could

Mortgage—continued.**—3.—Conditional Sale—continued.**

have raised during the year of grace as to the conditional sale or the regularity of the proceedings taken to make it absolute, or on the score of the mortgage debt having been discharged, &c. *Held* also that the application to the Settlement Court in 1865 by the mortgagees to be recorded as absolute owners, was an application to foreclose, as that Court gave the mortgagors the year's grace required by law, and that, according to the custom and usage of the province in 1865, the Settlement Court was the proper Court in which an applicant for foreclosure had to lodge his petition. *SAINDASS v. JEHANGEER*, 21 P.R. 1870. [*Appr.*, 29 P.R. 1876, 91 P.R. 1880; *R.*, 84 P.R. 1882, 75 P.R. 1883, 27 P.R. 1900=P.L.R. 1900, p. 241.]

(15-a)—*Conditional sale—Year of grace runs from date of order of first Court, not of Appellate Court.*—In this case the mortgage was by way of conditional sale, and the mortgagee obtained an order of Court that the mortgagor should redeem in one year upon payment of a certain sum or be foreclosed. This order was modified on appeal by reduction of the amount to be paid: *Held*, that the mortgagor's year of grace ran from the date of the order of the first Court and not from that of the Appellate Court. *JEHANGEER v. SAINDASS*, 42 P.R. 1870.

(16)—*Mortgage by way of conditional sale—Mortgagee's suit to have sale declared absolute—Notice by proper Court necessary—Reg. XVII of 1806.*—In order to maintain a suit by the mortgagee under a mortgage by way of conditional sale, to have such sale declared absolute, it must be proved that all legal formalities have been complied with, and amongst other things that notice has been issued by the proper Court, and this must be done, whether the mortgagor pleads that there has been any irregularity or not. Where a Tahsildar having no jurisdiction to issue notice under Reg. XVII of 1806 issued such notice and allowed one year for redemption, it was held that the year of grace had not begun to run, as such notice was not issued by the District Court which alone had jurisdiction to issue it. *JAMATA v. SHADA*, 91 P. R. 1880.

(17)—*Mortgage by conditional sale—Stipulation for payment of principal and interest on a fixed day—Post diem interest—Whether mortgagee entitled thereto—Construction of mortgage deeds.*—A mortgage by conditional sale was executed on the 18th of August, 1884. The deed commenced with the recital that the mortgagor had received from the mortgagee a loan of Rs. 800 and with a general covenant to pay interest thereon at the rate of 3 annas on the rupee per annum. There was a further covenant that, as a consideration for the loan, the mortgagor undertook to re-pay the principal and interest on April 29th, 1885, and mortgaged by conditional sale certain specified property, with the condition that, in the event of the mortgagor's failure to pay on due date, the deed would take effect as a sale out and out

Mortgage—continued.**—3.—Conditional Sale—continued.**

from the abovementioned date of April 29, 1885: *Held*, that the intention of the parties was that interest at the stipulated rate should continue to run until actual payment was made. (19 A. 39=23 I.A. 138=1 C.W.N. 52, R.) In construing a mortgage-deed, the Court is bound to consider the terms of the contract entered into by the parties as a whole, without laying any undue stress on any particular portion of the contract, and having due regard to the ordinary expectations of persons entering into mortgage transactions. **KALIKA PRASAD TEWARI v. INAYAT HUSSAIN, 16 Ind. Cas. 216.**

(18)—*Mortgage—Conditional sale—Expiry of term fixed by deed—Mortgagee's title becoming absolute thereafter—Law in Sind.*—Where A executed in favour of B a deed of sale conveying the suit property for Rs. 10,000, and B at the same time executed a counter agreement stipulating that, on payment of Rs. 10,000 together with the cost of improvements, within 5 years, B would transfer the property to A's wife who was treated to be benamidar for A. *Held* that, even if the transaction be treated as a mortgage by conditional sale, the right of redemption became extinguished by the expiry of the term fixed by the deed and that B's title became absolute. In Sind. the old law of India according to which at the expiry of the term the contract executed itself and the transaction closed and became one of sale, continues still to be in force. **FRAMJI BYRAMJI MINWALA v. SULLEMANJI SHEIKH EBRAHIMI, 6 S.L.R. 178.** (1 S.S.D. 301, 1 S.L.R. 96, F.; 13 M. I.A. 560, 1 M. 1, 15 M. 230, 2 B. 231, 11 M. 403, R.)

(19)—*Bye-bil-wuffa mortgage—Mortgagor's rights, express transfer of—Conditional sale—Suit for possession by mortgagee as proprietor—Conditional decree—Order of foreclosure under Reg. XVII of 1806.*—Plaintiff effected a *bye-bil-wuffa* mortgage of his lands, by which all his rights as mortgagor were, in the event of non-payment of the debt within three years, transferred to the mortgagee as vendee. The mortgagee, after 4½ years, sued for possession as vendee, got a conditional decree to the effect that, if the amount due was not paid within a year, he should be put in possession as proprietor by sale. After a year and a half, he put in a petition for possession. Notice of ejectment was then served on the mortgagor, who did not contest the conditional sale, but brought an action claiming to have reserved to him occupancy rights in the land. *Held* that the *bye-bil-wuffa* mortgage (or conditional sale) did not reserve to the mortgagor any part of his rights, as he had, by that deed, transferred his proprietary rights, as well as the right to cultivate his share to the conditional vendee (44 P. R. 1873, F.) *Held* also that the conditional sale not having been perfected in accordance with the procedure prescribed by Reg. XVII of 1806, the conditional decree passed in the suit was null and void; and that, to make the sale

Mortgage—continued.**—3.—Conditional Sale—continued.**

absolute, the conditional vendee must lodge a regular suit either for proprietary possession if not in possession, or, if in possession, he must sue to establish his right as absolute proprietor. (By Boulnois and Lindsay, JJ. *Campbell, J., contra*). **SHEOJI SINGH v. TARA, 29 P.R. 1876, F.B. [D., 171 P.R. 1882.]**

(20)—*Reg. XVII of 1806, s. 8—Mortgage by way of conditional sale—Title of mortgagee to possession—Limitation.*—A mortgage-deed contained a clause that, on failure to pay revenue or the profit on the part of the mortgagor, the mortgage should be considered to be a sale. The mortgagee sued for foreclosure more than 12 years after default had been made by the mortgagor. *Held* that, as the title of the mortgagee to possession could not become complete until he brings his suit after the performance of the ministerial act of issuing notice under s. 8, Reg. XVII of 1806, limitation did not begin to run from the date of default, and that art. 135, sch. II of the Limitation Act, was not applicable to the case. **HURDWARI MAL v. GAMDIN, 75 P.R. 1874.**

Of occupancy rights—*See* PUN. ACT XIII OF 1900, ss. 2 (3), and 9, 44 P.L.R. 1904=11 P.R. 1904.

Mortgage by member of agricultural tribe—Reference to Deputy Commissioner—*See* PUN. ACT XIII OF 1900, s. 9, 4 P.R. 1907=20 P.W. R. 1907.

Suit for possession—*See* PUN. ACT XIII OF 1900, s. 9 (2), 22 P.L.R. 1904=91 P.R. 1903.

See PUN. ACT XIII OF 1900, s. 9 (3), 142 P.L.R. 1904=38 P.R. 1904.

See PUN. ACT XIII OF 1900, ss. 9 (2), 19, 23, 79 P.L.R. 1904=7 P.R. 1903, Rev.

Mortgage by conditional sale of occupancy rights to Zemindar—*See* U.P. ACT XVIII OF 1873, s. 9, 7 A. 851, F.B.=A.W.N. 1885, 264.

Conditional sale clause struck out on reference by Civil Court to Collector—Jurisdiction of Civil Court to pass decree—*See* U.P. ACT II OF 1903, s. 9, A.W.N. 1906, 14=3 A.L. J. 743.

Mortgage without possession by way of conditional sale of ancestral property by childless proprietor—His widow selling that property along with other property and parting with its possession—Suit by reversioner to recover—Limitation Act, art. 141—Act I of 1900 (Punjab), art. 1—*See* LIMITATION—GENERAL, 70 P.W.R. 1908, F.B.

Pre-emption—By way of conditional sale—*See* LIMITATION—GENERAL, 120 P.L.R. 1901=103 P.R. 1901.

Suit for possession of property mortgaged by way of conditional sale—Starting point of limitation—*See* LIMITATION ACT, 1908, arts. 132, 135, 144, 68 P.W.R. 1908.

Accrual of right of pre-emption when sale becomes absolute—*Wajib-ul-arz*—Partition of

Mortgage—continued.**—3.—Conditional Sale—concluded.**

mahal—See PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-ARZ, 24 A. 493=A.W.N. 1902, 164.

Valid notice of foreclosure, under Reg. XVII of 1806—Objections to notice made on appeal for the first time—Validity—See BEN. REG. XVII OF 1806, 105 P.R. 1907.

Deed of sale out and out—Second deed of re-transfer executed after seven days—Construction of deed—See SALE—GENERAL, 8 A.L.J. 389, F.B.

Money decree on mortgage—Sale of equity of redemption—Mortgagee's title on purchase—See TRANSFER OF PROPERTY ACT, 1882, s. 99, 157 P.L.R. 1906=2 P.R. 1907.

—4.—Construction of mortgage-deeds.

See DEED—CONSTRUCTION OF DEEDS.

See MORTGAGE—FORM OF MORTGAGES.

(1)—*Intention—Procedure—Presumption.*—In the construction of mortgages the intention of the parties should be ascertained and followed. The intention of the parties must be gathered from the document creating the mortgage and from such other indications as may be found on the record. The presumption is in favour of the conservation of the right to redeem; and the intention to extinguish that right should be clearly expressed or should be deducible unmistakably from the words of the deed or the conduct of the parties. *MA PO v. MAUNG KYAW DUN*, U.B.R. 1897—1901. Vol. II, 509. (U.B.R. 1897—1901, Vol. II, 502, F.) [R., U.B.R. 1907, 2nd Qr., Mortgage, 1.]

(2)—*Mortgage instrument—Rule of construction.*—A mortgage instrument consisting of two connected parts must be construed as a whole; and the true construction to be put upon it should be that which, being reasonable, would give effect to all the parts of it. It was accordingly held in the case that, where, according to the former part of the mortgage instrument, a power was given to the mortgagee to take absolute possession of the property (and thereby arranging for the gradual repayment of the instalments of the debt), a construction whereby the mortgagee could not take possession, except at the option of the mortgagor, but could only realise the amount of the instalments by sale of the properties, was not maintainable. *DEPUTY COMMISSIONER OF RAE BARELLI v. RAMPAL SINGH*, 11 C. 237, P.C.=12 I. A. 1=4 Sar. 585.

(3)—*Mortgage, Construction of—Operative words in mortgage deed.*—In the construction of a mortgage-deed, effect may be given to the operative words in it in their ordinary meaning, if they are uncontrolled by anything in any recital. *THE LAND MORTGAGE BANK OF INDIA v. ABDUL KASIM KHAN*, 26 C. 395, P.C.

(4)—*Mortgage—Ambiguous description in document.*—If the description of property in a mortgage document is ambiguous, it must be

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

taken most strongly against the mortgagor, the party who conveyed the property. *SHAIK SOOLTAN ALI v. SYED AFTAKUR HOOSAIN*, 18 W.R. 63.

(5)—*Recitals in mortgage deeds—Effect of.*—Recitals in mortgage deeds and in petitions sent to officials that certain property has been transferred, could not effect a transfer of such property. *IMMADIPATTAM THIRUGNANA v. PERIYA DORASAMI*, 5 C.W.N. 217=28 I.A. 46=24 M. 377, P.C.=7 Sar. 811. [R., 26 M. 339, 2 Ind. Cas. 18.]

(6 & 7)—*Question of fact—Direct evidence on each side not wholly convincing—Necessary reliance upon surrounding circumstances.*—Where, in a suit in which the substantial question was whether a certain deed of mortgage represented a genuine transaction or a fictitious one, there was some evidence on each side bearing directly on the character of the transaction but on neither side was that evidence wholly convincing and persons whom one might have expected to be prominent witnesses were not called and the evidence that was adduced was open to much adverse criticism, it had been found necessary in India and it was equally necessary for their Lordships to rely largely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct. *DALIP SINGH v. CHAUDHRAINAWAL KUNWAR*, 10 Bom. L.R. 600=12 C.W.N. 609=30 A. 258=35 I.A. 104.

(8)—*Mortgage-deed—Mortgagee to have possession in lieu of interest—Dispossession—Suit for money.*—Suit for recovery of money due on a mortgage bond alleged to have been executed by the defendant's late husband S on taking the principal sum from plaintiff's father. The bond purported to have been executed by the late S as well as by his brother J, but plaintiff relieved J from the debt, stating that J was not present at the time of the execution of the bond. The conditions of the bond were that plaintiff's father should possess the mortgaged property in consideration of interest only accruing upon the principal sum lent, and that the mortgagor should take back the property whenever he should pay the principal sum to the mortgagee. Plaintiff was dispossessed by the shareholders J and A, and hence this suit for recovery of the principal sum. Held, that the money lent was recoverable, notwithstanding that there was no express condition to that effect in the bond; but as the money was borrowed by the defendant's husband on behalf of the family, the plaintiff could recover from the present defendant only her share of the debt. *GYARAM CHUCKERBUTTY v. BURODA DABEE*, 20 W. R. 484.

(9)—*Mortgage, Ijara lease by mortgagor—Mortgagee dispossessed of portion by co-sharer of mortgagor—Rights of mortgagor.*—Defendant

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

advanced a certain sum of money to R and T, and they, in order to secure the re-payment of this loan, being themselves *mokurruredars* of a certain mouzah, granted to him an *ijara* lease, representing that they were entitled to 16 annas, in which lease a jumma was reserved for the first year, a portion of which was to be paid to the superior proprietors, and another portion was to be applied to the discharge of the interest due to the defendant and a small sum was to go to the mortgagors as *huq-i-ijara*. After this *ijara* had been executed, the defendant was unable to obtain the whole 16 annas of the pledged property, or rather dispossessed of 8 annas of it by a person who claimed to be a share-holder of R and T and he was eventually obliged to bring a partition suit in which R and T's share, which was 8 annas, was divided off from the rest; and the defendant retained that as covered by the *ijara* lease for as much as it was worth as security for his loan. The present plaintiffs bought the mortgagor's share. They now sued upon the footing of the *ijara* lease claiming to have half the amount of the *huq-i-ijara* which was originally reserved. *Held* that the mortgagors could not, under the circumstances, claim any benefit whatever under the *ijara* lease until all the benefits of which the original *ijara* lease granted by them pretended to secure to the defendant were realized by him. *ACHUMBIT SINGH v. KESHO LALL*, 20 W.R. 128.

(10)—*Conditions in mortgage—Deed against alienation—Construction—Mortgagee given a right of pre-emption.*—A mortgage-deed stipulated that, during the mortgage or until the discharge of the mortgage debt, the mortgagor should not sell the property, or if he did sell it, should sell it to the plaintiff at a fixed price: *Held* that the provision created merely a right of pre-emption of the property at a fixed price in the event of its sale, but did not absolutely prohibit its alienation. He could not avoid any conveyance by the mortgagor without at the same time offering or asking to be allowed to purchase himself. *SHIVA CHARUN DASS v. SHEIKH ROOSTUM AND MUSSUMAT NUKUMON-NISSA*, Agra, F.B. 69 = Ed. 1874, 53.

(11)—*Sub mortgage—Assignment of mortgage—Rights of sub-mortgagee—Mutual rights.*—Where no complete assignment of the rights of a mortgagee had been effected but merely a sub-mortgage, the rights and liabilities of the original mortgagors and mortgagees *inter se* continued so that the former may redeem the mortgaged lands in spite of the sub-mortgage by paying the mortgage-money to the original mortgagees. *RAMAN v. DEWA SINGH*, 12 P.R. 1895.

(12)—*Suit on mortgage—Paramount title set up—Jurisdiction of Court—Legal position of assignee.*—In a suit on a mortgage, an assignee of the equity of redemption, who was made a party, did not ask to redeem, but pleaded that he was the landlord of the holding

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

which formed part of the hypotheca, and that, since the holding was not transferable, the mortgage in respect of it was invalid. The plaintiff did not ask to have that defendant's name struck out and the Court decided the question of title against the plaintiff. *Held* that, though the Court might have struck out the name of the party raising the question of a paramount title, it had jurisdiction to decide the question as a matter of convenience. (12 C. 414, R.) [R., 5 C.L.J. 95 = 11 C.W.N. 284, 33 C. 425 = 3 C.L.J. 205; F., 1 Ind. Cas. 661.] Even though the landlord was an assignee of a holding which he pleaded was non-transferable and his character as landlord was different from that as assignee, even the assignment was valid since by implication he had consented to a transfer which, but for the consent, would be invalid. *HARE KRISHNA BHOWMIK v. ROBERT WATSON AND CO.*, 8 C.W.N. 365. [F., 1 Ind. Cas. 661.]

(13)—*Mortgage — Covenant in, forbidding subsequent encumbrances—Subsequent lease—Rights of mortgagee and lessee—Priority.*—After a mortgage, all that remains in the mortgagor is the mere equity of redemption, and every title created by him, subsequent to that date, must cease with the cessation of that right, so far as the mortgagor, or persons deriving their title through him are concerned. So, a covenant in a mortgage bond prohibiting the creation of any new encumbrances by the mortgagor until the mortgage-debt is paid off, was held to prevent the latter from giving a subsequent lease over the property mortgaged assigning the rents in liquidation of a debt. *Held* further that the mortgage must prevail over the lease. *GOSSAIN MUNGUL DOSS v. RAGHOONATH SAHOY*, 17 W.R. 560.

(14)—*Mortgage of specific portion of joint-holding—Partition—Specific portion not falling to mortgagor's share—Remedy of mortgagee.*—Where the defendant mortgaged a specific portion of a joint holding, which, on partition, did not fall to his share, the plaintiff-mortgagee has a right to proceed against the property which actually fell to his mortgagor's share in lieu of the property mortgaged. *BELI RAM v. MUSST. SHAHZADA BEGAM*, 101 P.R. 1894. (1 I.A. 106, F.; 20 C. 533, R.) [R., 89 P.R. 1903]

(15)—*Joint-holding — Mortgage of share—Duty of mortgagor on partition.*—Where a co-sharer mortgaged his share, a portion of which he had already sold, he is not bound to make good the deficiency out of another share to which the mortgagor had subsequently succeeded. If a co-sharer alienates a specific share in a joint holding and the others acquiesce, the other co-sharers will be bound by such acquiescence at partition. If at partition the particular plot mortgaged did not fall to his share, the mortgagor is bound to

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

substitute other lands which fell to his share. **BABU RAI v. NATHU, 32 P.R. 1900.**

(16)—*Joint mortgagees—Discharge of debtor by one—Whether binding on co-mortgagee.*—One of two joint mortgagees cannot give a good discharge of the entire mortgage debt without the consent of the other mortgagee. **RAM CHANDRA v. RAJJAN LAL, 7 A.L.J. 99=5 Ind. Cas. 129=32 A. 164. (25 A. 155, F.)**

(17)—*Mortgage—Construction—Power of sale—Intention—Reg. V of 1827, s. 15, cl. 3—Personal remedy—Limitation.*—A mortgage-bond contained an express stipulation that the mortgagee was to enter into possession of the land and enjoy the rents and profits for ten years in lieu of interest after which period the mortgagor might enter into possession in the year in which he paid the debt. *Held* that, under cl. 3 of s. 15 of Reg. V of 1827, the mortgagee had no power of sale and that the intention of the parties was that the land mortgaged should not be sold in satisfaction of the mortgage debt. [*Expl.*, 11 Bom. L. R. 1315=34 B. 128=4 Ind. Cas. 595; *D.*, 21 B. 267, 5 Bom. L. R. 119.] When the suit was brought within three years from the expiration of the stipulated period of ten years, the mortgagee's personal remedy against the mortgagor was not time-barred. **SHAIK IDRUS v. ABDUL RAHIMAN, 16 B. 303. [R., 8 C.L.J. 196.]**

(18)—*Mortgage-deed—Construction—Personal liability.*—Where a mortgage-deed after providing for payment of principal and interest within a certain time and providing against alienation till such payment ended thus:—"Should it happen that I am unable to effect redemption within the period above specified, then, in that event, I will renew the document held by the mortgagees without any objection." *Held* that the deed also contemplated the personal liability of the mortgagors. **RAM PERSHAD v. CHATAR, 20 P.R. 1888. (88 P. R. 1880, 80 P.R. 1881, R.)**

(19)—*Mortgage—Money due on accounts—Credit—Consideration.*—Where immoveable property is secured for the payment of money due on accounts up to a certain amount, the transaction is a mortgage, though no entry as to the amount may have been made at the time in the account book, because equity regards that as done which ought to have been done. **SHEO LAL v. RAM RATTAN, 28 P.R. 1891.**

(20)—*Construction of document—Sale-deed—Mortgage.—Test as to transaction constituting mortgage.*—The question in this case was whether the instrument sued upon was a mortgage or a deed of sale with an option of repurchase after ten years. The solution of the question depended upon the terms of the instrument and the intention of the parties. The Subordinate Judge considered the transaction to be a mortgage by way of conditional sale, and under the

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

provisions of the Dekkhan Agriculturists' Relief Act allowed redemption, though the mortgage term had not expired. The District Judge held it to be a sale outright, with a right of repurchase reserved and dismissed the suit. The High Court however held the transaction to be a mortgage and laid down that the test in such cases was to be whether, after the execution of the instrument purporting to be a sale-deed, there continued to be a debt from the so-called vendors to the vendee, or whether the pre-existing debt became extinguished on the execution of the instrument. In the instrument under consideration there was the undertaking on the part of the so-called vendors to redeem on paying the debt which was recognized to be an existing debt the payment of which was postponed for 10 years. It was, therefore manifest that the parties themselves treated the transaction as a mortgage. **BAPU v. BHAVANI, 22 B. 245. [R., 2 Bom. L. R. 1058.]**

(21)—*Deed—Mortgage or sale—Conditions as regards redemption.*—Under the conditions of a deed, the mortgagee was at full liberty to re-build the property at his pleasure; the mortgage was to be redeemed in two years with the mortgagor's own means; after two years, the transaction was to become a sale; the collaterals and heirs were not entitled to redeem; and the mortgagee on redemption was entitled to expenses incurred in rebuilding. *Held* that such a transaction was a mortgage and not a sale with a condition for re-purchase; the conditions with regard to redemption were an inequitable and onerous character and could not be enforced against the mortgagor or his successors in title. **SUKH DIAL v. ANANT RAM, 131 P.R. 1894. (10 C. 30, 14 M. 170, 2 M. 131 and 271; D., 3 A. 359, 7 M. 395, 9 B. 524, R.) [R., 39 P. R. 1907.]**

(22)—*Mortgage—Sale—Construction whether lands sold or mortgaged.*—The grantee of certain waste lands in Burmah mortgaged them for securing advances taken for the part payment of the purchase-money. Subsequently he entered into an arrangement with his creditor for the advance of the whole balance. Then, on the joint application of the grantee and his creditor, an entry was made in the Revenue register to the effect that the ownership had been transferred from the grantee to the creditor, and endorsements in the same terms on the document of grant. In a suit for redemption brought several years after, *held*, with respect to the question which arose as to whether the transaction was a mortgage or a sale, that, on the true construction of the joint petition and the orders made thereon, the entry and the endorsements were intended only as a record of the arrangement proposed by the parties and sanctioned by the registering officer; that the intention was not to have an absolute sale; and that the transaction was a

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

mortgage which the plaintiff could redeem. **KADAR MOIDEEN v. NEPEAN, 21 C. 882, P.C.=21 I.A. 96=6 Sar. 453.** [D., 2 Bom. L.R. 1058.]

(23)—**Bhagdari lands—Mortgage—Alienation of portion only—Validity—Mortgage deed of Bhagdari lands—Construction—Bombay Bhagdari Act (V of 1862), s. 3.**—An alienation of any portion of any *bhag* other than a recognized division of such *bhag* or of any homestead, building-site (*gabhan*) apart or separately from such *bhag* or recognized sub-division is void under s. 3 of Act V of 1862 (*Bombay Bhagdari Act*). The suit properties were certain *bhagdari* lands, to which 4 *gabhans* (building sites) had been attached. The plaintiff was the mortgagee of the *bhag* under a mortgage-deed which recited that "all the properties appertaining to the entire *bhag*" had been mortgaged thereunder. The portion of the mortgage-deed relating to the *gabhans* mentioned only two by name, one only of which belonged to the *bhag* and the other did not. There were further recitals in the deed to the following effect:—"According to these particulars, lands, houses, and *gabhans* together with whatever may appertain to the said *bhag*, all the properties appertaining to the whole *bhag*, have been mortgaged and delivered into your possession. There is no other property appertaining to the said *bhag* of which mention is not made here." **Held** (1) that, upon a proper construction of the mortgage-deed, the document down to the end of the particulars was in terms a mortgage of certain properties only of the *bhag* expressly enumerated, supplemented by the description that they appertain to the entire *bhag* and that the particulars were the "leading description," and the supplementary description of them as constituting the entire *bhag* together with the houses or *gabhans* appertaining to it (which was incorrect) must be regarded as "*falsa demonstratio*," and (2) that the mortgage-deed was void under s. 3 of Act V of 1862, in respect of the property appertaining to the *bhag*, and that the mortgage could be given effect to in so far as it comprised properties not belonging to the *bhag*. **TRIBHOVANDAS JEKISHANDAS v. KRISHNARAM KUBERRAM, 18 B. 283.**

(24)—**Mortgage—Construction—Intention.**—B gave the appellant a simple mortgage on ten biswansis of a village called Raipur. He at that time possessed shares in two thokes of Raipur. No. 1 thoke was put up for sale and was purchased by the appellant. No 2 thoke was put up for sale and was purchased by the respondent. The appellant sought by the present suit to enforce his mortgage in respect of No. 2 thoke. The respondent objected that it was not included in the mortgage. **Held** on the construction of the mortgage-deed that the intention was to mortgage all the interest of the mortgagor in Raipur. **BHIK CHAND v. NIRPAT SINGH, A.W.N. 1883, 184.**

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

(25)—**Per Mahmood J.**—(a) The definition of simple mortgage in s. 58 (b) of Act IV of 1882, is only a reproduction of older law and is therefore applicable to a deed executed before the passing of the Act. (b) In the N.W. Provinces, words of hypothecation and simple mortgage have always been understood to import the right of the mortgagee to bring the property to sale for satisfaction of his claim, and no express words conferring such power are insisted upon as necessary to create such power. (9 M. 218, 10 M. 609, 10 B. 519, D.) (c) Where a transaction is described as '*arh*' and '*mustagbraq*' which means a hypothecation or simple mortgage, it implies a power of bringing the property to sale. **KISHAN LAL v. GANGA RAM, 13 A. 28=A.W.N. 1890, 216.** [Appr., A.W.N. 1894, 57.]

(26)—**Interpretation of document—"Arh"—"Mustagharag"—Suit for sale—Limitation—Act XV of 1877, sch. II, art. 147.**—Defendants having borrowed money from plaintiffs executed in their favour a bond, the material portion of which was as follows:—"We have pledged and hypothecated (*arh aur mustagharag*) our share of the zemindari (rights and interests) in the village Papli Khas, Pargana Meerut, to secure the creditors. Until payment of the aforesaid moneys, we shall not transfer the aforesaid property to any one by mortgage, sale, gift or otherwise; if we should do so, our act would be invalid. We have, therefore, executed these presents in the shape of a bond." **Held** that these words were equivalent to a simple mortgage as defined in s. 58 of the Transfer of Property Act, 1882, and carried with them power to sell through the intervention of the Court the property named in the bond, if the debt were not repaid according to the terms of the bond. **Held** also that a suit upon such bond to bring the property covered thereby to sale was governed by art. 147 and not by art. 132, Limitation Act, 1877. **TODAR v. AYUB KHAN, A.W.N. 1894, 57.** (14 C. 730, Diss.; 13 B. 90, 13 A. 28, Appr.)

(27)—**Contract Act (IX of 1872), s. 29—Transfer of Property Act (IV of 1882), s. 58—Mortgage of "our zemindari property"—Ascertainment of mortgagor's interest at date of mortgage—Mortgage not void for uncertainty.**—A deed of simple mortgage, describing the mortgaged property as our "*zemindari property*" without any further specification, was **held** not void for uncertainty, the words used being sufficiently certain, or at any rate capable of being made certain by proof of the obligors having, at the date of the deed, owned a specific zemindari interest. **SHADILAL v. THAKURDAS, 12 A. 175=A.W.N. 1890, 60.** (13 App. Cas. 523, 1 A. 275, 5 A. 11, 8 A. 486, 9 A. 158, 2 N.W.P. 263, R.) [R., 14 A. 162, 11 M.L.J. 27.]

(28)—**Bond charging profits of immoveable property—Construction—Effect of condition not to alienate—Simple mortgage.**—Where a bond

Mortgage—continued.

—4—Construction of mortgage deeds—continued.

charges the profits of immoveable property with the repayment of the loan, and stipulated that the obligee should take the management of the property and render accounts to the obligor, that if the loan was not paid when due, the latter should remain in possession till the loan was discharged, and also that the obligor should have no power to sell, mortgage or alienate the property till the discharge of the debt; *held* that the bond created a mortgage of the profits only and not of the property itself and that, therefore, the obligee cannot sue for the sale of the property. If there is a condition, in a bond for payment of money, not to alienate certain lands, it would constitute it a simple mortgage. **GANGA PRASAD v. KUSYARI DIN, 1 A. 611.**

(29)—*Mortgage partly usufructuary and partly simple—Right of mortgagee to decree for sale—Mortgage deed, construction—Intention of parties.*—For the purpose of construing a mortgage-deed it will be necessary to examine carefully the wording of the deed, and if its terms are not sufficiently clear and admit of more than one interpretation, it will be necessary further to ascertain in what manner the terms of the deed were understood and acted upon by the parties subsequent to their entering upon the contract. In the case of a mortgage deed the terms of which are of doubtful character, the Court will have to look to all its provisions as a whole, to the other instruments which were executed at the same time and admittedly form parts of the same transaction and to the surrounding circumstances, in order to gather the intention of the contracting parties. In the cases of mortgages of a mixed character and other than those expressly defined in s. 58 of the Transfer of Property Act, the deeds embodying them may be given effect to, as far as possible in accordance with the covenants contained in them; and so where a deed is partly of the nature of a usufructuary mortgage and partly of the nature of a simple mortgage, the mortgagee is entitled to bring the mortgaged property to sale under the conditions set out in the deed, and even where such a deed does not in terms provide for the recovery of the mortgage money by sale of the mortgaged property. **JAFAR HUSEN v. RANJIT SINGH, 21 A. 4 = A.W.N. 1898, 167.** (2 Agra 150, 2 A. 527, A.W.N. 1886, 212, A.W.N. 1888, 171, 14 M. 232, 17 M. 131, R.) [F., 6 N.L.R. 20; Appr., 30 A. 162 = A.W.N. 1908, 70 = 5 A.L.J. 130; R., 26 M. 662, 10 Bom L.R. 615; D., 28 A. 157 = A.W.N. 1905, 226.]

(30)—*Mortgage, simple and usufructuary, combined—Construction of document—Limitation Act (XV of 1877), art. 147.*—There can be no doubt that one and the same deed may create a simple and a usufructuary mortgage, and confer upon the mortgagee the alternative rights of possession and of bringing the mortgaged property to sale in enforcement of his security. Where a document provides that the

Mortgage—continued.

—4.—Construction of mortgage deeds—continued.

property is "mortgaged" for Rs. 3,000 for a period of three years, and it goes on to say in what manner the interest is to be paid from the rent of the shops, and if there is any excess, how much excess is to go to credit of principal, or if there is a deficit, how it is to be made good by the mortgagor, and the document also stated "having paid up in full the principal and interest due, I shall redeem the property: If the amount expressed in the deed be not repaid, the mortgagee is at liberty to recover the same in any way he thinks proper," this instrument is a combination of a simple mortgage and a usufructuary mortgage, and the mortgagee is entitled to maintain a suit to bring the property to sale. Art. 147 of the Limitation Act (XV of 1877) is applicable to suit for sale on a mortgage. **JUGAL KISHORE v. RAM SAHA, A.W.N. 1886, 212.** (6 A. 551, F.B., F.) [F., 21 A. 4.]

(31)—*Construction of document—Mortgage—Covenant for repayment of mortgage money within a time limited—Time not of essence of contract.*—A simple mortgage deed contained the following covenant as to repayment of the mortgage money:—"Asl arse panch baras men faq rahn kara lenge." *Held* that the time fixed for payment was any time within five years. **CHATTARBHUI v. RAGHUBAR DIAL, A.W.N. 1901, 36.** (23 M. 33, 10 A. 602, R.; 8 A. 95, D.) [R., 17 M.L.J. 83.]

(32)—*Mortgage-deed—Interpretation of.*—Where the mortgage-deed provided that the mortgagors will redeem the land in one year, paying the principal-debt and interest at the rate of one per cent. per mensem, and, in case of default, the mortgagee may take possession of the land mortgaged in lieu of receiving the principal sum and interest and the mortgagee claimed interest for the period subsequent to the expiration of the period fixed for the redemption of the mortgage and up to the date of the mortgagee's obtaining possession of the land, *held*, that the correct interpretation of the deed was that the mortgage was to be a simple one for the period of one year, and if not redeemed by that time, was to be converted into a usufructuary mortgage with possession. **MOHAN LAL v. MUKIM, 175 P.L.R. 1901 = 114 P.R. 1901.** (21 A. 39, P.C., D.)

(33)—*Mortgage of zamindari with entire right and income and kattubadis—Construction of mortgage-deed—Zamindar's right in one of the villages as simple mortgagee under the inamdars, whether covered by mortgage.*—By the instrument of simple mortgage executed in favour of the plaintiff, in this case, the defendant, a zamindar, mortgaged his entire zamindari as well as his entire right and income and the kattubadis on enfranchised inams. In the case of one of the villages mortgaged, the interests which the zamindar possessed in it at the time were two-fold, one, the right to the payment of the kattubadi, and the other, his

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

right as a simple mortgagee under the inamdars of that village. On plaintiff's suit to enforce the mortgage, the question arose whether the zemindar's right as mortgagee of the village was also mortgaged to the plaintiff along with the kattubadi payable to the zemindar in respect of it. Plaintiff claimed that both the above rights passed to him under the mortgage deed urging that the words "entire right and income" used in the deed showed that not only rights *qua* zemindar but also all the rights possessed by him, *qua* zamindar or otherwise, within the entire limits of the zamindari had formed the subject of the mortgage; but it was held that the zamindari's mortgage rights in the village were not covered by the mortgage-deed, that the expression, with our "entire right and income" related only to the estate held on zamindari tenure, as such, and had no reference to the entire zamindari tenure in its geographical sense. The intention of the parties that the mortgage should extend to quit-rents on enfranchised inams had to be given effect to by the express inclusion of such quit-rents in the deed, and that was because the right to such quit-rent was not possessed by the mortgagor *qua* zamindar. So also the parties would have expressly included the zamindar's simple mortgage right in the village, if their intention had been to include that right also in the mortgage. **BHIMARAJU CHETTY v. SRI KUNJA BEHARI GAJENDRA DEVU, 25 M. 42.**

(34)—*Hypothecation bond—Terms—Construction.*—Where a bond speaks of the property as hypothecated and provides that the plaintiff shall have recourse against the persons and the property of the executants in case of non-payment, the words are apt and appropriate for creating good hypothecation-bond. **NARAIN SINGH v. MATA PRASAD SINGH, A.W.N. 1887, 52.**

(35)—*Hypothecation bond, Construction of—Determination of liability.*—The first defendant and his deceased brother executed an instrument of hypothecation in favour of A, wife of the seventh defendant, in consideration of A undertaking to pay a creditor of the executants a sum due from them; and the bond provided that the amount of yearly rent payable by A's husband to the executant under a lease-deed executed on the same day should be paid to A by her husband for interest due to her under the hypothecation-bond, and that the principal amount was payable in seventeen years from the date of the bond. The lease-deed executed by A's husband was for a term of 23 years, and it in its turn referred to the hypothecation-bond and provided that the rent should be paid to his wife until the debt was cleared, and that thereafter, the rent should be paid to the lessors. In a suit by the transferee of A's interest in the hypothecation, for interest, held that the simultaneous execution of the hypothecation and the lease, the facts that the term of the latter covered the whole period fixed in

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

the hypothecation for the repayment of the principal, the relationship between the hypothecation creditor and the lessee (which pointed to their interests in the matter being identical) and lastly, the specific reference in each instrument to the appropriation of the rent to the interest, indubitably showed that the transaction between the parties was of a tripartite character intended to relieve the obligors from any responsibility in respect of interest, and to entitle the obligee to look for liquidation of interest solely to the source pointed out. **CHENNAPATNAM GOPAL ROW v. TADAKAM-ALLA NARASIMHA ROW, 27 M. 86. [R., 6 C. L.J. 639.]**

(36)—*Mortgage—Charge—Simple debt—Limitation Act, 1877, sch. II, arts. 132 and 147.*—This was a suit to recover principal and interest due on a mortgage by attachment and sale of the mortgaged property. The deed recited thus:—"The mortgagors shall pay the mortgage money by instalments of Rs. 60 a year, together with interest at the rate of annas 8 per cent, in case of default of payment of an annual instalment of Rs. 60 together with interest at the rate of annas eight per cent. the mortgagors will put Kirpa Ram mortgagee in possession of the mortgaged share of the house; if the mortgagors raise any objection the mortgagee will be at liberty to at once get possession of the mortgaged land by bringing a regular suit. Afterwards, the mortgagors will redeem and get released the mortgaged share on payment of the mortgage money together with the fixed amount of interest." Held, that in construing a document, the Courts must ascertain the intention of the parties, and as far as possible, interpret deeds executed by them accordingly, and that the deed referred to could not be interpreted as conferring on the mortgagee a right to sell the property, so as to make article 147, Second Schedule, Limitation Act, 1877, applicable. Art. 132 governed the case. Held, further, that the intention of the parties was to hypothecate the land in the first instance, giving the mortgagee the power of taking steps for assuming possession and so converting the charge into a usufructuary mortgage, but as the mortgagee failed so to convert it, the transaction remained no more than a promise to pay by the debtor who had hypothecated his land as a collateral security, and, as plaintiff failed to enforce payment within 12 years of the first default by taking possession and so carrying out and developing the contract, he was not entitled to a charge on the land or to be allowed to sell it to satisfy his claim. **MILKI RAM v. ACHHRU MAL, P.L.R. 1900, p. 178 = 23 P.R. 1900.**

(37)—*Mortgage—Primary security, and on its damage or destruction alternative security—Primary security sold in execution of prior mortgage—Liability of alternative security.*—A

Mortgage—continued.**—4.—Construction of mortgage deeds**
—continued.

mortgage-deed provided that "if the hypothecated property was damaged or destroyed by accident, or proved insufficient to satisfy the debt, then the debt should be recoverable from a moiety" of another house belonging to the mortgagor. On the first house being sold in execution of a prior mortgage, the mortgagee sued to recover the amount by the sale of the second house. *Held* that the contingency referred to in the bond had arisen, and the mortgagee was entitled to enforce hypothecation against the second house. **GANESH DAS v. MAYA RAM, A.W.N. 1882, 99.**

(38)—*Construction of document—Usufructuary mortgage—No term specified—Re-entry on the property by the mortgagor.*—In ascertaining whether a deed, confessedly ambiguous, amounts to an usufructuary mortgage or to a lease in perpetuity, the Judge should look within the four corners of the instrument before him and ascertain from it what kind of transaction the parties had in view when they entered into it. In the case of an usufructuary mortgage, where no term is specified, the mortgagor is entitled to re-enter on the property when, on taking an account, he is able to show that the principal and interest have been satisfied. **LALA DOUL NARAIN v. RUNJIT SINGH, 1 C.L.R. 256.**

(39)—*Usufructuary mortgage—Reg. V of 1827, s. 15, cl. 3—Sale of mortgaged property.*—A mortgage deed provided that the mortgagee was to take possession of the land and enjoy the profits in lieu of interest, and that the mortgagor was to be at liberty to recover possession in any year on payment of the sum of Rs. 750. There was no promise by the mortgagor to pay the money. It was simply provided that until he did pay the amount, the mortgagee was to retain the property. *Held* that the mortgage was a usufructuary mortgage, and that, under the circumstances of the case, it was not the intention of the parties that the land should be sold, and that the deed contained a special agreement which took the case out of the provisions of cl. (3) of s. 15 of Reg. V of 1827, which was the law in force at the time the mortgage was effected. **SADASHIV ABAJI BHAT v. VYANKATRAO RAMRAO SHINDE, 20 B. 296. [D., 21 B. 267, 5 Bom. L.R. 119, 11 Bom. L.R. 1315=34 B. 128=4 Ind. Cas. 595.]**

(40)—*Kanom—Suit by kanomdar for sale of mortgaged property—Maintainability.*—A kanomdar sued for sale of the mortgaged property in default of payment of the amount due on the kanom. *Held* that the suit was not maintainable and that the kanomdar had no right to bring the property to sale. In the instrument sued upon, there was no covenant to pay, nor was there any evidence that a promise to pay was one of the incidents of a "kanom" according to usage. A "kanom" in the mortgage aspect of it, is a usufructuary mortgage. **SRIDEVI v. VIRARAYAN, 22 M. 350. (15 M. 366, R.)**

Mortgage—continued.**—4.—Construction of mortgage deeds**
—continued.

(41)—*Transfer of Property Act (IV of 1882), ss. 58, 98—Construction of deed—Usufructuary mortgage.*—A mortgage deed for four years certain, provided that interest should be paid at a certain rate and that the mortgagee should have possession of the property and credit the profits thereof first in respect of the interest and then, the balance, if any, in respect of the principal, and that the property was redeemable at the expiry of the term on payment of the interest and principal that may then remain due on the mortgage. *Held* that although the instrument did not strictly fall within s. 58, cl. (d), of Act IV of 1882, because there was no stipulation in terms that the mortgagee was to remain in possession until payment of the mortgage money, still, applying the principles enunciated in s. 98 of the Act, it should be regarded as a usufructuary mortgage, not only during the four years, but after their expiration. **HIKMATULLAH KHAN v. IMAM ALI, 12 A. 203=A.W.N. 1890, 87. [R., 10 O.C. 14.]**

(42)—*Usufructuary mortgage-deed—Clause allowing mortgagor to redeem within three years and in default in a particular month in subsequent years, construction of—Suit for redemption brought within said three years, whether premature.*—Under the terms of a usufructuary mortgage-deed, the mortgagor was to pay back the mortgage-money and redeem the mortgage within three years and, in default, the mortgagee was to receive the money in any *Ani* month subsequently and restore the properties to the mortgagor. In accordance with the decision in *Rose Ammal v. Rajaratnam Ammal* (23 M. 33, R.), *held*, that, under the deed in question, the mortgagor had the right to redeem at any time on or before the expiry of the three years. All that the further clause in the document to the effect that on failure to redeem by the mortgagor within the three years he can pay the mortgage amount to the mortgagee in any month of *Ani* and recover the property, can be held to mean, is that he cannot recover in any subsequent year at a date earlier than *Ani* (June—July) as, if he did so, he would deprive the mortgagee of crops grown on the land. **CHINNASAMY REDDIAR v. KRISHNA REDDY, 16 M.L.J. 146. [R., 18 M.L.J. 235.]**

(43)—*Construction of document—Usufructuary mortgage with personal covenant for repayment of the mortgage-money—Such personal covenant not conferring a right of sale.*—Where a mortgage is in other respects a usufructuary mortgage, the insertion therein of a personal covenant to pay the mortgage-debt on demand unaccompanied by any hypothecation of the property, the subject of the mortgage, cannot alter the character of the mortgage and give the mortgagee a right to sell the mortgaged property in the event of non-payment of the mortgage debt. **KASHI RAM v. SARDAR SINGH, A.W.N. 1905, 226=28 A. 157. (21 A. 4, D.; 14 M. 232, 17 M. 431, Diss.)**

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

(44)—*Usufructuary mortgage—Suit by mortgagee in possession for mortgage amount and arrears of rent—Mortgagee when entitled to such rent—Intention of parties.*—The deed of mortgage in this case was redeemable at the end of its term by payment of the principal and the arrears of rent due from the mortgagors and the tenants, and the mortgagee who had obtained possession of the property sued for the mortgage debt with the arrears of rent due from the mortgagors and tenants of the property. Reversing the decree of the lower appellate Court and restoring that of the first Court, the High Court expressed its opinion that it was the intention of the parties that only arrears reasonably due were to be paid, and not such as arose from the negligence of the mortgagees, and, in the present case, it not having been shown that the arrears could not have been realised by due diligence of the mortgagees in possession, it was not competent to them to claim to recover such arrears. *CHOTILAL V. KALKA PERSHAD*, 7 N.W.P. 100.

(45)—*Usufructuary mortgage—Suit for enhanced Government revenue paid by mortgagee—Cause of action.*—Where, by the terms of a deed of usufructuary mortgage, the mortgagor accepts the liability for any enhanced revenue that may be paid by the mortgagee over and above the amount of such revenue entered in the mortgage-deed, and there is no provision or reservation for the adjustment of any such payments by the mortgagee to be made at the termination of the mortgage-tenure, the mortgagee may sue during the currency of the mortgage for excess revenue paid by him. *NIKKA MAL V. GARDNER*, 2 A. 193. [R., 13 A. 195 = A.W.N. 1890, 228.]

(46)—*Usufructuary mortgage—Condition for reconveyance of property.*—In a usufructuary mortgage, it was stipulated that the property was to be reconveyed on repayment of the principal sum lent, but nothing was said as to interest. *Held* that the condition implied that the usufruct was intended to be received by the mortgagee in lieu of interest, and, therefore, the mere fact that the amount of the principal had been received from usufruct was no ground for the mortgagor being entitled to re-possession of the property. *BUNWAREELAL V. MAHOMED HOSSEIN KHAN*, 2 Hay 150.

(47)—*Pre-emption—Custom, evidence of—Wajib-ul-arz—Reg. XVII of 1806—Construction of documents—Foreclosure.*—On the 11th May, 1871, the predecessor of the plaintiff mortgaged the disputed property by a deed of conditional sale, to the predecessor of the defendants for a period of 30 years, without possession, to secure a principal sum of Rs. 2,000 without interest. It was provided in the mortgage-bond that, if the mortgagor should die within the fixed period, then "after me the whole share of zamindari.....hypothecated

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

as above shall be considered as a complete sale" to the mortgagee. On the 4th January, 1881, immediately after the death of the mortgagor, the defendant, the representative of the original mortgagee, without any foreclosure or other legal proceedings procured mutation of names for the mortgaged property in his own favour and shortly afterwards entered into possession. *Held*, that the mortgage of 1871 was in substance, what it describes itself as being a mortgage by way of conditional sale. The mortgagee or his representative has, therefore, under Reg. XVII of 1806, the right to take legal proceedings with a view to foreclosure, and that foreclosure he could have obtained if, after the proper steps had been taken, the representatives of the mortgagor had failed to redeem within the time limited for that purpose by the terms of the Regulation. But there was no right to take possession of the property prescribed by law. In entering, as he did, therefore, the representative of the mortgagee was a mere trespasser, and the heirs of the mortgagor were entitled to sue him in ejectment as such. *HUB ALI V. WAZIR-UN-NISSA*, 3 C.L.J. 601, P.C. = 10 C. W.N. 778 = 28 A. 496 = 3 A.L.J. 712 = 1 M.L.T. 297 = 33 I.A. 107.

(48)—*Mortgage-deed—Period of redemption not stipulated for—Covenant as to mortgage becoming sale on default of payment of the agreed interest, whether amounts to a conditional sale—Reg. XVII of 1806, if applicable.*—The land in suit had been mortgaged with possession to the plaintiff by one D. No special period was fixed for redemption, but there was a condition that after six years' default in payment of the interest agreed upon by D, the land was to be considered as sold to the plaintiffs outright for the amount of principal and interest outstandings. Proceedings were taken by the plaintiffs against D's sons, under Regulations XVII of 1806, and the lower appellate Court, differing from the first Court, gave plaintiffs a decree for possession as owners by conditional sale. *Held*, following the Privy Council ruling in *Kishori Mohan Roy v. Ganga Bahu Debi* (23 C. 228, P.C., F.) that the agreement in question is not liable to the incidents applicable to such cases under the Regulation, the mortgage-deed in the present case containing no stipulated period of redemption such as is required by para. 8 of the Regulation and, in the absence of such a stipulation, the full period of sixty years allowed for redemption by the Limitation Act will hold good and such period of limitation cannot be affected by any covenant accelerating, for other purposes, the time at which the principal may become due. *Held*, further, on a mere oral contract binding the mortgagor to repay the borrowed amount within stated time, a conditional sale cannot be set up such as might confer the status of an owner on the mortgagee with respect to the property mortgaged to

*Mortgage—continued.***—4.—Construction of mortgage deeds—continued.**

him. *BHAG SINGH v. BASWA SINGH*, 50 P.R. 1906. (8 M. 185, D.; 11 A. 633, Diss.) [F., 70 P.R. 1907.]

(49) — *Mortgage — Agreement converting security into conditional sale—Effect.*—Where the effect of an agreement was to convert a mortgage-security of an earlier date into a conditional sale, the character of the mortgage security remained subject to all the incidents of a mortgage by conditional sale. *NOWAB GHOLAM RUSOOL v. MUSST. FUJJO*, 3 Agra 129.

(50) — *Sale — Stipulation for re-delivery of land conveyed on payment of sale amount with interest within certain time—Default—Effect.*—Plaintiff executed to defendant a document containing the following terms:—“The *Muddata Kriyam* executed on the 10th April, 1835 by the Madugula Zemindar to the Zemindar of Bobbili. As I have conveyed to you as sale for Rs. 6,000 the Papuchetti Seri adjoining the land of Kasbah Jagganathapuram in the Zamindari of Madugula, they are given you for absolute sale: so the said sale money has been received at the time of the sale. In the event of my paying you the principal Rs. 6,000 within six months from this date, you must give back the said land Papuchetti Seri to me. In the event of our not being able to pay according to the said stipulation, you should hereditarily from son to grandson enjoy the produce of the said land, yourself paying to government the assessment fixed on a subdivision reckoning this sale money to be a pure sale. This *Muddata Kriyam* has been executed with my consent.” Held that this document was a sale with a condition of re-purchase. The decisions of the late Sadar Court of Madras have carried the doctrine of relief after the time named in the conveyance so far as to say that wherever the security for money is an object of the transaction, no sale can become absolute. The High Court have followed the English rule and have held the question to be one of construction, admitting, however, for the purpose of the construction, other documents and oral evidence. *RAJAH LAKSHMI CHELLIAH GARU v. KRISHNA BHUPATI DEVU*, 7 M.H.C. 6. [R., 1 M. 1, P.C., 3 M. 26.]

(51) — *Mortgage by conditional sale—Time for redemption.—Heirs of the mortgagor—Right to redeem a portion.*—In a mortgage by conditional sale, the time fixed in the document is not of the essence of the contract. The time for redemption is 60 years. (1 M. 17, F.) In a mortgage by conditional sale containing a stipulation to account, if any part of the debt remained to be satisfied after accounts were taken, any one of the heirs of the mortgagor is entitled to redeem; but if nothing remains to be paid, one of the heirs can only redeem his share of the property. *AMIRUDIN v. SOBHA-NADRI*, 6 M. 339.

*Mortgage—continued.***—4.—Construction of mortgage deeds—continued.**

(52) — *Mortgage-deed — Construction of—Interest.*—In construing the tenor of mortgage-deeds with respect to interest, attention should not be confined to a single passage, but the whole provisions of the deeds with respect to interest should be taken into consideration. *BINDESRI NAIK v. GUNGA SARUN SAHU*, 2 C.W.N. 129, P.C. = 25 I.A. 9 = 20 A. 171 = 7 Sar. 273. (23 I.A. 138 = 1 C.W.N. 52, F.) [R., 14 C.P.L.R. 49, 1 N.L.R. 9.]

(53) — *Mortgage decree — Interest—“Date of payment,” meaning of — Construction.*—The ordinary meaning of the words “date of payment” is the date on which payment is made, and ought not to be construed as meaning the date on which payment ought to be, but is not made. Therefore, where a mortgage decree directed that interest should be paid at the bond rate up to “the date of payment.” Held, that the interest up to the date of actual payment must be paid and not up to the date of preliminary decree only. *RADHIKA MOHEM GHOSE v. BROJENEDRA KUMAR SAHA*, 14 C.W.N. 125 = 5 Ind. Cas. 61. (9 C.L.J. 288, 4 Ind. Cas. 56, 23 A. 181, 28 I.A. 35, 33 C. 846, R.)

(54) — *Interest provided for from date of decree to payment — Construction.*—Where a mortgage decree provides for interest to be recovered from the date of the decree till the date of payment, the words “date of payment” mean, the date of actual payment, and not the last day fixed for payment in the decree. *MANOO LAL v. DURGA PRASAD SINGH*, 5 C.W.N. 653. (26 C. 39 = 2 C.W.N. 633, 21 A. 361, R.)

(55) — *Mortgage-deed — Construction — Post diem interest not expressly provided for—Payability of, dependent upon terms and conditions in deed—Default of payment on due date—Claim for subsequent interest by way of damages—Continuing breach of contract—Limitation Act, arts. 115, 116.*—On the question arising in this case as to whether *post diem* interest was payable under the mortgage-deed, in which there was no express provision for payment of such interest, the High Court decided that the condition in the deed binding the mortgagor not to transfer the property till principal and in interest be paid up by him was not sufficient to indicate that the parties intended that interest should continue to run even after the due date. On appeal, the Judicial Committee held that the High Court had not rightly construed the terms of the deed and the effect of the several conditions in it. It was clear from the entire deed that the intention of the parties was that interest was to be continued to be paid at the stipulated rate subsequent to the due date and up to actual payment. The payability of such *post diem* interest was also established by inferences from the agreements accompanying the mortgage, viz., that the debtor was not to transfer the mortgaged property till payment

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

had been made of the principal and interest, and that the amounts paid by the debtor should be first credited towards payment of the interest. The mortgagees were, consequently, held entitled to payment of interest, at the rate mentioned in the mortgage-deed up to the date of the decree of the first Court, and, at the Court rate of 6 per cent. per annum subsequent to the date of the decree and up to realization. [*F.*, 20 A. 171, P.C., 11 M.L.J. 183; *Appr.*, 20 A. 219, F.B., 2 Ind. Cas. 850; *R.*, 20 M. 149, 20 M. 371, 25 C. 246, 12 C.P.L.R. 18, L. B.R. 1893—1900, 457, 2 O.C. 37, 23 M. 534 = 14 M.L.J. 101, 23 M. 637, 14 C.P.L.R. 49, 2 N.L.R. 162, 11 O.C. 323.] Where the mortgagee, not being entitled to claim *post diem* interest under the mortgage, claims to be recouped by way of damages for the loss sustained by non-payment of the mortgage-money on the due date, such claim could not be barred, *in toto*, by reason of arts. 115 and 116 of the Limitation Act. The principal debt which was not time-barred not having been paid, every day that it so remained unpaid, there was a continuing breach of contract, and the recovery of arrears of interest by way of damages cannot be barred so far as regards the amount of interest accrued during the six years next before the suit. *MATHURA DASS v. RAJA NARIND BAHADUR PAL*, 6 M.L.J. 214, P.C. = 19 A. 39 = 23 I.A. 138 = 1 C.W.N. 52 = 7 Sar. 88. [*R.*, 24 C. 699 = 1 C.W.N. 437; *D.*, 114 P.R. 1901 = 175 P.L.R. 1901, 95 P.L.R. 1902, 95 P.R. 1902 = 22 P.L.R. 1903.]

(56)—*Usufructuary mortgage—Right of sale—Covenant to pay principal—Claim for interest.*—A mere usufructuary mortgage would confer no right to have the property sold. But where there is a distinct covenant to pay the principal, and the land is security for the same, the inference is that it is the intention of the parties that the property should be sold; it is a simple usufructuary mortgage carrying with it the right to have the property sold in default of payment of the principal sum. Where the mortgagee is entitled to possession in lieu of interest and he never takes the trouble to obtain possession, he loses his right to interest. The land is security only for the principal sum and the mortgagee in such a case is not entitled to ask that the property may be sold in default of payment of interest. *MAHADAJI v. JOTI*, 17 B. 425. [*F.*, 11 Bom.L.R. 1315 = 34 B. 129; *R.*, 9 O.C. 144; *D.*, 22 B. 440, 10 O.C. 29, 11 O.C. 323.]

(57)—*Mortgage deed, recital as to delivery of possession in, effect of—Clauses as to payments of commission and interest construed.*—Where a mortgage deed set forth that possession of the property mortgaged by it was given to the mortgagee, whereas the mortgagee never in fact got possession of the same, the real agreement having been to the effect that, in case of mortgagor's failure to pay on demand, the mortgagee was to recover the

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

amount by bringing the mortgaged property to sale and, holding the former personally liable for any deficiency, the recital as to delivery of possession was held to be apparently a mere form of words and the mortgage was held nothing but a simple mortgage. There was also a covenant in the deed that a certain commission was to be paid for every year that the debt to the plaintiff remained outstanding. It was argued for the defendant, however, that the payment of the commission was subject to the clause about the keeping of a *gumasta* by the plaintiff, but it was held, that the stipulation for commission was clearly unconditional, as it did not appear from any of the wordings in the deed that the defendant's liability for commission had any connection with the undertaking by plaintiff to maintain a *gumasta*. Held, further, that on the construction of the clauses as to the payment interest even though they contained no express provision for *post diem* interest, the plaintiff was entitled, on default, to recover interest technically as damages, at the stipulated rate, up to the date of the decree, and at a reasonable rate, thence forward and up to realization. *GANGARAIN BIHARI LAL v. THE FIRM OF SHRIRAM SHALIGRAM*, 2 N.L.R. 162, P.C. (17 A. 511, P.C., 19 A. 39, P.C., *F.*; 25 C. 39, P.C., *R.*) [*D.*, 5 N.L.R. 37.]

(58)—*Mortgage—Construction—Compound interest—Additional interest.*—Where a mortgage-deed provided that interest should be paid at stated times failing which compound interest and principal should be paid on a fixed day, and that, if that amount was not paid on such fixed day, a higher rate of interest should be paid, held in a suit on the mortgage where it appeared that the amount was not paid on the fixed day, that, on a true construction of the document, compound interest to be paid by the mortgagor to the mortgagee could not be held to be confined to the period allowed for the repayment of the mortgage-money, but should be taken to extend to the subsequent period also during which the debt remained undischarged. (23 M. 534, *R.*) Also held that the compound interest was payable only up to the date of the decree, and subsequent interest should be paid up to the date of realization at 6 per cent. on the aggregate amount. *RAMANATHAN CHETTY v. NUR MUHAMMAD MARAKAYAR*, 11 M.L.J. 183.

(59)—*Construction of mortgage deed—Clause appropriate for usufructuary mortgage qualified by later clause providing for compound interest—Seeming inconsistency.*—A mortgage-deed, after providing for yearly payment of interest and means for realising the same, stipulated that "if as a mark of favour the mortgagor let the interest remain unrealised" the same would be added to the principal, and compound interest run thereon. Subsequent clauses provided (a) "that, after taking possession, the mortgagee would be entitled to receive

Mortgage—continued.**—4—Construction of mortgage deeds—continued.**

the net profits. . . . in lieu of interest and during the time of such possession the interest and profits would be equal" (b); "that if the net profits should not cover the amount of interest, the mortgagor would make good the deficiency out of his own pocket"—the deficiency, if not so made good being made payable "with interest at the rate mentioned above at the time of redemption. *Held*, that although cl. (a), standing alone, might possibly be construed as constituting an ordinary usufructuary mortgage, its *prima facie* meaning was qualified by cl. (b); the two clauses were not inconsistent with each other and read together made the principal money payable with compound interest. That the concluding portion of cl. (b) made the unpaid interest payable with compound interest. *JAWA-HIR SINGH v. SOMESHAH DAT*, 10 C.W.N. 266 = 1 M.L.T. 66, P.C. = 3 C.L.J. 354 = 28 A. 225 = 33 I.A. 42.

(60)—*Mortgage bond — Construction of — Simple mortgage—Mortgage with possession—Personal liability of mortgagor — Interest—Penalty — Reasonable compensation.*—Under the mortgage bond in dispute, the mortgagor stipulated that the house mortgaged was hypothecated as collateral security, and its possession was to be retained by the mortgagor who undertook to pay the mortgage debt, with interest at annas 12 per cent. per mensem, the interest being payable monthly and the principal within six years, that, in case the monthly payment of interest or the repayment of principal within six years failed, the rate of interest in either case was to rise to one per cent: *held*, that the deed disclosed a distinct promise to pay and the mortgage contemplated was clearly not of an usufructuary nature. Without deciding whether the enhanced rate of interest was or was not penal, the Chief Court considered the enhanced rate agreed to in the deed as a reasonable compensation to which the mortgagee was entitled. *BABU HARI SINGH v. PREMA SHAH*, 155 P.L.R. 1901. (127 P.R. 1881, 10 C. 740, D.; 16 C. 540, Diss.)

(61)—*Mortgage simple and usufructuary—Interest—Transfer of Property Act (IV of 1882), s. 68.*—The material portions of a mortgage-deed executed in 1869 were as follows. "The mortgagee has been put in possession of the mortgaged shop. I do hereby covenant that, until the re-payment of the mortgage-money, the mortgagee shall have the right to use the mortgaged shop himself, or to let it on an increased or reduced rent to any one else on his own authority; I have excused the mortgagee from paying Rs. 3 as rent of the mortgaged shop now occupied by him, and at the time of redemption of the mortgage the mortgagee shall not claim interest from me, nor shall I claim rent from him. Both parties shall abide by the terms entered in the mortgage deed. And if any party be guilty of a breach of the engagement during the currency of the mortgage, the matter shall not be

Mortgage—continued.**—4—Construction of mortgage deeds—continued.**

cognizable by the Court. The mortgage shall be redeemed whenever the mortgage money shall be paid in a lump sum to the mortgagee. If the mortgagee relinquishes or vacates the mortgaged shop of his own accord, he shall, from the date of doing so, be entitled to receive from me interest at one per cent. per mensem." The plaintiff in the suit was the representative of the mortgagee. The defendant was the purchaser of the equity of redemption. It appeared that the plaintiff gave up possession of the mortgaged property in August, 1882. Plaintiff sued the defendant for recovery of the principal and interest at one per cent. per mensem from August, 1882, by enforcement of his lien against the mortgaged property. It was contended in defence (1) that the mortgage was usufructuary and that the mortgaged property was therefore not liable to sale, (2) that the interest payable under the deed was not charged upon the property and the deed created a personal liability to pay the interest only on the part of the original mortgagor and that the defendant who was the purchaser of the equity of redemption was not therefore liable, and (3) that the interest was recoverable, if at all, only upon the redemption of the mortgage. *Held* overruling all these pleas that the plaintiff was entitled to a decree against the mortgaged property for the principal and interest. *CHANDAR KUAR v. SUBHKARAN DAS*, A.W.N. 1887, 119. (A.W.N. 1886, 212, R.)

(62)—*Mortgage-bond — Arrears of interest, suit for, before the principal was due.*—In a mortgage-bond, the interest was payable every year, failing which interest on the interest and also enhanced interest on the principal were provided for. *Held*, that the mortgagee was precluded, by the terms of the bond, from suing for interest or for sale of the mortgaged property, before the principal became due. *KANNU v. NATESA*, 14 M. 477. [R., 15 C.P. L.R. 78.]

(63)—*Mortgage-deed—Provision as to interest.*—A deed of mortgage, fixing a certain rate of interest without any specific condition that such interest will cease on the happening of a contingency and fixing also a date for redemption with the condition that on default it is to become a sale, does not intend that interest should cease from the date when the principal becomes due. *SARDAR UMRAO SINGH v. SARDAR THAKAR SINGH*, 77 P. R. 1898. [R., 92 P.R. 1905, 95 P.R. 1902.]

(64)—*Mortgage — Suit for redemption — Interest, whether charged on land—Construction of mortgage-deed.*—A deed of conditional sale of immoveable property, which was to become absolute at the end of seven years, provided that interest on its amount should be payable annually, that, in default of such payment, interest on such interest, at a certain rate, may be recoverable, and that the sale

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

may be recovered by suit from the person and other property of the mortgagor, and that the property might be redeemed on payment of the principal and the last year's interest. Interest for four years was recovered by suits against the mortgagor. At the end of the period, the mortgagor sued for redemption by depositing the principal and the interest for one year only, contending that the interest for the remaining years was not charged on the property. *Held*, on a construction of the deed, that notwithstanding the provision that the mortgagee might recover the annual interest from the person and other property of the mortgagor, the legal effect of the structure of the deed was to charge the interest also on the land, and that the stipulations, as to payment of interest, were framed on the assumption that it would be punctually paid at the periods mentioned in the deed, and that being so, the provision as to the last year's interest was only then to operate, and that it was not intended that the last year's interest should be on a different footing from the other interest, the true intention being that all the interest having been paid together with the principal sum, the transaction would be closed, and the conditional vendor might then, and only then, redeem the land, and that, therefore, the suit for redemption should be dismissed. *SURJU PRASAD v. MANSUR ALI KHAN*, 5 A. 463. [Affirmed on appeal, 9 A. 20, P.C.=13 I.A. 113.]

(65)—Stipulation for payment of principal in default in paying interest—Construction.—

Where by a deed of mortgage, a mortgagor covenanted to re-pay the principal within one year and the interest, every month, and, in default in paying interest, to pay both at once, *held*, on default being made in the payment of interest, that the suit for both the principal and interest which accrued due, may be instituted within the year. *YEO HTEAN SEW v. ABUZAFFER KORESHI*, 27 C. 938, P.C.=27 I.A. 98=4 C.W.N. 552=7 Sar. 706.

(66)—Mortgage of a taluka as hastobudi—Subsequent mortgage of sarbarakari rights in two garhs of taluka—Ascertainment of mortgagor's sarbarakari right in the garhs was only subsequent to plaintiff's mortgage—Nature of security for plaintiff's loan—Evidence Act, ss. 92 (6) & 98—Admissibility of evidence—Transfer of Property Act, s. 8—Judgment *nunc pro tunc*.—A suit was instituted on a mortgage-bond executed by the 1st defendant in favour of the plaintiff. The loan had been secured by the mortgage of a taluka belonging to the 1st defendant. Subsequent to the plaintiff's mortgage, the sarbarakari rights of the 1st defendant in two garhs of the taluka were mortgaged to defendants Nos. 2 & 3. The question for decision was whether the sarbarakari rights of defendant No. 1 in the two garhs were also

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

mortgaged to the plaintiff. *Held*:— *Per Pargiter, J.*—Evidence was admissible under ss. 92 (6) and 98 of the Evidence Act, because it showed how the plaint document was related to existing facts and because the nature of the landed tenures was a special matter which could not be stated off-hand but required to be elucidated by a reference to the particular facts. The villages composing the garhs were definitely ascertained and recorded as sarbarakari, only after the date of the mortgage to the plaintiff. In the negotiations, that preceded the plaintiff's mortgage, a list of all the villages comprised in the taluk was given by the manager of defendant No. 1 and in that, it was definitely stated that all the villages were hastobudi. As defendant No. 1 could not dispute that he mortgaged the villages in the two garhs as hastobudi, defendants Nos. 2 & 3, who derived their title from him, could not be in a better position. The result was that defendants Nos. 2 & 3 became puisne mortgagees of the sarbarakari rights in the two garhs. *Per Woodroffe, J.*—No books or papers were produced to show that the Zemindari and sarbarakari rights in the villages were kept existing separately by defendant No. 1. From the terms of the mortgage to the plaintiff, it was clear that defendant No. 1, intended to mortgage all the rights which he then possessed. In the list, it was expressly stated that the villages comprising the garhs were hastobudi and not sarbarakari villages. Under s. 8 of the Transfer of Property Act, a transfer of property passes to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof, unless a different intention is expressed or necessarily implied. In this case, both the superior and the subordinate rights were vested in one and the same person as Zemindar and the words in the plaint-bond being general, in the absence of reservation of either, all the rights in the mortgagor stood as security for the loan. After the appeal was argued, the appellant died, and hence the High Court entered its judgment *nunc pro tunc* and dated the judgment as on the date on which it was reserved, and not on that it was pronounced. *RAJA GOUR CHANDRA GAJAPATHI NARAYAN DEB v. RAJA MAKUNDA DEB*, 9 C.W.N. 710. (21 A. 314, 21 B. 314, F.)

(67)—Construction of terms of—Waiver of right to cancel arrangement for payment by instalments.—Where a mortgagee had not, on the mortgagor's failure to make regular payment, proceeded to cancel the arrangement for payment by instalments but had accepted irregular payments, and then the mortgagor made further default: *Held*, the mortgagee could not, on such further default, sue to set aside the whole arrangement *ab initio* but was only entitled to the balance of the principal together with interest from the date of the last instalment held

*Mortgage—continued.***—4.—Construction of mortgage deeds—continued.**

to be satisfied. *SAIYID SAKHAWAT HUSAIN v. GAJADHAR PERSHAD*, A.W.N. 1906, 139. (5 A. 289, Appr.)

(68)—*Construction—Remedy by sale or possession—Special provision—Limitation.*—A deed of mortgage provided, among other things, that on the mortgagor's making default of payment, the mortgagee should take possession of the land mortgaged, and hold possession until he might pay the principal and interest that remain unpaid, when the mortgagee took possession. The lower Court, upon a construction of this clause, came to the conclusion that the mortgaged property could not be brought to sale; and that the mortgagee's only remedy was a suit for possession, but that was time barred. *Held*, that the mortgagee was entitled to enforce his security by sale. *KRISHNAPA v. BABAJI*, 1 Bom. L.R. 461=23 B. 781.

(69)—*Priority of mortgage—Intention to preserve prior security.*—Where a person mortgaged his property first to A, then to another and thirdly to A again, in which last mortgage there was a recital of the first mortgage, and a statement as to the liquidation of the first debt, *held*, on a construction of the third mortgage deed, that the transaction did not amount to payment of the original debt, but it was in reality a fresh advance upon fresh security being given for both the old debt and the fresh advance and upon a fresh arrangement being made as to interest and that the old security for the old debt remained untouched. *Held*, also that even if this were not so, and the old debt was paid by the new transaction, that would not necessarily destroy the security; and if there was nothing to show a contrary intention, the creditor must be presumed to have intended to keep the security alive for his own protection. *GOPAL CHUNDER SREEMONY v. HEREMBO CHUNDAR HOLDAR*, 16 C. 523. (10 C. 1035, F.) [Appr., 23 C. 790; R., 12 C.P.L.R. 70, 5 C.L.J. 611=36 C. 193.]

(70)—*Mortgage deed, construction—Security for payment of debts previous to mortgage—Clog on right of redemption.*—Where it is clear from a mortgage-deed that the mortgaged property sought to be redeemed was given as security not only for the mortgage amount but also of previous debts, the mortgagor can redeem only on payment of all the moneys secured. But, if it does not appear on the mortgage-bond that such was intended, equity will not allow the right to redeem to be clogged by any such bye-agreement to postpone the redemption to the payment of all the debts due and payable by the mortgagor. *RAMA v. MARTAND*, 9 B. 236, Note. [D., 12 B. 231, 28 B. 349=6 Bom. L.R. 313.]

(71)—*Zuripeshgee lease—Construction.*—A *Zuripeshgee* lease contained the following provision, viz., "After the expiry of the term, it will be competent to me (lessor) in the month of Jeith of any year I can to pay the *Zuripeshgee*

*Mortgage—continued.***—4.—Construction of mortgage deeds—continued.**

and cancel the lease." *Held* that the words barred re-entry in the middle of any year in the event of the lessee's occupation continuing after the expiry of the lease owing to the lessor's default to pay off the loan, and that they did not contain any undertaking by the lessee to hold on until it suited the lessor to pay him off. *ROY GOUREE SUNKUR v. BHOLEE PERSHAD*, 17 W.R. 211.

(72)—*Mortgage—Redemption—Construction of mortgage bond.*—The appellants who borrowed a further amount from the mortgagee M who was in possession of the land under his previous mortgage, executed in his favour an instrument containing the following among other provisions:—"We make a trust of our 8 anna share in favour of M for a term of 11 years; he shall remain in possession, shall be entrusted with the profits and leases of the property.....should we after the expiration of 11 years pay the principal and interest at one per cent. in one lump sum, the share shall be redeemed in the month of *Jaith*." The appellants sued for possession eight years after the period fixed, on the ground that the principal and interest had been satisfied out of the profits. They contended that after the expiry of the 11 years, the respondent became a mortgagee and accountable as such. *Held* that the respondent's possession of the 8 anna share continued after the expiration of the 11 years upon the same terms and under the same obligations as he had occupied it before, and that, so far as the appellants were concerned, they could not release it except in *Jaith* of any year upon payment of the lump amount of principal and interest. *GHASI v. BALLABH RAM*, A.W.N. 1882, 137.

(73)—*Mortgage—Construction—Mortgagee empowered to proceed against mortgagor's other properties in certain events.*—Where a mortgage deed contained the words "that in the event of a sale in execution of decree or in consequence of some other claim, the property mortgaged be sold at auction or otherwise alienated, the mortgagee shall recover the money lent by him from any other property in the possession of the mortgagor, and the mortgagor's person and property shall also be held liable for the debt," *held*, these words were thereby intended to give some supposed further security to the mortgagee by allowing him the power, in case of the property going out of the mortgagor's hands in some unforeseen manner, to recoup himself from any other property the mortgagor might be possessed of, but not to take away from the mortgagee the right that every holder of a deed of conditional sale has to issue the usual notice of foreclosure, and at the expiry of the year of grace to obtain by suit possession of the property. *ACHUMBIT MISSER v. LALLA NUND RAM*, 11 W.R. 544.

(74)—*Mortgage-deed—Construction—Mortgagee in possession.*—*Held*, on the construction

Mortgage—continued.**—4.—Construction of mortgage deeds—continued.**

of a mortgage-deed, that the mortgagee in possession was not responsible for the amount of the gross rental as shown in the *jamabandi*, but only for such sums as were actually received by him or on his behalf, and such sums, if any, as might have been received by him but for his own neglect or fault. *BANARSI PARSAD v. RAM NARAIN*, 25 A. 287, P.C.=7 C.W.N. 514=30 I.A. 66=8 Sar. 447. [R., 8 O.C. 193.]

(75)—*Destruction of mortgaged property by vis major—Stipulation in mortgage-deed for payment to mortgagee of cost of restoring.*—The deed of mortgage in this case, itself provided for the mortgagee rebuilding the mortgaged house if it should be destroyed by 'asmani' or 'sultani' and this provision was construed to imply that the repayment of the amount, if any, expended by the mortgagee for such purpose was a condition precedent of redemption by the mortgagor. The mortgaged house was destroyed by fire originating in another part of the village and spreading ultimately to the house in question, and such destruction was held to be in the nature of a calamity from heaven within the meaning of the term 'asmani' used in the mortgage deed. Also the cost of rebuilding the house under such circumstances, should, even on general principles, be allowed to the mortgagee. *SAKHARAM SHET v. AMTHA DEVJI GANDHI*, 14 B. 28.

(76)—*Putnee — Contract — Consideration — Equitable relief.*—The defendants executed a deed to the plaintiffs, stipulating that the amount borrowed thereunder without interest should be re-paid on a given date, and that, in case of default, they (the defendants) should execute a putnee lease of certain properties to the plaintiffs, original sum borrowed being considered as a bonus for the lease. The deed also recited that, if the defendants did not execute the lease, the deed should be counted as a putnee patta. The defendants neither repaid the debt on the stipulated date nor executed the lease. The plaintiffs sued for possession. *Held* that the transaction was not a conditional sale, but a contract to create a putnee in favour of the plaintiffs on a certain date and for a certain consideration, unless that sum is paid without interest on a particular date and that the plaintiffs were entitled to possession of the properties recited in the deed on the footing of a putnee, such possession commencing from date of suit. *Held* further that plaintiff was entitled to relief even though he might have asked for something to which he was not strictly entitled, and that the Court could in equity, relieve the defendants upon payment of the original sum with interest from the date of advance, even if the bonus claimed be deemed inadequate. *JUSSEE-MOODDEEN BISWAS v. HURO SOONDUREE DOSSEE*, 19 W. R. 274.

See CIV. PRO. CODE, 1908, O. IX, r. 13, 1 A.L.J. 470.

Mortgage—continued.**—4.—Construction of mortgage deeds—concluded.**

See EVIDENCE ACT, 1872, s. 92, U.B.R. 1902–1903, Vol. II, Evidence 1, 2 L.B.R. 1.

Old debt mentioned in mortgage-deed—Clause undertaking to pay off the same before taking property back—Redemption conditional on payment of both debts—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 12 B. 231.

Post diem interest allowed as damages not chargeable on property—*See* INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 18 A. 316=A.W.N. 1896, 78.

Mortgage deed — Construction — *Post diem* interest not expressly provided for, Payability of, dependent on terms and conditions in the deed—*See* INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 19 A. 39=23 I.A. 138=1 C.W.N. 52, P.C.

See INTEREST—SPECIAL CASES, A.W.N. 1881, 108, A.W.N. 1883, 143.

See LIMITATION ACT, 1908, art. 132, 22 B. 107.

See LIMITATION ACT, 1908, art. 148, 14 B. 113.

Construction of covenant in a usufructuary mortgage for a payment of *kist* by mortgagee construed as referring to the *kist* payable under the settlement in force at the date of the mortgage—*See* MORTGAGE—GENERAL, 16 M. L. J. 28.

See MORTGAGE — REDEMPTION, 5 O.C. 155.

Case in which the plaintiff-pre-emptor was allowed to prove by evidence *aliunde* that a deed of simple mortgage and a lease together represented a transaction of usufructuary mortgage—*See* PRE EMPTION — CONSTRUCTION OF WAJIB-UL-ARZ, 3 A.L.J. 215=A.W.N. 1906, 82=28 A. 454.

See PRIVY COUNCIL, PRACTICE OF — CONCURRENT JUDGMENTS ON FACTS, 8 M. J. 149.

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 1 O. C. 191.

See TRANSFER OF PROPERTY ACT, 1882, s. 72, 20 A. 401=A.W.N. 1898, 90.

Whether the transaction of a sale and covenant by vendee for re-sale to vendor amount to a sale or a mortgage—*See* VENDOR AND PURCHASER—GENERAL, 16 M. L. J. 106=29 M. 307.

When *zur-i-peshgi* lease, an usufructuary mortgage—*See* ZUR-I-PESHGI LEASE, 12 C.P. L. R. 96.

—5.—Foreclosure.

See MORTGAGE—REDEMPTION.

(1)—*Right of mortgagee to sue for foreclosure.*—It is competent to a mortgagee to

Mortgage—continued.**—5.—Foreclosure—continued.**

institute a suit for foreclosure of his mortgage. **VENKATACHELLAM PILLAI v. THIRUMALA CHARY, 2 M.H.C. 289.** [R., L.B.R. 1872—1892, 1, 4 M. 179.]

(2)—*No consideration passed for mortgage—No mortgage-debt and no foreclosure.*—Where money has not been paid for a mortgage, there is no mortgage debt and therefore there cannot be a foreclosure of the mortgage. **DHANNU-LAL v. NATHURAM, 3 C.P.L.R. 131.**

(3)—*Mortgage—Foreclosure decree—Effect.*—A foreclosure-decree only affects the interest of the parties to the suit. **SRIMATI ANAND-MAYIDASI v. DHONENDRACHANDER MOOKERJEE, 8 B.L.R. 122, P.C. = 14 M.I.A. 101 = 16 W.R. P.C., 19.** [R., 28 B. 153 = 5 Bom. L.R. 892.]

(4)—*Mortgage after foreclosure.*—The legal position of a mortgagee after foreclosure is not impugnable except for collusion and fraud. **BABOO GOOROODOSSROY v. ROMANEE SOONDAREE DASSIA, 1 W.R. 272.** [Reversed, 17 W.R. 9.]

(5)—*Mortgage suit between Hindus—Foreclosure decree in Supreme Court—Effect.*—The effect of a foreclosure decree in the Supreme Court in a mortgage suit, between Hindus is equivalent to a decree establishing proprietary right in the Company's Courts, on similar suits on the like instruments. **NAWAB SIDHI NAZIR ALI KHAN v. OJODHYARAM KHAN, 5 W.R. P.C. 83 = 10 M.I.A. 540 = Suth. P. C. 635.**

(6)—*Decree dealing with different interests of mortgages as between themselves—Mortgagor not to be vexed again in respect of same mortgage.*—As an ordinary rule, a foreclosure suit must be a suit applicable to the whole property mortgaged and a mortgagor is not to be held liable to a variety of suits and proceedings in respect of the different interests which the mortgagees may as between themselves possess. As the rights of all parties under a mortgage might be fully and finally dealt with in a suit properly framed a decree in such a suit concludes the whole matter and the mortgagor cannot be further vexed in respect of the mortgage. **DHIRAJ SINGH v. MT. KALO, 7 C.P.L.R. 147.**

(7)—*Right of mortgagee after foreclosure to recover rent due under lease to mortgagor.*—A mortgagee, after a decree for foreclosure has been made absolute, is entitled to sue the lessees of the mortgagors for rent for the period due both prior and subsequent to the foreclosure decree. **DEOKARAN PRASAD v. SHEOCHARAN, 7 C.P.L.R. 126.**

(8)—*Decree for foreclosure—Delivery of possession for non-payment within time—No formal decree or order passed—Validity of delivery of possession.*—Where money payable under a conditional decree for foreclosure is not paid within the time fixed and, in consequence, the decree-holder is placed in possession of the

Mortgage—continued.**—5.—Foreclosure—continued.**

property in question, such possession cannot be disputed, because a formal decree or order for foreclosure has not been passed. **BALDEO KISHNI RAM MALIK BISANDASS v. ABHIMAN POONDALIK, 12 C.P.L.R. 103.**

(9)—*Right of mortgagor to collect rent due up to date of decree being made absolute.*—So long as a decree for foreclosure is not made absolute, the ownership of the mortgaged property continues to be vested in the mortgagor and he is entitled to exercise all rights appertaining to such ownership, provided he does no act which would render the security insufficient. He is therefore entitled to all rents which have accrued due up to the date of the decree being made absolute. **SINGAI GOPAL SAO v. MEHTAB BI, 9 C.P.L.R. 130.**

(10)—*Lands taken in execution of decree for possession after foreclosure, suit not sustainable for the recovery of.*—The lands in dispute were included within the lands claimed by the defendant B.P. as given in the plaint filed by him for possession after foreclosure of two mortgages by certain Mahomedans, all whose lands were claimed by the plaintiff as purchased subsequent to the said mortgages by the plaintiff's ancestor. The then claim of the defendant B.P. was decreed without an exception on the ground of the boundaries exceeding the lands mortgaged or encroaching upon the lands of the said ancestor of the plaintiff. The High Court held that the evidence in the present suit established that it was certain that in the execution case brought by the defendant under his decree, the lands in dispute were respectively claimed and denied, to be included in his decree, and were, after the passing of Act VIII of 1859, made over to the decree-holder as part of the decree. Whatever, therefore, might be the merits of the claim of the plaintiff the present suit would not lie as for the recovery of possession of the lands in dispute, because, it was not established that, in prior execution proceedings, besides the lands which the plaintiff allowed were the decreed lands, his ancestor, as he alleged, lost only the *lakheraj* portion, so that the lands in dispute had not been formally made over in execution but were otherwise taken possession of by the defendant. The lands in suit having thus passed in execution of the decree for possession after the foreclosure of the mortgage, the present suit was not maintainable for the recovery of possession of such lands. **CHUNDER COOMAR ROY v. PRANNATH ROY CHOWDHRY, 2 W.R. 300.**

(11)—*Agreement between mortgagor and other parties—Agreement by mortgagor to sell to no one but a particular person—Bona fide mortgagee without notice not affected by.*—Plaintiff sued on the allegation of a mortgage by conditional sale for valuable consideration from one M, defendant, and the mortgage was duly foreclosed. M did not object to the claim of the plaintiff, but one T, a co-parcener, intervened and contested plaintiff's right alleging that

Mortgage—continued.**—5.—Foreclosure—continued.**

before the mortgage T and M had entered into an agreement sanctioned by a Court's decree to the effect that the property in suit should not be sold by M to any one other than T. Both the lower Courts held that the plaintiff's mortgage was *bona fide* and there was no evidence of his having had notice of T's alleged agreement with M, and decreed that T may obtain possession on paying the plaintiff what was due on his mortgage. The contention advanced on second appeal that plaintiff, as *bona fide* mortgagee without notice who had foreclosed, was not affected by any arrangement made between defendant M, and other parties, but that the mortgage must stand, was held by the High Court to be sound and valid. In the absence of any evidence of plaintiff having entered into the mortgage with notice of the prior arrangement with T, plaintiff would be entitled to a decree. Also, if the agreement with T invalidated the mortgage to M, the latter took nothing by his mortgage, and T was under no legal obligation to satisfy. If, on the other hand, the mortgage was, under the circumstances, not affected by the prior alleged agreement with T, the plaintiff was entitled to the possession he sought. **RAMDOOLUB DAY v. MOHANUND DUTT, 2 W. R. 64.**

(12)—*Effect of—Interest of vendee by conditional sale—Obiter.*—Up to the time of the foreclosure becoming absolute, the interest of the vendee by conditional sale amounts only to securing his money and he holds the land simply as security. The effect of foreclosure is to put an end to the original conditional sale and to make the property the immoveable property of the person, who advanced the money, from the commencement. **SHAM NARAIN SINGH v. RUGHOOBURDYAL, 3 C. 508 = 1 C.L.R. 343.**

(13)—*Mortgage — Foreclosure — Mortgaged property, purchaser of share.*—Certain property was mortgaged to S, who disposed of a portion to R. After foreclosure-proceedings by S, both S and R sued to recover possession. The lower appellate Court dismissed the claim as regards R's portion, because R had not been a party to the foreclosure-proceedings. Held that, as the foreclosure was duly carried by "the receiver" of the deed of mortgage (s. 8, Reg. XVII of 1806), that is, the original mortgagee, it was good as regards the whole property, and conferred an absolute title on the mortgagee or anybody claiming under him. **RAJCHANDRA PODDAR v. SRIMATI MANORAMA, 3 B. L.R. App. 148 = 12 W.R. 353.**

(14)—*Mortgagee — Foreclosure decree.*—A foreclosure decree cannot give the mortgagee a title against a person who was not a party to the suit and cannot of itself deprive him of the right to redeem, which, if he has purchased a portion of the property mortgaged, he acquired by the purchase. **KHELUT CHUNDER GHOSE v. TARA CHURN KOONDOO CHOWDHRY, 1 W. R. 175.**

Mortgage—continued.**—5.—Foreclosure—continued.**

(15)—*Compromise between mortgagor and mortgagee — Breach by mortgagor — Right of mortgagee to fall back on mortgage rights.*—When, during the currency of the year of grace, after foreclosure proceedings had been applied for, the mortgagor and the mortgagee entered into a compromise, by which a portion of the mortgaged property was to be transferred to the mortgagee and the mortgagor was not to claim the *sur* lands appertaining to the mortgaged property, and the mortgagee was to give up his claim to the other portions of the property arising out of the mortgage and the foreclosure proceedings, the failure of the mortgagor to give effect to the compromise, would entitle the mortgagee to fall back on his equities under the mortgage and the foreclosure proceedings taken thereunder. **DHODHNA RAI v. MEGHU RAI, 4 A. 332 = A W.N. 1882, 56. (N.W.P. 1869, p. 22, F.)**

(16)—*Suit for foreclosure by prior mortgagee — Foreclosure decree made absolute — Puisne mortgagee not made party—Right of puisne mortgagee to foreclose his mortgage.*—Where a prior mortgagee obtained a conditional decree for foreclosure and had his decree made absolute, a puisne mortgagee, who was not made a party to the suit by the prior mortgagee was not prevented from instituting a suit foreclosing his own mortgage. **SETH GHASI RAM v. JAWAHIR SINGH, 11 C.P.L.R. 75. (3 C.P.L.R. 82, D.; 13 A. 432, 18 A 83, 23 C. 795, 20 M. 120, R.) [R., 12 C.P.L.R. 125.]**

(17)—*Mortgage — Foreclosure.*—When the whole of a mortgage debt is due to the persons claiming under the mortgage, jointly and not severally, there cannot be a foreclosure as to a portion of the mortgage, and a suit for possession of a portion of the mortgaged property is not maintainable. **BISHAN DIAL v. MANNI RAM, 1 A. 297. [Appr., 9 A. 68, F.B. = A.W.N. 1886, 298; D., 3 M.L.J. 176; R., 19 M.L.J. 221, 17 M. 12.]**

(18)—*Joint mortgage — Foreclosure as to a portion.*—Where a mortgage is clearly a joint one, and the whole property mortgaged is made liable for the whole debt, without any specification that a particular portion of the property is liable for a particular portion of the debt, the mortgagee cannot claim to foreclose a portion of the mortgage against some of the mortgagors exempting the rest. Such a foreclosure proceeding is irregular, and a suit for possession based on it is not maintainable. **CHANDIKA SINGH v. POHKAR SINGH, 2 A. 906. [Diss., 28 A. 174, F.B. = 2 A.L.J. 630 = A.W.N. 1905, 244; R., 3 C.P.L.R. 3, 3 O.C. 8, B.; D., 15 B. 186, 5 A. 257 = A.W.N. 1883, 10.]**

(19)—*Joint mortgage by conditional sale of two villages—Separate sales of the equity of redemption — Foreclosure in respect of one village.*—Where the equity of redemption is split up by the mortgagor selling it to several persons, the mortgagee can foreclose the mortgage in respect of a portion of the mortgaged

Mortgage—continued.**—5—Foreclosure—continued.**

property at a proportionate valuation. **BISHESHAR SINGH v. LAIK SINGH, 5 A. 257 = A.W.N. 1883, 10 (2 A. 206, D.) [R., 20 A. 23, F.B., 6 C.L.J. 46.]**

(20)—*Mortgage—Foreclosure in respect of part.*—Plaintiff, as a member of a joint Hindu family, alleged that he was one of the parties interested in a mortgage executed in the name of his co-sharers, and sued to establish his right to his interest in the mortgage and he subsequently issued a notice of foreclosure to the extent of his fractional share in the mortgage and then instituted the present suit to recover possession of the share, foreclosure having been completed according to law. It was held however that there had been no foreclosure of the mortgaged property as required by law, there being no authority that any one of the several parties interested in a mortgage is at liberty to foreclose in respect of his fractional share. No valid foreclosure having thus taken place, plaintiff was not entitled to sue for possession. Moreover, it was incumbent on the plaintiff to show that the mortgagor had notice of plaintiff's interest and there was no evidence to that effect. **BHORA ROY v. ABILACK ROY, 10 W.R. 476. [F., 1 A. 297; Appr., 9 A. 68, F.B. = A.W.N. 1886, 298.]**

(21)—*Mortgage-bond—Validity—Payment of part of consideration—Decree for foreclosure.*—Suit to enforce a mortgage under a conditional deed of sale. The principal money mentioned in the mortgage was Rs. 500, but the amount advanced was only Rs. 279. *Held*, a mortgage-bond does not cease to be enforceable, merely because a part only of the money mentioned in the bond has been advanced. When it was not shown that the mortgagor had cancelled the contract or had the power to cancel it. *Held*—that the mortgagee was entitled to a decree for foreclosure upon the footing of the money actually advanced. **MUNSHI BAJRANGI SAHAI v. UDIT NARAIN SINGH, 10 C.W.N. 932. (18 M. 136, D.)**

(22)—*Mortgage by conditional sale—Mortgage void as contravening s. 257-A, Civ. Pro. Code in respect of part consideration—No right to foreclosure for balance of consideration.*—Where a mortgage by conditional sale was executed partly in satisfaction of a decree and partly for an advance of money then made and the mortgage became void for non-compliance with the provisions of s. 257-A, Civ. Pro. Code, 1882, the mortgagee was entitled to get a money decree in respect of the cash advanced but would not foreclose. If he were allowed to foreclose, he would get for a part of the consideration what it was agreed he should only get for the whole. **PEMA v. DURGOO KACHI, 2 C P.L.R. 243.**

(23)—*Reg. XVII of 1806, s. 8, conditions precedent to foreclosure proceedings under, necessity of strict compliance with—Demand of mortgage money—Transfer of Property Act (IV of 1882).*—The provisions as to the procedure to

Mortgage—continued.**—5.—Foreclosure—continued.**

be followed in foreclosure proceedings under Reg. XVII of 1806 are not merely directory. Strict compliance with the conditions prescribed therein is a necessary precedent to the right of the conditional vendee to claim the forfeiture of the conditional vendor's right. The various requirements of the Regulation have to be strictly observed in order to entitle a mortgagee to come into Court and assert an absolute title to the property of the mortgagor. (3 C. 397 = 5 I.A. 18, 11 C. 111 = 11 I.A. 186, F.) In the present case the provisions of the Regulation had not been strictly observed and the plaintiff failed to establish that he had strictly followed them. It was also held that this suit could not be treated as one instituted under the Transfer of Property Act so as to grant the plaintiff the relief he would be entitled to by that Act, since, that would be countenancing an entire change in the nature and character of the suit from the shape in which it was originally instituted. **SITLA BAKSH v. LALTA PRASAD, 8 A. 388 = A.W.N. 1886, 140. [R., 11 A. 164, 20 B. 759.]**

(24)—*Mortgage, foreclosure of—Reg. XVII of 1806, s. 8, imperative and not merely directory—Service of the copy petition for foreclosure and of the parwana signed by the Judge, is essential.*—The provisions of s. 8 of Reg. XVII of 1806 are not merely directory, but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object the protection of mortgagors from fraud and oppression. The prescribed procedure must be strictly followed. (3 C. 397 = 5 I.A. 18, F.) It was therefore held in the case that, though the mortgagor, at the hearing of the foreclosure suit in the first Court, had not insisted on the insufficiency of the notification of the mortgagee's application for foreclosure, but had relied on another defence, it could not be construed as a binding admission that notice had been duly given; and that the mortgagor was not precluded from questioning the regularity of the proceedings in his subsequent appeal. **MADHO PERSAD v. GAJADHAR, 11 C. 111. P.C. = 11 I.A. 186. [F., 8 A. 388 = A.W.N. 1886, 140, 162 P.L.R. 1903 = 71 P.R. 1903; Cited, 48 P.R. 1902 = 63 P.L.R. 1902; R., 16 P.R. 1888, 11 A. 164 = A.W.N. 1889, 48, 16 A. 59, 9 O.C. 147, 46 P.R. 1907, 105 P.R. 1907; D., A.W.N. 1906, 309 = 3 A.L.J. 857 = 29 A. 145.]**

(25)—*Mortgage by conditional sale—Mortgage money not paid at stipulated time—Foreclosure—Suit for possession—Commencement of proceedings under Reg. XVII of 1806 before Act IV of 1882 came into force—General Clauses Act, I of 1868, s. 6.*—This was a suit for possession of certain immoveable property, which the plaintiff alleged that the defendants had mortgaged to him by a deed of conditional sale, dated 21st October, 1881. The plaintiff stated that, as the mortgage money was not paid at

Mortgage—continued.**—5.—Foreclosure—continued.**

the stipulated time, his title to the mortgaged property had become absolute by virtue of proceedings taken by him under Regulation XVII of 1806. The Court of first instance dismissed the claim holding that there was no evidence that the mortgage money was paid, and that, until that was proved, the foreclosure proceedings were void. The lower Appellate Court set aside the decree of the first Court on the ground that the defendant had admitted the receipt of the mortgage money and that the foreclosure proceedings had been properly conducted. In second appeal to the High Court, it was contended for the defendants that the case was governed, not by the provisions of Regulation XVII of 1806, but by those of the Transfer of Property Act, IV of 1882. *Held*, dismissing the appeal, that Regulation XVII of 1806 was rightly applicable to the case. The plaintiff took proceedings under the Regulation before the Transfer of Property Act came into force. Under s. 6 of the General Clauses Act (I of 1868), the repeal of the Regulation by the Act did not affect proceedings commenced under the Regulation, nor could the Act affect the right to the property which the plaintiff had obtained under the Regulation before the Act came into force. **GOKUL SINGH v. BIRJ LAL, A.W.N. 1885, 130.** [R., 32 A. 499=7 A.L.J. 420=6 Ind. Cas. 188.]

(26)—*Transfer of Property Act, 1882, procedure in, applicability of, to mortgages before the Act—Reg. XVII of 1806.*—The procedure laid down in the Transfer of Property Act is applicable to the case of foreclosure of mortgage executed before the Act came into force, subject to the restriction that the rights saved by s. 2 of the Act are not affected. (6 A. 262, *partially approved*.) In this case, a decree to a mortgagee, who had taken proceedings under Reg. XVII of 1806, was allowed to be granted in the terms of s. 86 of the Transfer of Property Act, substituting, however, the period of "one year" for the period of "six months" mentioned therein. **PERGASH KOER v. MAHABIR PERSHAD NARAIN SINGH, 11 C. 582.** [Overruled, 12 C. 583; D., 13 C. 50; Cons., 14 C. 451, 14 C. 599.]

(27)—*Mortgage by conditional sale—Suit for foreclosure—Reg. XVII of 1806—Transfer of Property Act, s. 2, cl. (c)—Procedure.*—Where the year of grace, upon a notice served on the mortgagor, in respect of a mortgage by conditional sale, under Reg. XVII of 1806, expired a few days after the Transfer of Property Act came into force: *held*, the Act did not regulate the procedure applicable to the case, the mortgagee having acquired the right to bring a suit under the Regulation at the expiration of the year of grace, and the mortgagor being under a liability to part with the property upon suit, and such right and liability coming under cl. (c), s. 2 of the Transfer of Property Act. **MOHABIR PERSHAD NARAIN SINGH v.**

Mortgage—continued.**—5.—Foreclosure—continued.**

GUNGADHUR PERSHAD NARAIN SINGH, 14 C. 599. (6 A. 262, 11 C. 582, 12 C. 583, 14 C. 451, R.) [F., 15 C. 357; R., 2 C.P.L.R. 130, 20 B. 759.]

(28)—*Reg. XVII of 1806—Suit for foreclosure—Procedure—Transfer of Property Act, s. 2—Act I of 1868 (General Clauses).*—Where the deed of conditional sale was executed and the due date expired while the Regulation was still in force, and notice of foreclosure was also served while the Regulation was in force, but when the year of grace expired the Regulation had been repealed by the Transfer of Property Act, *held* that foreclosure proceedings having been commenced under the Regulation they were saved by s. 6, Act I of 1868. **UMESH CHUNDER DAS v. CHUNCHUN OJHA, 15 C. 357.**

(29)—*Passing of Act IV of 1872—State of law before—Foreclosure proceedings.*—No separate preliminary application for foreclosure is necessary before the enactment of Act IV of 1872 (Punjab), to perfect the title of mortgagee as purchaser. **GANPAT v. FATTEH SINGH, 171 P.R. 1882.** (29 P.R. 1876, F.B., D.; 1 P.R. 1881, R.) [R., 171 P.R. 1885.]

(30)—*Reg. XVII of 1806, s. 8—Mortgage—Foreclosure—Copy of application not given to mortgagor.*—S. 8, Reg. XVII of 1806, requires that, when a mortgagee is desirous of foreclosing a mortgage, a written petition should be presented to the Court, and that the Judge, on receiving such written application, should cause the mortgagor or his legal representative to be furnished with a copy of it, and at the same time notify to him by a purwanna under his seal and official signature that, if he does not redeem the property mortgaged within one year from the date of the notification, the mortgage will be finally foreclosed. A mortgagee who has not fulfilled one of these conditions (as for instance, who has not furnished the mortgagor with a copy of the written application) is not entitled to foreclose. **SANTEE RAM JANA v. MODOO MYTEE, 20 W.R. 363.** [Appr., 2 C. 311.]

(31)—*Beng. Reg. XVII of 1806—Right to take foreclosure proceedings—Demand from mortgagor.*—A demand from the mortgagor or his representative is a condition precedent to the right to take foreclosure proceedings, under Reg. XVII of 1806. **GONESH CHANDRA PAL v. SHADA NUND SURMA, 12 C. 138.** (3 A. 408, Appr.)

(32)—*Irregular foreclosure proceedings—Demand for payment of mortgage-debt—Dismissal of suit for possession—Direction in decree limiting mortgagee's demand—Reg. XVII of 1806, s. 8.*—Foreclosure proceedings, taken by a mortgagee without previous demand made for payment of the mortgage-debt, are invalid and ineffective, and a suit for possession, based on such proceedings, is liable to be dismissed. The mere fact that the period limited by a

Mortgage—continued.**—5.—Foreclosure—continued.**

mortgage-bond has expired without its being satisfied, does not absolve the mortgagee from the obligation of making a demand for its payment. Where a Court dismisses a suit for possession under the above circumstances, it would be acting improperly in putting any limitation upon the amount to be demanded by the mortgagee from the mortgagor prior to the issue of a notice of foreclosure. Observations by *Stuart, C.J.*, on the capacity of a minor to take a mortgage. *BEHARI LAL v. BENI LAL*, 3 A. 408. [*F.*, 5 A. 9; *Appr.*, 12 C. 138; *R.*, 8 A. 388, 19 M.L.J. 752.]

(33)—*Demand for payment of mortgage money—Regulation XVII of 1806, s. 8.*—Before a mortgagee applies for foreclosure of mortgage, he must make a demand for the payment of the mortgage amount, and there must be a failure on the part of the mortgagor to comply with such demand. Foreclosure proceedings taken without such demand are invalid. *KARAN SINGH v. MOHAN LAL*, 5 A. 9 = A.W.N. 1882, 149. (3 A. 408, *F.*) [*R.*, 8 A. 388, 5 P.R. 1901, 4 A.L.J. 717 = A.W.N. 1907, 266.]

(34)—*Reg. XVII of 1806, s. 8—Demand of mortgage-money—Omission of—Effect in foreclosure proceedings.*—An omission to demand the mortgage amount in the notice to foreclose will vitiate the foreclosure proceedings. *PREMAN v. SARBANDI*, 114 P.R. 1885. (5 A. 9, 11 C. 3, *R.*) [*R.*, 16 P.R. 1883.]

(35)—*Previous demand—Failure to prove in the lower Court—Effect.*—Where, in a suit for possession after the necessary proceedings had been taken under Regulation XVII of 1806, it was found that neither the plaint alleged that there was demand before issue of notice nor did the plaintiff offer to prove it in the lower Court, he cannot offer to prove it in the Appellate Court, as the burden lay upon the plaintiff to prove that everything necessary to be done under the Regulation to complete his title had been done and he had not discharged it. *KIRPA RAM v. BHAGWANA*, 106 P.R. 1889. [*R.*, 46 P.R. 1907.]

(36)—*Suit for possession after foreclosure of—Punjab Alienation of Land Act—Effect of, on such suits—Foreclosure proceedings completed before the Punjab Alienation of Land Act.*—Plaintiff sued for possession of certain land mortgaged to him, under a deed of conditional sale, dated 1892. He alleged that the demand had been duly made, notice duly issued and all proceedings required by Regulation XVII of 1806 duly carried out, so that foreclosure was complete and he had thus become proprietor of the land. He claimed possession in virtue of the proprietary rights thus vested in him prior to the introduction of the Punjab Alienation of Land Act: *Held*, that if all the foreclosure-proceedings had been validly completed before the Punjab Alienation of Land Act came into force, and if the proprietary rights had vested in the plaintiff, the lower Appellate Court ought to decree the claim for possession. If, on the

Mortgage—continued.**—5.—Foreclosure—continued.**

contrary, it be found that the proceedings were invalid or, for any reason, the plaintiff's proprietary right had not become complete before suit, it ought to dismiss the suit. Case in which *Robertson, J.*, discussed the interpretation of the Punjab Alienation of Land Act and the procedure to be observed under that Act. *MELA RAM v. KIMAN*, 38 P.R. 1905 = 89 P.L. R. 1905. (38 P.R. 1904, 103 P.R. 1901, F.B., 20 P.R. 1903, *R.*)

(37)—*Reg. XVII of 1806, ss. 7 & 8—Construction—"Application," meaning of—"Date of notification," meaning of—Issuing of perwannah, meaning of.*—S. 7 of Reg. XVII of 1806 means that the mortgagor shall, before the mortgage is foreclosed, in the manner provided by the s. 8 of the Regulation, be entitled to the redemption of his property if (among other things) the amount due be deposited by him in the Zillah Court within one year (according to the era current where the mortgage may take place) from and after the application of the mortgagee to the Zillah Court for foreclosure in conformity with s. 8. A "mortgagee's application" in s. 7 of the Regulation means the whole transaction contemplated in s. 8, ending with the notification to the mortgagor. Thus, the year of grace for payment and the year necessary for completion of foreclosure commence to run from the date of the notification. "Date of notification" means the date when the perwannah or document of notification is issued by the Court, and not the date when it is served on the mortgagor nor the date when it is signed and sealed. No time should be counted against the mortgagor during which the perwannah, although it may be complete in all respects, is lying idle in the Sherishtah of the Court, and whatever might be the actual date when the Court put its hand to the document, still it is not to be treated as a notification within s. 8 until it has become an active order of Court. A perwannah is first issued when it is handed to the peon for delivery. *SUROOP CHUNDER NAG v. BONOMALEE PUNDIT*, 9 W.R. 116.

(38)—*Reg. XVII of 1806, ss. 7 and 8—Essentials of foreclosure notice.*—S. 8 of the Regulation makes it peremptory that the notice should tell the mortgagor that he must within the year redeem the property, as provided for by the previous section. Non-compliance with the Regulation in this respect would be fatal. *WASAWA SINGH v. RURA*, 24 P.R. 1895.

(39)—*Notice—Reg. XVII of 1806, s. 8.*—The notification under s. 8, Reg. XVII of 1806 is not merely a preliminary proceeding leading up to a judgment of foreclosure to be subsequently pronounced in Court. It not only fixes the date from which the period, during which the mortgagor is to retain the right to redeem, is to be computed, but it is, of itself, the operative act in foreclosure-proceeding. The service of the notice must be evidenced by the clearest proof, and must in all cases, be if not personal, at least such as to leave no doubt on

Mortgage—continued.**—5.—Foreclosure—continued.**

the mind of the Court that the notice itself must have reached the hands or come to the knowledge of, the mortgagors. **SYUD EUSUF ALI KHAN v. MUSSAMUT AZUM-TOONISSA, W.R. 1864, 49.**

(40)—*Reg. XVII of 1806, ss. 7 and 8—Foreclosure—Procedure—Perwannah—What it should contain.*—In order to obtain foreclosure, a mortgagee is required by s. 8 of Reg. XVII of 1806 to apply for that purpose by a written petition to the Judge. The Judge, on receipt of the application, is bound "to cause the mortgagor to be furnished with a copy of it, and at the same time to notify to him, by a *perwannah* under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive." The preceding section, i.e., s. 7, declares the mortgagor entitled to redeem on payment of the principal sum with the interest due thereon. **BHEEKHUN KHAN v. BECHUN KHAN, 3 N.W.P. 35.**

(41)—*Mortgage by conditional sale—Reg. XVII of 1806, s. 8—Defective notice—"Tarikh Itlanama se."*—*Held* (1) "that the notification" referred to in the end of s. 8 of Reg. XVII of 1806 is the time when the mortgagor is noticed that he has a year to redeem and that it does not refer to the date of the *parwana* which orders him to be noticed. (2), that *tarikh itlanama haza se* is not the same thing as *tarikh itlah se*, and this defect is sufficient to invalidate the notice. **GOKALCHAND v. MUHAMMAD MINIR KHAN, 46 P.R. 1904.** (3 C. 397, 36 P.R. 1893, 123 P. R. 1894, 24 P. R. 1895, *Cited.*) [*F.*, 74 P.L.R. 1906.]

(42)—*Reg. XVII of 1806—Conditional purchase—Expiry of year of grace—Right of purchaser to mesne profits.*—The right of a conditional purchaser, who had duly taken proceedings under Reg. XVII of 1806, became absolute on the expiry of the year of grace and he was entitled to claim mesne profits from that date. **JEORAKHUM SINGH v. HOOKUM SINGH, 3 Agra 358.** [*F.*, 6 A. 344=A.W.N. 1884, 110; *R.*, 6 C. 564=7 C.L.R. 583, 14 A. 405, 38 P. R. 1904, 4 A.L. J. 717.]

(43)—*Conditional sale—Foreclosure—Reg. XVII of 1806, s. 8.*—In a deed of conditional sale, it was stipulated (by the 5th clause) that, in the event of the principal sum lent not being paid at the end of 7 years, the conditional sale shall become absolute. By the fourth clause, it was stipulated that, in the event of default of payment of interest in any year, the term of seven years shall be cancelled and the conditional sale shall become absolute, without substituting any new period for the repayment of the principal sum lent. *Held*—(a) that the 4th clause was against the provisions of Reg.

Mortgage—continued.**—5.—Foreclosure—continued.**

XVII of 1806 as it tended to summarily convert a conditional into an absolute sale, in disregard and defiance of the Regulation, (b) that the 5th clause did not dispense with the necessity of complying with the provisions of s. 8 of the Regulation, (c) that, therefore, foreclosure proceedings taken by the mortgagee before the expiration of seven years was irregular, and that his suit for possession in pursuance of such proceedings was not maintainable. **IMDAD HUSAIN v. MANNU LAL, 3 A. 509.** [*F.*, 3 A. 557; *R.*, 16 A. 59.]

(44)—*Foreclosure of mortgage by tenant—Right of mortgagee to be placed in possession.*—Where the mortgagee of an occupancy holding made without the consent of the landlord foreclosed the mortgage, he could not assert his right to be placed in possession either as against the landlord or against a person claiming from him. **SUKHA GANDA v. CHAMRA SASPASTHY, 17 C P.L.R. 29.** (11 C.P.L.R. 138, *F.*)

(45)—*Conditional sale—Decree for redemption on payment of amount—Non-payment within three years from date of decree—Rights of vendor and vendee.*—The conditional vendees of certain land foreclosed and the vendor sued to have the foreclosure proceedings set aside and to redeem the land, and obtained a decree on 12th April, 1878, setting the foreclosure proceedings aside, and for the possession of the land, conditional on the payment of Rs. 216 within three years from the date of the decree. The plaintiff attached the land in execution of a decree against the vendor. The vendees objected claiming the land as their own, and this objection was allowed. The vendor did not deposit the money within three years from the date of the decree. The plaintiff sued the vendees to establish her right to bring the land to sale as belonging to the vendor. *Held* that, as the vendor had no subsisting rights, when the defendants objected to the attachment, in the land attached, the plaintiff could never assert with success any title to the land. **ABDUL KADIR v. BAHAL, A.W.N. 1882, 117.**

(46)—*Suit for possession by mortgagee entitled to foreclosure also, maintainability of—Civil Procedure Code, Act XIV of 1882, ss. 42 and 43.*—Where, at the date of suit, the mortgagee was, under the terms of the mortgage deed, entitled both to possession as mortgagee and foreclosure, *held*, that he could maintain his suit for possession without suing for foreclosure. **MUSTAFA ALI KHAN (RAJA) v. GANGA BAKSH SINGH, 12 O.C. 21=1 Ind. Cas. 327.**

(47 & 48)—*S. 8, Reg. XVII of 1806—Mortgage by conditional sale—Stipulated period—Covenant accelerating payment.*—Under s. 8, the right of the mortgagee by conditional sale to petition for foreclosure does not arise, until the period stipulated in the proviso for redemption has expired. That period is not affected or altered by a contract in the mortgage deed, making

Mortgage—continued.**—5.—Foreclosure—continued.**

without reference to redemption the whole principal lent become due upon failure to pay interest at a certain time. A separate stipulation which, for other purposes, accelerates the time at which the principal is to become due and makes no provision for the mortgagor making payment for avoiding compensation, cannot be taken into account in considering what are to be regarded as the "stipulated period." *KISHORI MOHUN ROY v. GANGA BAHU DEBI*, 23 C. 228 = 22 I.A. 183, P.C. = 5 M.L.J. 261 = 6 Sar. 649. (5 B.L.R. 389, 21 W.R. 274, Appr.) [F., 50 P.R. 1906; R., 119 P.R. 1906 = 81 P.L.R. 1907, 70 P.R. 1907 = 33 P.L.R. 1908.]

(49)—*Mortgage—Foreclosure—Agreement between mortgagor and mortgagee—Breach by mortgagor—Right of mortgagee to revert to foreclosure proceedings.*—After foreclosure proceedings had been applied for by a mortgagee under Reg. XVII of 1806, he entered into an agreement (*sulehnama*) with the mortgagor by which the term of grace was extended in consideration of the mortgagee obtaining security for an unsecured bond, and possession of a larger part of the seer land in lieu of interest. *Held*, in a suit by the mortgagee on failure of the mortgagor to pay the mortgage-money according to the agreement, that he (the mortgagee) was entitled to revert to the foreclosure proceedings which he had taken, and in which he had done all that by the Regulation he was required to do. *LALL DHUR RAE v. GUNPUT RAE*, 1 N.W.P. 81. [F., 4 A. 332 = A. W.N. 1882, 56, 26 M. 680.]

(50)—*Mortgage—Notice of foreclosure—Subsequent compromise between parties—Construction of compromise.*—On default of payment of the mortgage-debt in this case according to the terms of the mortgage contract, the mortgagee issued notice of foreclosure and the notice was served upon the mortgagor. The mortgagor and mortgagee having come to a certain arrangement during the currency of the year of grace, both of them filed petitions in the foreclosure proceedings setting forth the above arrangement, as to a payment in part having been made and accepted and as to the balance having to be paid and accepted on the date of the expiry of the year of grace, in default of which payment, the sale should become absolute. *Held* upon a right construction of the petitions filed by the parties, that there was no intention to substitute an entirely new contract for the one under which the notice of foreclosure issued, or to allow the proceedings towards foreclosure to drop. *GOONOMONEE DOSSIA v. PARBUTTY DOSSIA*, 10 W.R. 326.

(51)—*Subsisting mortgage—Suit for redemption—Limitation—Mortgagee originally out of possession—Subsequent possession—Under parol contract—Fresh title—Title of mortgagee—Opportunity given to mortgagor to contest—Proceedings sufficient to effect foreclosure.*—A mortgage not having legally been put an end to and 60

Mortgage—continued.**—5.—Foreclosure—continued.**

years not having elapsed since the last recognition of the mortgage by the mortgagee, the mortgagor or his representatives can claim to redeem it. The question for the Court to decide in such a case is therefore simply this, whether or not the original mortgage relied on by the plaintiffs had come to an end. Where a person who has been originally a mortgagee out of possession has been put into possession by the act and permission of the mortgagor, inasmuch as a parol contract is treated as enough in India to pass immoveable property, he should be taken to have really obtained a new title altogether different from that which he possessed before and having its foundation in the act of the parties themselves when they put him into possession. The proceedings in this case were those held before the issue of the Circular Order of 22nd July 1813. The mortgagor had an opportunity in a Court competent to decide the matter, to contest, as against the mortgagees, all questions of fact necessary to give a good and absolute title to them. He had such opportunity and was, in fact, called upon, if he could, to show that the mortgagees were paid off or that the mortgage was a bad one or that the year of grace had not elapsed. This he did not do, but on the other hand, admitted that the money was not paid and that the extension of the year of grace had elapsed without his having performed any conditions which would have saved the property from being foreclosed. It was *held* that, under the circumstances, whether the proceedings amounted to a regular suit or not, they were in themselves sufficient to effect a valid foreclosure. *RUNJEET NARAIN SINGH v. MUSSUMMAT SHUREEFOONISSA*, 10 W.R. 478.

(52)—*Mortgage—Profits to be taken in lieu of interest—Suit by mortgagee after term to recover mortgage-money maintainable—Demand and refusal—Cause of action.*—A mortgage of a village had been effected for seven years, under the terms of which the mortgagee was to remain in possession of the village and was to take the profits in lieu of interest, until redemption. When the mortgagee sued to recover the mortgage-money, after the expiry of the term, the mortgagor contended that the mortgagee was not entitled to recover his money, so long as his possession was not interfered with, and that he must wait for the recovery of the principal until he (the mortgagor) chose to redeem. *Held* that the mortgage was security for the repayment of the debt after the fixed term had expired, and that, during the currency of the term the mortgagor could not redeem, nor could the mortgagee recover his money, but that when the term had expired, either party could bring the transaction to a close. (5 N.W.P. App. 2, F.) [Not F., 11 A. 367 = A. W.N. 1889, 140.] Where there is a covenant on the part of the mortgagor to repay the money on the expiry of the term, which covenant he has failed to perform, no demand of

Mortgage—continued.**—5.—Foreclosure—continued.**

payment and refusal is necessary to give the mortgagee a cause of action against the mortgagor. **RANEE GANESH KOOER v. DEEDAR BUKSH, 5 N.W.P. 128.**

(53)—*Usufructuary mortgage—Interest not stipulated for—Construction—Covenant to pay at specified time—Effect.*—Where there is no stipulation for interest in a usufructuary mortgage-deed, the mortgagee is not entitled to interest, but the usufruct goes in lieu of interest. The effect of a stipulation as to re-payment of the mortgage amount at a specified time is, that the mortgagee would be entitled to foreclose his mortgage at such time if the amount is not re-paid. **GUNGA PERSHAD ROY v. BIBEE ENAYET ZAHARA, 16 W.R. 251.**

(54)—*Reg. I of 1798, s. 2 — Reg. XXXIV of 1803, s. 12 — Mortgage — Foreclosure.*—The "stipulated period" referred to in s. 2, Reg. I of 1798, and s. 12, Reg. XXXIV of 1803, is the whole period prescribed by the mortgage contract for the performance of conditions upon the fulfilment of which the mortgagor is entitled to a re-conveyance; and whether the mortgagor performs all those conditions or not, the application for foreclosure cannot be made before the expiration of such period. **SRIMATI SARASIBALA DEBI v. NAND LAL SEN, 5 B.L.R. 389=13 W.R. 364.** [Appr., 23 C. 228=22 I.A. 183, P.C.; Cons., 2 C. 311; R., 12 C. 614, 16 A. 59=A.W.N. 1893, 209; D., 21 W.R. 274.]

(55)—*Hindu Law—Mortgage of husband's property by widow without legal necessity—Previous gift of same property—Suit by mortgagee against widow and son of donee for recovery of debt by sale of hypotheca—Gift found to be inoperative—Remand for determining nearest reversioner improper.*—A Hindu widow who had made a gift of her husband's property to a reversioner, mortgaged it to one J without any legal necessity. When the mortgagee applied to the Collector for mutation of names, it was not allowed owing to the objection of B, the son of the donee, who claimed to have been in possession of the property from his father's time. Thereupon the mortgagee sued to recover the mortgage-debt by sale of the hypotheca. The Court of first instance, holding that B had fully proved his own and his father's possession under the deed of gift, exempted the property from sale, but decreed the claim against the widow personally. The lower appellate Court in appeal, after finding that the widow had full possession of the property mortgaged, that the gift in favour of B's father never operated, and that the widow had not borrowed money for any cause allowable by Hindu law, remanded the case to determine who was the nearest reversioner. On special appeal to the High Court, held that the lower appellate Court was in error in remanding the case under s. 351, Act VIII of 1859, to try the above issue, for,

Mortgage—continued.**—5.—Foreclosure—continued.**

whoever was the reversioner, his rights could not be prejudiced, as the hypothecation of the property was for a debt not sanctioned by the Hindu Law, and the property could not be sold in satisfaction of that debt, her interest in it being only limited. In the result, the claim of the plaintiff as brought was decreed with costs. **BULAKI SINGH v. JAI KISHEN DAS, 7 N.W.P. 203.**

(56)—*Promise to re-pay mortgage money in instalments—Agreement to treat mortgage as sale in default of paying instalments—Application of Reg. XVII of 1806—Meaning of the term "stipulated period" in s. 8 of the regulation.*—Reg. XVII of 1806, does not apply to the case of a mortgage, in which there is no stipulated period for redemption, but there is a condition that the mortgage debt is to be repaid in annual instalments, and that on default the land should be deemed to have been sold for the balance due at the time of default. (50 P.R. 1906, F.) The term "stipulated period" in s. 8 of the regulation means stipulated period for redemption, i.e., the full term, on the expiry of which the mortgage money is payable, although the mortgagee may, on a default being made, sue to foreclose at an earlier period under the terms of the deed. A foreclosure notice issued before the expiry of the stipulated period is premature and useless. **HAR GOPAL v. BHAGWAN SAHAI, 70 P.R. 1907=38 P.L.R. 1908.** (23 C. 228, P.C., F.)

(57)—*Reg. XVII of 1806, s. 8—Omission of service of notice of foreclosure.*—The omission to serve, on the mortgagor, a copy of the mortgage's application to foreclose, together with the Judge's *Parwana*, is fatal to the plaintiff's suit to recover possession of the mortgaged property after the expiry of the year of grace. The mortgagor should also be precisely informed as to the property or properties respecting which the mortgagee is desirous to foreclose. **THE BANK OF HINDUSTAN, CHINA AND JAPAN, LD. v. SHOROSHIB ALA DEBEE, 2 C. 311.**

(58)—*Suit for possession upon foreclosure—Reg. XVII of 1806, s. 8—Conditions to be satisfied preparatory to relief—Service of notice—Mode of proof—Functions of Judge under the section—Period during which mortgagor may redeem—Mortgagee seeking to foreclose, duty of—Foreclosure of entire estate or of part only thereof—Effect of service of notice on some of the mortgagors—Foreclosure of separate shares mortgaged.*—In an action brought to recover possession as upon a foreclosure, under s. 8 of Reg. XVII of 1806, it is essential for the plaintiff to satisfy the Court that the conditions of foreclosure required by that section, that the mortgagor should be furnished with a copy of the petition referred to therein and should have a notification from the Judge, in order that he may, within a year from the time of such

Mortgage—continued.**—5.—Foreclosure—continued.**

notice, redeem the property, have been complied with. [*R. & F.*, 11 C. 111=11 I.A. 186, P.C.; *R.*, 8 A. 388=A.W.N. 1886, 140, 11 A. 164=A.W.N. 1889, 48.] The service of the notice should be established by evidence and cannot be proved simply by the recorded return of the Nazir on the back of the notice. The functions of the Judge under the section are purely ministerial. (*vide* 10 M.I.A. 340—350.) The year, during which the mortgagor may redeem his property, runs, not from the date of the notice or the issuing of it by the Judge, but from the time of service of the notice. (10 W.R. 27, F.B., *Appr.*) [*F.*, 123 P.R. 1894, 74 P.L.R. 1906; *R.*, 3 A. 770=A.W.N. 1881, 66.] A mortgagee, seeking to foreclose, must discover and serve the persons, who are then owners of the estate. Where it is sought to foreclose the whole estate as upon one mortgage, one debt and one entire right, as against all the mortgagors in the suit, service of notice upon some only of them would not warrant the foreclosure of the whole estate or any part of it. [*R.*, 8 B. 497, 9 B. 128, 10 B. 648, 13 B. 51, 8 M.L.J. 309, 48 P.R. 1902=63 P.L.R. 1902, 4 A.L.J. 717=A.W.N. 1907, 266.] Whether there may not be cases of mortgages of separate shares, in which, by proceedings properly framed, foreclosure may take place in respect of some of such shares only. *NORENDER NARAIN SINGH v. DWARKA LAL MUNDUR*, 3 C. 397=1 C.L.R. 369=5 I.A. 18, P.C.=3 Sar. 771.

(59)—*Reg. XVII of 1806, s. 8—Notice—Service—Requirements.*—A service of notice to foreclose is not duly served, if a copy of the application be served upon the mortgagor's representatives without delivery of the parwana under the seal and official signature of the Judge, notwithstanding that the said representative may be informed of its purport by the process server. *POHLU MAL v. RUKNA*, 32 P.R. 1883.

(60)—*S. 8, Reg. XVII of 1806—Notice—Date of re-payment to be stated.*—A notice under s. 8, Reg. XVII of 1806, must not omit to mention that the mortgage debt is to be paid within one year from the date of notice, or the date on which the year of grace is to expire. *JEWAN MAL v. RAM SINGH*, 36 P.R. 1893. [*Cons.*, 46 P.R. 1904; *R.*, 123 P.R. 1894.]

(61)—*Notice of foreclosure before period for re-payment, whether valid and effective—Regulation XVII of 1806, s. 8, demand by mortgage under, when should be made.*—The question for consideration in this case was whether the notice of foreclosure issued to the mortgagor before the period for redemption with the year of grace actually expired was a valid notice so as to effect the foreclosure at the expiry of the year of grace. *Held*, the mortgage, not being redeemable, and the mortgagee not entitled to

Mortgage—continued.**—5.—Foreclosure—continued.**

payment until after the expiry of the year of grace, any notice before such period could have on effect towards foreclosure. Also the demand by the mortgagee provided for by s. 8, by Regulation XVII of 1806, can be made only after the mortgage money falls due. The further contention in the case, that the regulation cannot extend the stipulated period for payment, was held untenable in view of s. 7 which refers to the year of grace as the "extended period." *SANT SINGH v. JIWAN MAL*; 119 P.R. 1906=81 P.L.R. 1907. (23 C. 228, P.C., *F.*)

(62)—*Mortgage—Foreclosure—Notice under Reg. XVII of 1806.*—The year allowed to a mortgagor, by s. 8 of Reg. XVII of 1806, to deposit the amount of the mortgage-debt before the mortgage can be finally foreclosed, is to be reckoned from the date of the service of the notice under that section, and not from the date of the issue of such notice. *MAHESH CHANDRA SEN v. TARINI*, 1 B.L.R. 14, F.B.=10 W.R. F.B., 27. [*Appr.*, 3 C. 397, P.C.=1 C.L.R. 369=5 I.A. 18; *R.*, 3 A. 770=A.W.N. 1881, 66.]

(63)—*Reg. XVII of 1806—Foreclosure of mortgage—Proof of observance of conditions of Regulation—Effect of absence of notice of foreclosure.*—In order that a mortgagor, who has mortgaged certain land, by way of conditional sale, may be deprived of his right of redemption, by reason of the mortgage having been foreclosed under the Regulation, the mortgagee, who relies on foreclosure proceedings having worked a forfeiture of the estate of the mortgagor, must prove affirmatively the due performance of every condition necessary to be established under the Regulation, before the foreclosure can attach upon such estate. (16 P.R. 1888, 106 P.R. 1889, 24 P.R. 1895, 29 P.R. 1898, 48 P.R. 1902, 71 P.R. 1903, *R.*) Where, therefore, the notice of foreclosure prescribed by the Regulation, which was alleged to have been issued to the mortgagor, was not on the record of the foreclosure proceedings, the non-existence of the notice is a fatal defect and the Court could not, on the strength of the order of the District Judge which showed that the mortgagor appeared in person before him, and was warned that he would be precluded from raising any objection, if he did not redeem within one year, presume that notice has been issued to the mortgagor, and that it was accompanied by a copy of the mortgagee's petition for foreclosure and bore the seal and the official signature of the District Judge—a defect in any of these vitiating the foreclosure proceedings. *SOCHET SINGH v. DIAL SINGH*, 46 P.R. 1907.

(64)—*Reckoning of year of grace—Mistake in impressing the seal—Effect—Notice to state manner of redemption—Ss. 7 and 8, Reg. XVII of 1806.*—The year of grace allowed in foreclosure proceedings must be calculated

Mortgage—continued.—5.—**Foreclosure**—continued.

from the date of service of notice. A mistake in impressing the seal in a notice to foreclose is not fatal to the validity of the notice. The notice to be valid must also state that the mortgagor must redeem the property in the manner provided for by s. 7, Reg. XVII of 1806. *MULRAJ v. HARSA SINGH*, 123 P.R. 1894. (3 C. 397, P.C., F.; 57 P.R. 1888, 36 P.R. 1893, R.) [Cons., 46 P.R. 1904; Appr., 21 P.R. 1901=57 P.L.R. 1901; F., 5 P.R. 1901=P.L.R. 1900, p. 465; Cited., 21 P.R. 1903=83 P.L.R. 1903; R., 46 P.R. 1907.]

(65)—*Foreclosure of mortgage — Defective notice — Signature — Reg. XVII of 1806, s. 7.*—A signature, however illegible to ordinary people, on a foreclosure notice, on which is also the seal of the Court and of the officer signing, in a sufficient signature if it is meant to be a full signature and can be recognized by those acquainted with the particular officer's method of signing documents. A notice of foreclosure which does not correctly and sufficiently describe the various courses open to a mortgagor under s. 7, Reg. XVII of 1806, is a defective notice, vitiating the foreclosure proceedings. *TARA CHAND v. CHIMAN*, 3 P.L.R. 1912=12 Ind. Cas. 530.

(66)—*Reg. XVII of 1806, s. 7—Notice of foreclosure not signed by Judge—Invalidity of foreclosure proceedings.*—A notice of foreclosure under Reg. XVII of 1806 which does not bear the signature of the Judge, but is only sealed with the seal of his Court, is informal and bad, and foreclosure proceedings in which such notice is issued are invalid *ab initio*. *BASDEO SINGH v. MATA DIN SINGH*, 4 A. 276=A.W. N. 1882, 25. [F., 13 C. 50.]

(67)—*Parwana—No signature but only seal—Effect.*—A suit for possession after foreclosure proceedings will fail if the *parwana* or notice bore only the seal and illegible initials of the District Judge, without his official designation and signature. *SHAM SINGH v. KARM*, 185 P.R. 1889, F.B. [R., 5 P.R. 1901=P.L.R. 1900, p. 465.]

(68)—*S. 8, Reg. XVII of 1806 — Notice — Signature only — Validity.*—A notice under s. 8, Reg. XVII of 1806, is invalid, if it bore the signature only of the District Judge without his official designation. *RAM CHAND v. GHULAM MUHAMMAD*, 84 P.R. 1890. [Expl., 5 P.R. 1901=P.L.R. 1900, p. 465.]

(69)—*Reg. XVII of 1806, s. 8, Requirements of law in respect of notice under—Mortgage when entitled to defeat mortgagor's right of redemption.*—In the case of a notice issued under s. 8 of Reg. XVII of 1806, the fact that it does not bear the seal or signature of the District Judge, but only his initials, and that it merely notifies to the mortgagor the principal sum, due on the mortgage without any mention of the interest also due thereon, are defects in

Mortgage—continued.—5.—**Foreclosure**—continued.

the validity of the notice, vitiating the foreclosure proceedings and preventing the mortgagee from maintaining his suit based on such proceedings. In order to entitle a mortgagee to avail himself of the foreclosure proceedings so as to defeat the mortgagor's right of redemption, it is necessary for him to show that the requirements of the law have been strictly complied with. In the present case the requirements of the law not having been duly observed, although the mortgagee may not have been in fault or responsible in one sense for the omissions noticed above, he would be responsible in a legal sense and must stand the consequence of any defects which vitiate the validity of proceedings that are essential, before he can debar the mortgagor from asserting his right of redemption or claim to make his own till absolute. *MEHORO v. SUJA*, 84 P.R. 1882. [R., 16 P.R. 1888, 21 P.R. 1901=57 P.L.R. 1901, 134 P.L.R. 1910=8 Ind. Cas. 555; D, 75 P.R. 1883.]

(70)—*S. 8, Reg. XVII of 1806—Compliance with formalities in foreclosure proceedings—Non-compliance, a fatal defect—'Initials,' no 'official signature.'*—Absence of proof of any previous demand before issue of notice of foreclosure under s. 8, Reg. XVII of 1806, is a defect fatal to a suit for possession after the close of foreclosure proceedings. All the formalities laid down in the said Regulation must be complied with and it lies upon the plaintiff to prove that it had been so done. The mere affixing of "initials" of a Judge to the above notice is not sufficient and would not amount to official signature. *MUSST. LACHMI v. TOTA*, 16 P.R. 1888. [R., 71 P.R. 1903=162 P.L.R. 1903, 46 P.R. 1907, 105 P.R. 1907.]

(71)—*Notice signed as 'Deputy Commissioner and District Judge'—Validity.*—A notice under s. 8, Reg. XVII of 1806, is not invalid, merely because the words "Deputy Commissioner" is added to the signature as "District Judge" where both offices are held by one; it being a mere surplusage which can lead to no mistake. *HIRA CHAND v. CHATRU*, 133 P.R. 1894. (185 P.R. 1889, F.B., D.) [F., 42 P.R. 1887.]

(72)—*Mortgage—Notice of foreclosure—Validity—Reg. XVII of 1806.*—A notice of foreclosure signed by the Sheristadar of a Court and bearing the Court seal, (but not the Judge's signature), is not (on the principle in 4 A. 276) a valid notice under Reg. XVII of 1806, s. 8. In 4 A. 276 there was only the Court seal and not even the Sheristadar's signature. *DOMA SAHU v. NATHAI KHAN*, 13 C. 50.

(73)—*Reg. XVII of 1806, s. 8—Foreclosure of mortgage—Notice of foreclosure not signed by Judge.*—Where notice of foreclosure under the Regulation was not signed by the Judge, but only by the Munsarim, the foreclosure proceedings must be considered as void *ab initio*. An acknowledgment of receipt by the

Mortgage—continued.**—5.—Foreclosure—continued.**

mortgagor cannot cure the inherent defect in the notice by reason of its non-signature by the District Judge. *HANUMAN SARAN SINGH v. BHAIRON SINGH*, 12 A. 189 = A.W.N. 1889, 199.

(74)—*Bengal Reg. XVII of 1806, s. 8—Foreclosure proceedings—Prior demand for payment when provable—Initials—Official signature—Stipulated period.*—Though previous demand for payment is a necessary preliminary for success in foreclosure proceedings under s. 8 of the Regulation, there is nothing in the section requiring that the fact of the demand having been previously made must appear on the face of the proceedings. It is open to the plaintiff to show, in the course of his suit for possession, that payment had been demanded before the petition for foreclosure was presented. (11 C. 111, R.) The mere initials of the Judge attached to the *parwanah* cannot amount to the 'official signature' of the Judge as required by s. 8 of the Regulation. The 'stipulated period' of redemption in this section means the whole period prescribed by the mortgage-contract for the performance of the conditions upon the fulfilment of which the mortgagor is entitled to a re-conveyance, irrespective of the fact that under the strict terms of the deed, the mortgagee was, under certain circumstances, entitled to foreclosure at an earlier date. *KUBRA BIBI v. WAJID KHAN*, 16 A. 59 = A.W.N. 1893, 209. (5 B.L.R. 389, 3 A. 509, R.) [*Diss.*, 29 A. 145 = A.W.N. 1906, 309 = 3 A.L.J. 857; R., 63 P.L.R. 1902.]

(75)—*Foreclosure—Conditional sale—Defective notice—Appellate Court when bound to proceed under s. 9 (3) of Act XIII of 1900—Reg. XVII of 1806, s. 8.*—A foreclosure notice is bad in law and the proceedings thereunder are null and void, if it is issued in respect of two mortgage-debts, only one of which is in the form of a conditional sale. An appellate Court has no jurisdiction to make a reference under s. 9 (3) of Act XIII of 1900, and the Deputy Commissioner has no power to proceed under its sub-section (2), if the foreclosure notice is effectual, but if it is not, the appellate Court is bound to act upon the said section and can only dismiss the suit if the mortgagee refuses to accept a mortgage in one of the authorized forms. *JIWAN RAM v. BHANI RAM*, 6 Ind. Cas. 657 = 51 P.W.R. 1910.

(76)—*Mortgage operating as sale in default of payment of interest on a specified date—Reg. XVII of 1806, provisions of, regarding foreclosure clause—Suit, dismissal of.*—The plaintiff, mortgagee, brought a suit for possession of the mortgaged property, alleging that, under the terms of the mortgage-deed executed by the defendant, on failure, in any year, to pay interest due on the mortgage, he was entitled to foreclose and the mortgage would become a sale for the principal and the unpaid interest. The suit was dismissed on the ground that the foreclosure clause was a contravention of the

Mortgage—continued.**—5.—Foreclosure—continued.**

provisions of Reg. XVII of 1806 and could not be carried out. *Held*, that the dismissal of the suit was wrong inasmuch as the foreclosure clause did not contravene the provisions of Reg. XVII of 1806. *BURA MAL v. JAWAYA*, 62 P.L.R. 1905.

(77)—*Refusal by Judge to issue notice—Revision.*—An order of refusal by the District Judge to issue notice under Regulation XVII of 1806 on the ground that the deed of mortgage was not within the scope of the above Regulation is open to revision. *GULAB SINGH v. KARAM*, 119 P.R. 1892. (3 A. 576, F.)

(78)—*Mortgage—Foreclosure—Service of notice—Person really interested in protecting estate.*—The only person on whom the effectual service of notice of foreclosure can be made is the person really interested in protecting the estate, whoever he happens to be for the time being. *KALEE KOOMAR DUTT v. PRAN KISHOREE CHOWDHRAIN*, 22 W.R. 168.

(79)—*Mortgagor's legal representative—Notice of foreclosure.*—The legal representative of a mortgagor is entitled to redeem the mortgaged property, and as such, is entitled to notice of foreclosure. The mortgagor's legal representative is the person who, either by law or by contract between the parties, succeeds the mortgagor in the position which he holds relatively to the mortgagee in respect of the property; and a succession of this kind may occur either by the death of the mortgagor or by assignment of the equity of redemption. *SHEO GOLAM SINGH v. RAM ROOP SINGH*, 15 B.L.R. 34, Note = 23 W.R. 25. [R., 2 N.L.R. 113.]

(80)—*Mortgage—Notice of foreclosure—Regulation XVII of 1806.*—The words "legal representative" in Reg. XVII of 1806 are not used in the sense of a universal legal representative, such as an heir; a purchaser of mortgaged property is included within the meaning of the term, and, as such, is entitled to notice of foreclosure whether he be a purchaser of the whole property or of a distinct and definite portion only, and whether the mortgagee has or has not consented to the assignment. *GANGA GOBIND MANDAL v. BANI MADHAB GHOSE*, 3 B.L.R. A.C. 172 = 11 W.R. 548. [F., 23 W.R. 25, 31 P.R. 1883; *Expl.*, 23 W.R. 96.]

(81)—*"Mortgagor's legal representative"—Reg. XVII of 1806, s. 8.—Subsequent mortgagee entitled to notice of foreclosure.*—The term "mortgagor's legal representative" used in the Regulation was intended to apply to all or any persons who, at the date of the notice of foreclosure, possesses a title to the equity of redemption, whether absolute or defeasible, of the mortgage. [F., 2 N.L.R. 113.] Accordingly, where land, the subject of a conditional sale, was mortgaged to a second mortgagee, *held* that the latter is entitled to notice of foreclosure; and foreclosure proceedings taken without notice to him are invalid as against him. He

Mortgage—continued.**—5.—Foreclosure—continued.**

is entitled to have the opportunity of coming in to redeem the mortgage by conditional sale so as to preserve his security. *DIRGAJ SINGH v. DEBI SINGH*, 1 A. 499. (See 3 W.R. 230, 6 W.R. 230).

(82)—*Foreclosure decree—Death of judgment-debtor—Necessity for notice to all legal representatives of deceased.*—Where, after the passing of a decree, the judgment-debtor died, the decree should not be made absolute without notice being given to all the legal representatives of the deceased. *DALPAT RAO v. TARACHAND MARWADI*, 6 C.P.L.R. 1. [R., 9 C.P.L.R. 5; Not F., 16 C. P.L.R. 92.]

(83)—*Foreclosure-proceedings—Omission to give notice—Hindu Law—Widow—Maintenance—Charge.*—Omission on the part of a mortgagee to serve the mortgagor or his representative with notice of foreclosure, is sufficient to vitiate the whole of the foreclosure proceedings. A Hindu widow's claim for maintenance is a charge upon the family estate and she could make the estate chargeable with it into whosoever hands it may fall. *MUSSAMAT KHAKROO MISRAIN v. JHOOMUCK LALL DASS*, 15 W.R. 263. [Not F., 10 C.W.N. 1074=4 C.L.J. 476; Cons., 12 B.H.C. 69, 1 C. 365, 2 B. 494; R., 6 M. 83.]

(84)—*Reg. XVII of 1806—Service on minor—Sufficiency of—Act XL of 1858.*—Reg. XVII of 1806 does not give any special direction as to the person on whom service of the notice of foreclosure is to be made where the person for the time being entitled to the equity of redemption is a minor and it is not shown that a guardian has been appointed under Act XL of 1858. In such a case, service on the minor and on his mother would be sufficient. *DABEE PERSHAD v. MAN KHAN*, 2 N.W.P. 444. [F., 94 P.R. 1892.]

(85)—*Regulation XVII of 1806, s. 8—Notice to foreclosure—Minor—Mode of service.*—The presentation of a written petition under s. 8, Regulation XVII of 1806, by an authorised agent is a proper one. The copy of the application and *parwana* may be properly served on a minor mortgagee without a guardian by service on the brother. *LAL SINGH v. GOPAL DAS*, 94 P.R. 1892. (2 N.W.P. 444, F.) [R., 48 P.R. 1902=63 P.L.R. 1902.]

(86)—*Reg. XVII of 1806, s. 8—Mortgaged property situate in two districts—Foreclosure—Service of notice.*—Where mortgaged property is situate in two districts, an order made by the Judge of one district for foreclosure of the whole of the mortgaged property is a sufficient compliance with Bengal Reg. XVII of 1806, s. 8. [F., 2 A. 313, 5 C.L.R. 599.] Service of the order of foreclosure on the widow of a deceased mortgagor, who was also the guardian of a minor adopted son of the deceased, is effectual as regards the widow and the adopted son. *RAS-MONEE DEBEA v. PRAN KISHEN DASS*, 7 W. R. P.C. 66=4 M.I.A. 392.

Mortgage—continued.**—5.—Foreclosure—continued.**

(87)—*Regulation XVII of 1806, s. 8—Mortgage, foreclosure of—Property situated in different districts.*—In foreclosure proceedings, where the property mortgaged is situated in different districts, it is sufficient under Regulation XVII of 1806, s. 8, for a notice of foreclosure to be issued by the Judge of either district. *PROSUNNO COOMAR ROY CHOWDHRY v. HARAN CHUNDER CHATTERJEE*, 5 C.L.R. 599. (4 M.I.A. 392, F.)

(88)—*Property situated in two provinces—Foreclosure—Regulation XVII of 1806, s. 8.*—According to s. 8 of Regulation XVII of 1806, where mortgaged property is situate in two Districts, an order of foreclosure relating to the whole property may be obtained in the Court of either district. The same rule applied where the property is situate in two provinces, and the Regulation was in force in both of them at the time of the foreclosure-proceedings. *SURJAN SINGH v. JAGAN NATH SINGH*, 2 A. 313. (4 M.I.A. 392, F.)

(89)—*Mortgage—Foreclosure—Notice—Legal representative of deceased mortgagor.*—A notice of foreclosure addressed to a deceased mortgagor and reaching his legal representatives is valid, and consequently, the latter are bound to pay the amount of the mortgage to the mortgagee. *RAM CHUNDER HALDAR v. JONAB ALI KHAN*, 17 W.R. 230.

(90)—*Reg. XVII of 1806, s. 8—Purchaser of rights and interest of mortgagor.*—A purchaser of the rights and interests of a mortgagor is a "legal representative" of the mortgagor within s. 8 of Reg. XVII of 1806, and a notice of application for foreclosure must be served upon him. *GOLAM DUSTAGIR KHAN v. JOGAI SINGH*, 1 B.L.R. S.N. 3 (a)=10 W.R. 86.

(91)—*Sale of mortgaged property in execution of prior money decree—Foreclosure proceedings—Notice to purchaser.*—Where, in execution of a money-decree, obtained prior to a mortgage of the debtor's property by deed of conditional sale, the mortgagor's interest in the property is sold, the purchaser is entitled to due notice of foreclosure proceedings instituted subsequently to the sale, but before its confirmation. *RAMESWAR NATH SINGH v. MEWAR JUGJUT SINGH*, 11 C. 341. (2 C. 141 F.)

(92)—*Purchasers of mortgagor's rights—Notice.*—A purchaser of the mortgagor's interest whether he is in possession or not, is entitled to notice of foreclosure except where any alienation of such interest has been prohibited by contract between the mortgagor and mortgagee. (11 W.R. 548, F.) A notice of foreclosure does not bind any purchaser who has not been served with it. *BHANOOMUTTY CHOWDRAIN v. PREMCHAND NEOGEE*, 15 B.L.R. 28=23 W.R. 96. (3 B.L.R. 172, F.) [R., 2 B. 1, 14 C. 464, 2 N.L.R. 113.]

(93)—*Purchaser of mortgaged property—Right to notice of foreclosure.*—The mortgagee is bound to give notice of foreclosure to the

Mortgage—continued.**—5.—Foreclosure—continued.**

purchaser of mortgaged property. Failure to serve the notice will defeat the mortgagee's suit. But if the objection as to non-service of notice be either not pressed by the mortgagor in the suit, or, being pressed, be decided against the mortgagor, it cannot be subsequently raised in a later suit by the legal representative of the mortgagee. **MITTERJEET SINGH v. MOOKH LALL SINGH, 25 W.R. 139.**

(94)—*Mortgage—Foreclosure—Right of purchaser from mortgagor to notice of foreclosure—Reg. XVII of 1806, s. 8—Construction—Mortgagee empowered to proceed against mortgagor's other properties in certain events.*—The purchaser from a mortgagor is his legal representative, and where the mortgagee proceeds to foreclose, the purchaser is entitled to notice of foreclosure under s. 8, Reg. XVII of 1806, if the purchase was made before such notice had been served upon the mortgagor. If, however, the purchase was made after notice served upon the mortgagor, fresh notice to the purchaser is unnecessary. Where a mortgage deed contained the words "that in the event of a sale in execution of decree or in consequence of some other claim, the property mortgaged be sold at auction or otherwise alienated, the mortgagee shall recover the money lent by him from any other property in the possession of the mortgagor, and the mortgagor's person and property shall also be held liable for the debt," held, these words were thereby intended to give some supposed further security to the mortgagee by allowing him the power, in case of the property going out of the mortgagor's hands in some unforeseen manner, to recoup himself from any other property the mortgagor might be possessed of, but not to take away from the mortgagee the right that every holder of a deed of conditional sale has to issue the usual notice of foreclosure, and at the expiry of the year of grace to obtain by suit possession of the property. **ACHUMBIT MISSER v. LALLA NUND RAM, 11 W.R. 544.**

(95)—*Suit for possession of mortgaged property by mortgagee—Notice of foreclosure to purchaser and legal representative.*—A mortgagee is bound to give notice to a purchaser from the mortgagor of his intention to foreclose, and a person who succeeds as heir to a mortgagor is also entitled to such notice as his legal representative. A mortgagor is not bound to give notice to the mortgagee of a transfer of his rights, nor is the transferee from the mortgagor bound to give any such notice. **MADHUB THAKOOR v. JHOONUCK LALL DOSS, 12 W.R. 105.** (3 W.R. 231, *Not F.*) [*R.*, 15 W.R. 263.]

(96)—*Rights of purchaser not affected by subsequent acts of vendor—Purchaser of equity of redemption—When entitled to notice of foreclosure.*—The rights acquired by the plaintiff in this case, by his purchase, were those which his vendor possessed at the date of the sale to him. By the subsequent sale in execution of a money-decree against his vendor, the

Mortgage—continued.**—5.—Foreclosure—continued.**

rights and interests of the vendor were alone sold. But as the vendor had ceased to have any interest, nothing passed by that sale to the execution purchaser, and those proceedings could not have any effect on the rights previously acquired by the plaintiff under his purchase. [*R.*, 10 W.R. 86, 1 A. 499.] In this case, the High Court observed that, though it cannot be laid down that, in foreclosure proceedings, and suits to establish the lien of a mortgagee and to bring the property to sale in satisfaction of the mortgage, which are somewhat in the nature of proceedings *in rem*, it is, in all cases, necessary to serve subsequent incumbrancers not in actual possession of the property, with notice or to make them parties, yet, it is the duty of the Court to give sufficient consideration to their rights. **BISSONATH SINGH v. BROJONATH DOSS, 6 W.R. 230.** [*R.*, 10 W.R. 86, 1 A. 499.]

(97)—*Equity of redemption sale—Notice to purchaser.*—A purchaser of the equity of redemption, before the notice for foreclosure, must be served with the notice and this holds good even where part only of the mortgaged property has been sold. **MULRAJ v. SOBHA RAM, 31 P.R. 1883.** (76 P.R. 1876, *R.*)

(97-a)—*Mortgage—Notice of foreclosure—Extension of period for redemption after expiry of year of grace—Second notice of foreclosure—Reg. XVII of 1806, s. 8—Foreclosure proceedings—Irregularities capable of waiver.*—A mortgagee having caused notice under s. 8 of Reg. XVII of 1806, to be served upon the mortgagor, brought a suit for possession after the expiry of the year of grace. The mortgagor then applied for an extension of time to redeem, and the Court passed an *ex parte* order granting the extension, and the suit was dismissed as premature. After the expiry of the extended period, the mortgagee's suit having been renewed, the defendant contended that the period of grace having been extended, a second notice under the Regulation was necessary, and such notice not having been given, the suit was not maintainable. *Held* that the order granting extension of time to the mortgagor was made without any legal authority, and that therefore a second notice under the Regulation was unnecessary. Omission on the part of the mortgagee to demand payment from the mortgagor before applying for issue of notice under s. 8 of Reg. XVII of 1806, and omission to serve a copy of the application, are irregularities capable of waiver, and not fatal defects in the procedure, so as necessarily to vitiate all subsequent proceedings. Thus, where a mortgagor, after receipt of notice of foreclosure, applied and got an order for an extension of time for redemption, but failed to redeem, and in a suit for foreclosure then brought, omitted both in the first Court and in the lower Appellate Court to take exception to the foreclosure proceedings on the ground that no demand was made; he was held to have waived any defence open to him on this ground, and not to be

Mortgage—continued.**—5.—Foreclosure—continued.**

entitled to insist upon a re-opening of the case in special appeal. *FATTEH v. SAIN DITTA*, 76 P.R. 1877. [R., 155 P.R. 1882, 21 P.R. 1901=57 P.L.R. 1901; D., 84 P.R. 1882]

(98)—*Mortgage—Foreclosure—Sale of equity of redemption after proceedings taken—Notice by mortgagee—Fresh notice on purchaser, necessity for—Conditional mortgage—Agreement between mortgagor and mortgagee after sale of equity of redemption—Effect of agreement on purchaser.*—Where a mortgagor sold his right of equity of redemption after foreclosure proceedings had been applied for and notices duly served on him, it was not necessary for the mortgagee to issue fresh notice on the purchaser, and the requirements of the Regulation were satisfied by the service of the notice on the person who, at the time of service, was entitled to redeem. Where a mortgagor, before the expiry of the year of grace and after the sale of the equity of redemption, agreed with the mortgagee that of the two villages conditionally mortgaged, one should be given to him and decree for foreclosure should be obtained by the mortgagee in respect of the other, such agreement did not bind the purchaser and he could not be prejudiced thereby, inasmuch as, notwithstanding such arrangement he was at liberty to deposit the money in Court, or to tender it to the mortgagees, and the foreclosure proceedings could not be rendered invalid for such agreement having been made. *MUHUNT JYRAMGIR v. RAJAH KRISHAN KISHORE CHUND*, 3 Agra 307.

(99)—*Foreclosure—Right to notice—Ben. Reg. XVII of 1806, s. 8—Purchaser of equity of redemption.*—The purchaser of the equity of redemption is not entitled to notice in a foreclosure suit, especially if the purchase has not been made until after the institution of the suit. *GOOROPERSAUD JANAH v. BIPPROPSAUD BERRAH*, Marsh 292=2 Hay 152.

(100)—*Reg. XVII of 1806, s. 8—Mortgage—Foreclosure—Notice—"Legal representative of mortgagor."*—The words "mortgagor's legal representative" naturally designate that person who, either by law or by contract between the parties, succeeds the mortgagor, whether mediately or immediately, in the position which he holds relative to the mortgagee in respect of the property which is the subject of mortgage. If, in a suit for foreclosure, before the issue of notice, the equity of redemption was duly and completely assigned in such a way as to bind the mortgagee, then notice must issue to the assignee. But if the assignment took place after the notice to the mortgagor, no notice to the assignee is necessary. *KISHEN BULLUBH MUHTA v. MESSRS. BELASOO COMMUR*, 3 W.R. 230. [F., 10 W.R. 86, 11 W.R. 544, 1 A. 499=2 Ind. Jur. 464, 2 N.L.R. 113; Cons., 12 W.R. 105; R., 6 W.R. 230.]

(101)—*Two mortgagees holding equal shares—Subsequent vesting of equity of redemption in*

Mortgage—continued.**—5.—Foreclosure—continued.**

one—Foreclosure—Notice.—Where A and B jointly hold a mortgage in equal shares, but subsequently the equity of redemption becomes vested in one of them, a notice of foreclosure confined to a one-half share only is sufficient and the proceedings are valid. *HUNOOMAN-PERSAUD SAHOO v. KALEEPERSAUD SAHOO*, W.R. 1864, 285. [R., 1 A. 297.]

(102 & 103)—*Notice of foreclosure—"Legal representative" of mortgagor—Reg. XVII of 1806, s. 8.*—Neither the holder of a decree for money who has attached property which is subject to a conditional mortgage, nor the holder of a prior lien on such property, is a "legal representative" of the mortgagor, within the meaning of s. 8 of Reg. XVII of 1806, so as to be entitled to notice of the foreclosure of such mortgage. *RADHEY TEWARI v. BUJHA MISR*, 3 A. 413. (14 M.I.A. 101, R.)

(104)—*Notice of foreclosure—Reg. XVII of 1806, s. 8.*—A mourasi mokurari pattadar, under a mortgagor, is not entitled to a notice of foreclosure under s. 8 of Reg. XVII of 1806. He is not a "representative" within the meaning of the section and is not entitled to redeem. *SRIPOTI CHURN DEY v. MOHIP NARAIN SINGH*, 9 C. 643=13 C.L.R. 119.

(105)—*Mortgage by lumbardar to pay Government revenue—Mortgage as agent of co-sharers—Foreclosure—Notice—Suit by co-sharers to recover their shares—No appeal against decree of first Court—Associations—Repudiation—Mortgage by lumbardar—Notice to co-sharers—Foreclosure—Suit for possession—Parties.*—The plaintiffs were shareholders whose interests were mortgaged by their lumbardar with his own share to the lumbardars of another puttee in the same estate to raise a sum necessary to satisfy an arrear of Government revenue. The defendants had served notice of foreclosure upon the lumbardar who represented the plaintiffs, and obtained a declaration that the sale had become absolute and they also sued and obtained a decree against the lumbardar for possession. The plaintiffs brought this suit claiming to recover possession of their own share in the puttee on the ground that the mortgage was made without their authority and was not binding on them and claiming pre-emption of the share of the lumbardar. Held that the plaintiffs must be taken to have been parties through their agent the lumbardar to the mortgage-deed, for if they were not they should have repudiated the judgment of the Court of first instance which decreed them their shares conditionally on their paying their quota of the mortgage debt; moreover inasmuch as the mortgage was made to obtain the sum necessary to discharge the arrears of Government revenue the plaintiff must be held to have been acquainted with the act of their lumbardar and content to be bound by it. Therefore as parties to the mortgage through their lumbardar, they could not repudiate the consequences of the deed to which

Mortgage—continued.**—5.—Foreclosure—continued.**

they were parties. Where a mortgage was made by a *lumbardar* for himself and as agent for other sharers it is necessary to issue notice of foreclosure both to the *lumbardar* and to his co-sharers and in a suit for possession the co-sharers also should be made parties. **PUNCHAM SINGH v. MUNGLE SINGH, 2 Agra 407.**

(106)—*Bye-bil-wufa—Kutkobala—Redeemability—Reg. XVII of 1806—Ss. 7, 8—Foreclosure—Reg. III of 1793, s. 14—Reg. II of 1803, s. 3—Limitation—Service of notice.—A Bye-bil-wufa, or Kutkobala (mortgage or conditional sale), is redeemable like an ordinary mortgage, and is liable to foreclosure. When a mortgagee seeks to foreclose, he must proceed under Ben. Regs. III of 1793, s. 14; II of 1803, s. 3; and XVII of 1806, ss. 7 and 8. The pendency of litigation as to the ownership of the equity of redemption, between the heirs of the mortgagor and a party claiming as purchaser, is a "good and sufficient cause" within the exception to the operation of the Ben. Reg. of Limitation III of 1793, s. 14, why a mortgagee should not have instituted proceedings for foreclosure within twelve years, the time prescribed by that Regulation. The service of notice of foreclosure on the occupant of the mortgaged property (a party who claimed as purchaser from the mortgagor, but who had not established his title) does not estop the mortgagee from disputing the occupant's title to redeem the mortgaged premises. **PRANNATH ROY CHOWDRY v. ROCKEA BEGUM, 7 M.I.A. 323.***

(107)—*Insolvency of mortgagor—Appointment of Receiver—Foreclosure proceedings without notice to Receiver, Validity of.—Where a mortgagor has been declared an insolvent and a Receiver appointed by the Court all his property vests in the Receiver. Foreclosure proceedings subsequent to such vesting order are not valid, if notice thereof has not been given to the Receiver. **GANPAT RAO v. RAMCHAND, 2 C.P.L.R. 90.***

(108)—*Decree absolute—Foreclosure decree—Amendment of application for order absolute—Granting application ex parte—Irregular.—An amendment of an application for an order absolute for foreclosure ought not to be granted ex parte without notice to the judgment-debtor. (32 C. 253, F.B., 10 C.W.N. 306, 35 C. 767, Rel. on.) If it is granted without such notice, the party affected is entitled to have the order discharged in an appropriate proceeding, namely, by an application under s. 108, Civ. Pro. Code, 1882, to set aside the order, or an application for review of judgment or an appeal. **ABHOY CHURN GAIN v. NABA KUMAR DUTT, 6 Ind. Cas. 306.***

(109)—*Second mortgages—Notice, Right to—Reg. XVII of 1806.—A second mortgagee, under a mortgage bond, is entitled to notice of foreclosure under Reg. XVII of 1806. **NUDYAR CHAND CHUCKERBUTTY v. ROOP DASS BANERJEE, 22 W.R. 475. (1 W.R. P.C., 19, 7 B.L.R. 136=15 W.R. P.C., 35, F.)***

Mortgage—continued.**—5.—Foreclosure—continued.**

(110)—*Reg. XVII of 1806—Second mortgagors—Petition to foreclose—Service upon some—Sufficiency.—In order to comply with the provisions of Reg. XVII of 1806, the petition to foreclose must be served upon each of the mortgagors, if there are several; service upon one or some of them is insufficient. **MAYA SHAH v. FERROZDIN, 51 P.R. 1892.***

(111)—*Mortgagor and mortgagee—Subsequent mortgage, prior foreclosure of, prior mortgagee's lien not affected by—Notice of foreclosure, service of, on mortgagor.—The main objection taken, on this second appeal to the lower Court's judgment awarding possession to the first mortgagee, was with reference to the mode in which the lower Court had disposed of the question as to the respective rights of a prior and subsequent mortgagee. The High Court held that, though the point whether a second mortgagee is the mortgagor's legal representative for the purpose of the notice under s. 8, Reg. XVII of 1806, has not been completely settled; yet, where, as in the present case, the first mortgagee has had no knowledge or cognizance of the second mortgage, or of the foreclosure proceedings taken under it, the objection is not valid that he ought to have served the notice on the subsequent mortgagee or his representative. The service on the mortgagor was sufficient according to law. The defendant had no ground to complain of the loss of his lien on the property as subsequent mortgagee, which loss was brought upon by himself. He should have known of the prior mortgage, and he should have kept himself informed if anything was done to foreclose the mortgage. **KALEE KISHORE CHATTERJEE v. TARA PERSHAD ROY, 4 W.R. 1.***

(112)—*Under Reg. XVII of 1806—Extinction of mortgagor's right.—When a mortgagor, after proceedings for foreclosure had been taken against him under Reg. XVII of 1806 and after the expiry of the year of grace, again mortgaged the property, he could mortgage only his exproprietary rights. If the mortgagor, who cultivated the land as tenant of the second mortgagee, is ejected by the first mortgagee, who had foreclosed the mortgage, the second mortgage comes to an end, although the second mortgagee was not a party to the foreclosure decree. **KUNJ BEHARI v. BALDEO RAI, 3 A.L.J. 531=A.W.N. 1906, 246.***

(113)—*Reg. XVII of 1806, s. 8—Notice of foreclosure—Irregularity in proceedings—Waiver by mortgagor.—Where the Court omitted to send with a notice of foreclosure a copy of the mortgagee's petition as required by s. 8, Reg. XVII of 1806, and the mortgagor had, since the issue of notice, continued to live in the neighbourhood of the property and the mortgagee erected buildings on it and used it as his own without objection or claim made by the mortgagor, held, that the irregularity in not issuing the notice had been waived by the plaintiff's subsequent conduct and was not*

Mortgage—continued.**—5.—Foreclosure—continued.**

such as would help the mortgagor to avoid the foreclosure, *SALIGRAM TEWAREE v. BEHAREE MISSER*, **W.R. 1864, 36.**

(114)—*Oral conditional mortgage—Reg. XVII of 1806.*—Property made over to a person on the condition that, if the money borrowed from him be not repaid within a certain time, it shall become his absolute property, becomes such property on failure to pay, without the issue of a notice of foreclosure under s. 6 of the Reg. XVII of 1806, the provisions of which apply only to holders of deeds of conditional mortgage. *GOBARDHAN DAS v. GOKAL DAS*, **2 A. 633.** [*Not F.*, 50 P.R. 1906.]

(115)—*Mortgage—Foreclosure—Extension of time for payment of mortgage-money—Fresh proceedings, if necessary.*—Where, after taking proper proceedings to foreclose his mortgage, a mortgagee grants an extension of time through the Court to his debtor for payment of the mortgage-money, *held* that, on the expiry of the extended time, it is not necessary that he should take proceedings *de novo* and cause a fresh notice of foreclosure to be served on the mortgagor. *ANUNDCHUNDER GHOSE v. GOURCHUNDER GHOSE*, **1 W.R. 44.**

(116)—*Merger of mortgagor's and mortgagee's interests, prevention of—Two mortgagees on the same property to the same mortgagee—Foreclosure proceedings on first mortgage—Subsequent suit on second mortgage for debt—Effect of second suit for money-decree on the second mortgage.*—The purchaser, at an execution sale, of properties subject to mortgage encumbrances, can legally take assignment of the mortgages *bona fide*, in the name of a trustee, for the purpose of preventing a merger of the mortgagor's and mortgagee's interests in the property. [*F.*, 4 C.L.J. 317.] The purchaser of a portion of certain properties, upon which there were two mortgages, being liable to contribute proportionately to the payment of both, could not, as beneficial assignee of the mortgages, foreclose the first mortgage, and then sue the debtor mortgagor for the whole debt due upon the second, as though that debt were not a charge upon the mortgaged property at all, and he himself were not liable for his proportion of it. [*D.*, 4 C.L.J. 573=34 C. 13.] The effect of the second suit *supra* is to re-open the foreclosure proceedings, and a decree could be made in that suit upon the whole case. *Quære.*—Whether, in the circumstances of the case, the purchaser *supra*, could, in equity, foreclose at all under the first mortgage? *KALIPROSONNO GHOSE v. KAMINI SOON-DURI CHOWDHRAIN*, **4 C. 475=3 C.L.R. 184.**

(117)—*Two mortgages to same mortgagee—Suit on first mortgage—Mortgagor's rights foreclosed—Subsequent suit on second mortgage, if maintainable—Re-opening of foreclosure.*—On the first of two successive mortgages of the same property made by the defendant to the plaintiff, the latter obtained a decree for foreclosure, and,

Mortgage—continued.**—5.—Foreclosure—continued.**

on default of payment by the former, the property became absolutely foreclosed. Plaintiff subsequently sued on the second mortgage and his claim was allowed by the lower Courts. On second appeal the High Court reversed the lower Court's decree, holding that, though the defendant might have pleaded, on the former occasion, that the plaintiff could not foreclose unless he formally abandoned his claim under the second mortgage, his omission to do so could not deprive him of his right to insist that the previous foreclosure decree precluded the plaintiff's suing on the subsequent mortgage, or, at any rate, that the foreclosure decree should be re-opened. *BABU RAVJI v. RAMJI SVARUPJI*, **11 B. 112.** [*F.*, 12 A. 537 = A.W.N. 1890, 90.]

(118)—*Decree for foreclosure—Payment after date fixed—Effect of.*—Where money due under a decree for foreclosure decree before an application for foreclosure is filed, though after the date fixed for such payment, the payment is none the less good and the decree cannot be made absolute. *DHARANI GAOTIA v. SUDARSHAN SATPASTI*, **12 C.P.L.R. 101.** (16 C. 246, 21 C. 810, 9 C.P.L.R. 75, 78; *F.*, 19 A. 184, 25 C. 311, D.)

(119)—*Grant of extension of time fixed for payment of amount due under decree for foreclosure.*—The Court is competent to grant one enlargement of the time fixed in a foreclosure decree for payment of the decree amount on good cause shown. The prayer for enlargement of time should be granted if there is a probability of the judgment-debtor's raising the decree amount and saving the mortgaged property within a reasonable time. *HARI RAM v. CHATUR BHUJ*, **5 C.P.L.R. 54.**

(120)—*Power of executing Court to postpone date fixed for payment of mortgage money.*—Though an appellate Court may pass a decree for foreclosure and fix a day by which the sum due must be paid to prevent the decree from being made absolute, the Court executing the decree can, from time to time, postpone such date and, until the decree is made absolute, postponements can be made. *GANGARAM v. NANDU SUNAR*, **5 C.P.L.R. 104.**

(121)—*Striking off application by mortgagor to extend time for redemption—No bar to future application.*—An order striking off an application to extend the time for redemption, in the absence of the applicant, is not a refusal on the merits and would not have the effect of barring a future application. *KESHAV RAO KAWALE v. BAXI*, **9 C.P.L.R. 75.** [*R.*, 12 C.P.L.R. 101, 2 N.L.R. 137.]

(122)—*Power of Court to open a decree for foreclosure.*—Under the Transfer of Property Act, no power to open a foreclosure is expressly reserved to the Courts. *SHANKAR RAO GOVIND v. GANESHA TELI*, **13 C.P.L.R. 177.** [*Not F.*, 3 N.L.R. 55.]

Mortgage—continued.**—5.—Foreclosure—continued.**

(123)—*Mortgage created not by deed but by decree of Court—Condition as to exercise of right of redemption within 12 years, effect of—Reg. VII of 1806, s. 8, application of, to mortgages not created by deed.*—In this suit for redemption, the main point for determination was that of the effect of a previous decision *inter partes* passed by the settlement Superintendent in 1859. That Court while declaring the relation of mortgagor and mortgagee to subsist between the then plaintiff and defendant, attempted to abridge the right of redemption by declaring that failure to redeem within 12 years would extinguish the rights of the owner. *Held* that such decision could not have greater force than a contract of mortgage by way of conditional sale voluntarily entered into by the parties themselves would have had, and that there was no ground for holding that Reg. XVII could not apply to a mortgage by way of conditional sale created by decree of a Civil Court and not by deed between the parties. **AHMED KHAN v. MAHLA KHAN, 132 P. R. 1882. [R., 93 P.R. 1903 = 161 P.L.R. 1903.]**

(124)—*Notice of foreclosure served on mortgagor—Subsequent transfer of property—Fresh notice served on purchaser.*—Where the notice of foreclosure was duly served on the mortgagor, no subsequent transfer of the property whether made voluntarily by him as by private sale, or caused involuntarily as by seizure and sale of his right and interest in execution of a decree, could affect the validity of the notice or could impose on the mortgagee any new obligation in the way of causing a fresh notice to be served on the purchaser. Thus, where the mortgagee caused a second notice to be served on the purchaser (the mortgagor's right having been taken in execution of a decree and sold) and the foreclosure took place more than a year after the service of the first notice but within one year from the service of the second notice, and the application by the mortgagee to issue the second notice to the purchaser specially asked that the notice thus to issue was to run from the date of the first notice and the notice issued was in accordance with this request. *Held* that the foreclosure proceedings were regular and the suit for possession was maintainable, inasmuch as the second notice was not so much a fresh notice issued superseding or revoking the first, but it was merely in effect a re-service of the first notice on the purchaser which could not render inoperative its first service. The second notice was not meant to be issued as an original notice in substitution of the former one, but merely for greater caution to bring to the knowledge of the purchaser that a notice had already been issued. **MOULIVE ZAMIN ALI v. HOSSEIN ALI, 2 Agra 387.**

(125)—*Mortgage—Foreclosure—Extension of time for payment — Fresh notice.*—No fresh notice is necessary where, after a mortgage becomes foreclosed, the mortgagee abstains

Mortgage—continued.**—6 —Foreclosure—continued.**

from enforcing his right and allows his mortgagor further time for payment. **BRIJO MOHUN SUTPUTTY v. RADHA MOHUN DEY, 20 W.R. 176. [D., 14 C. 451.]**

(126)—*Mortgage — Notice of foreclosure.*—Where, after notice of foreclosure, and before expiry of the year of grace, a mortgagee allows the mortgagor six months to redeem and the mortgagor subsequently dies, it is necessary to issue a fresh notice of foreclosure. **MUNSHI BAZLUR RAHIM v. ABDULLA, 2 B L.R. S.N. 5 (a) = 10 W.R. 359.**

(127)—*Nature of proceedings between decree nisi and order absolute — Res judicata—Necessity for notice before passing order absolute—Setting aside ex parte order absolute—Extending time for payment — Burden of proof—Civ. Pro. Code, ss. 108, 622, 647—Transfer of Property Act, s. 87.*—The proceedings between a decree nisi in a mortgage case and the order absolute are neither a continuation of a pending mortgage suit, nor are they proceedings in execution of a decree under the Civ. Pro. Code. The decree nisi in a mortgage suit is undoubtedly a decree which decides the suit as such, and it is, as regards the Court making it, a final adjudication upon all the issues raised in the suit, which it is necessary to decide for the purpose of determining the controversy between the parties, and those issues become *res judicata*, whether or not an order absolute is subsequently passed. Such proceedings are taken in accordance with the special provisions of the Transfer of Property Act and are absolutely independent of Chap. XIX. Civ. Pro. Code. (2 N.L.R. 172, Diss.; 11 C.W.N. 156, F.) When the holder of a decree nisi makes an application for an order under s. 87, Transfer of Property Act, the Court is bound by s. 647, Civ. Pro. Code, to issue a notice to the opposite party, informing him of the fact that such an application has been made, and the date fixed for hearing the non-applicant against it. A notice is necessary, because, (1) s. 647 of the Code is a statutory provision, which, on an application under s. 87 of the Transfer of Property Act, requires procedure analogous to that prescribed for suits, as far as possible, and necessarily implies the issue of notice to the non-applicant; (2) in view of the above statutory provisions, no analogy can be drawn from the practice of the English Courts; (3) the decree nisi gives the judgment-debtor no notice of the date when an application is made for an order absolute on an allegation of non-payment. Such an application may not be made for months after expiry of the date fixed for payment, and it may be made notwithstanding payment, or in spite of some compromise. The judgment-debtor is, therefore, clearly entitled to appear and be heard in response to it. (9 C.P.L.R. 5, 29 C. 644, Diss.) If an order absolute is made *ex-parte*, the Court may, on grounds analogous to those stated in s. 108 of the Code, set it aside and resume the proceedings *inter partes*. It is also open to review and revision in the same

Mortgage—continued.**—5.—Foreclosure—continued.**

way; and at least one appeal is generally allowed in respect of it. Notice of proceedings for an order absolute is not, however, an invitation to redeem, nor is it a second decree nisi calling for redemption. The provisions of the law as to foreclosure absolute, following upon non-payment within the time limited, are imperative and can only be delayed, upon good cause shown by the party, who was given the right to redeem. Unless an extension of time is made upon good cause, the Court has no jurisdiction to refuse or even to delay the order absolute, and it equally has no jurisdiction to allow redemption after due date, without so extending the period originally fixed by it (2 N.L.R. 137, *F.*) and if the Court does so, it acts *ultra vires*, so as to justify interference under s. 622 of the Code. The *onus* is on the judgment-debtor to show good cause for the extension of time. SETH BAGWANDAS v. SHRIDHAR, 3 N.L.R. 55. [*R.*, 3 N.L.R. 146; *Rel. on*, 4 N.L.R. 54; *Not F.*, 4 N.L.R. 158.]

(128)—*Reg. XVII of 1806, s. 8—Foreclosure—Notice—Mode of service—Proof of service—Evidence.*—The Regulation which requires notice of foreclosure to be served on the mortgagor or his legal representative does not provide for any mode of service in substitution for personal service. However, in some cases it has been held that personal service is not absolutely necessary. But to justify resort to any other mode of service it must be shown that, in spite of efforts made for that purpose, the notice could not for some reason be personally served. A copy of the report of the Nazir of the Civil Court, a copy of the deposition of a witness not taken in the presence of the parties, and a copy of the final foreclosure proceeding are not legal evidence to prove the service of notice of foreclosure. MADHO SINGH v. MAHTAB SINGH, 3 N.W.P. 325. [*Cited*, 48 P.R. 1902=63 P.L.R. 1902.]

(129)—*Foreclosure of mortgage—Notice, how to be served—Execution sale.*—The notice, which the law requires to be served previous to foreclosure, is to be served on the mortgagor or his legal representative. Where the mortgaged property is partly sold in execution of a decree, and the decree-holders had a priority of right over the mortgagee, the balance, if any, of the sale proceeds would go in diminution of the mortgagee's claim. DEOKEE MISSER v. RAM GOLAM ROY, W.R. 1864, 298. [*D.*, 25 W.R. 113.]

(130)—*Foreclosure of mortgage—Notice—How served.*—It is not necessary that the notice of foreclosure should be served on the mortgagor personally. It is sufficient if the service is effected by affixing the notice on the door of the mortgagor's house, if the mortgagor is not at home at the time when the serving officer goes there with the process. SOORJO KANT BANNERJEE v. KRISTO KISHOREE PODDAR, 14 W.R. 423.

Mortgage—continued.**—5.—Foreclosure—continued.**

(131)—*Reg. XVII of 1806—Foreclosure proceedings—Duty of Zillah Judge.*—In foreclosure proceedings, the Zillah Judge was, under Reg. XVII of 1806, judicially required to see that it was proved before him that the notice had been *duly* served, and to record a proceeding certifying that all that the Regulation required had been duly carried out, and also any elucidating facts necessary to be recorded as occurring within the year of grace. MEER ABBAS ALY v. NUND COOMAR GHOSE, 7 W.R. 123.

(132)—*Mortgage—Foreclosure—Notice—Report of peon in proceedings before another Court—Evidence—Transfer of mortgagor—Transferee, if entitled to notice—Foreclosure.*—Where, in a suit for foreclosure, the defendant-mortgagor alleged that notice was not served on him, and the witnesses who were called to prove the service denied all knowledge of the matter, *held* that the report of the peon in the formal proceedings before another Court was not admissible as evidence in the case, and that the acquiescence of one mortgagor was not binding on the other. Transferees in possession are entitled to have notice of foreclosure. TAZUN BIBEE v. SHIB CHUNDER DHUR, 19 W.R. 170.

(133)—*Mortgage by way of conditional sale—Auction sale of equity of redemption—Foreclosure of mortgage—Notice to auction purchaser.*—Plaintiff who had a conditional sale deed of certain property executed in his favour foreclosed the sale after the equity of redemption was sold in execution of a decree held by defendant's husband, and was purchased by him. In a suit for possession by the plaintiff against the auction-purchaser's widow, who impugned the genuineness of the conditional sale-deed and pleaded ignorance of the foreclosure proceedings, it was held that the plaintiff was bound to show by evidence independently of the mere copy of the foreclosure proceedings that the notice was served on the auction-purchaser. SOOKHMUN v. CHOORAMUN, 1 Agra 172.

(134)—*Mortgage by conditional sale—Suit for possession—Notice of foreclosure—Onus of proving notice and delivery of copy of foreclosure petition.*—In this suit for possession of land mortgaged by way of conditional sale to the plaintiff by the father of the defendant, it was alleged that notice of foreclosure had been served on the father, but such service of notice on which the plaintiff's title depended was denied by the defendant. The Chief Court was of opinion that the lower Appellate Court should not have proceeded as it did presuming due service of the notice. The burden of proving due service of the notice was held to rest on the mortgagee and further, it was essential for the plaintiff to prove that a copy of the petition for foreclosure was delivered to the mortgagor. GUGAN v. RUP RAM, 139 P.R. 1882. (3 C. 397, P.C. at p. 405, *F.*) [*R.*, 48 P.R. 1902=63 P.L.R. 1902.]

Mortgage—continued.**—5.—Foreclosure—continued.**

(135)—*Mortgage—Reg. XVII of 1806, s. 8.*—*Held*, that the endorsements on the copies of the notices with the foreclosure proceedings and the reports then made are no evidence of the fact that a copy of the application made by plaintiff was served on the mortgagors. **DES RAJ v. KHAN BAHADUR, P.L.R. 1900, p. 332.**

(136)—*Reg. XVII of 1806, s. 8—Conditional sale-deed becoming absolute without application for foreclosure—Agreement of parties.*—A conditional sale may become absolute, by the agreement and acts of parties, without proceedings under the Regulation. **RUGHONATH DASS v. RAMGOPAL, 5 N.W.P. 29. (2 Agra 176, F.)**

(137)—*Regulation XVII of 1806—Foreclosure proceedings—Conditional sale becoming absolute by agreement.*—A conditional sale may, by the agreement and acts of the parties, become absolute without foreclosure proceedings under the Regulation. **GOORDYAL v. MUSSUMAT HUNSKOONWER, 2 Agra 176. [F., 5 N.W.P. 29.]**

(138)—*Reg. XVII of 1806, s. 8—Foreclosure—Nature of proceeding—Proper form.*—A proceeding under s. 8, Reg XVII of 1806 is not in the nature of a civil suit. A Judicial Assistant Commissioner, not invested with the powers of a Deputy Commissioner, was not a Judge of the Zillah Court, under Regulation XVII of 1806. **PERTAB SINGH v. SIRDAR HARSA SINGH, 55 P.R. 1883. (54 P.R. 1877, F.B., D.)**

(139)—*Incorporeal right—Applicability of Regulation XVII of 1806.*—Regulation XVII of 1806 and the formalities laid down therein would not apply to incorporeal rights connected with or involving interests in land. **MELA MAL v. MELA MAL, 88 P.R. 1888. (117 P.R. 1885, R.) [R., 64 P.R. 1902; Disc., 57 P.R. 1906.]**

(140)—*Adverse possession—Mortgagor and mortgagee—Assertion of proprietary right by mortgagee after invalid foreclosure proceedings.*—*Held*, that a mortgagee, who has taken fruitless foreclosure proceedings, cannot, by asserting himself to be the proprietor and getting mutation in Revenue records in his favour, start a possession adverse to the mortgagor. **INDAR v. ASSA SINGH, 90 P.L.R. 1908=65 P.R. 1908=113 P.W.R. 1908. (14 M. 38, 14 B. 279, 16 B. 134, 32 C. 296, 49 P.R. 1882, R.)**

(141)—*Bona fide purchase—Possession and mutation of names—Effect—Foreclosure proceedings—Purchase from mortgagor not made a party.*—Where a party bona fide purchased from another, as his own property, land in fact mortgaged, and obtained possession and mutation of names, his title was held to be adverse to that of the mortgagee. Foreclosure proceedings in the Supreme Court as to mofussil property, to which a purchaser from the mortgagor is not made a party, cannot affect

Mortgage—continued.**—5.—Foreclosure—continued.**

that purchaser. **KUNDU CHOWDRY v. KILA CHANDRA GHOSE, 8 B.L.R. 104, P.C.=16 W.R. P.C., 33=14 M.I.A. 144. [R., 5 M. 184; Expl., 14 B.L.R. 87=22 W.R. 90]**

(142)—*Attachment of mortgaged property—Suit for foreclosure by mortgagee—Omission to make attaching creditor party to suit—Right of purchaser at Court-sale to claim redemption.*—A mortgagee, who has notice of an attachment of the mortgaged property in execution of a decree for money against the mortgagor, is bound to make the attaching creditor a party to a suit for foreclosure, which he brings. If he does not do so, the purchaser at the auction sale, in pursuance of the attachment, will be entitled to redeem him, in spite of a decree for foreclosure passed in his favour. **MUKUND SINGH v. DURUG SINGH, 3 C.P.L.R. 59.**

(143)—*Mortgage of jote—Foreclosure—Transfer of names—Act VIII (B.C.) of 1869, s. 26.*—When the mortgagee of a jote obtains a foreclosure decree, it is his duty, under s. 26, Act VIII (B.C.) of 1869, to have his name registered in the lessor's *sherishta*. **ROBERT WATSON & CO. v. GONESH CHUNDER SAHOO, 3 C.L.R. 240.**

(144)—*Arbitration—Agreement in pursuance of award of arbitrators—Construction.*—Where certain arbitrators summoned by the Revenue authorities under the Regulation relating to panchayats investigated into the nature of certain debts and ascertained the amounts to be contributed by the other co-sharers to one who had paid them, and they, accepting the award, promised to pay principal and interest on a certain date, and also further agreed that, if they failed to pay on the specified day, their shares should thenceforward become his absolute property, *held* that such an agreement amounted to a conditional sale and was liable to the incidents which, under the Regulation, attached to such sales, and the suit for possession without summary process of foreclosure was not maintainable. **GHOSEE LALL v. GAIND LALL, 3 Agra 184.**

(145)—*Suit by one co-sharer who pays the revenue of whole estate against mortgagee—Contribution, Suit for—Basis of suit.*—A suit by one co-sharer who pays the revenue of whole estate against mortgagee of any of the other co-sharers who has foreclosed will lie. A suit for contribution is not founded upon implied promise or request; but the obligation to pay rests on the ground that in *aequali jure*, the law requires equality. **GUNGA GOBIND MUNDUL v. ASHOO-TOSH DHUR, 21 W.R. 255.**

(145-a)—*Hindu Law—Joint Mitakshara family—Mortgage by conditional sale given by Karta—Foreclosure decree—Son not made party—Mortgagee not aware of son's interest—Whether son can redeem.*—When a mortgagee has obtained a foreclosure decree on a mortgage by conditional sale against the head of a Hindu family governed by the *Mitakshara*, a

Mortgage—continued.**—5.—Foreclosure—continued.**

son who was not a party to the foreclosure decree cannot afterwards redeem, if he is unable to show that the mortgagee had notice of his interest at the time of the foreclosure suit. **BALKI MOHAPATRA v. BROJOBASHI PANDA**, 14 Ind. Cas. 333. (25 A. 214, F.B., 8 A.L.J. 922, 12 Ind. Cas. 111, Rel. on.)

(145-b)—*Bond containing stipulation to pay later advance at time of redemption of earlier mortgage—No property made security in the later bond for further advance.*—The ancestor of the defendants executed two bonds, dated respectively July 19, 1864, and September 1, 1865, in favour of the ancestors to the plaintiffs. The former was a mortgage by way of conditional sale. The latter bond contained a promise to pay a definite sum with interest by the last day of *Baisakh*, and provided that, in the event of default, the obligees might recover the money from the obligors personally and their moveable and immoveable property (none being specified). After making reference to the earlier deed, the obligor said: "When we offer to pay the amount on the deed of conditional sale, we will first pay the amount with interest of the present deed of conditional sale..... therefore we have written this bond (*tamassuk*) in order that it may be of use." In a suit for foreclosure in the event of non-payment of the amounts due under the two deeds: *held*, that the later bond did not create a mortgage. **BALDEO RAI v. MURLI RAI**, 10 A.L.J. 120.

(146)—*Sub-mortgage — Purchaser of mortgagee's interest at sale in execution of sub-mortgagee's decree—Mortgage by mortgagee, of properties after sub-mortgage—Foreclosure suit and decree against mortgagee alone treated as owner—Priorities.*—A R, claiming title as mortgagee under a mortgage-deed executed on 26th July, 1890, deposited the title-deeds of the mortgaged property (being the mortgage-deed itself and a deed of assignment of the same) by way of equitable mortgage with the plaintiff in October, 1895. In March, 1895, A R purported to execute a mortgage as owner in fee of some of the properties in favour of A G who, in July 1902, brought a foreclosure suit which was decreed in the same month. The plaintiff was not made a party to this suit. A G's case that the mortgage of 26th July, 1890 was satisfied previous to the execution of the mortgage in his favour, by the mortgagors making over to A R all the mortgaged properties, was disbelieved. Meanwhile in 1901, plaintiff had sued on his mortgage and had, on 28th August, 1902, purchased the right, title and interest of his mortgagor A R in execution of the decree obtained by him. The plaintiff instituted the present suit to enforce the mortgage of 26th July, 1890 against the original mortgagors, as also A R and A G. *Held*, that the plaintiff, not having been made a party to A G's suit, could not be barred or affected by the decree in that suit, and an enquiry as to the priority between the plaintiff and A R was necessary

Mortgage—continued.**—5.—Foreclosure—continued.**

for the proper disposal of the case. **THA HNYN v. MAUNG MYA SU**, 14 C.W.N. 214, P.C.=5 Ind. Cas. 151=11 C.L.J. 166=12 Bom. L.R. 234=20 M.L.J. 153=37 C. 239.

(147)—*Mortgage by unregistered deed—Subsequent mortgage by registered deed of conditional sale—Foreclosure by second mortgagee—Suit by prior mortgagee to realize his mortgage debt.*—A piece of land was mortgaged to a certain person, by an unregistered deed, and possession given to him. Subsequently, by a registered deed a whole village, including the land previously mortgaged, was mortgaged to a third person by a deed of conditional sale. The second mortgagee foreclosed his mortgage and ejected the prior mortgagee. The latter sued to have it declared that he was entitled to realize his mortgage-debt from the property mortgaged to him. *Held* that a registered mortgage was entitled to priority over an unregistered one under Act XIX of 1843, and that, as the power of foreclosure was incidental to a mortgage in the form of conditional sale, the second mortgagee by availing himself of that power did not forfeit the priority he possessed. **BHIROOGEE MISR v. OOLFUT ALI**, 2 N.W.P. 311.

(148)—*Suit for foreclosure—Order absolute obtained before the expiry of time by concealing facts—Taking advantage of mistake of Court—Suit to set aside decree and order absolute—Maintainability.*—Where a suit for foreclosure was compromised, the mortgagee agreeing to give the mortgagor six months' time to pay up the amount found due, but the Court by mistake passed a decree *nisi* allowing only three months' time, and the mortgagee taking advantage of the mistake and without drawing the Courts attention to the terms of the compromise petition, obtained an order absolute before the six months expired. *Held*, in a suit to set aside the foreclosure decree and order absolute, that the facts amounted to fraud on the part of the mortgagee and the decree should be set aside. **BAISHNAB CHARAN LAHA v. BASUNTA KUMAR PAIN**, 13 C.W.N. 300=4 Ind. Cas. 68.

(149)—*Mortgage — Foreclosure — Suit for possession—Fraud and collusion—Pona fides—Evidence.*—Where plaintiff (mortgagee sued for possession after foreclosure and one of the defendants, who, having purchased a part of the property at an execution sale, was in possession thereof, pleaded that the mortgage was a fraudulent and colourable transaction entered into between the mortgagor and the mortgagee for the purpose of defrauding creditors, the Privy Council, reversing the High Court's decree, restored the judgment of the Principal Sudder Ameen that the mortgage was not a *bona fide* transaction; because, in the opinion of their Lordships, the mortgagee had not adduced better and more reliable evidence than he had actually given in the case to make out the reality and *bona fides* of his mortgage.

Mortgage—continued.—5.—**Foreclosure**—continued.

N.B.—In this case, though the mortgagee had it in his power so to do, he did not examine either himself or his moonshee, who was said to have taken a principal part in the original transaction, or the mortgagor. **WOOMESH CHUNDER ROY v. GOOROODOSS ROY, 17 W. R. 9, P.C.**

(150)—*Suit for possession upon foreclosure, dismissal of — Damages — Covenant to pay — Costs.*—Where a suit for possession upon foreclosure, brought against the mortgagors and their co-sharers at the suggestion of the mortgagors, was dismissed owing to the intervention of the co-sharers, *held*, the plaintiff was entitled to recover the money lent, from the mortgagors, with interest and costs of the dismissed suit, even in the absence of a covenant to repay the money lent in the mortgage-deed. **BHUGWAN ACHARJEE v. GOBIND SAHOO, 9 C. 234 = 11 C.L.R. 355.**

(151)—*Transfer of Property Act (IV of 1882), ss. 86, 87—Foreclosure suit—Costs if may be recovered from mortgagor personally.*—A mortgagee, who has obtained an order absolute for foreclosure, may proceed against the mortgagor personally for the costs of the suit. **SHAFFAR KHAN v. SATYANUNDA DAS GUPTA, 13 C.W. N. 742 = 4 Ind. Cas. 545. (14 C. 185, F.; 12 C. W.N. 364, 35 C. 431, D.)**

(152)—*Mortgage—Interest.*—Where a transaction has all along been treated by both parties and by the Courts hitherto as a mortgage for a loan on which interest was not only due, but had in part been paid, it is not competent to one of the parties or the Court on remand to raise the question that by the terms of the *ikrarnama* no interest was due. **GUNGA PHUL OJHA v. GOPAL OOPADHYA, 1 W.R. 135.**

(153)—*Foreclosure of mortgaged property not properly defined—Procedure of Appellate Court.*—Where a decree does not define with certainty the property or share in it which the mortgagee is entitled to foreclose, though he was simply declared to have a right to foreclose, the Appellate Court should itself either remedy the defect or remand the case for that purpose. **BISSESSUR THAKOOR v. GUNGA BISSEN MISER, W.R. 1864, 215.**

(154)—*Pre-emption — Limitation—Transfer of Property Act (IV of 1882), ss. 86, 87—Foreclosure of mortgage—Date of accrual of cause of action.*—A right of pre-emption, arising on the foreclosure of a mortgage under the Transfer of Property Act, accrues not from the date upon which the mortgagor is under a decree given under s. 86 of the Act, declared absolutely debarred of all rights to redeem the property, but from the date on which the mortgagee obtains an order absolute in terms of s. 87 of the same Act. **ANWAR-UL HAQ v. JWALA PRASAD, 20 A. 353 = A.W.N. 1898, 67. (14 A. 405, 16 C. 246, R.) [F., 20 A. 375.]**

Mortgage—continued.—5.—**Foreclosure**—continued.

(155)—*Mortgage by conditional sale—Foreclosure—Reg. XVII of 1806, s. 8—Title of mortgage—Pre-emption—Purchase-money—Burden of proof.*—A proceeding under Reg. XVII of 1806, foreclosing a mortgage by conditional sale, being purely ministerial, cannot bind the mortgagor on whom notice of foreclosure is served, much less can it bind third parties. It is not, therefore, conclusive as regards the amount of the purchase-money where it is in issue in a suit for pre-emption in respect of such conditional sale. (10 M.I.A. 340, R.) Nor, on general principles, can a decree in a suit for foreclosure be conclusive on the question of such amount, against the plaintiff in the pre-emption suit who was not a party to the suit in which it was passed. The pre-emptor, in the case of such a mortgage which has become absolute, is bound to pay, as the price of the property, the entire amount due on such mortgage at the time it became absolute; and the property becomes the absolute property of the mortgagee at the termination of the year of grace, even though he may not have obtained a decree establishing or declaring his proprietary right. **TAWAKKUL RAI v. LUCHMAN RAI, 6 A. 344 = A.W.N. 1884, 110. (10 M.I.A. 340, R.; 5 A. 187, 22 W.R. 539, 8 W.R. 476, 3 Agra 103, 358, F.) [Appr., 14 A. 405, F.B.; R., 6 A. 551, 121 P.R. 1894, D., 11 A. 164.]**

(156)—*Suit for foreclosure—Minority of defendant—Burden of proof—Admissibility of previous judgments—Evidence Act (I of 1872), s. 13 (b).*—In a suit for foreclosure, one of the defendants contended that he was a minor at the date of executing the mortgage, and so not competent to enter into a contract; *held*, that the burden of proving the validity of the contract lay on the plaintiffs in the first instance. Where certain judgments were admitted in evidence of proof of the defendant's minority under s. 13, cl. (b), *held*, the judgments were not admissible, the cases in which they had been passed not being instances in which any right asserted by the defendant was recognized or exercised or in which its exercise was asserted, disputed or departed from. Those judgments were admissible to prove only the denial by the defendant of his competency to execute the contracts and the Court's decision thereon, but they were not admissible to prove, as against the plaintiffs, the fact of the defendant's minority. **GAYA DIN v. MUSSAMMAT DULARI, 6 A.L.J. 693 = 2 Ind. Cas. 839.**

(157)—*Purchase of land worth more than Rs. 100—Inability to pay purchase money—Mortgage by purchaser of purchased land as security for price—Suit for foreclosure—Validity and enforceability of mortgage in favour of true owner—Estoppel by false statement where truth known to both parties.*—The defendants bought lands worth more than Rs. 100, and, being unable to pay the purchase-money, mortgaged them to secure payment of the price. They took no deed of conveyance from the vendor, the mortgage-deed reciting that

Mortgage—continued.**—5.—Foreclosure—continued.**

the conveyance was to be executed later on. In a suit by the plaintiff to foreclose the mortgage; *Held*, dismissing the suit, that, the defendants having acquired no title, and having nothing to mortgage, the mortgage in favour of the true owner was meaningless even where the mortgagor was in physical possession, and that the mortgage was not enforceable at law. Where both the parties to a transaction know the truth as to matters therein stated, no question of estoppel by a false statement can arise. **SITARAM v. MT. HARKU BAI**, 4 N. L. R. 28. (30 C. 539, R.)

(158)—*Conditional decree for foreclosure—Mortgage-money made payable by instalment—Order of Court refusing to make decree absolute—Appeal—Civ. Pro. Code, 1882, s. 540.*—An order of an Additional District Judge, refusing to make absolute a conditional decree for foreclosure, by which the mortgage-money was made payable by instalments, on the ground that all instalments due up to date have been deposited in Court, is a "decree" within the meaning of s. 2, Civ. Pro. Code; and an appeal lies against such order under s. 540, Civ. Pro. Code. **Pandurang v. Ram Chandra Venkatesh**, 4 N. L. R. 54. (3 N. L. R. 55, 3 N. L. R. 146, 2 N. L. R. 178, 16 C. P. L. R. 111, R.) [R., 4 N. L. R. 158.]

(159)—*Mortgage by conditional sale payable by instalments—Provision for foreclosure in default—Right of mortgagee to sue for instalment due.*—Where a mortgage by conditional sale provided for payment of the mortgage money by instalments and foreclosure in default of payment of instalments, mortgagee was bound to follow the conditions of the mortgage and had no right to sue separately for an instalment. The estate was liable for the debt and if the debt was not paid otherwise, it was discharged by the foreclosure. It was not open to the mortgagee to recover his money separately from the mortgagor and from his property other than mortgaged. He was bound either to give up his mortgage or claim money only or keep to his mortgage and follow the conditions thereof. **MAHADEO v. BUKHTAWAR MALL**, 2 C. P. L. R. 229.

(160)—*When mortgagee may sue for consideration money—Mortgage in possession—Foreclosure—Accounts—Liability of mortgagor.*—A mortgagee may, for good and sufficient cause, such as not obtaining or being deprived of possession of the property by process of law, sue for the consideration money. A mortgagee in possession is required to account to the mortgagor before foreclosure. A mortgagor is liable to a mortgagee, notwithstanding the alleged ownership of a third party. **SHECK MAHOMED BUKSH v. THAKOOR DYAL SINGH**, 1 W. R. 365.

(161)—*Court not to refuse to consider profits during possession of mortgagee.*—In taking accounts between the parties to a suit for foreclosure, it would not be equitable to refuse to

Mortgage—continued.**—5.—Foreclosure—continued.**

consider the profits that accrued due, while the property was in the possession of the mortgagee, though after the expiry of the lease between them. **MURATSINGH LACHMANSINGH v. BAKTAWARSINGH**, 6 C. P. L. R. 22.

(162)—*Mortgage—Law of foreclosure in Bengal as established by Regulations and practice—Benamsee lease—Error in plaint, no bar to relief really sought—Conditional sale—Foreclosure—Suit for possession and mesne profits—Necessity for mortgagee in possession to produce account books in Court—Reg. XV of 1793, s. 11.*—Up to the year 1806, the rights of the holder of a bye-bill-wufa (conditional sale) were enforceable according to the strict terms of the contract. It was then necessary for the mortgagee, if he wished to save his estate from forfeiture, to tender the amount due, or to pay it into Court, pursuant to the provisions of Regulation I of 1798, within the period stipulated for the re-payment of the loan. Regulation XVII of 1806 first introduced a modification of the strict rights given by the contract. S. 7 of that Regulation gives the mortgagor a right of redemption within one year after an application, by the mortgagee to the Court under s. 8 of that Regulation. After such an application, the mortgagor must either pay or tender the money lent, or the balance then due, if any part of the principal sum has been discharged, and if the mortgagee has not been in possession, any interest that may be due, or he must make a deposit pursuant to s. 2 of Regulation I of 1798. The general effect of these Regulations is, that if anything be due on the mortgage and the mortgagor makes no deposit or an insufficient deposit, the right of redemption is gone at the expiration of the year of grace. The title of the mortgagee, however, is not even then complete. A mortgagee after having done all that Regulation XVII of 1806 requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession. In that suit the mortgagor may contest the validity of the conditional sale, or the regularity of the proceedings taken under Regulation XVII of 1806 in order to make it absolute. He may also allege and prove that nothing is due or that the deposit which he has made is sufficient to cover what is due, but the issue, in so far as the right of redemption is concerned, will be whether anything, at the end of the year of grace, remained due to the mortgagee, and if so, whether the necessary deposit had been then made. If that is found against the mortgagor, the right of redemption is gone. [Appr., 15 W. R. P. C., 35=7 B. L. R. 136=13 M. I. A. 560; Expl., 3 Agra 358; R., 13 W. R. 44, 17 W. R. 197, 3 A. 610=A. W. N. 1881, 31, 3 A. 770=A. W. N. 1881, 66, 6 A. 344=A. W. N. 1890, 110, 12 B. 36, A. W. N. 1893, 209=16 A. 59; D., 16 W. R. 251, A. W. N. 1892, 108=14 A. 405.] The defendant's husband gave the plaintiff

Mortgage—continued.**—5.—Foreclosure—continued.**

an instrument which purported to be an absolute bill of sale of certain lands in consideration of a certain sum advanced. On the same day, the plaintiff executed to the defendant's husband an *ikrar* importing that on payment of the said sum with interest on a specified date, the sale should be void; but that in the event of the seller not paying the principal and interest according to his engagement, the *ikrar* was to be null and void, and the purchaser was to become the absolute proprietor of the property. On the day before the date of the bill of sale, the defendant's husband had granted a lease of the mortgaged premises *benames* to the plaintiff's son, but really to plaintiff who, under color of it, obtained possession of the mortgaged premises. Plaintiff commenced this suit in order to complete his title under the foreclosure. Treating the lease to his son as a subsisting lease to that person, and himself as out of possession, plaintiff asked to have possession decreed to him together with mesne profits. *Held* (a) that, as the real object of the suit was to perfect plaintiff's title as absolute owner of the property, he was not debarred from that relief, if he was otherwise entitled to it, because, under an erroneous view of the lease, he had asked for it by his plaint in a somewhat different form and with something to which he was not entitled. (b) That the lease did not save the plaintiff from the liabilities whilst it gave him the advantages of a mortgagee in possession, still less could it be taken to modify the terms of the conditional sale. (c) That the plaintiff was entitled to possession of the mortgaged premises as absolute owner by virtue of the conditional sale which had been duly made absolute, but was not entitled to a decree for any mesne profits. [*Cons.*, 6 C. 564=7 C.L.R. 583.] Under s. 11, Regulation XV of 1793, the production of accounts by a mortgagee in possession seeking to foreclose, cannot be called for when there is neither plea nor proof that the usufruct had liquidated the principal and interest, and where no deposit had been made to cover the balance admitted to be due. The necessity for a mortgagee in possession to produce his accounts arises:—First, when the mortgagor has deposited the principal money, leaving the question of interest to be settled by an adjustment of the account; secondly, when the mortgagor has deposited all that he admits or alleges to be due; and thirdly, when he pleads and undertakes to prove that the whole of the principal and interest had been liquidated by the usufruct of the mortgaged premises. **FORBES v. AMEEROONISSA BEGUM**, 5 W.R. P.C. 47=10 M.I.A. 340. [*F.*, 11 W.R.P.C. 19.]

(163)—*Payment by puisne mortgagee of amount due under prior mortgage-decree to which he was party and acceptance of the amount by decree-holder—Suit by puisne mortgagee for foreclosure decree in respect of amount so paid—Civ. Pro. Code, s. 244, whether such suit barred by—Transfer of Property Act, ss. 74, 85, 86—Form of foreclosure-decree.—*

Mortgage—continued.**—5.—Foreclosure—continued.**

A mortgage-decree directed, that, in the event of the decree amount not being paid within a certain time, the defendant should be absolutely debarred of all right to redeem the mortgaged property. A puisne mortgagee, who was a party to the suit, paid the decretal amount in Court and the amount was taken out by the decree-holders. Thereupon, the puisne mortgagee made an application to the Court that a decree for absolute foreclosure of the mortgaged property might be prepared in his favour. The Court did not allow the application, on the ground that the puisne mortgagee had become the representative of the prior mortgagee under s. 74 of the Transfer of Property Act and was entitled to bring a suit for foreclosure, but that he had not acquired the status of a decree-holder, and that, while he was defendant, he could not execute the decree as decree-holder. Hence, the present suit by the puisne mortgagee. The plaint contained a statement of all the material circumstances but the prayer of it was inartistically framed. The Court of first instance gave a decree in plaintiff's favour but the High Court reversed it on the ground that the suit was barred by the provisions of s. 244, Civ. Pro. Code. *Held*, though the prayer of the plaint is inartistically framed, it is sufficient, with the aid of the prayer for further relief, to enable the Court to give the plaintiff the appropriate relief, if he is otherwise entitled to it. *Held*, also, that, on payment by the puisne mortgagee of the sum into Court within the time allowed and acceptance of that sum by the then plaintiffs, the decree was spent and became discharged and satisfied. There was, therefore, nothing left to be done in the execution department. It is true that the present plaintiff, having made that payment acquired, under s. 74 of the Transfer of Property Act, all the rights and powers of the first mortgagees as such. But this would not have the effect of reviving or giving vitality to a decree which by the terms of it had become discharged. A new decree is required to work out the respective rights of the parties under the other peculiar circumstances of the case. S. 244, Civ. Pro. Code, is not therefore a bar to the present suit. Further, their Lordships expressed an opinion that the form of order given in s. 86 of the Transfer of Property Act contemplates a suit between one mortgagee and the mortgagor only and should not be treated as a common form to be literally followed in every suit for foreclosure, but to be adapted to the particular circumstances of each case. To regulate the rights of puisne mortgagees, in mortgage decrees, to redeem a prior mortgage, a form of order known in the Chancery Division of the High Court in England might be adopted in India. **GOPI NARAIN KHANNA v. BABU BANSIDHAR**, 9 C.W.N. 577. P.C.=27 A. 325=2 A.L.J. 336=2 C.L.J. 173=7 Bom. L.R. 427=15 M.L.J. 191=32 I.A. 123=8 Sar. 799.

(164)—*Foreclosure, Suit for—Decree for foreclosure, Alteration of, before making absolute—*

Mortgage--continued.

—5.—Foreclosure—continued.

Decree for foreclosure in respect of part of mortgaged property subsequent to order absolute in respect of the remaining part—Transfer of Property Act, s. 87—Execution of decree—Code of Civil Procedure, s. 244—Mortgage.—The defendant and his father who were living in union owned between them a 6 p. share which the father in 1892 mortgaged to the plaintiff by way of conditional sale. The plaintiff sued for foreclosure and obtained a decree nisi in February, 1897. To that suit the defendant was not made a party. Before the decree could be made absolute, his father died and the plaintiff's application for an order absolute was made against the defendant who objected that his interest in the property should be excluded from the operation of the decree and the objection was allowed by the Munsiff and an order was passed making the foreclosure absolute in respect of the father's share only. The plaintiff then sued for a declaration that the defendant was bound by the foreclosure decree passed against his father and that that decree should be made absolute as regards the defendant's interest. That suit was finally dismissed. The plaintiff brought the present suit for half the amount due upon the mortgage at the date of the previous decree and, in default of payment, foreclosure of the defendant's right to redeem his interest in the property. *Held*, that the suit was not barred by s. 244, Civ. Pro. Code so far as regards the questions whether the mortgage made by his father was binding upon the defendant and whether the defendant was bound to pay his father's debt out of any family property which had passed to him by survivorship; but that having regard to the provisions of s. 87 of the Transfer of Property Act, the foreclosure of the father's interest having been made absolute on account of the non-payment of the whole debt, the suit was not maintainable. **RAJA RAM V. SHEOPAL SINGH, 7 O.C. 137.**

(165)—*Mortgage suit between Hindus—Foreclosure decree in Supreme Court—Effect—Pendency of suit in Supreme Court—Supplemental suit in Zilla Court—Effect—Mortgage—Fraud of mortgagee—Purchase by mortgagee in possession at sale for arrears of revenue—Effect on equity of redemption.*—The effect of a foreclosure decree in the Supreme Court in a mortgage suit, between Hindus is equivalent to a decree establishing proprietary right in the Company's Courts, on similar suits on the like instruments. The mere pendency of a suit in the Supreme Court is no bar to the prosecution of a suit in the Zilla Court intended to be simply in furtherance of, and supplemental to the suit in the Supreme Court. The equity of redemption is not lost where a mortgagee in possession fraudulently allows the Government revenue to fall into arrears with a view to the land being put up to sale and becomes the purchaser of it at the Government sale for arrears. **NAWAB SIDHI NAZIR ALI KHAN V. OJODHYARAM KHAN, 5 W.R.P.C. 83=10 M.I.A. 540=Suth.**

Mortgage—continued.

—5.—Foreclosure—continued.

P.C. 635. [*Expl.*, 1 B.L.R. F.B., 58=10 W. R. F.B. 51; *Appr.*, 26 M. 385=13 M.L.J. 129; *Rel. on.* 7 Ind. Cas. 772, 7 Ind. Cas. 21=12 C. L.J. 336; *R.*, 20 W.R. 333, 34 C. 241=5 C.L. J. 385.]

(166)—*Act VIII of 1859, s. 246—Foreclosure, decree for—Execution—Sale—Objection by alienees pendente lite—Rights of judgment-debtor.*—Where a mortgagee having petitioned for sale under a decree for foreclosure, E and P came forward to claim under conveyances made by the judgment-debtor *pendente lite*, and the Moonsiff ordered the sale of the rights and interests of the judgment-debtors. *Held*, that the sale was inoperative and the Moonsiff's order inapplicable to the case and that the decree-holder had a right to the property sold which had been originally pledged to him. E and P could only take the property as subject to the rights of the parties to the suit, and the Moonsiff should have treated them as the judgment-debtors. **SHAIKHA EIDA V. RAMJUG PANDEY, 21 W.R. 14.**

(167)—*Sale—Transfer of Property Act, IV of 1882, s. 58.*—Where a mortgage bond provided that, until the payment of the principal and interest, certain properties of the mortgagor were hypothecated as security for the said debt and that the mortgagor would not transfer those properties in any way and that if, on the fixed date, the principal and interest were not paid up in a lump sum as stipulated, the creditor was at liberty to realize his money from the hypothecated property by a regular suit, or by an application for foreclosure; *held*, in a suit for foreclosure brought on the mortgage, that the mortgage deed was not an instrument of conditional sale within the meaning of s. 58, Tr. P. Act, that it was no more than an agreement by way of mortgage in which the mortgagor pledges certain property for money advanced, that the document could not be construed as an agreement for foreclosure in its commonly accepted sense, as applied to instruments of conditional sale, that the suit proceeded upon that basis but that it was competent to the Court, in lieu of a decree for foreclosure, to make a decree for sale of the mortgaged property. **SHEOAMBAR PANDEY V. FAKHARUDDIN AHMAD, A.W.N. 1886, 11.**

(168)—*Suit for foreclosure—Subject-matter, value of—Jurisdiction.*—*Held*, that a suit for foreclosure of a mortgage of land is a suit for land. (9 B.L.R. 171, 27 M. 157, 22 B. 701, R.) *Held*, further, that the value of the subject-matter of such a suit cannot exceed value of the mortgagor's interest which will pass to the plaintiff mortgagee on foreclosure. **GIRDHARI LAL V. SHEO NANDAN LAL, 11 O.C. 154. (8 A. 438, R.)**

(169)—*Mortgagee in possession—Application for foreclosure of mortgage—Limitation—Limitation Act, arts. 135, 147 and 178—Beng. Reg. XVII of 1806, s. 8.*—There is no authority for holding that a mortgagee in possession is bound

Mortgage—continued.—5.—**Foreclosure**—continued.

to apply for foreclosure within 12 years from the date of the default. He can take out foreclosure proceedings at any time during the subsistence of his mortgage. **NAGAR v. SAUDAGAR, 57 P.R. 1908 = 115 P.W.R. 1908.** (121 P.R. 1894, 35 P.R. 1899, 103 P.R. 1901, F.B., 65 P.R. 1906, 4 M. 172, R.)

(170)—*Mortgagee without possession—Foreclosure.*—The right of a mortgagee without possession to effect foreclosure does not cease 12 years after the alleged mortgage. The possession of the mortgagor is not to be presumed to be adverse to, but may be perfectly reconcilable with, the subsisting lien of the mortgagee. **KALI COOMAR DUTT ROY v. JUGGUT SOONDEREE CHOWDRAIN, 1 W.R. 239.**

(171)—*Case heard by Court of two or more Judges—Difference of opinion between Judges—Procedure—Mortgagee under English deed right of, to foreclose immediately upon default—Possession subject to mortgagor's right of redemption—Suit to recover possession under mortgage—Limitation—Commencement.*—In this case the two Judges who heard the case originally failed to expressly state the point of law on which they happened to differ, and it was held that though s. 23 of Act XXIII of 1861 did not clearly state the manner in which the point upon which the Judges differ is to be stated or how the proceedings are to be framed, yet it is clear that, in a Court where the concurrence of two or more Judges is necessary to a judicial determination, there must be a bringing together of the minds of the Judges and an expression of opinion thereafter. In the present case, however, the Judges differing in opinion on points of law having omitted to state the particular points upon which they differed, there cannot be taken to have been any determination of the appeal, and where such a case is referred to other Judges for final determination such other Judges have jurisdiction to go into the whole case. [F., 12 W.R. 397; Appl., 8 W.R. 171; R., 9 W.R. F.B., 1, 6 A. 468; D., 15 C.L.J. 360.] Under an English deed of mortgage prepared according to the English form, the mortgagor conveys the property to the mortgagee, and the latter becomes entitled to recover possession of the property. He is in fact entitled to such possession even before the foreclosure, immediately the default was made, and he would hold such possession subject both to his own right to foreclose and to the right of the mortgagor to redeem. The right of the mortgagee to sue for possession does not depend upon his obtaining a decree for foreclosure, and where a person has in good faith purchased the whole or a portion of the rights of the mortgagor before any suit was pending against him, the decree in the foreclosure suit cannot be deemed to bind such person. **KHELUT CHUNDER GHOSE v. TARACHARN KOONDO CHOWDHRY, 6 W.R. 269.** [Affirmed on appeal to Privy Council, 8

Mortgage—continued.—5.—**Foreclosure**—continued.

B.L.R. 104, P.C. = 16 W.R. P.C., 33; Appl., 27 C. 185; R., 12 C. 614, 14 C. 464; D., 9 B. H.C. 53.]

(172)—*Foreclosure suit—Limitation—Act IX of 1871, art. 135.*—Held that, as regards a foreclosure suit, limitation told against the mortgagee from the time when he was first entitled to possession, and not from the accrual of any cause of action. **LALL MOHEN GUNGOPADHYA v. PROSUNNO CHUNDER BANERJEE, 24 W.R. 433.** [D., 10 C. 68; Cons., 6 C. 564; R., 12 C. 614.]

(173)—*Novation of contract—Suit for foreclosure—Limitation Act, 1859, s. 1, Act IX of 1871, sch. II, arts. 135, 144 and Act XV of 1877, s. 2, sch. II, art. 147.*—Where after the execution of a usufructuary mortgage, part only of the money is advanced by the mortgagee and a proportionate part only of the property is left in his possession, and subsequently a contract is entered into by which the transaction is converted into a mortgage by conditional sale and the undelivered portion of property is surrendered by the mortgagee, the latter cannot sue for foreclosure on the basis of the original mortgage which was superseded by the new contract, or, in respect of the whole of the mortgaged property. Though a suit for foreclosure on a mortgage of 1861 instituted after the commencement of the Limitation Act of 1877 would be in time by that Act, yet, it would be barred if the time for the suit had expired before that Act came into force. The period of limitation applicable to a suit for foreclosure was 12 years under cl. 12 of s. 1 of Act XIV of 1859, and under arts. 135 and 144 of sch. II to Act IX of 1871. A suit for foreclosure on a deed of 1861 was therefore barred before the Act of 1877 came into force. **KARIMDAD KHAN v. MUSTAQIM KHAN, 26 A. 4 = A.W.N. 1903, 175.** (11 A. 144, 14 B.L.R. 87, 4 C. 283, 1 Agra, F.B., 102, D.)

Mortgage of absolute occupancy holding without landlord's consent—Possession given to mortgagee under foreclosure decree—Right of landlord to recover possession—See C.P. ACT XVII OF 1889, s. 38, 12 C.P.L.R. 144.

Mortgage by absolute occupancy tenant of several holdings—Splitting up of mortgage for ascertaining value thereof—See C.P. ACT XVII OF 1889, s. 38 (2), 11 C.P.L.R. 17.

Both parties agriculturists—Foreclosure-proceedings taken and completed before the Act—Necessity for reference to Collector—See PUN. ACT XIII OF 1900, s. 9, cls. 2 and 3, 5 P.R. 1905 = 97 P.L.R. 1905.

See PUN. ACT XIII OF 1900, s. 9 (3), 150 P.L.R. 1901.

Requirements of valid notice in the case of foreclosure—See U.P. ACT XVIII OF 1876, ss. 10, 11, 12, 13, 10 O.C. 179.

Mortgage-decree before passing the Bundlekand Land Alienation Act—Order absolute for foreclosure—See U.P. ACT II OF 1903, s. 9 (3), 3 A.L.J. 738 = A.W.N. 1906, 271.

Mortgage—continued.—5.—**Foreclosure**—continued.

Person entitled to notice of foreclosure—Objection raised by mortgagor for want of notice to co-occupant—Pre-emption—See **BERAR LAND REVENUE CODE**, ss. 206, 211, sub-s. 1, cl. (a), 3 N.L.R. 84.

Setting aside *ex parte* order absolute—See **CIV. PRO. CODE**, 1908, O. IX, r. 13, 16 C.P.L.R. 92.

See **CIV. PRO. CODE**, 1908, O. XXI, rr. 91, 92, A.W.N. 1884, 318.

Refusal of costs to plaintiff—See **COSTS—SPECIAL CASES**, 13 C.P.L.R. 74.

See **COSTS—SPECIAL CASES**, 1 B.L.R. O. C., 27, 2 Ind. Jur. N.S., 160.

Appeal arising out of a suit for foreclosure—Court fee is payable on subject-matter in dispute in appeal, not on the principal money secured by the mortgage—See **COURT FEES ACT**, 1870, s. 7 (e), cl. IX, sch. I, art. 1, 5 A.L.J. 531=A.W.N. 1908, 247=4 M.L.T. 448=30 A. 547.

Appeal, memorandum of—Suit for foreclosure—Only amount found due challenged on appeal—Stamp duty to be paid—See **COURT-FEES ACT**, sch. I, art. 1, 1870, s. 7, cl. IX, 5 N.L.R. 130=3 Ind. Cas. 920.

Entry on land by mortgagee after decree absolute—Right to crops on land—See **CROPS**, 15 C.P.L.R. 141.

See **ESTOPPEL—ESTOPPEL BY CONDUCT**, 155 P.R. 1882.

No direction for delivery of possession in decree for foreclosure—Right of decree-holder to be placed in possession by way of execution—See **EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT**, 17 C.P.L.R. 62.

Ex parte order absolute for foreclosure—Refusal to set it aside—Appeal—See **EX-PARTE ORDER**, 2 Ind. Cas. 67.

Mortgage by father—Foreclosure decree against father binding sons' interest also—See **HINDU LAW—JOINT FAMILY**, 5 B. 687, (Note 2).

See **HINDU LAW—WIDOW**, 1 A. 503.

See **INTEREST—SPECIAL CASES**, 28 P.R. 1897.

Order for—See **JURISDICTION—SUITS FOR LAND**, Cor. 125.

See **JURISDICTION—SUITS FOR LAND**, Bourke O.C. 319, 1 Ind. Jur. N.S. 40.

See **LANDLORD AND TENANT—TRANSFER OF LANDLORD'S INTEREST**, 12 C.L.R. 479.

See **LETTERS PATENT, HIGH COURT**, 1865, S. 12, CALCUTTA, 11 B.L.R. 301.

Foreclosure of mortgage by conditional sale—Limitation—See **LIMITATION ACT**, 1908, s. 3, arts. 132, 147, 11 C.W.N. 959, F.B.=6 C.L.J. 237=34 C. 941.

Mortgage—continued.—5.—**Foreclosure**—continued.

Suit for foreclosure—Suit for possession barred—Effect—See **LIMITATION ACT**, 1908, s. 31, 9 Ind. Cas. 1038.

See **LIMITATION ACT**, 1908, art. 10, 2 Agra 364.

Suit to declare, against the heir of a mortgagee by conditional sale who has foreclosed is governed by art. 120 of the Limitation Act—See **LIMITATION ACT**, 1908, arts. 120, 144, 3 Bom. L.R. 707.

See **LIMITATION ACT**, 1908, arts. 135 and 144, 35 P.R. 1899.

Suit for possession after, by mortgagee—See **LIMITATION ACT**, 1908, art. 144, 6 C. 564=7 C.L.R. 563.

See **LIMITATION ACT**, 1908, arts. 144, 135, 90 P.R. 1895.

Decree for foreclosure—Appeal against a portion of the decree—Execution of appellate decree—Application for order absolute—Limitation Act, arts. 178 and 179—Transfer of Property Act, ss. 86 and 87—See **LIMITATION ACT**, 1908, arts. 181, 182, 2 A.L.J. 180, F.B.=A. W.N. 1905, 70=27 A. 501.

Decree for, not final decree—*Lis pendens*—See **LIS PENDENS**, 3 A.L.J. 675=A.W.N. 1906, 283=29 A. 76.

See **LUNATIC**, 10 B.L.R. 364=19 W.R. 163.

Gift to equity of redemption—Validity under Muhammadan Law—Notice to donee of foreclosure—See **MAHOMEDAN LAW—GIFT**, 86 P. R. 1910=130 P.W.R. 1910=171 P.L.R. 1910=8 Ind. Cas. 307.

Suit by sub-mortgagee—Parties—See **MORTGAGE—GENERAL**, 5 Ind. Cas. 654=12 C.L.J. 137.

Suit for foreclosure against assignee of mortgaged property—Representatives of mortgagor—See **PARTIES TO SUITS—GENERAL**, Bourke O.C. 319.

See **PLAINT—VERIFICATION AND SIGNATURE**, 1 B.L.R. A.C. 100=10 W.R. 145.

Power of sub-mortgagee to sue for sale of mortgagee rights of his mortgagor—See **PLEADINGS**, 7 Ind. Cas. 167=12 C.L.J. 357.

See **PRACTICE AND PROCEDURE**, 3 N.W.P. 176.

Effect of Punjab Alienation of Land Act on suits for possession after foreclosure of mortgage—See **PRE-EMPTION—GENERAL**, 20 P.R. 1905=77 P.L.R. 1905.

See **PRE-EMPTION—GENERAL**, 3 O.C. 184, 82 P.R. 1880.

In a suit for pre-emption in the case of a mortgage by conditional sale, the cause of action arises at the time of the execution of the deed as also at the time when the mortgage is foreclosed—See **PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-ARZ**, 27 A. 12=A.W.N. 1904, 149=1 A.L.J. 353.

Mortgage—continued.**—5.—Foreclosure—continued.**

Effect of—On right of pre-emption—Sale, when complete—Limitation—Cause of action—*See* PRE-EMPTION—RIGHT TO PRE-EMPT, 6 O.C. 275, B.

See PRE-EMPTION—RIGHT TO PRE-EMPT, 35 P.R. 1881.

See PRE-EMPTION—MISCELLANEOUS, A. W.N. 1886, 67.

See PRIVY COUNCIL, PRACTICE OF—MISCELLANEOUS, 5 W.R. P.C. 47=10 M. I. A. 340.

Foreclosure proceedings taken under Reg. XVII of 1806—Validity—Procedure—*See* BEN. REG. XVII OF 1806, 12 Ind. Cas. 345.

Mortgage—Foreclosure proceedings—Service of notice—Substituted service when permissible—Demand by registered notice—Burden of proof—Evidence—*See* BEN. REG. XVII OF 1806, 63 P.L.R. 1902.

See BEN. REG. XVII OF 1806, A.W.N. 1882, 25.

Foreclosure of mortgage by conditional sale—Notification to mortgagor—*See* BEN. REG. XVII OF 1806, s. 8, A.W.N. 1906, 309=29 A. 145=3 A.L.J. 857.

See BEN. REG. XVII OF 1806, s. 8, 14 B.L. R. 87=22 W.R. 90, 14 C. 451, P.L.R. 1900, p. 465=5 P.R. 1901.

See RES JUDICATA—GENERAL, A.W.N. 1892, 51.

Mortgage—Sale of equity of redemption prior to suit for—Right of mortgagor to appeal against foreclosure decree—*See* RIGHT OF APPEAL, 1 M.H.C. 7.

See SALE—GENERAL, 8 P.L.R. 1903.

See SUCCESSION CERTIFICATE ACT, 1889, s. 4, A.W.N. 1900, 94.

See TRANSFER OF PROPERTY ACT, 1882, s. 2, 2 C.P.L.R. 130.

When a mortgagee can foreclose a portion of the mortgaged property—*See* TRANSFER OF PROPERTY ACT, 1882, s. 60, 3 C.L.J. 377.

Suit by mortgagee by conditional sale—Portion of property exempted—Persons interested in the property exempted not necessary parties—*See* TRANSFER OF PROPERTY ACT, 1882, s. 85, 2 A.L.J. 630, F.B.=A.W.N. 1905, 244=28 A. 174.

Joinder of prior mortgagee in suit for foreclosure or sale—Necessity for continuing till the end—*See* TRANSFER OF PROPERTY ACT, 1882, s. 85, 17 C.P.L.R. 139.

Decree under s. 86 of the Transfer of Property Act—Suit by mortgagee—Decree directing payment by mortgagor within a certain time and in default of foreclosure—Default by mortgagor—Possession of mortgagee adverse—Second suit by mortgagor for redemption barred—*See* TRANSFER OF PROPERTY ACT, 1882, s. 86, 8 O. C. 33.

Mortgage—continued.**—5.—Foreclosure—concluded.**

Decree for foreclosure obtained against all the defendants—Order absolute obtained only against some of the defendants—Effect—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 86, 87, 10 Ind. Cas. 174.

Conditional decree for foreclosure or sale—Mortgagor's right to claim redemption before expiry of term—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 86 and 88, 1 N.L.R. 106.

Necessity for notice to judgment-debtor before making order absolute for foreclosure—*See* TRANSFER OF PROPERTY ACT, 1882, s. 87, 9 C.P.L.R. 5.

Mortgagor paying only part of sum under a foreclosure decree, not entitled to claim return of sums, paid by him, before passing of order absolute to foreclose mortgaged property, in lieu of balance unpaid by him—*See* TRANSFER OF PROPERTY ACT, 1882, s. 87, 10 O.C. 354.

Mortgage—Order absolute for—Without notice to mortgagor—Maintainability of application to set aside such order—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 87, 89, 32 C. 253, F.B.=9 C.W.N. 81.

See TRANSFER OF PROPERTY ACT, 1882, s. 88, A.W.N. 1885, 329.

—6.—Form of Mortgages.

See CONSTRUCTION OF MORTGAGE DEEDS.

(1)—*Suit on mortgage—Defendant's plea that he was vendee and not mortgagee, onus of proof.*—In a suit for possession wherein the plaintiff alleges that the defendant is his mortgagee, but the defendant answers that the deed is one of sale to him and not of mortgage, the form of the instrument is not by itself conclusive, but the question will have to be considered whether or not there continued to be a debt from the plaintiff to the defendant. Where it appears, *aliunde*, as, for instance, by the conduct of the alleged vendee, the defendant, and, by the entries in his accounts treating the consideration money in the alleged deed of sale as a continuing debt due to him, that the deed was intended as a mere security for money and that he so treated it, the Court will have to regard it as such accordingly. *GOVINDA v. JESHA PREMAJI*, 7 B. 73. [F., 13 M. 494; R., 22 B. 245, 2 Bom. L.R. 1058, 72 P.R. 1901=114 P.L.R. 1901.]

(2)—*Agreement compromising pending suit—Creditors to be in possession of debtor's property for certain time in satisfaction of debt—Right of debtor to claim redemption.*—By the terms of an agreement entered into by the plaintiff and defendants, a pending suit was compromised and payment of an ascertained balance found due by plaintiff was secured by the creditors (defendants) being placed in possession of plaintiff's land for a certain number of years, with the right of enjoying all the rents and profits thereof, subject to the payment of a fixed rent part of which was to be paid to the

Mortgage—continued.**—6.—Form of Mortgages—continued.**

plaintiff and the remainder to be retained by the creditor towards payment of the debt. *Held* that the agreement was a mortgage, and, as such, redeemable on the usual terms. **MASHOOK AMEEN SUZZADA v. MAREM REDDY, 8 M.H. C. 31.** [*Appr.*, 2 M. 45; *R.*, 2 M. 314, 4 M. 113, 20 B. 677; *D.*, 16 M. 486.]

(3)—*Mortgage—Intention—Construction.*—For creating a mortgage, it is sufficient, if it appears from the deed, that it was the intention of the parties to create a charge upon the land. If the intention can be collected from the instrument, the form of expression is not material. The particular instrument in this case construed (*Markby J., dubitante*) to indicate an intention of creating a mortgage. **RAJKUMAR RAMGOPAL NARAYAN SINGH v. RAM DUTT CHOWDHRY, 5 B.L.R. 264, F.B. = 13 W.R. F.B. 82.** [*F.*, 13 A. 28; *R.*, 1 A. 611, L.B.R. 1893—1900, 340, 33 C. 1133 = 4 C.L.J. 121 = 10 C.W.N. 1010; *D.*, 20 W.R. 12, 3 C. 336 = 1 C.L.R. 91, 7 C. 196 = 8 C.L.R. 454.]

(4)—*Loan of money—Lender put in possession of rents and profits of land—License—Mortgage.*—Where the lender of money is put in possession of the rents and profits of land for payment of interest on the loan, this is not a mere license or permission which can be revoked by the borrower at his pleasure, but is in the nature of a mortgage transaction in respect of which a suit for redemption can be brought. **KHOOSHAL RAE v. JANKEE DOSS, 2 N.W. P. 9.**

(5)—*Transfer of land in consideration of debt—Mutation of names—Agreement to re-transfer—Document creating no right in immovable property, not compulsorily registrable under s. 17 of Act III of 1877.*—In consideration of debts due to defendant-appellant, transfer of revenue khata was effected in his name by the plaintiff-respondent. Some years later, appellant agreed on certain conditions to effect the change of the khata again into the plaintiff's name after the debt due by the latter was satisfied, and executed an instrument intended to serve as evidence of such agreement. On the question as to the necessity or otherwise of the registration of the above instrument, *held* that it created no rights in land, but only amounted to a personal covenant to effect a mutation of names in the Government books when the debt was satisfied and as such did not require registration. With respect to the true character of the previous transfer which was recited in the said agreement, the High Court was of opinion that no sale had been made to the appellant but only a mortgage. As was held by both the lower Courts, when the khata of the land was previously transferred, the parties intended not to effect a sale of the property, but only a mortgage for the security of debts due by the transferor to the transferee. **PATEL RANCHOD v. BHIKHABHAI, 21 B. 704.** [*R.*, 2 Bom. L.R. 1058; *D.*, A.W.N. 1906, 180.]

Mortgage—continued.**—6.—Form of Mortgages—continued.**

(6)—*Advance on zur-i-peshgi lease.*—A lease was granted on a *zur-i-peshgi* advance for seven years at an annual *jumma* of Rs. 214-4-0, from which a deduction of Rs. 111-15-0 was to be made on account of interest; and it was also stipulated that if, after the expiration of the lease, the loan was not repaid, the lease should continue. *Held* that, under the circumstances as stated above, the transaction between the parties was a mortgage. **KISHTO COOMAR SINGH v. CHOWDREE BEERAJ SINGH, 2 Hay 159.**

(7)—*Usufructuary mortgage—Right to possession till discharge of debt.*—Where a person, by paying off a mortgage debt, becomes a usufructuary mortgagee in place of the original *zuripeshgidar*, he has a right to remain in possession of the property until the discharge of the debt by the usufruct. It is not necessary that he should sue for the amount due to him under the mortgage. **SHAIKH FYEZULLAH v. SYUD KAZIM HOSSEIN, 14 W. R. 29.**

(8)—*Construction of deed—Transaction whether mortgage or lease—Name given in deed not material—Essentials for mortgage.*—In this case, the plaintiff's father who owed the defendant a sum of money gave him certain land for twenty years in consideration thereof. It was also agreed that if the defendant shall plant vines, he should be at liberty to retain the land so planted even after the twenty years at a moderate annual rent. Plaintiff sought to redeem the land as if it were subject to a mortgage. He contended that the transaction was essentially a mortgage, and it being a mortgage, the agreement for a tenancy of undefined duration after the lapse of the twenty years was void, as fettering the right of redemption necessarily incident to a mortgage. It had therefore to be decided whether the transaction amounted to a mortgage or not, and, applying the usual test of mutuality of remedy, it was held that it was not a mortgage. Not only was there no stipulation for interest, but there was no undertaking for the payment even of the principal in any case. The land had been granted for a term instead of the money and the grant extinguished the debt. There was no debt and therefore no mortgage. The only objection to the operation of the clause of tenancy in the deed being thus removed, the defendant was held to have the right to retain occupation at least of the vine-yard planted and maintained by him on payment of the agreed annual rent. **ABDUL-BHAI v. KASHI, 11 B. 462.** [*R.*, 12 C.P.L.R. 96, 6 N.L.R. 65 = 6 Ind. Cas. 817; *D.*, 21 B. 704, 6 Bom. L.R. 630.]

(9)—*A mortgage, what is not.*—A mere covenant that the debtor will not part with any of his property until payment of the debt, will not constitute a mortgage. **GUROO SINGH v. LATAFUT HOSSAIN, 3 C. 336 = 1 C.L.R. 91.** [*F.*, 8 C.L.R. 454; *R.*, 12 A. 175.]

(10)—*Transfer of Property Act (IV of 1882), ss. 68, 98—Mortgagee given possession of part of*

Mortgage—continued.**—6.—Form of Mortgages—continued.**

property under anomalous mortgage, rights of— A mortgage-deed with the stipulations that, on the expiry of the term fixed therein, the mortgagor should be allowed to redeem the properties without paying back the principal amount borrowed by him or the interest thereon, and that, on the expiry of the above term, the mortgagee should deliver possession of the properties to the mortgagor without raising any objection, would be an anomalous mortgage under s. 98 of the Transfer of Property Act. Where, on such a mortgage, the mortgagor fails to deliver possession of part of the property mortgaged, it is not open to the mortgagee to sue as under s. 68 of the Act, since that section cannot apply to a case where the mortgagee has been given no right to claim repayment. Nor can the mortgagee continue, beyond the fixed term, in possession of the part of the property delivered to him. The only right the mortgagee could claim would be to remain in possession of the part for the stipulated period and to recover damages for the breach of contract by the mortgagor in not having delivered possession of the whole land mortgaged. **VISWALINGA PILLAI v. PALANI-APPA CHETTI, 21 M. 1.**

(11)—*Advance taken by landlord—Security for payment of rent, lease not turned into mortgage.*—A landlord on giving a lease ordinarily takes an advance of moneys which are to be credited to the lessee in his accounts as rent. The sums so taken are considered as security for the payment of the rent, and the fact that the money is always credited to the last year's rent shows the meaning of the custom, which is that, in case of a tenant's absconding during the term of his lease, the landlord may have this sum at least to fall back upon, and it has been never contended in any case of this description that such an advance might change the lease into a mortgage. **BABOO GRIDHAREE SINGH v. MR. COLLIS, 8 W.R. 497.**

(12)—*Devise of immoveable property subject to its being mortgaged in a particular manner by the devisee—Property mortgaged in a different manner—Enforceability of mortgage.*—Where by a will, certain immoveable property was devised subject to the condition that the devisee, who was also an executor, should, for the purpose of securing the payment of a legacy, execute a mortgage of the property in favour of the Official Trustee of Bengal, and the executor, instead, mortgaged it to one of his co-executors; held in a suit by the co-executor to enforce the mortgage, that the suit was not maintainable, as the mortgage, not being in accordance with the terms of the will, was invalid, and conveyed no rights to the plaintiff. **VAUGHAN v. HESELTINE, 1 A. 753. [R., 1 A. 762.]**

(13)—*Agreement to sell referring to existing mortgage—Stipulation as to re-purchase, whether makes transaction a mortgage.*—Plaintiffs sued to redeem an alleged mortgage passed by an ancestor of theirs. The document put forward by them did not purport to be a mortgage

Mortgage—continued.**—6.—Form of Mortgages—continued.**

at all but a sale deed. It recited a previous mortgage under which the mortgagee was already in possession, and stated that though a sale had been contemplated it had not been effected, because the parties could not agree as to the exact price of the lands, and that the price of the lands having been afterwards settled the arrangement was come to under the instrument that, if within 5 years from its date, plaintiffs should pay the price so fixed with interest, they should have back the lands, the mortgagee accounting for the profits and that, in default of such payment by the plaintiffs, the lands should be the absolute property of the mortgagee. The question had to be determined whether plaintiffs had a right to redeem i.e., whether there was a mortgage still subsisting. The document sued on was held to put an end to the mortgage that was subsisting at its date and substituted for it the agreement embodied therein which was not only not a mortgage but extinguished even the previous mortgage-debt so that the mortgagee could no longer enforce the payment of such debt to him. The mere stipulation for reconveyance and re-purchase could not by itself make the transaction a mortgage. To make a mortgage there must be a debt and in this case there was no debt and no transfer of the property as security for such debt. **VASUDEO v. BHAU, 21 B. 528. [R., 2 Bom. L.R. 1058; D., 6 Bom. L.R. 630.]**

(14)—*Vendor and purchaser—Agreement to reconvey, whether amounts to mortgage.*—An agreement between the vendor and purchaser of certain immoveable property that, on payment of a certain sum by the vendor, within a specified time, the property would be restored to him, and that, on failure of such payment, it should become the absolute property of the purchaser, does not create the relation of mortgagor and mortgagee; on the expiry of the period specified without any payment having been made, the property would vest in the purchaser absolutely. **BHUP KUAR v. MUHAMMADI BEGAM, 6 A. 37 = A.W.N. 1883, 211. [R., 2 Bom. L.R. 1058; D., 19 A. 434.]**

(15)—*Construction of documents—Sale of perpetual lease with condition of re-purchase—No mortgage.*—Where a purchaser of land granted a mukurari potta (perpetual lease) of it, to the person, who advanced the purchase-money for him, not as a security for the debt, but as an absolute acquittance of it, and it was also stipulated that, on payment of the debt without interest to the grantee or his heirs by the grantor or his heirs, the potta should be cancelled without any claim to mesne profits by the grantor, held, the transaction was not a mortgage, but evidence of a sale and acquittance of a debt, with power to re-purchase, under certain conditions personal to the vendor (grantor). **SITUL PURSHAD v. LUCHMI PURSHAD, 10 C. 30, P.C. = 10 I.A. 129 = 13 C.L.R. 382 = 4 Sar. 470. [F., 29 M. 307 = 16 M.L.J. 106; R., 8 A. 452; D., 1 L.B.R. 257.]**

Mortgage—continued.**—6.—Form of Mortgages—continued.**

(16)—*Conveyance and counterpart—Mortgage by conditional sale.*—A mortgagor executed a deed of conveyance for an inadequate price to the mortgagee, who executed in his turn a "counter-part" on the same date agreeing to reconvey the same if the sum without interest be repaid in a certain time. No payment was made in time, but after a long time, the property was sought to be redeemed. *Held* that, there was no evidence to show that the parties intended to enter into a transaction different from what appears on the face of the documents and that the plaintiff could not redeem. *AYYAVAYER v. RAHIMANSA*, 14 M. 170. [R., 131 P. R. 1894, 28 B. 153; D., 21 B. 706.]

(17)—*Charge on immoveable property not specifically named—Ambiguous document.*—An instrument charging a certain annual allowance on the mortgagors "granted villages" (where certain villages had been granted by Government) was not void for uncertainty, as, though the villages were not named in it, there was no doubt as to the particular villages which had been granted. *KANHIA LAL v. MUHAMMAD HUSAIN KHAN*. 5 A. 11 = A.W.N. 1882, 159. (1 A. 275, D.; 2 N.W.P. 263, F.) [R., 12 A. 175 = A.W.N. 1890, 60, 7 O.C. 108.]

(18)—*Transfer of Property Act, ss. 98, 100—Bond purporting to create charge on all property of obligor—Maxim "certum est quod certum reddi potest"—Suit for money due under bond.*—A registered bond contained the following: "To secure this money, I pledge voluntarily and willingly my wealth and property in favour of the said banker. Whatever property, &c., belonging to me be found by the said banker, that all should be available to the said banker. If, without discharging the debt due to this banker, I should sell, mortgage, or dispose of the property to another banker, such transfer shall be void." The creditor sued to recover the amount due under the bond by sale of certain immoveable property belonging to the debtor. *Held*, that the words used in the bond as indicating the property which was intended to be subject to the charge were sufficiently specific and certain to include, and were intended to include, all the property of the debtor. This being the construction of the bond, the maxim "*certum est quod certum reddi potest*" applied, and the bond did create a charge upon the immoveable property of the debtor in respect of the monies due under it. *RAMSIDH PANDE v. BALGOBIND*, 9 A. 158 = A.W.N. 1887, 15. (7 C. 196, R.) [D., 12 A. 175; R., 14 A. 162, 18 M. 364, 8 O.C. 227.]

(19)—*Mortgage—Redemption—Co-sharers—Construction.*—Where several share-holders in an estate have executed a joint mortgage of it, and have all subsequently executed deeds of further charge to which one or more have been parties, a purchaser of a portion of the estate from all the co-sharers, suing for redemption of the whole estate, must discharge all the debts which they jointly or severally charged on the

Mortgage—continued.**— 6.—Form of Mortgages—continued.**

property, for he represents all the co sharers. A mere agreement in a bond executed by a mortgagor subsequently to a mortgage, to the effect that "after the expiry of the mortgage, when the time comes for payment of the mortgage money, first I will pay this bond with interest and after that I will pay the amount of the mortgage," is sufficient to create a charge on the mortgaged estate. *BHUGWAN DASS v. MAHOMED JAFER*, 4 N.W.P. 161.

(20)—*Mortgage of chattels—Possession—Bona fides—Fraud.*—Mortgages of chattels may be made by parol. It is not essential to the validity of such a mortgage that there should be delivery of possession to the mortgagee. A mortgage may be supported if proved to have been made *bona fide*, although the property mortgaged may have been left in the possession of the mortgagor. *SHYAMSOONDAR v. CHEITA*, 3 N.W.P. 71. [R., 9 C.W.N. 14.]

(21)—*Mortgage of future crops, validity of.*—Future indigo crops that may be grown upon a certain plot of land may be validly mortgaged. (2 B.L.R. A. C. 230, R.) Such a transaction is neither governed by the Transfer of Property Act nor by the Contract Act; it is in the nature of an agreement to mortgage moveable property that may come into existence in future. *MISRI LAL v. MOZHAR HOSSAIN*, 13 C. 262. [R., 10 A. 133, 2 C.P.L.R. 193, 5 C.P.L.R. 6, 16 M. 429, 13 C.P.L.R. 43, 31 C. 667, 11 O.C. 301, 5 N.L.R. 21.]

(22) — *Mortgagee — Construction—Money-decree.*—The material part of a mortgage deed was as follows:—"If I do not pay off the money within the above term, then you will, after the expiration of the term, sell the above share of the land, and recover your money. If, by sale of the above land, the money receivable by you be not satisfied with charges, then you will realize the proper amount by selling my other landed properties, to which I will make no objection or excuse." The plaintiff, mortgagee, sued to recover a sum of money with interest due on the above bond, but he prayed only for a simple money-decree against the defendant and he did not ask for any sale of the property secured by the mortgage. *Held* that the plaintiff was entitled to a simple money-decree but it must be restricted to property of the defendant other than his landed property, and so it would be available against his moveable property only. *JOGESWAR DUTT v. NITACHAND CHUCKERBUTTY*, 4 B.L.R. App. 48.

(23)—*Attachment—Claim—Investigation—Mortgage, if legal or equitable—Courts in India—Mortgage of goods by debtor—Attachment—Possession with owner—Inference—Bona fides.*—The Courts in India are Courts both of law and equity. Therefore, for the determination of claims to attached property it is not material whether a mortgage is an equitable or a legal mortgage. Where goods are mortgaged and left in the possession of the original owner, the circumstance that they are

Mortgage—continued.**—6.—Form of Mortgages—continued.**

so left is not to be held as a fraud *per se* rendering the mortgage liable to be defeated as between the mortgagee and third parties, such as *bona fide* purchaser or judgment-creditors. But, when possession is left with the mortgagors, the Court must take that circumstance into consideration in determining whether or not the mortgage was fraudulent and colourable. The circumstances of each case should be closely scanned, and where it is shewn that the original dealing is *bona fide*, it should be supported, notwithstanding there has been no delivery. *DEANS, MANAGER, ALLAHABAD BANK v. RICHARDSON, 3 N.W.P. 54. [R., 9 C.W.N. 14.]*

(24)—*Mortgage—Part payment of mortgage-amount—Suit by mortgagee for possession of proportionate part of mortgagor's land—Intention of parties—Irregularities in procedure, objections to whether could be raised for first time in special appeal.*—It is not an absolute rule of law, that a mortgagor who has received only a portion of the principal money, is bound nevertheless to complete, as to such portion, the mortgage security, by giving land in proportion, to the person making such advance; the Court would not be justified without some further evidence, upon such an inchoate and incomplete transaction, in giving to the mortgagee part of the land in mortgage, though the parties may by their subsequent act and conduct, raise the inference that it was so intended. When objections to irregularities or illegalities in the procedure, which should have been raised and discussed in the lower Court, are for the first time raised in special appeal, the High Court under the circumstances will make every reasonable presumption in favour of the regularity or legality of such proceedings. *ACHUMBHEET TEWAREE v. BHUGWANT PANDEY, 1 N.W.P. 161.*

(25)—*Delivery by vendor to purchaser of the title deeds of lands as security for his delivering the title-deeds—Equitable mortgage created by deposit of title-deeds.*—The vendee of a *Muttah* of an estate paid part of the consideration money. When the parties came to complete, the vendors had not the title-deeds but they promised to deliver them in a few days, and agreed that the remaining part of the purchase-money should be retained by the vendee, and they handed over to him the title-deeds of another *Muttah*, called T., to be held as security for their delivering to such vendee the title-deeds of the sold *Muttah* in order to perfect his title. The purchaser, on the faith of this, advanced large sums, and paid off a mortgage on *Muttah* T. This latter *Muttah* having been sold, the vendee brought a suit to recover the amount advanced by him on account of that *Muttah*, claiming to be equitable mortgagee, and to have a charge on that estate for the advances made by him in respect thereof. *Held*, that the transaction created a lien, and bound the *Muttah*

Mortgage—continued.**—6.—Form of Mortgages—continued.**

T for the advances made by the vendee. *VARDEN SETH SAM v. LUCKPATHY RAYJEE LALLAH, 9 M.I.A. 303.*

(26)—*Mortgage—Equitable mortgage—Payment of original mortgage*—A person is not entitled to claim as equitable mortgagee merely on showing that he paid off the original mortgage; he must also show that it was his own money that was paid and that he was to stand in the situation of the original mortgagee. *PANDOORUNG BULLAL PUNDIT v. BALKRISHN HURBAJEE MAHAJUN, 5 W.R. P.C. 124=2 M.I.A. 60. [F., 17 W.R. 480; R., 8 M. 246.]*

(27)—*Equitable mortgage—Deposit of title-deeds—Conflicting evidence—Privileged communication.*—In Lower Burma both oral agreements to mortgage and mortgages by deposit of title-deeds are valid. If the parties contracting did in fact enter into the contract known as an equitable mortgage, knowing the nature of it and intending by the deposit of the title-deeds to create a lien upon the property covered by the title-deeds as collateral security for the repayment of money, the Court, in the absence of any express direction of the law to the contrary, are bound to give effect to such an agreement. Where the evidence is conflicting, the true test is to see what facts are put beyond doubt and to apply those ascertained facts as a guide in dealing with the oral evidence. S 126, Evidence Act, deals with professional communications. Where one defendant had written a letter to a co-defendant and the document came into the hands of the plaintiff, it was held that there was no rule relating to privileged communications preventing its production in evidence. *PARCHEAPPA CHETTY v. MA U, L.B.R. 1872—1892, 412.*

(28)—*Mortgage by deposit of title-deeds.*—A lien or charge upon property equivalent in most respects to a mortgage may be made by simply depositing title-deeds with a creditor as security for a debt without writing and without registration. Foreclosure is the best form of decree to adopt when after a mortgage by simple deposit of title-deeds the interest of the mortgagor has been transferred to a third person, though not in ordinary cases where the depositor of the deeds remains owner of the land. *HAJI ABDUL RAHIMAN v. MI PU AND ASHAH BI, L B.R. 1872—1892, 1. (2 M.H.C. 289, R.) [R., L.B.R. 1872—1892, 555.]*

(29)—*Hypothecation—Covenant not to alienate—Intention to pledge—Formal words of hypothecation—Specification of property.*—Even without some formal words of hypothecation there can be valid hypothecation, if the intention of the parties is sufficiently express. Where a bond commences by a statement that R and H are zemindars of a *Mouzah*, the position of which is then described and it then states that

Mortgage—continued.**—6.—Form of Mortgages—continued.**

they have borrowed the money, that they promised to pay with interest and that they bind themselves, and not to transfer their rights and interests (hukceat) by means of sale or mortgage until the debt has been paid, *held* that the reference to the *Mouzah* and the statement that they are zemindars, followed by the subsequent words prohibiting alienation of their rights, sufficiently indicate their intention to pledge their property. *MARTIN v. PURSRAM*, 2 *Agra* 124. [*F.*, 13 A. 28 = A.W.N. 1890, 216; *Appl.*, 5 B.L.R. 264, F.B.; *R.*, 6 A. 551, F.B. = A.W.N. 1884, 188; *D.*, 1 A. 274.]

(30) — *Mortgage—Hypothecation.*—An instrument, which recites that the obligor has received a certain amount of money and has mortgaged his house to the obligee, that the latter has been put in possession of the mortgaged property, that he promises to pay the sum to the mortgagee, within two years and redeem the mortgaged property, and that, if he fails to pay the mortgage-money within that time, the mortgagee shall be at liberty to recover the amount in any manner he pleases, creates a simple mortgage of the house, which can be enforced by sale. *PHUL KUAR v. MURLI DHAR*, 2 *A.* 527. (7 N.W.P. 55, *D.*) [*F.*, A.W.N. 1888, 171; *R.*, 21 A. 4 = A.W.N. 1893, 167.]

(31) — *Bond—Hypothecation of property—Mortgage.*—When a bond hypothecates property for money advanced, it is a deed of simple mortgage. *NAZINA BIBEE v. JUGGO MOHUN DUTT*, 14 *W.R.* 461.

(32) — *Hypothecation of property to come into existence in future—Equity, rule of, purchase by third person—Notice.*—A man can hypothecate indigo produce which is to come into existence in future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon the property, and the hypothecation becomes a complete arrangement. [*F.*, 16 M. 429; *Appl.*, 29 A. 163 = 4 A.L.J. 57 = A.W.N. 1907, 7; *R.*, 31 C. 667, 11 O.C. 301.] A person purchasing such property with notice of the prior equitable interest does not acquire any title to it; but it is not the case with one who purchases without notice. *BANSIDHAR v. SANT LAL*, 10 *A.* 133 = A.W.N. 1888, 35. [*R.*, A.W.N. 1890, 62.]

(33) — *Hypothecation-bond, terms in, taken sufficient to create charge.*—The terms of the bond, by which the property was hypothecated in this case, were objected to be of so general a character that they did not constitute a legal hypothecation, but it was held that the clause in the bond, *viz.*—“our rights and property in the aforesaid Taluqa shall remain pledged and hypothecated for this debt,” was sufficiently clear and explicit to constitute and create a charge upon the shares and interests of which, it was recited, in the opening of the instrument, that the obligors were the owners. *BISHEN DAYAL v. UDIT NARAIN*, 8 *A.* 486 = A.W.N. 1886, 216. [*R.*, 12 A. 175.]

Mortgage—continued.**—6.—Form of Mortgages—continued.**

(34) — *Money decree—Auction purchaser—Hypothecation—Subsequent mortgage—Condition against alienation.*—An auction purchaser at a sale in execution of a mere money decree acquires only the rights existing in his judgment-debtor at the time of sale. [*Appl.*, 1 A. 483, 1 A. 236; *Not F.*, 4 B. 57, 22 C. 33; *F.*, A.W.N. 1881, 127, 4 A. 518, 29 C. 537; *D.*, A.W.N. 1886, 18, 9 C.L.R. 369; *R.*, 8 A. 324, 7 C. 677.] Where the holder of a hypothecation bond obtains only a money decree, and in execution of it attaches, brings to sale and purchases the hypothecated property, he cannot successfully resist the claim of the holder of a subsequent mortgage created previous to the attachment and sale, to foreclose the same. (14 B. L.R. 408 = 23 W.R. 187, 7 M.H.C. 229, *Diss.*) [*Appl.*, 1 A. 433, 1 A. 236; *Not F.*, 4 B. 57, 22 C. 33; *F.*, A.W.N. 1881, 127, 4 A. 518, 29 C. 537; *D.*, A.W.N. 1886, 18, 9 C.L.R. 369; *R.*, 8 A. 324, 10 A. 520 = A.W.N. 1888, 210, 7 B. 146.] The holder of a money decree, obtained on a hypothecation bond, who purchases the hypothecated property in execution of that decree, cannot urge, against the holder of a subsequent mortgage created prior to the attachment and sale, a condition against alienation contained in his bond. (5 N.W.P. 81, *Impugned*). [*R.*, 7 C. 677, 13 A. 432, F.B.] Observations of *Turner, J.* on the nature and incidents of a simple mortgage, and the rights of subsequent incumbrancers. *KHUB CHAND v. KALIAN DAS*, 1 *A.* 240, F.B. [*R.*, 7 B. 146.]

(35) — *Bond—Stipulation not to alienate property—Subsequent alienation—Right of stranger to defeat it.*—A debtor executed a bond to G and stipulated that he would make no transfer of his property until the debt to G had been paid up. Subsequently the debtor hypothecated his property to the plaintiff contrary to the terms contained in the bond in favour of G. *Held* that the stipulation could not be used by a stranger who is not a party to it to defeat the later incumbrance to the plaintiff. *KOONDUN LAL v. WAZEER ALI*, 3 *N.W.P.* 205.

(36) — *Mortgage—Hypothecation of their “respective zemindaree shares” —Construction of such deed.*—In an instrument, the mortgagors describing themselves as zemindars and shareholders of a particular village, declared that for the consideration therein expressed, they mortgaged their “respective zemindaree shares,” and all other moveable and immoveable property owned and possessed by them, in satisfaction of the debt secured by the bond. *Held* that it was such an hypothecation of specific property as to entitle the person in whose favour it has been made to priority over a subsequent *bona fide* purchaser for value, and that it was beyond question that the parties intended to mortgage the shares of which they described themselves to be in possession. *RAE MANICK CHUND v. BEHAREE LAL*, 2 *N.W.P.* 263. [*F.*, 5 A. 11 = A.W.N. 1882, 159; *R.*, 12 A. 175 = A.W.N. 1890, 60.]

Mortgage—continued.**—6.—Form of Mortgages—continued.**

(37)—*Usufructuary mortgage-deed—Property not hypothecated—Suit for sale not maintainable.*—Under the usufructuary mortgage deed in this case the debtor had covenanted to put the creditors in possession of the property mortgaged which they were to retain for a certain period, taking the profits in lieu of interest. He having failed to fulfil that contract, it was held to be competent to the creditors to sue to enforce the contract or to recover the money due to them within the time allowed by law. It was, however, not competent to them to claim the sale of the property as if the deed were one not of usufructuary mortgage but of hypothecation, inasmuch as there was nothing in the deed purporting to hypothecate the property to secure the debt. *DULLI v. BAHADUR*, 7 N.W.P. 55. [R., 11 A. 367 = A.W.N. 1889, 140; *Doubted*, 7 A. 120 = A.W.N. 1884, 283; D., 2 A. 527.]

(38)—*Mortgage by conditional sale before 1858.*—If the period prescribed by the deed of conditional sale has run out before 1858, whether the deed constitutes a security for a loan or not, the rule laid down in *Thambuswamy's* case (1 M. 1) is to be observed and effect given to the intention of the parties, so far as it can be gathered from the instrument itself. *BAPIRAZU v. KAMARAZU*, 3 M. 26. (1 M. 1 F.) [R., 8 M. 185, 8 C. P.L.R. 113, U.B.R. 1897—1901, Vol. II, 502.]

(39)—*Mortgage by conditional sale—Redemption—Executed since 1858—Construction of.*—(By Court) (*Innes, J. Diss.*) In Madras, in cases of mortgage by way of conditional sale executed subsequent to the year 1858, the true rule is to allow the mortgagor to redeem the mortgage after the expiry of the time limited by the contract, as suggested in L.R. 2 I.A. 241 (S.C. 1 M. 1). (*Per Innes, J.*)—The intention of the parties, as gathered from the terms of the instrument, should be given effect to in construing such documents. *RAMASWAMI v. SAMIYAPPA NAYAKEN*, 4 M. 179. (2 I.A. 241 = 1 M. 1, R.) [F., 15 M. 230; R., U.B.R. 1897—1901, Vol. II, 502, 14 M.L.J. 347, 8 M. 185, 8 C.P.L.R. 118, 19 A. 434, 30 C. 883; D., 7 C.P.L.R. 22.]

(40)—*Mortgage by conditional sale—Equity of redemption.*—The contract of mortgage by conditional sale is a form of security, known under various names throughout India and, by the ancient Law of India, enforceable according to its letter. This law must be taken to prevail in every part of India where it is not modified by Legislation or by established practice. The essential characteristic of a mortgage by conditional sale was that, on the breach of the condition, the contract executed itself, and the transaction was closed and became one of absolute sale. (13 M.I.A. 560, *Cons. & Appr.*) From 1858, in the Madras Presidency, and from 1864 in Bombay, the Courts have, erroneously and in contravention of the law of India, adopted, with regard to this class of securities, doctrines which the

Mortgage—continued.**—6.—Form of Mortgages—continued.**

English Courts of Equity have applied to mortgages in England. *Quære*:—Whether, in dealing with future cases, the Judicial Committee ought to follow the new course of decisions which has sprung up in these presidencies, or their own decision in *Pattabhiramier's* case. *THUMBUSAWMY v. HOSSAIN ROWTHEN*, 1 M. 1 = 2 I. A. 241, P.C. = 3 Sar. 531. (13 M.I.A. 560 = 7 B.L.R. 136, R.) [F., 6 M. 339, 7 C.P.L.R. 22, 1 L.B.R. 192; *Appl.*, 4 M. 179, 8 M. 185; *Expl.*, 14 M.L.J. 347; *Cons.*, 3 M. 26; R., 2 B. 231, 6 C. 564, 12 C. 614, 11 M. 403, 14 B. 19, 14 B. 78, 15 M. 230, L.B.R. 1872—1892, 549, 14 A. 195, 8 C.P.L.R. 113, U.B.R. 1897—1901, Vol. II, 502, 23 M. 114, 1 S.L.R. 96; D., 30 C. 883.]

(41)—*Mortgage by conditional sale before Transfer of Property Act—Redemption.*—Under the Privy Council ruling in 1 M. 1, the Courts of this Presidency are at liberty to apply the doctrine of English Courts of equity to mortgages executed after 1858, until the Legislature settled the law, as it has now done, by the Transfer of Property Act. *VENKATASUBBAYYA v. VENKAYYA*, 15 M. 230 = 1 M.L.J. 677, (4 M. 179, *Expl. & F.*) [F., 14 M. L.J. 347; R., U.B.R. 1897—1901, Vol. II, 502.]

(42)—*Mortgage, by conditional sale—Redemption of.*—In a case of mortgage by conditional sale, held that the mortgagor has not necessarily any right of redemption after the time limited by the contract. In such a case, if it was the intention of the parties at the time the agreement was made that, on failure of payment within the prescribed period, the mortgaged property should become the property of the mortgagee, and the forfeiture clause was not inserted merely by way of penalty to enforce payment, effect must be given to their intention, and the parties must be bound by the terms of their agreement. *MAUNG SHWE MAUNG v. MAUNG SHWE YIT AND MA KYE*, L.B.R. 1872—1892, 549. (1 M. 1, R.) [R., L.B.R. 1872—1892, 645, U.B.R. 1897—1901, Vol. II, 502, 1 L.B.R. 192; *Diss.*, L.B.R. 1893—1900, 315; *Overruled*, L.B.R. 1893—1900, 378; F., U.B.R. 1907, 3rd Qr., Mortgage 1.]

(43)—*Sale convertible into a mortgage.*—A deed which, on the face of it, was described as a mortgage, stated that the grantee was already in possession under a previous mortgage by the grantor, and was under the new deed to receive the profits in liquidation of interest so far as they would go, and that the grantor was not to be liable to re-pay the principal money or such balance of interest (if any) as might accrue upon it, unless he adopted a son, and the grantee, unless that event happened, was to enjoy the property conveyed in right of purchase for the sum due to him, both on account of principal and interest. Held that such a deed was a sale liable to be converted into a mortgage, and not a mortgage liable to be con-

Mortgage—continued.**—6.—Form of Mortgages—continued.**

verted into a sale. *SUBHABHAT bin BABAN-BHAT v. VASUDEVBHAT bin SUBHABHAT*, 2 B. 113. (1 B.H.C. 199, 9 B.H.C. 69, D.) [R., 2 B. 231, 7 B. 73, 11 B. 462, 131 P.R. 1894, 2 Bom. L.R. 1058; D., 21 B. 704, 6 Bom. L.R. 630.]

(44)—*Sale convertible into mortgage on contingency—Sale absolute if contingency fails—Right of redemption barred—Indicia whether transaction is sale or mortgage—Rule as to mortgages convertible into sales.*—Where the relation of mortgagor and mortgagee had once existed and the mortgagor, in consideration of the mortgage-debt, and of a further sum paid, executed a deed of sale of the mortgage lands to the mortgagee, and at the same time the mortgagee signed an agreement to re-convey the lands upon payment of the two sums within a specified time, *held* that such a transaction amounted to a sale convertible into a mortgage and not a mortgage convertible into a sale, and that the mortgagor was not entitled to redeem the lands after the expiry of the specified period. (*Ensworth v. Griffith*, 5 Bro. P.C. 184. F.; 1 B. H.C. 199, 9 B.H.C. 69, D.; 2 B. 113, R.) The usual indicia which might lead a Court to the opinion that such a transaction was a mortgage and not a sale are—(1) insufficient consideration for the sale of the land, (2) a stipulation that the grantee should account for the rents and profits during his possession or for payment of interest by the grantors either before, at, or, after the period named for the re-purchase, (3) the lands remaining in the possession of the grantors after execution of the deeds, (4) any subsequent advance made by the grantee on the security of the lands, (5) any right on the part of the grantee to recover from the grantors the sum or any part of it, either before, at, or after the period named for the re-purchase. (Note No. (96) by Mr. Butler to his Ed. of Coke upon Littleton, 205 (a) referred to in *Goodman v. Grierson*, 2 B. and B. 279, R.) [F., 21 B. 528; R., 7 B. 73, 4 B. 594, 131 P.R. 1894, 19 A. 434, 2 Bom. L.R. 1058, 8 Bom. L.R. 669; D., 21 B. 704, 23 M. 114, 6 Bom. L.R. 630.] The rule laid down in 1 B.H.C. 199, viz., once a mortgage always a mortgage, governs in the Bombay Presidency mortgages with clauses of conditional sale, executed either before or after 1858 or 1864, in spite of the observations upon it in 1 M. 1=L.R. 2 I.A. 241 and 13 M.I.A. 560. N.B.—The ancient law and usage of the Courts respecting *gahan lahan* mortgages discussed. *BAPUJI APAJI v. SENAVARAJI MARVADI*, 2 B. 231. [R., 14 B. 19, 14 B. 78.]

(45)—*Bai-bil-wafa form of mortgage—Two documents of same date for sale and reconveyance—Admissibility of parol evidence to show real intention to create mortgage.*—Where there were two documents of the same date, one being a deed of absolute sale, and the other an undertaking by the vendee to re-convey the property sold to him under the sale-deed, oral and other evidences extraneous to the documents were held admissible for the purpose of

Mortgage—continued.**—6.—Form of Mortgages—continued.**

determining whether the intention of the parties to the transaction was to effect a complete sale with a condition of re-purchase, or to create a mortgage by conditional sale or *bai-bil-wafa*, such intention having to be gathered from the terms of the deed, or from the surrounding circumstances or from both. In this case, on a consideration of the terms of the second deed, the *ikrarnamah*, the surrounding circumstances and the oral evidence, the High Court *held*, in concurrence with the Court below, that the contracting parties intended the transaction to be one of mortgage by conditional sale, and not an absolute sale with a right to re-purchase. *BALKRISHAN DAS v. W. F. LEGGE*, 19 A. 434=A.W.N. 1897, 109. * (17 I. A. 98=12 A. 387, 14 A. 195, 4 M. 179, 2 B. 231, 6 A. 37, 7 M.H.C. 219, R.) [*Affirmed on appeal*, 22 A. 149=4 C.W.N. 153, P. C.; R., 4 O. C. 31, 2 Bom. L. R. 1058, 5 C.W.N. 351, 72 P. R. 1901=114 P.L.R. 1901, 29 A. 708, P.C.=9 Bom. L. R. 851=11 C.W.N. 913=4 A.L. J. 737=17 M.L.J. 400.]

(46)—*Personal liability if necessary—Mortgage by conditional sale.*—It is not necessary in a mortgage by conditional sale that the mortgagor should make himself personally liable for the re-payment of the loan. *BALKISHEN DAS v. W. E. LEGGE*, 22 A. 149, P.C.=4 C.W.N. 153=27 I.A. 58=2 Bom.L.R. 523=7 Sar. 601. (13 M.I.A. 560; R.)

(47)—*Mortgage by conditional bill of sale—Joint property held benami in name of co-sharers—Interest of mortgagee.*—An estate was bought *benami* in the name of A by the father of A. After the father's death, a sum of money was raised by conditional bill of sale signed by A as proprietor and by his brother B as *motullah*. Afterwards, and after the death of B, and after B's heirs had separated from A, A raised a further sum by a bill of sale, reciting the former conditional bill of sale, and stating that the additional sum was raised to discharge the same. *Held* that, if the grantee took with notice that he was entitled to a half share only of the estate, the additional charge would operate as a mortgage of such half share only; but that portion of the money for which the original bill of sale was given was a charge on B's share as well as on the possession of his heirs. *KISHEN CHUNDER GHOSE v. NUND KISHORE SINGH*, Marsh 651.

(48)—*Bai-bil-wafa deed by plaintiff in pre-emption suit, effect of, on right to pre-empt—Transfer of Property Act (IV of 1882), s. 58.*—Where, before the sale of the property in respect of which pre-emption was claimed by the plaintiff, he had executed in respect of his share in the village in virtue of which he claimed the right to pre-empt, a document amounting to what is known in the Muhammadan Law as a *bai-bil-wafa* deed, such deed amounting to a mortgage within the meaning of cl. (c) or of cl. (e) of s. 58 of the Transfer of Property Act, it was *held*, that the plaintiff had

Mortgage—continued.**—6.—Form of Mortgages—continued.**

not, by reason of having done so, ceased to be a share-holder in the village, and the *bai-bil-wafa* or conditional sale by the plaintiff not having become absolute at the time of the accrual of his right to pre-empt, plaintiff was entitled to maintain his suit for pre-emption. *ALI AHMAD v. RAHAMATULLAH*, 14 A. 195 = A.W.N. 1892, 42. (17 I.A. 98 = 12 A. 387, D.) [Appr., 20 A. 19; R., 19 A. 434; D., 72 P.R. 1901 = 114 P.L.R. 1901, 6 C.W.N. 192.]

(49)—*Transfer of Property Act* (IV of 1882), ss. 58 (b), 100 — *Mortgage—Construction of document*—"Arth" "Mustaghraq" "Rehan"—*Power of sale in default not expressly given—Mortgage executed before the Act*—Where a bond by which certain immoveable property was made security for a loan, contained a stipulation against alienation until repayment of the loan and also enabling the mortgagee provision to proceed against the other property of the executant in case the secured property should be destroyed or prove insufficient for the debt, it was held that it amounted to a simple mortgage [s. 58 (b)] and not merely to charge (s. 100), although the bond contained no express provision for sale of the property in default of payment, and although the transaction was described as "arth" and "mustaghraq," and not as "rehan." [R., 12 C.P.L.R. 26, 33 C. 1133 = 4 C.L.J. 121 = 10 C.W.N. 1010, 5 A.L.J. 723 = A.W.N. 1908, 277.] Held, also, that the decision would be the same whether the transaction was entered into before or after the *Transfer of Property Act*. *KISHAN LALL v. GANGA RAM*, 13 A. 28 = A.W.N. 1890, 216.

(50)—*Ikbuldawah—Stipulation by debtor not to alienate property till satisfaction of decree—Breach of contract—Right and remedy of decree-holder*.—An *Ikbuldawah* containing a stipulation that the debtor shall not alienate certain property till the satisfaction of a decree does not amount to a hypothecation giving the decree-holder a lien on the property. The decree-holder may sue for damages on the breach of contract by the judgment-debtor, but he cannot sue to enforce his lien on the property against a purchaser. *CHOONEE LALL v. PUHULWAN SINGH*, 3 Agra 270.

(51)—*Covenant in mortgage-bond not to lease, effect of, on subsequent lease—Proper course to be adopted by mortgagee in such a case*.—A covenant by a mortgagor not to lease or mortgage the property is purely a personal one so as not to render a subsequent lease invalid or to put an end to it on the mortgagee purchasing the property himself in execution of his mortgage-decree. (14 B.L.R. 408 = 23 W.R. 187, 24 W.R. 210, 25 W.R. 216, R.) [R., 29 A. 679 = 4 A.L.J. 703 = A.W.N. 1907, 227.] The proper course for such mortgagee is to sue such lessee to have his right declared to sell the property to satisfy his mortgage-debt, thereby giving him an opportunity of redeeming. [R., 5 M. 184, 17 M. 17, 21 C. 116, 7 C.W.N. 11, 29 A. 679 = 4 A.L.J. 703 = A.W.N. 1907, 227.]

Mortgage—continued.**—6.—Form of Mortgages—continued.**

Where a plaintiff has all along contended that he is entitled to *khas* possession and that the *zuripeshgi* lease is void, the Court would be entirely changing the nature of his claim, if it were to allow him to frame and try it on another basis. *RADHA PERSHAD MISSER v. MONOHUR DAS*, 6 C. 317 = 7 C.L.R. 293. [R., 5 C.L.J. 527.]

(52)—*Condition in mortgage deed not to alienate—Equities in favour of the mortgagees*.—An alienation of mortgaged property in violation of a condition in the mortgage not to alienate, is not absolutely void, but voidable in so far as it is against the mortgagee's rights. In such a case, the mortgagee will have obtained all that in equity he is entitled to, if it is declared that the alienation against the terms of the mortgage shall not bind the auction-purchaser, unless he desires its continuance. *CHUNNI v. THAKUR DAS*, 1 A. 126. [F., 1 A. 610; Expl., 4 A. 518; R., 5 M. 184, A.W.N. 1890, 59.]

(53)—*Mortgage—Charge—Condition against alienation*.—Where a bond stated, that the obligors mortgaged their property as security for the loan, and that so long as the same remained unpaid, the property would not be sold or mortgaged to any one, held by the Full Bench, (*Petheram, C.J., dissenting*), that the bond created a simple mortgage, and by *Petheram, C.J.*, that it created only a charge in favour of the obligor on the property, for it did not give him, either expressly or impliedly, the right to sell the property himself. *SHEORATAN KUAR v. MAHIPAL KUAR*, 7 A. 258, F.B. = A.W.N. 1885, 8. [Diss., 13 A. 28; R., 13 B. 90, F.B., 14 B. 377, 20 B. 408, F.B., 12 C.P.L.R. 26.]

(54)—*Promise not to alienate property—Charge*.—An undertaking by a judgment-creditor, in a Petition to the Court, executing a decree against him, stating generally that he would not alienate his property until the debts are paid, does not amount to a charge on his property. *BHUPAL v. JAG RAM*, 2 A. 449. [R., 12 A. 175.]

(55)—*Bond—Vague covenant against alienation—Effect*.—A vague covenant in a bond not to alienate property of the covenantor, till the loan secured by the bond is paid, does not give the covenantee any lien upon any specific property. (3 C. 363, F.; 5 B.L.R. 264, D.) [R., L.B.R. 1893—1900, 340.] In this case, it was held that the fact that the bond containing the general covenant against alienation of any property of the debtor was registered in book "four," and not in book "one," which related to immoveable property, negatived any intention of the parties to specifically charge the property. *NAJIBULLA MULLA v. NUSIR MISTRI*, 7 C. 196 = 8 C.L.R. 454. [R., 9 A. 158, 18 M. 364, 8 O.C. 227, 33 C. 1133 = 4 C.L.J. 121 = 10 C.W.N. 1010, 35 C. 845 = 12 C.W.N. 316 = 7 C.L.J. 149, 12 A. 175.]

Mortgage—continued.**—6.—Form of Mortgages—continued.**

(56)—*Zur-i-peshgi lease with consent not to alienate or evict lessee.*—By a *zur-i-peshgi* lease granted upon the advance of Rs. 5,517, the lessee was to hold possession of certain villages for the term of five years, and to pay himself, out of the proceeds of the villages, interest on the loan and the lessor undertook not to mortgage or alienate the property during the term, and not to oust the lessee, or, if he did, that he would pay him Rs. 1,000. Before the expiration of the term, the villages were taken in execution, and sold under a decree at the suit of a third party, and the lessee turned out of possession. *Held* that the lessee had no claim against the villages for the principal money and that the sum of Rs. 1,000 was forfeited. **NUNDLALL v. KILLIANABUTTEE, Marsh 209 = 1 Hay 532.**

(57)—*Security for debt—Mortgage—Covenant not to alienate.*—Where a deed was in the following terms:—"that, for the security of the payment of this debt, the lands mentioned in this deed are pledged by me, and that, until the principal money and interest recited in this deed are paid off, I would not on any account transfer the property pledged to any body by sale or *hiba-bil-ewaz*, or gift or mortgage in any other way," *held* that the terms were quite sufficient to create a mortgage. **LALA RAMDHARI LAL v. JANESSAR DAS, 6 B L.R. App. 14.**

(58)—*Simple mortgage bond—Mortgagee's lien after summary decree.*—A, having a simple mortgage bond, specially registered, attached the lands, under mortgage to him, under a summary decree under the provisions of the Registration Act. These lands had been attached by other creditors prior to A's decree and were sold subsequent to it to B. After the sale, A, under his attachment, sold the mortgagor's right, title and interest, which he himself purchased and it was held he could not sue the mortgagor and B to enforce his mortgage lien against the properties. (14 B L.R. 408, *F.*) *N.B.*—This case has been overruled by the Full Bench in 7 C. 714 = 9 C.L.R. 353, where it has been decided that a plaintiff obtaining a decree for his mortgage money does not thereby lose his lien; because, a man who has an equitable lien for a simple contract-debt, does not lose his lien by turning his debt into a judgment-debt. **DOSS MONEY DOSSEE v. JONMENJOY MULLICK, 3 C. 363 = 1 C.L.R. 446.** [*Appr.*, 5 C. 928 = 6 C.L.R. 370; *F.*, 7 C. 196 = 8 C.L.R. 454; *Expl.*, 7 C. 677 = 9 C.L.R. 233; *R.*, 8 C. 700; *Overruled*, 7 C. 714, *F.B.* = 9 C.L.R. 353.]

(59)—*Mortgage bond—Lien of mortgagee—Attachment—Sale—Purchase moneys—Act VIII of 1859, s. 270—Act XIV of 1859, s. 20—Proceedings to keep decree alive—Trust property—Surplus profits of trust.*—Where a form of mortgage or charge created by a bond does not vest any estates in the mortgagee, but only established a

Mortgage—continued.**—6.—Form of Mortgages—continued.**

lien incident to the money debt such lien continues when the debt passes into a judgment debt, and when the judgment debt is assigned to another by sale of the decree. [*Diss.*, 10 C. 567; *Appl.*, 5 C. 928 = 6 C.L.R. 370; *R.*, 22 W.R. 98, 14 B.L.R. 408 = 23 W.R. 187, 1 A. 240, *F.B.*, 14 C. 475.] If at the date of the sale of a decree on a bond which only establishes a lien as incident to a money debt the property over which the lien extends has already been attached, the attachment enforces the lien; and if the property is sold pending the attachment, the lien is transferred from the property to the purchase-moneys. [*R.*, 22 W.R. 98, 14 C. 464.] If the application of the purchaser of a decree for attachment of purchase moneys is rejected, he may institute a regular suit to establish his title under Act VIII of 1859, s. 270; otherwise he forfeits his lien both on the land and on the purchase-moneys. But he does not forfeit his right to execute the decree otherwise. [*R.*, 22 W.R. 98.] The proceeding intended by Act XIV of 1859, s. 20, need not be a proceeding by a person legally and rightfully entitled to the decree, that section requiring no more than that some actual proceeding should be taken, which, if successful, would result in the discharge or partial discharge of the judgment-debt. [*Diss.*, 16 C. 355; *F.*, 20 C. 388; *R.*, 7 C.L.R. 424, 36 C. 543 = 9 C.L.J. 271, 10 C.L.J. 396.] Where property is purchased out of the surplus profits of a trust which are not required for the purposes of the trust, and, which the trustee is entitled to retain for his benefit, such purchase enures for his own benefit. **SYUD NADAR HOSSEIN v. PEAROO THOVILDARINEE, 14 B.L.R. 425, Note = 19 W.R. 255.** [*Expl.*, 10 O.C. 263.]

(60)—*S. 68, Evidence Act—Mortgage—Attestation—Proof.*—Where only one attestator proved a mortgage bond attested by more than two witnesses and where its due execution was not denied, *held*, that, having regard to s. 68, Evidence Act, the document may be taken as properly proved. **NUND KISHORE LAL v. KANEE RAM TEWARY, 29 C. 355 = 6 C.W.N. 395.**

(61)—*Mortgage transaction being reduced to writing on different papers—Ascertainment of intention from all documents—Registration.*—Though there is nothing in law to prevent the whole of a mortgage transaction being reduced in any form to writing on different papers, whether attached together or detached from each other, and the Court, in cases in which the terms as appearing in the different papers are contradictory or inconsistent, has to ascertain the intention of the parties by reading all the papers together as forming one document though each paper on the face of it purports to be a separate document, yet, the requirements of the Transfer of Property Act making registration compulsory for the validity of such a transaction cannot be held to have been complied with if some of the papers are registered

Mortgage—continued.**—6.—Form of Mortgages—concluded.**

while the others are left unregistered. *MUTHA VENKATACHELAPATE v. PYANDA VENKATACHALAPATE*, 27 M. 348. [D., 2 Ind. Cas. 930.]

Debt—Bond authorising recovery of debt from "my moveable and immoveable property" whether constitutes a mortgage—See LIMITATION ACT, 1908, arts. 66, 116, 14 A. 162=A.W.N. 1892, 27.

See LIMITATION ACT, 1908, arts. 132, 147, 10 B. 519.

See REGISTRATION ACT, 1908, s. 48, L.B. R. 1893—1900, 660.

Simple mortgage—Power of sale—Necessity for intervention of Court—See TRANSFER OF PROPERTY ACT, 1882, s. 58, cl. (b), 12 C.P.L. R. 26.

Bond providing for collateral security without actual transfer of any interests is simple mortgage and not charge—Attestation by two witnesses, necessity for—See TRANSFER OF PROPERTY ACT, 1882, ss. 58, 59, 100, 9 C.W.N. 1001.

—7.—Marshalling.

(1)—*Mortgage of several estates—Sale of one of them by a third party—Marshalling.*—If one of several mortgaged properties is sold in execution of a money decree by a third party, the mortgagee must realise the debt from the other estate before proceeding against the one which has been sold. *MUSSAMUT NOWA KOOWAR v. SHEIKH ABDOL RUHEEM*, W.R. 1864, 374. [R., 7 A. 711.]

(2)—*Property hypothecated for bond—Rights of subsequent purchaser—Money-decree on bond, liability of the property to satisfy—Marshalling.*—Plaintiffs sued to confirm a deed of sale under which he purchased certain land. Defendant denied the genuineness of the plaintiff's deed of sale and pleaded that the land purchased by the plaintiff had been pledged as a security for a bond on which it appeared a suit had been brought and a decree given on confession of judgment. Both the lower Courts found the purchase of the plaintiff to be a valid purchase, but the Principal Sudder Ameen held that the property so purchased was hypothecated for the bond on which execution had been taken out, and he directed that the same be held liable to satisfy such part of that decree on the bond as could not be satisfied from any other source. The case was sent back for finding whether, when hypothecated property has passed to a bona fide purchaser, the same can be declared liable to satisfy such part of a money-decree on the bond as could not be satisfied from any other source. If A has mortgage upon two different estates for the same debt, and B has a mortgage upon one only of the estates for another debt, B has a right to throw A in the first instance for satisfaction upon the security which he, B cannot touch, at least where it will not prejudice

Mortgage—continued.**—7.—Marshalling—continued.**

A's rights or improperly control his remedies. A subsequent purchaser of one of the estates has just as great an equity as an incumbrancer—*Per Norman, J. BISHONATH MOOKERJEE v. KISTO MOHUN MOOKERJEE*, 7 W.R. 483. [R., 7 A. 711.]

(3)—*Sale of mortgaged property—True value of property—Enquiry in to—Government assessment.*—Property to subject of a mortgage may be sold in satisfaction but it must be sold as a whole and cannot be disposed of piecemeal at the pleasure of the mortgagee. An enquiry should be made into the relative value of the properties included in the mortgage and each of them must be proportionately burthened with its share of the debt. In calculating the value of the properties the Judge ought not to assume that the Government assessment represents the true value. Many circumstances might make that assessment a very unsafe guide as to what the real value of the lands was. *MAHARAJAH KISHEN PERTAB SAHEE BAHADOOR v. LALLA NUND COOMAR SINGH PARRAY*, 25 W.R. 388. (14 W. R. 17, P.C., F.)

(4)—*Mortgage—Subsequent mortgage of part of mortgaged property—Marshalling.*—A mortgage upon three different estates had been made in favour of plaintiff. The defendant subsequently got a mortgage extending to one of them only. In a suit by the former to establish his claim upon the three estates, the defendant for the first time in the High Court contended that the plaintiff should, in the first instance resort to the two other estates for the satisfaction of his demand before he could touch the third which was the only property available to him. Held, that the contention could not be allowed, as the objection was not urged in the Court below and as the appellant had not given any evidence that he was a bona fide subsequent mortgagee without notice. The introduction into India of the doctrine of marshalling of securities is of doubtful propriety as it will interfere with the legal rights of parties by prejudicing the rights of the plaintiff or by improperly controlling his remedies. *KHETOOSSEE CHEROORIA v. BANEE MADHUB DOSS*, 12 W.R. 114. [R., 7 A. 711=A.W.N. 1885, 191, 18 B. 160.]

(5)—*Mortgage—Subsequent purchaser of part of mortgaged property without notice—Suit for sale of whole property on mortgage—Marshalling—Apportionment.*—The equities which apply to a puisne incumbrancer in the marshalling of securities apply also to a bona fide purchaser for value of a portion of property the whole of which is subject to a prior mortgage. (1 W.R. 353, W.R. 1864, 374, 7 W.R. 483, 12 W.R. 114. R.) [F., 22 B. 304, F.B.; R., 26 B. 88=3 Bom. L.R. 628, 31 M. 419, F.B.=3 M.L. T. 287=18 M.L.J. 229; D., A.W.N. 1887, 183.] Where, in a suit for recovery of money by enforcement of a mortgage, the mortgagor

Mortgage—continued.

—7.—**Marshalling**—continued.

and a subsequent *bona fide* purchaser of a portion of the property mortgaged were both impleaded as defendants, although the purchaser could claim contribution from the mortgagor in respect of any sum he may be compelled to pay over and above the share of the debt apportioned on his property, such apportionment could not be made in second appeal. **RODH MAL v. RAM HARAKH**, 7 A. 711 = A.W. N. 1885, 198.

(6)—*Mortgage of two properties—Subsequent mortgage of one of them to another with notice of first mortgage—Right of second mortgagee to marshal securities—Applicability of doctrine of marshalling to mortgages in the mofussil.*—Before the provisions of the Transfer of Property Act (IV of 1882) were made applicable to the Presidency of Bombay, where two properties had been mortgaged to one person, and one of them is subsequently mortgaged to another person with notice of the former mortgage, the second mortgagee was held to have an equity to call for a marshalling of the securities in his favour so as to require the first mortgagee to proceed to realize his security in the first instance out of the property not mortgaged to the second mortgagee. The doctrine of marshalling of securities, as obtaining in England, is applicable to mortgages in the mofussil. **CHUNILAL VITHALDAS v. FULCHAND**, 18 B. 160. [F., 22 B. 304.]

(7)—*Purchaser at execution-sale under second mortgage—Right of marshalling not destroyed by notice given subsequent to mortgage.*—A purchaser at a Court-sale under a second mortgage, whether he be the original mortgagee or not, purchases not only the rights of the mortgagor but all the rights of the mortgagee acquired up to the sale, including a right to insist on the plaintiff (first mortgagee) marshalling his securities. There is nothing in s. 81, or elsewhere, to destroy one right of marshalling by a notice given subsequent to the mortgage. **INDERDAWAN PERSHAD v. GOBIND LALL CHOWDHRY**, 23 C. 790.

(8)—*Mortgage money, suit for—Execution sale—Low price paid for mortgaged property—Satisfaction of mortgage.*—Suit to recover principal and interest on a mortgage bond hypothecating the obligee's share in three villages, K, S and P. The plea was that plaintiff had paid himself by becoming the purchaser at an execution sale of another decree of the obligee's rights in K for a low price. At the sale in question, the bids were made on the understanding that the property was burdened with the plaintiff's bond-debt. Held that, as plaintiff chose to give out that he intended to burden the village K with the payment of the whole sum due to him, and took advantage of the lowness of the bids to buy the property himself, he cannot now be allowed to proceed against the other properties. **BYJONATH SAHOY v. BOOLHUN BISWANATH KOOR**, 24 W.R. 83. [D., 6 C. 711.]

Mortgage—continued.

—7.—**Marshalling**—continued.

(9)—*Transfer of Property Act, s. 81—Marshalling, enforceable only between creditors of same person.*—No marshalling ought to be enforced unless the parties between whom it is enforced are creditors of the same person, and have demands against the property of the same person. **GOPALA v. SAMINATHAYYAN**, 12 M. 255.

(10)—*Tr. P. Act, s. 81—Notice—Prejudice to third parties.*—The principle of marshalling cannot be exercised to the prejudice of third parties (1 Y. and C.C.C. 401 and 2 Y. and C.C.C. 377, F.) The principle applies only when the second mortgagee has no notice of the prior mortgage. **SATIS CHUNDER MUKHERJI v. GOPAL CHUNDER CHUCKERBUTTI**, 2 C.W.N. 397.

(11)—*Sale of part of mortgaged property—Right of mortgagee to proceed against entire property.*—The general doctrine that, where one creditor has a demand against two estates, and another creditor has a demand against one only, the latter is entitled to throw the former on the fund that is not common to them both, is a narrow one, and cannot generally be enforced against an incumbrancer, who is a mortgagee; and a mortgagee is not bound to proceed first against that portion of the mortgaged property that had not been sold to a purchaser for value. **LALA DILAWAR SAHAI v. DEWAN BOLAKIRAM**, 11 C. 258. [F., 17 A. 434 = A.W.N. 1895, 83, 24 C. 746; Cons., 29 M. 217; D., 2 C.L.J. 288; R., 31 C. 95 = 8 C. W.N. 30, 31 M. 419, F.B. = 18 M.L.J. 229 = 3 M. L.T. 287.]

(12)—*Mortgagee and attaching creditors under money decrees—Marshalling.*—As between a mortgagee and the mortgagor's attaching creditors holding mere money-decrees, the doctrine of marshalling has no application. **KRISTODOSS KUNDU v. RAMKANT ROY CHOWDHRY**, 6 C. 142 = 7 C.L.R. 396.

(13)—*Rights of mortgagee.*—Where a person purchases a portion of mortgaged property, he cannot compel the mortgagee to realise the mortgage amount from the other portion of the mortgaged property, either on the ground that the purchase money which he paid went to discharge a prior incumbrance or that such portion is sufficient to satisfy his debt. **RAMA RAJU v. SUBBARAYUDU**, 5 M. 387. [R., A.W.N. 1887, 183, 17 A. 434, 29 M. 217.]

(14)—*Right of mortgagee to recover from portion of mortgaged property the whole debt.*—Where there was a money decree, and a mortgage decree against the same person, and in execution of the former, part of the mortgaged property was brought to sale and purchased by the holder of the money decree, he was not entitled to insist on redeeming his share by paying a proportionate amount of the debt due to the mortgagee who has the right to realise his debt from the whole or any portion of the mortgaged property. **TIMMAPPA v. LAKSHMAMMA**, 5 M. 385. [R., 21 M. 369, 29 M. 217.]

Mortgage—continued.**—7.—Marshalling—continued.**

(15)—*Mortgage—Subsequent mortgage of some of the properties to another person—Right to marshalling and apportionment.*—The second mortgage which the first and second defendants executed subsequent to the original mortgage to the plaintiff-respondent did not include the house described in the plaint nor the field survey No. 122, which were both included in plaintiff's mortgage. The field was still with the original mortgagors, plaintiff himself having purchased the equity of redemption in the house at a prior auction-sale. In the present suit, plaintiff sought to enforce his mortgage to its full extent against all the properties included in his mortgage with the exception of the house. At a sale in execution of a decree obtained against the first and second defendants under the said second mortgage, third defendant, the appellant, purchased the mortgaged properties and became the owner thereof, subject to the plaintiff-respondent's mortgage thereon. Appellant contended that plaintiff must enforce his claim against the above-mentioned house and field before he could proceed against the lands included in the mortgage under which he claimed. The question of marshalling had to be considered and also of apportionment. First, as to the appellant's claim to have the securities marshalled, it was objected that he had not that right, being merely a purchaser at the Court sale, but it was held that the right to have the securities marshalled extends to a purchaser and is not to be confined to a puisne incumbrancer. The appellant in his capacity as purchaser was clearly entitled to require the respondent to seek satisfaction first out of the property not covered by the purchase before holding the property in his (appellant's) possession liable to make the debt good. With regard to the apportionment, it was clear that the plaintiff when he purchased the equity of redemption in the house purchased it subject to its due proportion of the mortgage-debt. That proportion of the mortgage debt thus ceased to exist and the plaintiff's right as mortgagee to recover the money secured by his mortgage was reduced to that extent. What proportion of the mortgage-debt was thus wiped out would depend upon the proportion of the value of the house to the value of the rest of the mortgaged properties, which proportion was to be left to be settled by the Court executing the decree. *LAKHMIDAS v. JAMNADAS*, 22 B. 304, F.B. [F., 26 B. 88=3 Bom. L.R. 628; R., 24 M. 96=12 M.L.J. 383, 22 A. 284, F.B., 26 B. 538, 6 Bom. L.R. 284, 12 C.W.N. 448=8 C.L.J. 92, 31 M. 419=18 M.L.J. 229=3 M.L.T. 287, 11 C.L.J. 639.]

(16)—*Mortgage-debt—Apportionment between all the properties mortgaged.*—Where a mortgagee deliberately abstained from executing his decree against those properties in the mortgagor's possession, but proceeded against that property that had passed out of the mortgagor's possession, the mortgage-debt was directed to

Mortgage—continued.**—7.—Marshalling—continued.**

be apportioned between all the properties, and the mortgagee was not allowed to proceed against the property which had passed out of the mortgagor, except for the proportionate amount, without satisfying the Court of every possible effort having been made to execute the remainder of the decree against the other properties in the mortgagor's possession. *RAM DHUN DHUR v. MOHESH CHUNDER CHOWDHRY*, 9 C. 406=11 C.L.R. 565. [Appr., 13 B. 45; R., 6 O.C. 197, 10 C.L.J. 150; D., 29 M. 217.]

(17)—*Mortgage—Apportionment—Priority—Form of decree.*—A held an eight annas share, B and C each a four annas share in a certain estate. A mortgaged his share to G; the respondent took a mortgage of the whole estate; and afterwards the appellant took a mortgage of B's share and half of A's share. Subsequently, he purchased the equity of redemption in the whole estate. It was held that the appellant was entitled both to have an apportionment made and to have an eight annas share of the estate put up for sale, unless the respondent was willing to pay off the appellant's mortgage-debt. Rules as to form of decree set out. *GUNGA NARAIN SEN v. HURISH CHUNDER CHANGDASS*, 6 C.L.R. 336. [R., 2 C.W.N. 397.]

(18)—*Mortgage of family property by two brothers—Subsequent mortgage of portion of same property by one of them to same mortgagee—Suit on second mortgage—Decree—Execution—Sale of mortgaged property—Purchase by mortgagee—Effect on first mortgage—Mortgagee subsequently suing on first mortgage—Mortgage debt, if can be apportioned.*—S, V and N were brothers and members of an undivided Hindu family. On the 24th January, 1878, S and V jointly mortgaged to the plaintiff for a consideration of Rs. 199 a portion of the undivided property. On the 28th July, of the same year, S alone, for a further advance of Rs. 200, gave a further mortgage to the plaintiff of a part of the same lands already mortgaged to him. Subsequently, the three brothers partitioned the whole undivided property among themselves, and the property comprised in the mortgage of 24th January 1878 fell to the shares of V and N. In 1881, the plaintiff sues upon the second of the above mortgages. He obtained a decree, and, at a sale in execution of that decree himself purchased the property included in the mortgage. In the meantime, on the 27th January, 1882, and 6th December, 1883, V and N respectively mortgaged, with possession, to the defendant R, some of the lands which had been comprised in the first mortgage of the 24th January, 1878, and which had come to them on partition. In 1883, the plaintiff filed the present suit against the defendants and upon his first mortgage of the 24th January, 1878, claiming to recover Rs. 316-14-0 from the mortgaged property and from S and V personally as mortgagors. He also prayed that the defendant R, who was in possession,

Mortgage—continued.**—7.—Marshalling—continued.**

should not be allowed to obstruct him in selling the mortgaged property. S and V remained *ex parte*. The defendant R contended that the plaintiff, having sued upon the second mortgage without including the earlier one was now barred from suing on the latter by ss. 13 and 43 of the Civ. Pro. Code. He also urged that the plaintiff, having purchased part of the lands comprised in the mortgage now sued upon, in execution of the decree obtained by him upon his second mortgage, could not now seek to burden the remaining lands included in the mortgage with the whole of the mortgage-debt, but that a proportionate part of the debt must be deemed to have been satisfied. *Held* that the previous suit on the second mortgage formed no bar to the plaintiff's present suit, under ss. 13 and 43, Civ. Pro. Code and that the plaintiff could not recover his debt due under the first mortgage from the remaining lands without deducting a proportionate part of that debt. *Held* also that a mortgagee will not be allowed, without special reason, deliberately to execute his decree exclusively against one of the owners of the equity of redemption for the whole debt. **MORO RAGHUNATH v. BALAJI TRIMBAK, 13 B. 45. [R., 21 B. 544, 23 M. 377.]**

(19)—*Mortgage—Apportionment—Right of defendants.*—The fact that a person, who, if compelled, in execution of a mortgage-decree against him and others in possession of the mortgaged property, to discharge the mortgage-debt by paying an amount in excess of the amount proportionate to the value of property in his hands, may claim to be reimbursed by the other persons in possession of the property, does not in any way restrict the plaintiff-mortgagee's discretion to proceed against all or any of the parcels making up the whole of the mortgaged property. **MUSST. BISHEN KOUR v. MUNSHI AZIZ-UD-DIN, 75 P.R. 1895.**

(20)—*Mortgage—Sale—Bona fide purchaser—Priority.*—Both on principle and on authority, a prior *bona fide* mortgagee will have preference over a subsequent purchaser for value without notice except under exceptional circumstances. **NARSINGH DAS v. THAKAR DAS, 23 P.R. 1891.**

See CIV. PRO CODE, 1908, s. 73, 65 P.R. 1895.

See HINDU LAW—DEBTS, 11 B.H.C. 76.

See MORTGAGE—REDEMPTION, 4 C.L.R. 294.

Gross negligence—Priority of mortgages—English law—Fraud—*See* TRANSFER OF PROPERTY ACT, 1882, s. 78, 15 M. 268=2 M.L.J. 95.

Prior mortgagee parting with title-deeds, when guilty of gross negligence—Postponement of priority—*See* TRANSFER OF PROPERTY ACT, 1882, s. 78, 12 M. 424.

Mortgage—continued.**—7.—Marshalling—concluded.**

See TRANSFER OF PROPERTY ACT, 1882, s. 78, 12 M. 429, 13 M. 383.

Not compellable so as to prejudice mortgagee—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 85, 81, 82, 95, 56, 60, 29 M. 217.

—8.—Possession under Mortgage.

(1)—*Mortgage—Purchase of mortgagor's rights by ticcadar of mortgagee—Effect.*—A purchase by the ticcadar of a mortgagee or the mortgagor's rights does not of itself have the effect of changing the relative positions of the ticcadar and the mortgagee, and make the ticcadar a mortgagor in possession. **SYUD MAHOMED WAHED v. SYUD MAHOMED TUTEEF, 1 W. R. 201.**

(2)—*Usufructuary mortgage—Possession withheld by mortgagor—Suit for money.*—Though a deed of mortgage and conditional sale contained a covenant for possession by the mortgagee during the mortgage term and the mortgagor received the mortgage-money, possession was not given. *Held*, that the mortgagee could sue the mortgagor, for recovery of the principal-money and interest advanced. **RAJA OODIT PURKASH SINGH v. MARTINDELL, 4 M.I.A. 444.**

(3)—*Mortgaged land not made over to mortgagee by mortgagor's default—Right of mortgagee to recover consideration—Objections in appeal.*—Where land covered by mortgage was the only security of the mortgagee for the recovery of the money advanced and was not made over to mortgagee, because of fault of mortgagor, the mortgagee was held entitled to recover from the mortgagor due proportion of the consideration. Objections not taken in grounds of appeal ought not to be entertained in hearing such appeal. **PITAMBAR MISSER v. RAM SURUN SOOKOOL, 25 W.R. 7. [D., 21 B. 175, 26 B. 241; R., 3 Bom. L. R. 876.]**

(4)—*Mortgage security found previously encumbered—Mortgagee's right to his money.*—A mortgagee who finds that he is without proper security in consequence of a prior lien on the property hypothecated to him, can claim his money without waiting for expiry of term. **RADHA CHURN SHAHA v. PARBUTTEE CHURN DUTT, 25 W.R. 51. [R., 26 B. 241, 3 Bom. L. R. 876.]**

(5)—*Usufructuary mortgage—Destruction of security—Right of mortgagee.*—Where, under the terms of a usufructuary mortgage, the mortgagee obtains possession in his own right to the usufruct and specially undertakes to pay the mortgagor the excess usufruct instead of crediting it to the debt, the mortgagee's right to recover his debt, with interest thereon, cannot be extinguished or modified by the destruction of the material portion of what was given as security, unless such destruction is imputable to his fault or he is under an obligation to restore the security (a warehouse in this case). **VENKATESHVARA v. KESAVA CHETTY, 2 M. 187. [D., 27 M. 86.]**

Mortgage—continued.**—8.—Possession under Mortgage—contd.**

(6)—*Usufructuary mortgage—Right to sue for mortgage money—Act IV of 1882 (T. P. Act), s. 68 (b) and (c).*—When a usufructuary mortgage deed contained a stipulation that "if, on the part of the mortgagor or other person, any kind of dispute or any interference or obstruction took place in obtaining of possession by the mortgagee, of the mortgaged property, the mortgagee might sue for the mortgage-money," but there was no covenant against alienation, the mortgagee could not, after possession once obtained and secured, sue for the money, on the ground that he had been subsequently deprived of a portion of the property, by a person to whom the mortgagor had sold it; there being no covenant against alienation, the sale by the mortgagor could not be a wrongful act, and cannot be considered wrongful under any rule of law, and the wrongful act of the purchaser, though committed, under colour of the purchase, cannot be said to be a consequence of the wrongful act of the mortgagor. **JHABBU RAM v. GIRDHARI SINGH, 6 A. 298 = A.W.N. 1884, 97.** [R., 11 A. 367, A.W.N. 1892, 66, 6 Bom.L.R. 288; D., 16 A. 318, F.B., A.W.N. 1901, 52.]

(7)—*Terms in mortgage binding mortgagee to pay assessment of mortgaged lands—Mortgagee not bound to save property from paramount title—Failure of security—Suit to recover debt from mortgagor personally—Limitation.*—In this case, the mortgagee was only under an obligation, by the terms of the mortgage, to pay the assessment due in respect of the mortgaged lands, and this obligation he duly discharged. When, therefore, by the default of the mortgagor in paying the assessment on other lands standing in his brother's name, the mortgaged lands were sold at a Revenue sale, the mortgagee's security came to an end, there being no rule of law which requires the mortgagee to incur expenses to save the mortgaged property from a paramount title. The mortgage consideration for the loan having failed, it became at once recoverable, by the plaintiff personally from the mortgagor. A suit for the purpose would be barred in three years unless the mortgage-deed was a registered one and contained an undertaking by the mortgagor to pay the loan. **SAMABA KHANDAPA v. ABAJI JOTIRAU, 11 B. 475.** [Appr., 2 N.L.R. 174; R., P.L.R. 1900, 202, 8 O.C. 166, 30 A. 388 = 5 A.L.J. 670 = A.W.N. 1908, 161; D., 21 M. 242 = 8 M.L.J. 81.]

(8)—*Personal services—Mortgagee in possession cannot charge.*—It is a well established principle of mortgage law that a mortgagee in possession cannot charge for personal services. **MAHADEV v. RAMACHANDRA, 6 Bom. L.R. 590.**

(9)—*Mortgagee in possession of land—Redemption—Expenses—Revenue survey.*—Where a mortgagee is in possession, he is entitled to be allowed, on redemption, the expenses incurred by him in connection with the Revenue survey

Mortgage—continued.**—8.—Possession under Mortgage—contd.**

of the mortgaged lands. **BAPUSA SADASHIV v. RAMJI GOPALJI, 2 B.H.C. 220.** [F., 9 B.H.C. 69.]

(10)—*Mortgagee in possession—Cultivation.*—A mortgagee in possession is bound to cultivate the ordinary crops which the land is capable of yielding. **GIRJOJI BHIKAJI v. KESHAVERAV N. HINGE, 2 B.H.C. 211.**

(11)—*Mortgage—Purchaser.*—If a person mortgages property of which he has no present ownership, and subsequently becomes the owner of the mortgaged property, the lien created by the mortgage attaches to such ownership, and subsequent purchasers from the mortgagor take subject to the equities which affected the property in the hands of the mortgagor. **MAHOMED ASSUD-OOLLAH KHAN v. KARAMUT-OOLLAH, 4 N.W.P. 11.**

(12)—*Bom. Act V of 1864—Hindu Law—Mortgagee without possession—Suit to recover land—Mamlatdar's order against mortgagor—Judgment not inter partes.*—For a Hindu mortgagee to successfully maintain an action of ejectment against third persons wrongfully in possession of the mortgaged property, it is not necessary that such mortgagee should have been put in possession by his mortgagor. If the mortgagor had been in possession within 12 years, and the mortgagor gave the mortgagee the right to be put into possession, the mortgagee would be entitled to bring his action based upon the title of his mortgagor. A mortgagee is not affected by a Mamlatdar's order, made under Bombay Act V of 1864, on the application of the mortgagor for possession subsequent to the date of the mortgage. **KRISHNAJI NARAYAN v. GOVIND BHASKAR, 9 B.H.C. 275.** [R., 2 B. 299, 6 B. 168, F.B.]

(13)—*Mortgagee in possession—Sale for arrears of revenue.*—A mortgagee in possession has no right to recover any share of the sale proceeds of the mortgaged property sold for arrears of revenue, except to the extent that he shows that the usufruct of the property while he held the mortgage was insufficient to pay him back his original loan. **HUR DEO NARAIN SINGH v. FUZLA HOSSEIN, 1 W.R. 270.**

(14)—*Mortgage—Payment of mortgage by third person—Right of such person.*—Where a mortgage was paid off by a third person, with his money, such person could enforce his lien as assignee of the mortgage, but cannot obtain possession of the mortgaged property in the capacity of an absolute owner. **BABOO DUT JHA v. PEAREE KAUNT, 18 W.R. 404.** [R., 1 C.L.R. 152.]

(15)—*Usufructuary lease—Diluvion.*—Where a mortgagee is deprived by diluvion of land over which he holds an usufructuary lease, he has a right, unless the terms of the lease are very special, to call upon the lessor for the unpaid balance of the loan. **SHEO GOLAM SINGH v. ROY DINKER DYAL, 21 W.R. 226.**

Mortgage—continued.**—8.—Possession under Mortgage—contd.**

(16)—*Mortgage in English form—Right of entry—Validity of covenant.*—When an express right of entry is covenanted for, the mortgagee would be entitled to enter into possession, although it might be that such right of entry ought to be enforced through the intervention of the Court. The mortgagee, when he enters into possession, would be in possession as mortgagor; and there is nothing in the law of this country to prohibit such a covenant being enforced. Where the mortgagee does not seek to enforce his lien as against any portion of the property, and has no necessity to do so, but it is the mortgagor who seeks to destroy the lien upon the ground that it has come to an end, the right of the mortgagee cannot in any sense be said to be extinguished by efflux of time, although 12 years have run out from the date of the default, if he is rightfully in possession as mortgagee under the covenant. [*F.*, 7 C. W. N. 11.] It is one thing to hold that a creditor or a mortgagee is not entitled to enforce his remedy by a suit in Court, but it may be quite a different thing when the question is whether the debtor or the mortgagor is entitled to a specific relief as against the creditor or the mortgagee. *LUTCHMIPUT SINGH BAHADUR v. THE LAND MORTGAGE BANK OF INDIA, LTD.* 14 C. 464.

(17)—*Mortgagee by conditional sale, suit by—Possession—Subsequent wrongful dispossession—Right of redemption.*—A mortgagee by conditional sale, who was put in possession, but was subsequently wrongfully dispossessed of the mortgaged property, can successfully maintain a suit, if brought within time, to recover possession of the same, though his claim for foreclosure may be barred by limitation. Such subsequent possession is, of course, possession as mortgage is subject to the right of redemption. *AMAN ALI v. AZGAR ALI MIA*, 27 C. 185. [*F.*, 7 C. W. N. 11.]

(18)—*First mortgagee in possession—Right of second mortgagee to oust first mortgagee—Remedy of second mortgagee—Suit for redemption.*—A mortgagee, who has been placed in possession in execution of a decree for possession, cannot be ousted at the instance of a subsequent mortgagee and the remedy of the latter is a suit for redemption. The second mortgagee cannot, by merely alleging that no money is due on the first mortgage, require the latter mortgagee to prove that the mortgage money has not been paid. *NARAYEN SETH v. MUKUND RAM*, 2 C. P. L. R. 173. [*R.*, 7 C. P. L. R. 3.]

(19)—*Mortgage by conditional sale—Subsequent lease by mortgagor—Right of mortgagee to retain possession—Effect of subsequent sale to mortgagee.*—The owner of a property first mortgaged it by conditional sale to one person, then while the mortgage was in existence he leased it to the plaintiff for sixty years and

Mortgage—continued.**—8.—Possession under Mortgage—contd.**

finally sold it to the mortgagee as a continuation of the conditional sale. *Held* that the mortgagor had no right to grant a lease which would have the effect of keeping the mortgagee out of the property for sixty years. After the purchase of the equity of redemption, the mortgagee was entitled to protect himself by his mortgage against the lease. When a mortgagee is in possession by virtue of his mortgage, the lessee of the mortgagor cannot oust him, *CHAINSUKHDAS v. MT. MUNYA*, 4 C. P. L. R. 193.

(20)—*Conditional mortgage—Subsequent registered deed of sale—Priority.*—A person claiming under a registered deed of sale executed in 1867 was held not to have a better title than a conditional mortgagee in possession under an unregistered deed of 1853, i.e., executed before the new Registration Acts (XVI of 1864 and XX of 1866). *SHEODYAL AHEER v. GOOL MAHOMED KHAN*, 2 N. W. P. 296. [*R.*, 7 C. 753 = 10 C. L. R. 129.]

(21)—*Mortgage—Possession—Priority—Lis pendens—Civ. Pro. Code, 1859, ss. 223, 230.*—A mortgagee in possession is entitled to have his claim satisfied in preference to a mortgagee of a prior date but unaccompanied by possession. When a suit for possession brought by a prior mortgagee was being contested, a subsequent mortgagee brought a suit for possession and obtained possession before the decree in the other suit. *Held* that possession so obtained pending the earlier suit, would not avail to give the subsequent mortgage priority over the first mortgage. The effect of the two sections taken together would seem to be that an alienation of property *pendente lite* is *prima facie* fraudulent, but that, if the alienee could show that he was a *bona fide* purchaser for valuable consideration without notice, or that, in any other way, he had an equity superior to that of the plaintiff in the suit, he might recover the property from which he had been in the first instance summarily removed. *KRISHNAPPA MAHADAPPA v. BAHIRU YADAVRAV*, 8 B. H. C. A. C. 55. [*R.*, 11 B. H. C. 41; *Expl.*, 11 B. H. C. 24.]

(22)—*Two mortgages on same property—Purchaser under second mortgage—Claim to possession—Duty to discharge prior lien.*—If a property has been twice mortgaged, the purchaser under the second mortgage can only obtain possession after discharging the lien created by the first mortgage, *CHEIT NARAIN SINGH v. GUNGA PERSHAD*, 25 W. R. 216. [*F.*, 6 C. 317, 31 C. 737.]

(23)—*Possession—Conditional sale—Prior lien—Liability to discharge.*—Where a prior lien did subsist upon the land at the time of the conditional sale of the same to the plaintiff, the plaintiff is bound to pay off that lien before he can obtain possession of the property. *BROJENDRO COOMAR ROY CHOWDHRY v. MR. J. P. WISE*, 18 W. R. 329. [*Appr.*, 19 W. R. 130.]

Mortgage—continued.**—8.—Possession under Mortgage—contd.**

(24)—*Mortgage—Transfer of mortgaged property by mortgagee in exchange—Right of mortgagor to property obtained in exchange.*—Where a mortgagee transfers mortgaged property in exchange for a number of similar properties, the mortgagor cannot claim possession by redemption of a particular property among those obtained in exchange, unless there was a binding agreement, between him and the mortgagee, at the time of the exchange, that such property was to take the place of the property mortgaged. *NIDHI LAL v. MAZHAR HUSAIN*, 7 A. 436 = A.W.N. 1885, 68.

(25)—*Sale of mortgage after foreclosure—Intermediate title created by mortgagor—Issue—Possession—Right of mortgagee.*—When a contract between the parties at the time of the mortgage was either that the mortgagor should pay off the mortgage within a certain time and thus redeem the property, or else that he should give up the property in the same state in which it stood at the time of the mortgage, it follows that if, subsequent to the mortgage, the mortgagor has created any encumbrance which was not in existence at the time of the mortgage, it is upon him to show that such encumbrance has not injured the outturn of the property. A mortgage of certain property which had been made in favour of a Bank, was sold to K (by S who had purchased it from the Bank) and he got a decree for possession after foreclosing the mortgage. The original mortgagor had granted a *miras pottah* to G, subsequent to the mortgage. W who bought the foreclosure decree intervened unsuccessfully in a suit instituted by G for arrears of rent setting up an intermediate title between proprietor and ryot. W subsequently sued G to have his right declared to a certain share of the rent payable by a ryot. The Court of first instance dismissed his suit on certain issues framed by it. The lower Appellate Court decreed his suit, on the determination of the single issue that the *miras pottah* was granted subsequent to the mortgage. *Held* (1) that the issue on which the lower Appellate Court allowed the plaintiff to rest his case was one which legitimately arose upon the facts on which either side relied, and that that Court had no doubt a discretion to allow the issue, which was one of law only, to be heard, and had jurisdiction to determine it; (2) that it was not necessary for plaintiff to prove his possession, as his cause of action was his being prevented by the defendant from enjoying the usufruct of the property by receipt of rents from ryots, etc; (3) that the plaintiff was entitled to get the property free from the *miras* lease as the mortgagee taking possession of the property under the terms of the mortgage was entitled to have that property in the condition in which it stood when it was mortgaged to him. *GOVIND CHUNDER BANERJEE v. J. P. WISE*, 12 W.R. 19.

(26)—*Possession under mortgage—Possession of mortgagee under decree on mortgage—Right of*

Mortgage—continued.**—8.—Possession under Mortgage—contd.**

assignee of mortgagor to oust mortgagee except by suit for redemption.—Where a mortgagee has been placed in possession under a decree passed on the mortgage, he cannot be ousted by any order of the Collector at the instance of any person deriving title from the mortgagor, so long as the decree, under which he has been placed in possession, is in force, and he cannot be ejected except under a decree for redemption passed by a competent Court. *GANESHDASS v. KHUMANSINGH*, 7 C.P.L.R. 3. (2 C.P.L.R. 173, R.)

(27)—*Suit by mortgagee for possession—No interest in mortgagor at time of suit—Person in possession not made party—Right of latter to recover possession from mortgagee*—A mortgagee had instituted a suit for possession under a mortgage and obtained possession in execution. But, at the time the suit was instituted, the mortgagor had no interest in the mortgaged property, all his interest including his right of redemption having passed to another, the present plaintiff, and the latter was not made a party to that suit, though he was in possession at the time. Now he sued to recover possession and contended that, as he was not a party to that suit, he could not be deprived of possession in execution. *Held* that any question of priority of mortgage between the plaintiff and the mortgagee could only be decided in the course of a suit under the mortgage and consequently he was entitled to recover possession until the mortgagee established his claim against him. *BATTU LAL KHEMCHAND v. SHUJAYAT BEG*, 5 C.P.L.R. 74.

(28)—*Suit for possession by usufructuary mortgagee or in the alternative for mortgage amount—Sons of mortgagor, whether necessary parties—Transfer of Property Act, 1882, s. 85.*—An usufructuary mortgagee brought a suit for possession of the mortgaged property, and in the alternative for the mortgage-money, joining as defendants in the suit the mortgagor and a purchaser from the mortgagor of the property in execution of a simple money decree, but without joining the two sons of the mortgagor as defendants. The lower Appellate Court dismissed the suit for non-joinder of the mortgagor's sons as defendants. *Held* that, as the property was not the ancestral property of the mortgagor and as s. 85, Transfer of Property Act, was not applicable to this suit, it being not a suit under Chap. IV of the Act, the mortgagor's sons were not necessary parties to the suit. *RAM NARAIN RAM v. PALO PATAK*, 1 A.L.J. 367.

(29)—*Possession—Limitation—Alienation pending sale under a decree.*—In 1871 defendant 1 mortgaged his land by a *san* mortgage to the plaintiff and the equity of redemption which remained with him was sold in 1872 in execution of a money decree, and was purchased by defendant 2 who was placed in possession in 1876. In 1877 the plaintiff sued the defendants 1 and 2 on his mortgage and obtained a

Mortgage—continued.**—8.—Possession under Mortgage—concl'd.**

decree for his money and an order that he could recover it from the defendant 1 by the sale of the property. On the 6th June 1880, defendant 2 mortgaged it with possession to defendants 9 and 10. On the 19th November, 1883, the property was sold and was purchased by R from whom the plaintiff bought. On the 19th November, 1895, the plaintiff brought this suit for possession. The Court of first instance rejected the plaintiff's claim as time-barred and the lower appellate Court confirmed its decree: *Held*, that the plaintiff was entitled to a decree against the defendants 1 and 2. His title as purchaser was complete and his suit even if it fell under art. 138 of the Limitation Act was within time. In 1880 the decree which the plaintiff had obtained for sale was pending over the property and so no alienation was possible that could in any way derogate from the plaintiff's right to bring the property to sale, but as defendants 9 and 10 (mortgagees) had been allowed to remain on in possession for more than twelve years after the mortgage, the mortgage must be held to be a valid charge upon the land, and the plaintiff must redeem them before he could obtain possession of the land. **PREMANAND v. ADESANG, 1 Bom. L.R. 208.**

See **EJECTMENT, SUIT FOR, 9 B.H.C. 275.**

See **LANDLORD AND TENANT—TRANSFER OF LANDLORD'S INTEREST, 44 P.R. 1874.**

See **LIMITATION ACT, 1903, arts. 142, 144, U.B.R. 1892—1896, Vol. II, 509.**

See **PARTIES TO SUITS—GENERAL, 2 N.W. P. 72.**

See **RES JUDICATA—ADJUDICATIONS, 10 C.L.R. 229.**

See **VALUATION OF SUIT, 1 P.R. 1891.**

—9.—Redemption.

See **BURDEN OF PROOF—MORTGAGE.**

See **LIMITATION ACT, 1908, art. 148.**

See **MALABAR LAW—MORTGAGE.**

See **MORTGAGE—ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE.**

See **TRANSFER OF PROPERTY ACT, 1882, ss. 58 to 101.**

(1)—*Mortgage—Butwarra among mortgagees—Right of Redemption.*—A butwarra entered into between the mortgagees of an estate cannot bind the mortgagors, or change the nature of the security given by them. The mortgagors' right to redeem what they had mortgaged is indefeasible, and cannot be interfered with by the unauthorized acts of their mortgagees. **SHAIKH MUZUHUR HOSSEIN v. HUR PERSHAD ROY, 15 W.R. 353.**

(2)—*Right to redeem not variable by agreement.*—Where a document is, on its face, a mortgage, the right to redeem is so much an essential as not to be variable by agreement. The question of intention *extra* the document

Mortgage—continued.**—9.—Redemption—continued.**

does not, therefore, arise. **SAMATHAL v. HER H. M. M. KAMATCHI AMMA BOYI SAIB, 7 M. H.C. 395. [R., 1 M. 1, P.C., 4 M. 179, F.B.]**

(3)—*Conditions of redemption as between mortgagor and mortgagee.*—The terms on which a mortgagor is entitled to redeem must be the same whether they are to be ascertained in a suit for redemption or for foreclosure. In determining what equity the mortgagor is bound to do, the question is what are the duties and liabilities which his situation imposes at the time of the institution of the suit and not whether he is plaintiff or defendant on the record. **THAYAR AMMAL v. LAKSHMI AMMAL, 18 M. 331.**

(4)—*Who is entitled to redeem—Person having an interest in mortgage property, repudiating the mortgage as unauthorised and as not binding on him, whether entitled to redeem.*—Redemption is primarily an incident of the contract of mortgage, and, as such, the right to it can only exist in such persons as are reached and bound by the contract. No person who is not affected by the contract of mortgage can sue to redeem such mortgage. Thus, where a person having an interest in the mortgaged property repudiates the mortgage as unauthorised and as not binding on him such a person has no right to redeem. If he has any interest in the property covered by the mortgage, his suit would be one, not to enforce, but to avoid the contract. **GHANYA v. UKUND RAO, 4 N.L.R. 9. [F., 5 N.L.R. 103; R., 5 N.L.R. 117; Rel. on, 5 N.L.R. 172.]**

(5)—*Redemption—Terms of mortgage precluding possibility of redemption and unjust and unfair not to be enforced.*—Where the terms of a mortgage instrument preclude from all possibility of redeeming the mortgage and where the terms of the deed are most unfair and unjust and such as no man with his eyes open would consent to, the terms would not be enforced by the Court. **SHANKER RAMDUTT v. HARDASS, 3 C.P.L.R. 115.**

(6)—*Parties, non-joinder of—Effect of, in mortgage suit—Transfer of Property Act (IV of 1882), s. 85—Registration Act (III of 1877), s. 60—Signature—Handwriting—Test of genuineness—Evidence Act (I of 1872), s. 39—Account books, non-entry in, no evidence—Covenant that payment not endorsed on bond not allowable—Proof of such payments, allowable—Interest after date fixed for redemption.*—It is of the essence of modern procedure to take care that an action shall not be defeated by the non-joinder of the right parties. When a party in interest is not made a party to a mortgage suit, the decree is not generally for this reason wholly void. It is effectual as against the persons interested in the equity who are made parties. And the only effect of the failure of the plaintiff to bring on the record a person who has an interest in a fragment of the equity of redemption is to leave his rights untouched, with the consequence that, if the plaintiff

*Mortgage—continued.**—9.—Redemption—continued.*

obtains a decree for foreclosure, he may subsequently find himself liable to be redeemed by the person who had been left out from the litigation. (19 C. 401, 5 C.W.N. 423, *F.*; 18 A. 109, *Not F.*) The endorsement made by the Registering Officer is admissible, under s. 60 of the Registration Act, in evidence, in proof that the facts mentioned therein have actually occurred. The test of genuineness of a signature ought to be the resemblance, not to the formation of letters in some other specimen or specimens, but to the general character of writing, which is impressed on it as the involuntary and unconscious result of constitution, habit or other permanent cause, and is, therefore, itself permanent. The best, usually perhaps the only proper, evidence of handwriting is that of persons, who have acquired a previous knowledge of the party's handwriting from seeing him write, and who form their opinion from the general character and manner of these, and not from criticising the particular letters. Although the entries in books of account are relevant to the extent provided by s. 39 of the Evidence Act, yet such a book is not by itself relevant to raise an inference from the absence of any entry. (10 C. 1024, 7 C.L.R. 356, 30 C. 231, *F.*; 4 C.W.N. CCVII, *R.*) In spite of a covenant in a bond to the effect that all payments are to be endorsed on the back of the deed and that no payment not so entered is to be recognised, the debtor is entitled to credit for payment actually made and otherwise proved. (3 W.R. Mis. 23, 8 W.R. 316, 5 M.H.C. 451, 1 N.W.P. 228, 1 B. 45, *F.*) The interest after the date fixed for redemption in the decree should be allowed not upon the principal sum alone, but upon the aggregate amount found due. KAMALAPATHI BANERJEE v. BEJOY LAL ROY CHOWDHURY, 3 Ind. Cas. 291. (10 C.L.J. 203, 3 Ind. Cas. 289, *F.*)

(7)—*Prior mortgagee not making puisne mortgage party—Subsequent suit by the latter—Conditions of redemption—Interest at the contract rate.*—In a suit by a prior mortgagee, one of the *puisne* mortgagees was not made a party, and the former purchased the property at the sale held under the decree obtained by him in his suit. The *puisne* mortgagee sued, subsequently to redeem the prior mortgages, and, in that suit, a question as to the conditions of the redemption arose. *Held*, that the *puisne* mortgagee not being a party to the previous suit, it ought not to affect either his rights or his liabilities. He could not use the previous decree so as to cut down the prior mortgagee's interest, and at the same time deprive him of the whole advantage of it. The prior mortgagee should, therefore, be entitled to whatever interest his contract entitled him to. (18 C. 164, *P.C.*, *F.*) The equitable considerations which appear to have prevailed with the learned Judges in *Gangadas Bhattar v. Jogendra Nath Mitter* (11 C.W.N. 403, *D.*) seem to be applicable only to a case in which the prior mortgagee has

*Mortgage—continued.**—9.—Redemption—continued.*

notice of the subsequent encumbrance, and the subsequent encumbrancer has no notice of the prior mortgage. In such a case it may be just to penalize the prior mortgagee for his disregard of the provisions of s. 85, Transfer of Property Act. THENAPPA CHETTIAR v. MARI-MUTHU NADAN, 18 M.L.J. 344=31 M. 258=4 M.L.T. 293. [*Rel. on*, 4 N.L.R. 168; *R.*, 7 M.L.T. 194]

(8)—*Decree for redemption—Appeal by some defendants only—Other defendants also necessary parties—Procedure.*—Plaintiff obtained a decree for redemption against the defendants 1 to 4. The defendants 1 and 3 alone appealed against the decree, and the decree was reversed, and suit dismissed. *Held*, that, as the defendants 2 and 4 were also necessary parties to the appeal, the lower appellate Court should have either dismissed the appeal or made them parties. KICHA REDDIAR v. REDDIAPPA REDDIAR, 6 M.L.T. 346.

(9)—*Mortgage—Implied authority of one of the partners to create—Parties—Non-joinder—Time for redemption.*—Where the nature of the business of a partnership included the buying of land and the raising of money on loan in order to carry on the business, an authority to one partner to mortgage partnership land may be implied. Where one of two mortgagees sued on a mortgage alleging that he had brought up the share of the other mortgagee, but the latter was not joined as a party, and there was no registered deed of assignment of his interest in the mortgage to the plaintiff: *Held*, that the formal defect in the suit might be remedied in appeal by permitting him to join as a plaintiff or permitting plaintiff to add him as a formal defendant. A Court ought not to allow a period of less than six weeks for redemption. ANA PENA NATER SHA v. ANAMALAY CHETTY, 10 Ind. Cas. 776.

(10)—*Redemption-suit—What judgment should contain when redemption is allowed—Forms of decrees.*—When redemption is allowed, the judgment should declare that the plaintiff will be entitled to redemption of the property sued for upon payment of such amount as the Court finds to be due in respect of the mortgage, and should name a date on or before which this sum must be paid into Court. The date should be fixed in the case of cultivated land so that the party who has sown the crop shall have the benefit of it. The judgment should then direct that if the plaintiff pays in the money on or before such date, the defendant shall after such date deliver over possession of the land to the plaintiff together with any documents of title relating to the land which the defendant may have in his custody or power, and shall further do all things necessary to place the plaintiff in the same position in regard to the land as he was in previous to the mortgage. This direction should be followed by an order that if the plaintiff makes default in paying in the money within the time allowed, then the plaintiff will

Mortgage—continued.**—9.—Redemption—continued.**

thenceforth be absolutely debarred and foreclosed from all rights of redemption of the property and the suit will stand dismissed with costs. **MAUNG MO GALE v. MA SA U**, 1 L.B.R. 186. (1 L.P.R. 85, F.) [R., 3 L.B.R. 190.]

(11)—*Suit for redemption—Decree to state the specific sum.*—A decree in a suit for redemption should specifically state the amount for which the mortgage should be redeemed and ought not to leave it to be determined in execution. **HASHIM KHAN v. SARDAR**, 34 P.R. 1896.

(12)—*Decree on puisne mortgage—Sale subject to prior mortgage—Whether decree-holder bound to redeem prior mortgage, before bringing properties to sale.*—Where a second mortgagee has obtained a decree for sale subject to the prior mortgage. *Held* that the decree cannot be construed as compelling the decree-holder to redeem the prior mortgage, before taking steps to sell the property. **ARAVAMUTHA IYENGAR v. KUMARASAMY CHETTY**, 7 M.L.T. 230 = 5 Ind. Cas. 490. (25 M. 529, 24 M. 471, D.)

(13)—*Suit for redemption—Denial of mortgage—Appellate Court—Point taken in appeal—Omission by vakil to argue.*—The plaintiff sued to redeem the land on payment of the money that might be found due on the mortgage. The mortgagee denied the existence of the mortgage. *Held* that the lower Court was not justified in decreeing possession of the land free from any payment, merely because the defendant denied the mortgage. If a point really arises and is taken in appeal, the appellate Court will not be justified in holding that it has been abandoned, merely because the Vakil has not argued it. **DADA valad VALLI v. BAVA SHA valad KASAN**, 6 B.H.C.A. C. 9.

(14)—*Declaratory decree—Suit for declaration of mortgagor's title—Validity of, without offering to redeem.*—The mortgagor can sue for a declaration of his right in the land mortgaged without suing for redemption. **BUJHAWAN v. NANHA**, A.W.N. 1882, 73.

(15)—*Equity of redemption.*—The rule "once a mortgage always a mortgage" does not apply in Upper Burma to mortgages made before Upper Burma became British territory; and in such cases the intention of the parties must be ascertained and followed. **MAUNG AN v. MAUNG HNAW**, U. B. R. 1897—1901, Vol. II, 502. (2 B. 231, 14 B. 19, 1 M. 1, 3 M. 26, 4 M. 179, 15 M. 230, L.B.R. 1872—1892, 549, R.) [F., U.B.R. 1897—1901, Vol. II, 509, 516; R., U.B.R. 1907, 3rd Qr., Mortgage 1.]

(16)—*Usufructuary mortgagee Rights of—Mortgaged estate ever redeemable.*—When the original transaction is a usufructuary mortgage, the mortgagee is entitled to nothing beyond the re-payment of his principal and interest from the usufruct of the property and the Court will not allow additional advantages to be obtained, through the necessity of a debtor,

Mortgage—continued.**—9.—Redemption—continued.**

by the conversion of a mortgage into a transaction of a different nature. Once a mortgage, always a mortgage, is a principle not to be departed from and being a mortgage an estate mortgaged is always redeemable and the law will contest even an express agreement of the parties and will let a man loose from his agreement and admit him to redeem a mortgage. **TEWAREE LOLL v. KASSEENAUTH**, W. R. F.B. 79.

(17)—*Mortgage between 1858-1882—Redemption—"Once a mortgage always a mortgage"—Applicability of doctrine.*—Mortgages executed subsequent to 1858 but prior to 1875 are governed by the doctrine of "once a mortgage, always a mortgage" adopted by the Madras High Court. In regard to mortgages executed between 1875 and 1882, when the Transfer of Property Act came into force, a similar view has been adopted. **KARUPPAN SERVAI v. ALAGARA KOUNDAN**, 14 M.L.J. 347. (1 M. 1, Expl.; 15 M. 230, 23 M. 117, R.)

(18)—*Transfer of Property Act, s. 74—Redemption of prior mortgage.*—S. 74 of the Transfer of Property Act contemplates the existence of two mortgages at one and the same time, and the independent action of the subsequent mortgagee to put an end to the prior mortgage. The section does not apply when the first mortgage is a usufructuary mortgage and the second also purports to be a usufructuary mortgage. **KOOPMIA SAHIB v. CHIDAMBARAM CHETTI**, 19 M. 105.

(19)—*Prior mortgage—Redemption by subsequent mortgagee—Effect.*—A person, who has redeemed a prior mortgage, has a right to extinguish the same or to keep it alive, and, in the absence of evidence to the contrary, the presumption will be that he intends to keep it alive for his own benefit. **GHANAYA v. PANDIT CHAJJU RAM**, 38 P.R. 1894. (1 A. 325, 10 C. 1035, 9 C. 961, D.) [R., 30 P.R. 1904 = 139 P.L.R. 1904, 32 P.R. 1903 = 54 P.L.R. 1903.]

(20)—*Mortgage—Redemption of a prior mortgage by a co-mortgagor—Subrogation to the rights of the mortgagee—Priority over subsequent mortgagees.*—There is no difference in principle between the case of a subsequent mortgagee or purchaser of equity of redemption and that of a co-mortgagor satisfying a prior mortgage. Where one of the co-mortgagors pays off the amount of prior mortgage, he is by such payment subrogated to the rights of the mortgagee and is entitled to priority over the subsequent mortgagees. **HAR PRASAD v. RAGHUNANDUN PRASAD**, 6 A.L.J. 832 = 31 A. 166 = 1 Ind. Cas. 825. (4 A. 58, 26 A. 227, R.)

(21)—*Right of second mortgagee to redeem prior mortgage—Keeping alive of mortgage—Extinguishment—Intention of parties—Transfer of Property Act, 1882, s. 74.*—Whether a mortgage paid off, has been kept alive or extinguished, depends upon the intention of the parties, the mere fact that it has been paid off

Mortgage—continued.**—9.—Redemption—continued.**

not deciding the question whether or not it has been extinguished. Express declaration of intention will cause either the one result or the other; and in the absence of such expression, the intention may be inferred either one way or the other. *AJUDHIA PRASAD v. DULARI LAL*, A.W.N. 1885, 21.

(22)—*One of the mortgagors redeeming the whole mortgage—Rights of mortgagors inter se.*—By redeeming a mortgage of the ordinary kind under which possession did not pass to the mortgagee, one of the several mortgagors becomes entitled to a charge on the interests of the other mortgagors, for the amount payable by the latter. *MALIK AHMAD WALI KHAN v. MUSSAMAT SHAMSI JAHAN BEGAM*, 10 C.W.N. 626, P.C. = 3 A.L.J. 360 = 3 C.L.J. 481 = 1 M.L.T. 143 = 8 Bom. L.R. 397 = 16 M.L.J. 269 = 28 A. 482 = 33 I.A. 81 = 8 Sar. 918.

(23)—*Suit for redemption—Jurisdiction.*—Where the subject-matter of the suit is, not only whether the property has been redeemed by payment out of the usufruct, but also whether the property and the right to redeem belongs to the plaintiff, the question of jurisdiction depends on the value of the property and not on the amount of the mortgage. *KALLAN DAS v. NAWAL SINGH*, 1 A. 620. [R., 11 B. 591.]

(24)—*Mortgage—Suit for redemption—Valuation of suit—Jurisdiction.*—In a suit for redemption, the value of the subject matter for purposes of jurisdiction is not the market value of the land but the amount of the mortgage money. *KUBAIR SINGH v. ATMA RAM*, 5 A. 332 = A.W.N. 1883, 47. [F., 5 A.L.J. 713 = A.W.N. 1908, 276; R., 14 C.P.L.R. 154.]

(25)—*Joint-mortgage—Suit for redemption of portion, valuation for purposes of Court-fees—Court Fees Act (VII of 1870), s. 7, art. 9—Suit for redemption of share of one co-mortgagor—Jurisdiction under Ben. Civil Courts Act, VI of 1871, s. 20—Subject-matter in dispute, meaning of.*—Where, on account of the purchase of a portion of the equity of redemption by the mortgagee, the mortgage-debt has been *pro tanto* extinguished and some of the mortgagors become entitled to recover a portion only of the mortgaged property, in a suit for redemption of such portion, "the principal money expressed to be secured" on which the Court-fee for the suit is to be calculated under art. 9, s. 7 of the Court Fees Act, must be taken to be the proportionate amount of the debt for which the portion sought to be redeemed would be liable. Where the plaintiff is entitled to come into Court to redeem a portion of a mortgage, the "subject-matter in dispute" with reference to the terms of s. 20 of the Bengal Civil Courts Act (VI of 1871) must be taken to mean the mortgagees' subsisting interest which the plaintiff redeeming seeks to clear off, and the limits of the pecuniary jurisdiction of the Court to entertain the suit must be fixed with reference to the proportionate amount of the

Mortgage—continued.**—9.—Redemption—continued.**

mortgage debt sought to be paid off. *AMANAT BEGAM v. BHAJAN LAL*, 8 A. 438 = A.W.N. 1886, 146. [Not F., 11 O.C. 154; R., A.W.N. 1887, 262, 14 C.P.L.R. 154, 6 O.C. 130, 31 A. 44 = 5 A.L.J. 713 = A.W.N. 1908, 276.]

(26)—*Partial redemption—Court-fees—Court Fees Act, VII of 1870, s. 7, cl. ix.*—In cases in which it is competent to the mortgagor to sue to recover a portion alone of the mortgaged property, the mortgage-debt must be regarded as distributed over the whole of the property, and as regards the portion of the property sued for, the "principal money expressed to be secured," for the purposes of cl. ix of s. 7 of the Court Fees Act, must be taken to be the proportionate amount of the debt for which such portion of the property is liable. *BALKRISHNA DHONDO v. NAGVEKAR*, 6 B. 324. [Appr., 8 A. 438 = A.W.N. 1886, 146.]

(27)—*Court Fees Act, 1870, s. 5—Institution fee to redeem kanom.*—To redeem a *kanom*, the institution fee must be computed on the *kanom* debt as it originally stood. REFERENCE UNDER COURT FEES ACT, s. 5. 14 M. 480. [R., 29 M. 367 = 16 M.L.J. 287.]

(28)—*Suit for redemption valued at Rs. 2,300—Money due being above Rs. 5,000—Appeal.*—On the plaintiff's offer to redeem a mortgage by paying Rs. 2,300, the original mortgage amount, the objection was that, more than Rs. 5,000—being then due, it could not be redeemed unless that amount was paid, and the Court found in favour of the defence. The question arose whether the appeal lay to the Chief Court or to the Divisional Judge. Held that the valuation of the suit by the plaintiff must govern the case for the purposes of jurisdiction and that the appeal lay to the Divisional Judge and not to the Chief Court, although the Lower Court had found that the defendant's allegation was true and that the property could be redeemed by payment of over Rs. 5,000. *RANJI KHAN v. BIR BAB*, 91 P.R. 1889. [R., 106 P.R. 1895, F.B.]

(29)—*Lekha mukhi mortgage—Mortgage satisfied by mortgagees enjoying land—Suit for possession by mortgagor—Nature of suit—Valuation.*—The plaintiff sued for possession of his property from a *lekha mukhi* mortgagee, on the ground that the mortgage debt had been fully satisfied from the profits arising from the land enjoyed by the defendant and that the charge no longer existed on the land. Held that the suit was one for redemption and the valuation of the suit was the amount secured and not the value of the land. *ABDUR RAHIM v. SEVA RAM*, 73 P.R. 1899.

(30)—*Court-fee—Redemption decree—Cross-objections by mortgagor for reduction of amount made payable—Power of Appellate Court to reduce amount—Mortgage—Interest—Compound interest—Undue influence—Dominating the will of mortgagor—Contract Act, s. 16.*—Where, in an appeal by a mortgagee against a decree passed in a suit for redemption, the mortgagor files

Mortgage—continued.**—9.—Redemption—continued.**

cross-objections for reduction of the amount payable for redemption, he must pay *ad valorem* Court-fee on the sum by which he seeks to have the amount reduced. An Appellate Court cannot reduce the amount by a sum greater than that in respect of which Court-fee has been paid on the cross-objections. Where the consideration of a mortgage-deed consisted of previous interest and costs and the mortgagee was a money-lender with whom the mortgagor had dealings for a considerable period: *Held*, that the mortgagee was in a position to dominate the will of the mortgagor and was not entitled to compound interest at the rate of 12 per cent. per annum stipulated in the mortgage-deed. **MANSA RAM v. UMRA**, 134 P.W.R. 1911=213 P.L.R. 1911=11 Ind. Cas. 198. (27 A. 447=A.W.N. 1905, 40=2 A.L.J. 105, 29 M. 367=16 M.L.J. 287, 5 P.R. 1911=59 P.W.R. 1911=9 Ind. Cas. 676; *F.*, 13 A. 94; *Diss.*, 77 P.R. 1898, 58 P.R. 1904, 92 P.R. 1905, 10 B. 41, *D.*)

(31)—*Stamp duty—Value of suit—Jurisdiction—Lower Burma Courts Act*, 1900, s. 25.—The amount on which stamp duty is payable does not determine the jurisdiction of a Court, but the amount or value of the subject matter of a suit. In a redemption suit, the subject-matter of the suit is the land sought to be redeemed; therefore, the actual present value of that land at the time the suit is filed must determine any question as to the Court which is competent to try the suit. **MAUNG KYAW DUN v. MAUNG KYAW**, 1 L.B.R. 96. [*R.*, U. B.R. 1910; 2nd Qr., Civil 10; *D.*, 5 L.B.R. 208.]

(32)—*Valuation of subject-matter of suit—Jurisdiction—S. 8, Suits Valuation Act—S. 2, Lower Burma Courts Act*.—In a suit for redemption by a mortgagor in possession of the mortgaged property, the subject-matter of the suit, within the meaning of cl. (h) of s. 2 of the Lower Burma Courts Act, 1900, is the mortgage, and the amount of the principal money secured by the mortgage determines the jurisdiction of the Court competent to try the suit. **KALEE KUMAR NAG v. M. MAYAPPA CHETTY**, 5 L.B.R. 208, F.B.=8 Ind. Cas. 973. (2 A. 698, 778, 3 A. 822, 5 M. 284, 5 A. 332, 8 A. 438, 11 B. 591, 7 B. 448, 15 C. 104, 13 B. 489, 14 B. 19, 16 M. 326; *F.*, 1 L.B.R. 96, *D.*)

(33)—*Usufructuary mortgage—Redemption—Value of suit—Jurisdiction*.—In a suit for redemption of a usufructuary mortgage, the subject-matter of the suit is the property which the plaintiff seeks to recover, and the value of the suit for purposes of jurisdiction is the market value of the property at the time the suit is filed. **NGA TUN BAW, NGA CHEIN v. MI KYE**, U.B.R. 1910, 2nd Qr., 10. (1 L.B.R. 96, *F.*; 5 A. 352, 8 A. 438, 11 B. 591, 14 B. 19, 5 M. 284, *Cons.*)

(34)—*Redemption, Suit for—Tender of mortgage money—Interest in case when exact amount*

Mortgage—continued.**—9.—Redemption—continued.**

not tendered—Costs, mortgagee entitled to, when exact amount not tendered—Transfer of Property Act, ss. 88 and 84—*Appeal as to costs—Memorandum of appeal insufficiently stamped—Court Fees Act—Irregularity not affecting merits of case or jurisdiction—Disposal of appeal not sufficiently stamped—Civ. Pro. Code*, s. 578.—The plaintiff (mortgagor) deposited in Court on the 19th September, 1899, under s. 83, Transfer of Property Act, the sum of Rs. 1,300, as the amount due on the mortgage. The defendant (mortgagee) refused to take the amount so deposited in full discharge of the amount due on the mortgage claiming Rs. 285 more. Accordingly, the plaintiff brought a suit for redemption on payment of Rs. 1,300. The Subordinate Judge found that Rs. 1,308-3-3 were due on the mortgage on the 19th September, 1899, and he decided that, as that amount had not been deposited, the plaintiff was liable to pay interest up to the date of the suit. The plaintiff appealed to the District Judge. He valued his appeal at Rs. 127-8-0 and paid a Court-fee on that amount. That amount was the difference between the amount deposited in Court and the amount found due by the Subordinate Judge and was interest. In his memorandum of appeal he objected to the payment of this amount, and to the order of the Subordinate Judge as to cost. The District Judge held that the defendant was more in the wrong than the plaintiff and should not get his costs and he awarded the plaintiff two-thirds of his cost. He also held that the first Court should not have awarded interest after the date on which payment was tendered. *Held*, that the plaintiff should have paid a Court-fee in respect of the first Court's order as to costs as well as in respect of his objection to pay Rs. 127-8 as interest, and that the memorandum of appeal was insufficiently stamped. But the decree of the District Judge could not be reversed on the ground that the memorandum of appeal was insufficiently stamped, as the irregularity did not affect his competency to try the appeal and therefore the provisions of s. 578, Civ. Pro. Code, were a bar to its reversal on that ground. As a general rule, a mortgagee is entitled to his costs in a foreclosure or a redemption suit and should not be deprived of them or made to pay the costs, unless he has been guilty of misconduct with reference to the suit or the subject of it. The mere circumstance that the defendant claimed more than what he was decided to be entitled to is not a ground for refusing him his costs and ordering him to pay plaintiff's costs. According to s. 84, Transfer of Property Act, interest on the principal sum ceases from the date of tender of "the amount remaining due on the mortgage" that is, of course, the exact amount. There is no provision in the section that, although the exact amount is not tendered, interest shall cease *pro tanto*. *Held*, therefore, that interest did not cease on the part of the mortgage-money due on the 19th September,

Mortgage—continued.**—9.—Redemption—continued.**

1899, which was covered by the tender and the defendant was entitled to the amount awarded by the Subordinate Judge. *BALDEO PERSHAD v. INAYAT KHAN*, 6 O. C. 135. [R., 12 O. C. 171.]

(35)—*Redemption—Value of suit—Money claimed by defendant for improvements—Res-judicata—Second suit for redemption.*—The mortgagor sued for redemption of two pieces of land and obtained a decree in 1885, to the effect that he could redeem the land in dispute in the present suit on payment of Rs. 49 and the other on payment of Re. 1. After obtaining the decree, the plaintiff paid a rupee and redeemed the other land, but took no steps to redeem the land in suit. In 1907, he filed a suit for redemption. In 1904, the mortgagee alleging himself as owner had brought a suit, stating dispossession by the mortgagor of a very small piece of a land, which was either a part of the land in suit or only adjunct thereto, and obtained a decree. The mortgagee pleaded that he had spent Rs. 800 on the land which he was entitled to recover from the mortgagor, that the suit was barred by limitation and *res-judicata*, and the original Court, (Munsiff, second class), had no jurisdiction to try the case. It was also contended on further appeal that the lower Appellate Court (District Judge) had no jurisdiction to hear the appeal. *Held*, that the previous suits for 1885 and 1904 did not operate to bar the present suit. (93 P.R. 1908, F.B. = 164 P.L.R. 1908, F.) (2) That the mortgagee was not entitled to recover anything on account of improvements. (3) That the lower Courts had jurisdiction to hear the case. *MOHUN v. DIALU*, 135 P.L.R. 1909 = 4 Ind. Cas. 939. (19 P.R. 1908 = 129 P.L.R. 1908, D.)

(36)—*Construction of document—Duty of the Court where a document has been wrongly construed so as to affect the interest of the party so construing—Mortgage by conditional sale—Redemption—Limitation Act (XV of 1877), sch. II, arts. 134 and 148—Time from which limitation is to be reckoned—Sale of part of mortgaged property—Bona fide purchaser—Redemption of part of mortgaged property on payment of proportionate amount when claim as to part barred by time etc.—Court Fees Act (VII of 1870), s. 7, sub-s. ix—Suit for redemption with a prayer for recovery of surplus profits—Code of Civil Procedure, s. 373—Improper valuation of Court-fees.*—A Court is bound to consider the terms of a deed in accordance with the view as to its true meaning which the Court may entertain. Any improper construction put upon it by a party cannot be allowed to prejudice his rights, whatever they are upon its true construction. Where a certain property was mortgaged by way of conditional sale for a period of nine years, and it was agreed that the sale would be cancelled on payment of the amount of the consideration money in nine years. *Held*, that the agreement of the parties was that the loan

Mortgage—continued.**—9.—Redemption—continued.**

was to be left outstanding for a period of nine years, and that, within that period, the mortgagee could not foreclose the mortgage, nor could the mortgagors redeem it. *Held*, further, that for a suit for redemption, the time began to run, under art. 148 of the second schedule to the Limitation Act, 1877, from the expiration of the term of nine years, and the mere fact that the plaintiffs alleged that the mortgage debt had been satisfied within that period did not affect the question of limitation. It is well settled law that a mortgage, as well as an out-and-out sale, by a trustee or a mortgagee, is a 'purchase' within the meaning of art. 134 of the second schedule to the Limitation Act, 1877. The said article is applicable only to cases in which a purchaser, whether his purchase be absolute or *sub-modo*, must obtain and hold possession for 12 years or upwards, in order that he may have that benefit of the article. *Held*, therefore, that a person, who *bona fide* purchases from a mortgagee in possession what is represented to him and what he believes to be the absolute interest, is entitled to the protection of art. 134 of the second schedule to the Limitation Act, 1877. (25 M. 99, 23 B. 614, D.; 9 A. 97, 14 M.I.A. 1, 16 B. 583, 20 A. 482, 22 B. 225, 24 M. 471, 27 B. 373, R. & F.) When 12 villages were mortgaged to a mortgagee, 5 out of which passed to other persons from whom they could not be redeemed, on account of the claim being barred against them, *held*, that the mortgagor was entitled to redeem the remaining 7 on payment of a proportionate amount of the mortgage money. S. 7, sub-s. IX of the Court Fees Act (VII of 1870), provides that, in a suit for redemption, the Court-fee should be valued at the principal amount secured by the mortgage, and the mere fact that the plaintiffs claimed, in the suit, payment of any sum, which might be found to be due to them on the taking of the accounts, did not alter the nature of the suit, so as to necessitate the payment of an additional fee on such sum. S. 373 of the Code of the Civil Procedure empowers a Court to allow a plaintiff to abandon a part of his claim, with liberty to bring a fresh suit in respect of the part so abandoned, if the Court is satisfied that the suit must fail by reason of some formal defect or that there is sufficient ground for permitting him to abandon part of his claim. This section was intended to meet, amongst other cases, a case in which there has been an improper valuation of the Court-fee stamp. *HUSANI BEGAM v. COLLECTOR OF CAWNPORE*, 4 A. L.J. 375 = A.W.N. 1907, 133 = 29 A. 471. [R., 6 A.L.J. 222 = 31 A. 300 = 2 Ind. Cas. 180.]

(37)—*Suit for redemption—Valuation of suit for purposes of further appeal—Revision—Punjab Courts Act, 1884, ss. 40 (i) (a) (ii) and 70 (i) (b)—Mortgage—Foreclosure—Defective notice—Reg. XVII of 1806—Waiver to take advantage of legal defects.*—Where, in a suit for possession, by redemption, of half of a building, which half was worth more than

Mortgage—continued.**—9.—Redemption—continued.**

Rs. 2,500, but the mortgage burden on which was only Rs. 1,500, the claim was for redemption on payment of Rs. 1,000, and the decree, appealed against, was for redemption on payment of Rs. 1,500, the value of the suit was held to be Rs. 1,500, i.e., the sum made payable by the decree appealed against, and not the value of the property bearing the mortgage burden, and the case was held to be one to be argued on the basis of cl. (b) of s. 70 (1) of the Punjab Courts Act and not under s. 40 (1) (a) (ii). Where a mortgagor appeared, on receipt of a defective notice of foreclosure issued under the provisions of Reg. XVII of 1806, to contest the notices and offered to pay to the proper persons, held that the mere offer to pay to the persons entitled did not amount to a waiver of his right to take advantage of the legal defects in the foreclosure procedure in a subsequent suit for the redemption of the mortgage. (21 P.R. 1903, R.) *Quræe*.—Whether cross objections, under s. 561, Civ. Pro. Code, can be entertained by an appellate Court in a case where no appeal lies. **BALWANT SINGH v. RAM DAS, 28 P.R. 1908=41 P.W.R. 1908=141 P.L.R. 1908.** [R., 23 P.R. 1909=197 P.L.R. 1908.]

(38)—*Appeal — Jurisdiction.*—The plaintiff brought a suit, in the Court of the Subordinate Judge, for redemption of four mortgages for sums amounting in the aggregate to less than Rs. 5,000. The defendant, in his written statement, pleaded that there were four more mortgages on the property. The aggregate of the mortgage-money according to him exceeded Rs. 5,000. Two of the mortgage deeds set up by the defendant were found by the Subordinate Judge to be invalid, and the actual amount of mortgage money, which the Subordinate Judge found to be rightly a charge on the property and on payment of which he decreed redemption, fell under Rs. 5,000. An appeal against the decree of the Subordinate Judge was filed by the defendant before the District Judge, who, on objection having been raised by the other side, returned the appeal for presentation to the Court of the Judicial Commissioner, Oudh. The defendant appealed against this order of the District Judge. Held, that the appeal was properly presented to the Court of District Judge. **LALLU SAH v. GAYA PERSHAD, 9 O.C. 96 (B).** [F., 10 O.C. 42.]

(39)—*Suit for redemption—Relief about surplus in the hands of the mortgagee—Jurisdiction determined by the amount of mortgage money only.*—Where the plaintiff in a suit for redemption asserted in his plaint that on taking the account, a large sum of money would be found due to him from the mortgagee, and asked that it might be awarded to him, without making any definite prayer for a decree for either a definite or an estimated sum of money independently of the claim to redemption, held that the jurisdiction of the Court to try the suit was determined by the amount of the mortgage-money, and the claim for the surplus

Mortgage—continued.**—9.—Redemption—continued.**

could not be taken into account in determining the question of jurisdiction. **MUHAMMAD HUSAIN v. MUSSAMMAT INTIAZ-UN-NISSA, 13 O.C. 32=5 Ind. Cas. 444.**

(40)—*Foreclosure proceedings — Deposit — Legal tender.*—A deposit made in Court by the mortgagors during foreclosure proceedings accompanied by a petition that it be kept pending enquiry as to the amount due is not a legal tender. **GOLUCKMONEE DABIA v. NUBUNGO MOONJUREE DABEA, W.R. F.B. 14.**

(41)—*Tender, rejection of, by mortgagee—Redemption, action of—Costs can be refused to mortgagee.*—A Court of Equity can take all the circumstances of a case into consideration, and do complete justice between the parties. If a mortgagee rejects a tender he rejects it at his own risk, and in an action for redemption he may be refused his costs in consequence, or may be ordered to pay costs. **GOVIND v. DILLAR JANG, 1 Bom. L.R. 381.**

(42)—*Tender of mortgage-debt where no place for payment is specified—Interest, cessation of, only on proper tender.*—Where a person seeks to redeem, he must make a proper tender of the mortgage-debt, and if no particular place for payment is specified under the contract, he must seek the creditor out. The reasons for the mortgagor not being able to make a proper tender of the redemption money have nothing to do with the mortgagee, the sole question being whether there was a proper tender or not. Where there was no proper tender, interest will continue to run as s. 84 applies only to a case of proper tender and interest does not stop from the date of the improper tender. **MAHADAJI v. PAIRIA, 2 N.L.R. 62.**

(43)—*Proof—Practice and Procedure.*—A plaintiff seeking to redeem must prove the specific mortgage set up in his plaint clearly and indefeasibly, but the question of proof necessary for the plaintiff to succeed must in each case depend upon and may be affected by the pleadings and the defence raised by the defendant. **DADA v. GENU, 5 Bom. L.R. 333.**

(44)—*Suit for—Burden of proof—Subsisting title.*—In a suit for redemption, the onus lies on the plaintiff to show the existence of a subsisting mortgage, which he is entitled to redeem. **MUSAFIR RAI v. MUSSAMMUT LAGAN BARTA KUAR, 2 A.L.J. 62=A.W.N. 1905, 14.** (A.W.N. 1895, 167, R.)

(45)—*Usufructuary — Question whether a usufructuary mortgagee can sue for the mortgage money where there has been no covenant to pay it—Where the security has been wholly or partially destroyed, the right should be admitted—No authority for lumping mortgages together—Date from which limitation begins to run when security is destroyed—Limitation Act, 1877, arts. 57, 120, 132.*—Where the security has been wholly or partially destroyed, it is only equitable that the right of a usufructuary mortgagee to sue for the mortgage money, where there has been

Mortgage—continued.

—9.—Redemption—continued.

no covenant to pay it, should be admitted. (U.B.R. 1897—1901, Vol. II, 516, *F.*) There is no authority for lumping the mortgages together. (U.B.R. 1897—1901, Vol. II, 505, *R.*) Where the subject-matter of a usufructuary mortgage, containing no covenant to pay, becomes wholly or partially destroyed, a suit by the mortgagee to recover the mortgage money would be governed by art. 120 of Act XV of 1877 and not by art. 132 or by art. 57. **MAUNG SHWE DOK v. MA LE, U.B.R. 1897—1901, Vol. II, 518.**

(46)—*Suit for redemption—Proof of mortgage—Non-production of mortgage-deed—Secondary evidence.*—In a suit for redemption, the plaintiffs did not produce the mortgage-deed or a certified copy of it, but alleged that the mortgage-deed was in the possession of the defendant, but took no steps under Chap. X, Civ. Pro. Code, so that secondary evidence may be admitted in regard to the facts and contents of the deed. They called witnesses to prove the mortgage, and produced a *jamabandi* of a certain year in which the names of their ancestors were recorded as holding the land. *Held* that the mortgagors had not proved the mortgage by legal evidence. **SHEOBARAKH v. SHEOBHIKH, A.W.N. 1882, 131.**

(47)—*Old mortgage—Burden of proof—Secondary evidence of terms of a mortgage-deed—Admission.*—In a suit for redemption of a mortgage of 1846, *held*, with reference to the provisions of s. 6 of Act I of 1869, that the burden is on the plaintiff to give at least *prima facie* proof that the mortgage is redeemable. (3 I. A. 85, *R.*) *Held* further, that secondary evidence of the terms of the mortgage deed, if admissible, must be of the kinds specified in s. 63 of the Evidence Act. *Held* also, that no admission by the mortgagee can operate to make a mortgage redeemable which by law was irredeemable at the time when the admission was made. **KAYASTH SCHOLARSHIP TRUST, ALLAHABAD v. SHANKAR DIN, 11 O.C. 285 (B.)**

(48)—*Redemption, Suit for—Mortgage-deed—Notice to produce—Secondary evidence—Evidence Act, 1872, ss. 65 (c) 66 (2).*—In a suit for redemption of mortgage, the defendant denied the mortgage but the suit was decreed. On appeal, the defendant contended that the mortgage having been shown to be in writing, secondary evidence of the mortgage was illegally taken. *Held* that secondary evidence was rightly taken as cl. (a) of s. 65 of the Evidence Act allows, "when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved" and that notice referred to in s. 66 of the Act was not necessary as, under cl. (2) of the proviso, the necessity does not exist "when from the nature of the case the adverse party must know that he will be required to produce it." **SAHAI v. SHEO DAR SHAN, A.W.N. 1888, 147.**

Mortgage—continued.

—9.—Redemption—continued.

(49)—*Mortgage—Redemption—Non-production of mortgage-deed.*—Where, in a suit for redemption, the defendant contended that the mortgage consideration was largely in excess of that on payment of which the plaintiff sought to redeem, and the defendant admitted that the sum due under the mortgage bond was only Rs. 112, but pleaded that a further sum of Rs. 288 was due from the mortgagors *held* that the defendant was bound to produce the mortgage-deed and to prove that the further liabilities were charged upon the mortgaged property. **SHEO SAHAI v. SIDHGOPAL, A.W. N. 1881, 92.**

(50)—*Mortgage—Mortgagee destroying deed of mortgage—Secondary evidence.*—In a suit for redeeming a mortgage, it was found that the mortgagee, with a view to deprive the plaintiff of the equity of redemption, had destroyed the deed by which the property was mortgaged. *Held* that the mortgagee could not be permitted to prove the contents of the deed or the amount of the mortgage debt by secondary evidence, and that the mortgagor should be allowed to recover the lands without any payment. **SHEK ABDULLA v. SHEK MUHAMMAD JAFAR, 1 B H.C. 177.**

(51)—*Redemption suit—Terms of the mortgage, no evidence to prove—Period for which the mortgage is made, effect of, no evidence to prove—Interest to be presumed equal to the profits of the property.*—In a suit for redemption, the plaintiff, in order to prove the mortgage set up by him, produced a witness whose evidence established the fact of mortgage. In appeal, it was contended that, as this evidence did not prove the terms of the mortgage, the plaintiff was not entitled to a decree for redemption. *Held*, that, in the absence of evidence, it could not be assumed that the mortgage was made for a period exceeding that alleged by the plaintiff. *Held* also, that, in the absence of evidence to the contrary, it could not be assumed that the interest, if any, was agreed to be paid, exceeded the profits of the property. **PANCHAM TEWARI v. RAM UDIT UPADHYA, 10 Ind. Cas. 7.**

(52)—*Redemption—Evidence—Corroboration—Discrepancy.*—As a general rule, a claim to redeem a mortgage founded on a subsequent loan which saves limitation is open to suspicion and requires close testing; but there are exceptions where surrounding circumstances supply corroborative evidence of the genuineness of the claim. **MAUNG AN v. MAUNG PO WIN, U.B.R. 1897—1901, Vol. II, 500. [Overruled., U.B.R. 1897—1901, Vol. II, 367.]**

(53)—*Partial relief on the footing of defendant's admission.*—Where the plaintiff sues for redemption of a mortgage of the whole property for a small amount and fails to substantiate his averments, he cannot, in that suit, fall back on the admission of the defendant, who admits the mortgage of a portion only, but for a very much

Mortgage—continued.**—9.—Redemption—continued.**

larger amount, and claim to redeem that portion. *RATAN KUAR v. JIWAN SINGH*, 1 A. 194, F.B. [R., 11 A. 438, 18 A. 403=A.W.N. 1896, 132.]

(54)—*Sale — Burden of proof.*—Where the plaintiff sued to redeem certain land of which she admitted defendant had been in possession for over 30 years, but which she alleged she had mortgaged to him and the defendant alleged the land had been sold to him by plaintiff, but adduced no evidence of sale, *held* that, there being practically no evidence on either side, the plaintiff's claim should have been dismissed, the burden of proof being on her to prove the mortgage. *MA YA v. MAUNG KYAING*, L.B.R. 1872—1892, 482. (L.B.R. 1872—1892 78, 102, 474, R.) [R., L.B.R. 1893, 1900, 514, L.B.R. 1893—1900, 85, L.B.R. 1872—1892, 494, *Expl.*, L.B.R. 1893—1900, 461.]

(55)—*Subsequent small advances to keep mortgage alive should be strictly proved.*—Evidence of subsequent advances of small sums for the purpose of keeping alive old mortgages of which the redemption would otherwise be barred by limitation should be most carefully tested and considered. *MAUNG WAIK GYI v. MA KYI MA*, U.B.R. 1897—1901, Vol. II, 507.

(56)—*Suit to redeem mortgage — Mortgage not proved—Admission of mortgage right.*—A plaintiff, failing to establish the particular mortgage which he sues to redeem, cannot be allowed to fall back on some other mortgage as to which admissions may have been made by the defendants. No redemption decree can be passed on admissions made within the statutory period of a mortgage, under which the defendant held, but which was not pleaded in the plaint. *KRISHNA PILLAI v. RANGASAMI PILLAI*, 18 M. 462=5 M.L.J. 187. [F., 13 M.L.J. 274, 17 M.L.J. 122=2 M.L.J. 65; R., 18 A. 403, 22 M. 259, A.W.N. 1899, 132; D., 19 M. 160.]

(57)—*Cause of action set forth in plaint, onus on plaintiff to establish—Plaintiff in suit for redemption, bound to prove particular mortgage sued on.*—Where the plaintiff in a suit on a mortgage fails to prove the particular mortgage alleged in his plaint and relied on by him, he cannot be given a decree in the suit in respect of a different mortgage or mortgages not included in the plaintiff's cause of action but found to subsist between the parties on admission or from the evidence in the case. So, where a plaintiff in a suit for redemption fails to establish the specific mortgage and the averments on which he has based his suit, he cannot claim to get a decree for redemption by reason of some other mortgage in respect of which the defendant happened to admit that he was the plaintiff's mortgagee. *SHEO PRASAD v. LALIT KUAR*, 18 A. 403=A.W.N. 1896, 132. (17 B. 365, 4 B. 584, 16 A. 165, 18 A. 131, 1 A. 194, 11 A. 438, A.W.N. 1889, 187, 18 M. 462, 8 B. 543, 11 M.L.A. 7, *Diss.*) [F., 3 O.C. 173; R., 129 P.L.R. 1904; D., A.W.N. 1899, 132.]

Mortgage—continued.**—9.—Redemption—continued.**

(58)—*Mortgage, usufructuary — Redemption — Limitation — Burden of proof—Civ. Pro. Code, s. 50 (d).*—In a suit for redemption of mortgage, where a plaintiff alleges that he is entitled to possession by reason of the determination of a mortgage, it is for him to prove (unless it is admitted) that he had, at the commencement of the suit, a subsisting title to the possession of the property, i.e., a title not barred by limitation; and, with reference to s. 50 (d) of the Civ. Pro. Code he should allege in his plaint facts showing that such right exists. A plaintiff in such a suit is not entitled to succeed merely because the defendant fails to prove the case he sets up, unless the defendant's pleadings show that, on failure to prove a particular defence, the plaintiff must be entitled. *ZINGARI SINGH v. BHAGWAN SINGH*, A.W.N. 1889, 187. (A.W.N. 1889, 155. F.) [R., 18 A. 295, 403.]

(59)—*Redemption—Suit by assignee of equity of redemption—Burden of proof as to receipt of consideration.*—In a suit for redemption by the assignees of the equity of redemption, the onus of proving that the mortgagor did not in fact receive the moneys, which he acknowledged by his execution on the mortgage-deed to have received, is *prima facie* of the plaintiffs. *MUHAMMAD ALLAHYAR KHAN v. MUHAMMAD SAMI UDDIN KHAN*, A.W.N. 1887, 245.

(60)—*Mortgage—Suit by a mortgagor to redeem from a co-mortgagor who has redeemed whole of mortgaged property—Burden of proof.*—Where a mortgagor is suing his co-mortgagor for possession, upon payment of the proportionate amount of redemption money due of mortgaged property which has been redeemed by the said co-mortgagor, all he has got to prove is that a mortgage was made within 60 years by him and the defendant or those whom they represent, that the defendant or those represented by him redeemed the mortgage, and that the plaintiff is willing to pay his proportionate share of redemption money commensurate with his interest and reasonable interest from the date of redemption. *RANI v. AMIR BAKHSI*, A. W. N. 1898, 39.

(61)—*Sale—Burden of proof — Custom.*—Where the plaintiff sued to redeem certain land of which the defendant was in possession and which plaintiff alleged had been absolutely transferred to defendant in payment of a debt, the plaintiff reserving his right to redeem at any time on payment of the debt and the defendant alleged that the transaction at the time of transfer was a sale, *held* that the burden of proof was on plaintiff to prove the mortgage. It is a common practice in this country for the people to transfer their lands absolutely to their creditors with the reservation that the debtor may redeem the land at any time on repayment of the debt. But it is going too far to say, in the absence of any evidence, that this is the invariable custom of the country of which all the Courts of the country must take

Mortgage—continued.**—9.—Redemption—continued.**

judicial notice. *PO SHWE AUNG and MA NU v. PO TO BYA*, **L.B.R. 1872—1892, 494.** [*R.*, **L.B.R. 1893—1900, 85, 616, L.B.R. 1893—1900, 514; Expl., **L.B.R. 1893—1900, 461.**]**

(62)—*Suit by mortgagor—Denial of mortgage—Burden of proof.*—Where, in a suit for redemption, the defendant denies the mortgage and sets up independent title to ownership in himself with possession for thirty years, the burden lies upon the plaintiff to prove his title as owner and mortgagor and not upon the defendant to prove adverse possession. *RAM CHAND v. BHANA MAL*, **71 P.R. 1900**

(63)—*Mortgage, suit for redemption of—Entry of defendant's name in Revenue records as proprietor—Burden of proof.*—In a suit for redemption by the representative of a mortgagor, the defendant admitted his having obtained possession originally as a mortgagee, but alleged that subsequently the mortgage was foreclosed and his name was entered in the Revenue registers as proprietor, *held* that the defendant was bound to establish that he was not in possession as mortgagee but as proprietor. *HANUMAN SARAN SINGH v. BHAIRON SINGH*, **12 A. 189 = A.W.N. 1889, 199.**

(64)—*Burden of proof—Probabilities.*—Where the land in suit had been held for the last 35 years by the defendants without any apparent interference or assertion of title on the part of the plaintiffs, who now set up a mortgage while the defendant pleaded that the land was ancestral property redeemed by his predecessor in title from plaintiffs' predecessor in title about the time of the alleged mortgage, *held* that the mortgage must be strictly established and that the probabilities were more in favour of the defence than of the other side. *MA TET PYA v. MAUNG SHWE PO*, **U.B.R. 1892—1896, Vol. II, 570.**

(65)—*Redemption of land mortgaged.*—The respondent came upon the land in dispute by the license of the appellant, who caused M.T.T. to redeem it from mortgage, after which it was held jointly by the families of M.T.T. and the respondent. About 15 years subsequently according to the respondent, the appellant made over the land altogether to him and M.T.T. The respondent also raised the question of the appellant's title. The burden of proof being entirely on the respondent and no limitation being established, in the absence of proof of adverse possession, the respondent was held to be estopped from denying the appellant's title, under s. 116, Evidence Act, and the presumption was that he continued to hold under him. *U THA PE v. MAUNG PANAW*, **U.B.R. 1892—1896, Vol. II, 561.** (*L.B.R. 1872—1892, 51, 70, F.*) [*Cited & R.*, **2 U.B.R. 1897—1901, Vol. II, 464.**]

(66)—*Joint mortgagors—Representatives of mortgagors—Ancestral property—Presumption from circumstances as to division of.*—Proof required of a member of a family who claims the

Mortgage—continued.**—9.—Redemption—continued.**

right of redeeming land separately mortgaged by other members. *MAUNG BU BWIN v. MAUNG PO SET*, **U.B.R. 1892—1896, Vol. II, 556.**

(67)—*Claim to land alleged to be mortgaged—Burden of proof.*—When an ancient mortgage is set up, it must be satisfactorily proved against persons being in possession who deny its existence. In considering the probabilities and improbabilities of the case, it must be borne in mind that we have here a family which has been in possession of land for a period that cannot have been less probably than a hundred years and may have been a great deal more, and that this is an attempt to deprive them of it on the strength of a flimsy piece of *parabaik*, on which a document could be manufactured in a few minutes and of the statements of a witness who had no business with the transaction he speaks to and who cannot give a satisfactory account of it. Even without the numerous inconsistencies, improbabilities and difficulties adverted to above, it would be a rash thing to place confidence in evidence of that kind. If people really have a claim to land in the hands of others and yet allow nearly 40 years to go by without asserting it in any way or allowing any one to know anything about it, they cannot expect their claim to command belief when they at last put it forward, unless they are able to adduce trustworthy and unambiguous evidence in its support. The value of land generally has been greatly enhanced of late years, and there is naturally strong temptation to assert claims to it, good and bad. The present claim seems to me to be of the latter character, and to fail for want of credible evidence. *MA HNIN YWET v. MA SAING*, **U.B.R. 1892—1896, Vol. II, 565.**

(68)—*Suit for redemption of mortgage by persons holding land as tenants on the allegation that they were representatives of the original mortgagor and the landlord, representative of the original mortgagee—Burden of proof.*—The plaintiffs, the tenants of the defendant, set up a mortgage about a hundred years old by their ancestor, and produced documents which, however, were not proved. *Held* that the burden of proof was entirely on plaintiffs, and that there was nothing to take the case out of the usual prescribed period of sixty years' limitation. *MA MEIN MA v. MAUNG PYAUNG*, **U.B.R. 1892—1896, Vol. II, 579.** [*R.*, **U.B.R. 1892—1896, Vol. II, 373.**]

(69)—*Applicability of the doctrine of res judicata.*—In redemption suits, the doctrine of *res judicata* applies to all matters which existed at the time of giving judgment and which the party had an opportunity of bringing before the Court. *VINAYAK v. DATTATRAYA*, **4 Bom. L.R. 492 = 26 B. 661.**

(70)—*Redemption—Maxim—Redeem up and foreclose down—Decree nisi—Res judicata—Civ. Pro. Code, (Act V of 1908), s. 11—Registration Act (XVI of 1908), ss. 17, 49—Document*

Mortgage—continued.**—9.—Redemption—continued.**

severable in parts—Some parts not requiring registration—Document can so far be used in evidence—Company—Directors de facto—Notice to strangers—Mortgagee in possession—Agreement empowering him to charge for his personal services—Agreement valid—Clog on the equity of redemption—Once a mortgage always a mortgage—Manager of a Mill—Acquiescence—Elements of—Fraud, what constitutes.—When there is more than one mortgage upon a property, then the rule is, redeem up, and foreclose down, which, in fact, means that the first mortgagee suing for foreclosure must make all subsequent mortgagees parties to the suit and so afford each in turn the chance of redeeming before being foreclosed. The first mortgagee can neither foreclose nor be redeemed by the original mortgagor without taking into account intermediate encumbrances. If the intermediate encumbrancers, who are parties to the suit, do not choose to exercise their rights to redeem, each in turn would be foreclosed before the first mortgagee could come into touch with the mortgagor. A decree *nisi* in itself from its nature is provisional and requires the party seeking to have it enforced to move it absolute. Whether the decree be procured by the mortgagor or the mortgagee, it is in the option of either party to enforce it and have it converted into a decree absolute but until one or the other party does so, it never can be a final decision or constitute *res judicata*. (7 B. 467, *Commented on*.) Where a decree is couched in general terms and a question of *res judicata* arises upon it, the Court may look at all the intrinsic evidence before it and the materials of the case as a whole, even going so far as statements in the depositions of witnesses. (24 C. 504, *F*.) Where a document, which as a whole requires registration but is not registered, contains separable parts which do not require registration, those parts may be admitted in evidence to prove transactions which *ex hypothesi* do not affect immoveable property of the value of Rs. 100 or upwards. An agreement whereby the mortgagee in possession agrees with his mortgagor to carry on the management of a mill (the property mortgaged) and to finance it in consideration of his getting a fixed remuneration, is not compulsorily registrable. As between a Company and persons having no notice to the contrary, directors *de facto* are as good as directors *de jure*. Outsiders dealing with a Company are bound to acquaint themselves with its external position, which can usually be gathered from the papers of their constitution, the Memorandum of Association and the Articles of Association, but are not bound to inquire into and satisfy themselves upon all the details of the Company's in-door management. This principle requires modification where the persons sought to be affected with notice are themselves within the Company. An agreement, whereby a mortgagee in possession agrees with his mortgagor to charge for his personal services, valid, if it does not constitute a clog on

Mortgage—continued.**—9.—Redemption—continued.**

the equity of redemption. The maxim "once a mortgage always a mortgage" means that there can be no additional contract so as to preclude the mortgagor from redeeming. It does not include previous or past agreements independent of the mortgage, unless they are unconscionable or clearly obtained by undue influence or the abuse of fiduciary relations. The payment of fair remuneration to the manager of a large concern like a spinning and weaving mill, to keep it in a high state of efficiency, is not a clog on the equity of redemption; and in principle it makes no difference whether the manager is the mortgagee in possession or a third party. The acquiescence which will deprive a man of his legal rights must amount to fraud. A man is not to be deprived of his legal rights, unless he has acted in such a way as to make it fraudulent for him to set up those rights. The elements or requisites necessary to constitute the fraud are: (1) the plaintiff must have made a mistake as to his legal rights; (2) he must have expended some money or must have done some act on the faith of such mistaken belief; (3) the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff; (4) the defendant must know of the plaintiff's mistaken belief on his rights; and (5) the defendant must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. All these elements must exist together. **THE HOPE MILLS LIMITED v. SIR COWASJI J. READYMONEY, BART, 13 Bom. L. R. 162 = 10 Ind. Cas. 749.**

(71)—*Usufructuary mortgage—Tender of money due by mortgagor, valid, effect of—Tender, if extinguishes security—Redemption, Suit for—Nature and scope of suit—Decree, effect of—Mortgagee in possession, liabilities of—Damages, suit for, for wrongful detention of property—Mesne profits—Transfer of Property Act (IV of 1882), ss. 76, 84, 89 and 92—Accounts, taking of—Res judicata, constructive—Defence which might and ought to have been taken in a former trial—Principle of the rule—Civ. Pro. Code, s. 13, Expls. II and III.*—A mortgagee who refuses a valid tender, does so at his risk; he does not thereby cease to be a mortgagee, and whatever is due to and from him, after the date of the tender, should be included in the accounts taken, in a subsequent suit for redemption. In cases of legal or equitable mortgage, a tender properly made and improperly rejected, is not equivalent to payment, and neither extinguishes the mortgage-debt, nor determines the mortgagee's property in the security. A proper tender will stop the running of interest, if the mortgagor keeps the money ready to pay over to the mortgagee, and does not afterwards make any profit out of it. (25 B. 115, *Expl. & D.*; 21 C. 252, 21 A. 425, 4 C.P.L.R. 88, 12 C. 482, 17 C. 968, 19 C. 615, 7 W.R. 364, *D.*)

Mortgage—continued.**—9.—Redemption—continued.**

The essence of foreclosure and redemption suits is, that, in such suits, each party is entitled to enforce his rights; a plaintiff claiming foreclosure is bound, upon the accounts being taken, if the balance is against him, to pay that balance; on the other hand, a plaintiff claiming redemption, must submit to a decree for sale or foreclosure, if he makes default in payment; and to avoid a multiplicity of suits, it is necessary, under decrees for foreclosure or redemption that the accounts between the parties should be settled and discharged; if the balance is against any party, he must pay it (9 C. 377, 16 I. A. 107, 16 C. 682, R.) In a redemption suit, the mortgagor is entitled, as in a question with his mortgagee, to have a general account taken of what is due upon the mortgage and the fact that the mortgagor then declared, in his pleadings, his intention of bringing a separate action for recovery of the profits received by the mortgagee after refusal of his tender, does not entitle him to maintain an action for damages for wrongful detention of property after the tender, which would have been wholly unnecessary, if the claim urged in the latter action had been put forward and given effect to in that litigation. SATYABADI BEHARA v. MUSSAMMUT HIRABATI, 5 C.L.J. 192=34 C. 223. (20 C. 322, R.; B.L.R. Sup. Vol. 109, D.) [R., 34 C. 305=5 C.L.J. 270, 34 C. 636=5 C.L.J. 550, 30 A. 225=5 A.L.J. 192=A.W.N. 1908, 96, 19 M.L.J. 648=6 M.L.T. 262=33 M. 100=3 Ind. Cas. 729.]

(72)—*Redemption suit—Account—Claim for mesne profits between date fixed for redemption and actual date of delivery of property—Whether separate suit maintainable—Civ. Pro. Code (Act XIV of 1882), ss. 13, 43—Res judicata—Relinquishment of claim—Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 31.*—It is the duty of the mortgagor in a suit for redemption to include a claim, not merely for the recovery of possession, but also for an account of what was due upon the mortgage security. But a distinction ought to be drawn between the claim for mesne profits between the date of tender or deposit and the date of the decree in the redemption suit, and the mesne profits from the latter date to the date of delivery of possession. The claim for mesne profits between the date of tender or deposit and the date of the decree must be included in the suit for redemption; but the claim for mesne profits for the period, which intervened between the date fixed for redemption in the decree and the date of actual delivery of possession, may be enforced in a separate suit. (31 B. 527, 34 C. 223, D.) Such a suit does not fall within art. 31 of sch. II of the Provincial Small Cause Courts Act, and is maintainable in a Small Cause Court. SAKARI DUTTA v. SHEIK AINUDDY, 6 Ind. Cas. 336=14 C.W.N. 1001.

(73)—*Transfer of Property Act (IV of 1882) ss. 92, 93—Lapse of decree for redemption by non-payment of decretal money—Second suit for*

Mortgage—continued.**—9.—Redemption—continued.**

redemption not maintainable by mortgagor.—When once a decree for redemption has been obtained by the mortgagor, he is debarred from again suing to redeem the same mortgage. It is the intention of the Legislature, as expressed in ss. 92, 93 of the Transfer of Property Act that there should be one suit only for redemption. The mere fact that a mortgagor has failed to comply with his decree for redemption within time cannot give him a fresh cause of action. Allowance of a second suit for redemption would therefore be going contrary to the provision in s. 13 of the Civ. Pro. Code and also to the principle of s. 244 of the Code. DAVID HAY v. RAZI-UD-DIN, 19 A. 202=A.W.N. 1897, 24. (3 N.W.P. 62, 13 B. 567, F.; 10 B. 461, R.; 11 A. 386, 6 M. 119, 7 M. 423, 15 M. 266, Diss.) [Overruled, 24 A. 44, F.B.=A.W.N. 1901, 194; Appr., 25 M. 300, F.B., 6 O.C. 367; R., 3 O.C. 371, 43 P.R. 1907=169 P.L.R. 1908=101 P.W. R. 1907, 93 P.R. 1908=164 P.L.R. 1908=123 P.W.R. 1908; D., 21 A. 251.]

(74)—*Lis pendens—Revenue sale under ss. 13, 54, Act XI of 1859—Purchase by auction-purchaser pending suit to enforce mortgage on property.*—The principle of *lis pendens* applies to a case where a person purchases a share of an estate sold for arrears at a revenue sale under ss. 13 and 54, Act XI of 1859, held at a time when execution proceedings in a suit to enforce an existing mortgage on the property were pending. So the auction-purchaser will lose his equity of redemption, if he does not redeem within the time allowed by the mortgage-decree to the original decree-holder. *Quare.*—Whether if the mortgagee, contesting the validity of the revenue sale, delays its confirmation, any question of equity in auction-purchaser's favour arises. HAR SHANKAR PRASAD SINGH v. SHEW GOBIND SHAW, 26 C. 966=4 C.W.N. 317. [F., 2 C.L.J. 288, 11 C.W.N. 495=5 C.L.J. 45, Note; R., 32 C. 891=1 C.L.J. 371=9 C.W.N. 728, 7 C.L.J. 1, 10 C.L.J. 590.]

(75)—*Reg. XVII of 1806, s. S—Discretion of Judge to extend time.*—A Judge has no discretion to extend the time allowed to the mortgagor under s. S, Regulation XVII of 1806. MAHOMED GAZEE CHOWDHRY v. ABDOL MAHOMED AMEEROODEEN, 5 W.R. Mls. 31.

(76)—*Mortgage—Foreclosure—Notice—Redemption.*—The time for redemption expires with the period stipulated for the payment of the principal sum. WOOMA CHURN CHOWDHRY v. BEHAREE LALL MOOKERJEE, 21 W.R. 274. [Appr., 23 C. 229; R., 16 A. 59=A.W.N. 1893, 209.]

(77)—*Redemption—Time granted by first Court—Unsuccessful appeal.*—Where the defendant was allowed six months by the first Court to pay off a mortgage debt, and, upon appeal by the defendant, the appeal was dismissed: held, that the six months' time allowed to the defendant should run from the date of the first Court's decree, and not of the appellate

Mortgage—continued.**—9.—Redemption—continued.**

decree. **FAIJUDDI SARDAR v. ASIMUDDI BISWAS**, 11 C.W.N. 679. [*Expl.*, 13 C.W.N. 36, Note; *D.*, 36 C. 122=8 C.L.J. 547.]

(78)—*Reg. VII of 1806—Tender of deposit within year of grace—Holiday—Mortgage.*—A mortgagor desiring to make a deposit or tender of the amount due to the mortgagee must do it within the year of grace allowed by *Reg. XVII of 1806*; the mortgagor is not entitled to the deduction of any holidays which may occur at the time when the year of grace expires. **KUMOLA KANT MYTEE v. SREEMUTTY NARAINEE DOSSEE**, 9 W.R. 583.

(79)—*Application for foreclosure—Counting of year of grace—Service of notice.*—The year of grace counts from the date of issue of notice of application for foreclosure and not from the date of service of notice. **GHAZEE-OD-DEEN v. BHOOKUN DOOBRY**, 2 *Agra* 301.

(80)—*Decree for redemption fixing time for payment of mortgage money—Omission to specify consequence of non-payment, effect of.*—Where a decree for redemption directed that the mortgage amount was to be paid within the period fixed thereby for the purpose, but was silent as to what was to happen in the event of the money not being paid within such period, the mere omission, on the part of the Court to specify the consequence of the default of the payment within the time fixed, could not have the effect of giving the plaintiff extension of time for payment beyond the maximum statutory period laid down by the *Transfer of Property Act*, s. 92. **SHEIKH WAZIR v. DHUMAN KHAN**, 16 A. 65=A.W.N. 1893, 222. (14 A. 529, *R.*; 14 A. 350, *Diss.*) [*R.*, 48 P.R. 1906=104 P.L.R. 1906.]

(81)—*Redemption of prior mortgage by second mortgagee, time fixed by decree for, whether extended by mere fact of appeal from decree.*—A decree for possession was passed in favour of the appellants, purchasers in execution of a decree for sale on a prior mortgage, subject to the condition that the defendant-respondent, a second mortgagee, in possession, was to have the option to redeem the prior mortgage and retain the property by payment of the necessary amount within six months from the date of the decree. On default of such payment, the decree-holders applied for execution and were held entitled to delivery of possession of the property. The defendant, second mortgagee, not having exercised his right of redemption, within six months fixed by the decree granting it, his right to redeem became barred, and the time within which he should redeem could not be computed as from the date of the decree of the High Court on appeal, that decree not having extended the time originally fixed for the purpose. By the mere fact of having preferred an appeal from the decree, the defendant could not be regarded as having secured an extension of the time allowed to him by the

Mortgage—continued.**—9.—Redemption—continued.**

decree. **CHIRANJI LAL v. DHARAM SINGH**, 18 A. 455=A.W.N. 1896, 130. (18 A. 223, *Appl.*) [*R.*, 11 C.P.L.R. 115, 48 P.R. 1906=104 P.L.R. 1906, 17 M.L.J. 44, Note.]

(82)—*Transfer of Property Act (IV of 1882), ss. 87, 89, 93.—Time for payment of amount of redemption decree, when could be extended by Court.*—So far as the power to extend the time in a suit for redemption or in a suit for foreclosure is concerned, the jurisdiction of a Court is limited, in the case of foreclosure by s. 87, and, in the case of redemption, by s. 93 of the *Transfer of Property Act*, and, in that respect, the two suits are placed on exactly the same basis; in neither case has a Court power to extend the time for payment except on good cause shown. The intention of the Legislature in the sections of the Act relating to the above matter has been that no extension of time could be granted, except for good cause shown, whether the order under s. 87 in a suit for foreclosure, or the order under s. 93 in a suit for redemption, has been applied for or not. **RAMLAL v. TULSA KUAR**, 19 A. 180=A.W.N. 1897, 11. (16 C. 246, 16 M. 214, *D.*) [*Diss.*, 1 O.C. 91, U.B. *R.* 1897—1901, Vol. II, 582; *R.*, 19 A. 205, 5 O.C. 82, 2 N.L.R. 137, 36 C. 122=8 C.L.J. 547; *D.*, 24 A. 479.]

(83)—*Pre-emption—Limitation—Transfer of Property Act (IV of 1882), ss. 86, 87—Foreclosure of mortgage—Date of accrual of cause of action.*—A right of pre-emption arising on the foreclosure of a mortgage under the *Transfer of Property Act*, accrues not from the date upon which the mortgagor is, under a decree given under s. 86 of the Act, declared absolutely debarred of all rights to redeem the property, but from the date on which the mortgagee obtains an order absolute in terms of s. 87 of the same Act. **ANWAR-UL-HAQ v. JWALA PRASAD**, 20 A. 358=A.W.N. 1898, 67. (14 A. 405, 16 C. 246, *R.*) [*F.*, 20 A. 375.]

(84)—*Transfer of Property Act (IV of 1882), ss. 92, 93—Decree for redemption—Application to execute decree after time fixed for payment of mortgage money.*—Where a mortgagor has obtained a decree for redemption and a period of three months is fixed for payment by him of the amount due under the mortgage, he cannot be permitted, after the expiry of the period, to pay the amount and execute his decree, even though the mortgagee has not applied for foreclosing the right of redemption. **ELAYADATH v. KRISHNA**, 13 M. 267. (16 C. 246, *Diss.*) [*Diss.*, 25 M. 244; *Not F.*, 5 O.C. 82; *Appr.*, 19 M. 40, F.B.; *R.*, 16 M. 214, 25 M. 300, F.B., 27 M. 40, 2 N.L.R. 137.]

(85)—*Transfer of Property Act, IV of 1882, s. 87—Decree for foreclosure—Decree made absolute without notice—Right of mortgagor to apply for extension of time.*—A decree for foreclosure had been made in a suit on a mortgage. On the expiry of the time fixed for payment, the

Mortgage—continued.**— 9.—Redemption—continued.**

mortgagee applied for and obtained an order absolute. The mortgagor not having had notice of the application, applied for extension of time, and within the extended time, paid the amount due and recovered possession of the property from the mortgagee. The mortgagee appealed against the order. *Held* that an appeal lay and that the order granting extension of time to the mortgagor was correct, inasmuch as the final order was made without notice to the mortgagor, who was entitled to apply for extension as soon as he became aware of the *ex parte* order. **NARAYANA REDDI v. PAPAYYA, 22 M. 133 = 8 M.L.J. 205.** [*Diss.*, 25 M. 244, F.B.; *F.*, 27 C. 705, 3 C.L.J. 533; *R.*, U.B.R. 1897—1901, Vol. II, 582, 32 C. 253 = 9 C.W.N. 81, F.B., 2 N.L.R. 137; *D.*, 27 M. 40, 4 C.L.J. 317.]

(86)—*Decree for redemption, specify time for payment of money.*—The question of foreclosure must necessarily be determined in the suit for redemption, the decree in which ought to fix the time within which the money for the redemption is payable. The proper course for a mortgagee, on failure of the mortgagor to pay the redemption money is not the institution of a suit for possession of the land, but an application to the Court to pass a final foreclosure-decree in the suit and, so long as such a decree is not passed, he has no right to the land. **HLA NYO v. SANI PYU AND SANIPRU, 3 L.B.R. 190.** (1 L.B.R. 186, *R.*)

(87)—*Redemption—Default in payment of interest—Action on covenant before principal sum is due.*—Where, by a proviso in a mortgage, it is agreed that, "in case of default in payment by the mortgagor of the principal sum, or any one instalment of interest thereon," etc., "then and in any such case the whole of the money so secured by these presents shall immediately thereupon become due and payable with a power of sale on such default," and where the principal sum and interest thereon were also secured by a bond, and warrant of attorney to confess judgment thereon, the condition of which was in the same words as the covenant for repayment in the mortgage. *Held*, that, in an action on the covenant contained in the proviso, and on the bond, brought on default of payment of an instalment of interest, but before the date on which the principal was payable, the plaintiff could only recover on either the covenant or the bond in respect of the interest unpaid. **FOOL CHUND JOHURRY v. RAM KRISTO BOSE, 1 Ind. Jur. N.S. 425.**

(88)—*Transfer of Property Act, ss. 87, 89, 92 and 93.*—When a mortgagor has obtained a decree in a suit for redemption and failed to pay the mortgage money within the time limited by the decree, he is not entitled, after the expiry of the time limited, to apply for the execution of the decree. **VALLABHA VALIYA RAJAH v. VEDAPURATTI, 19 M. 40, F.B. = 5 M.L.J. 282.** [*F.*, 35 C. 683 = 12 C.W.N. 628 =

Mortgage—continued.**— 9.—Redemption—continued.**

9 C.L.J. 1; *Cons.*, 31 M. 354 = 18 M.L.J. 259 = 3 M.L.T. 281; *R.*, 25 C. 703, A.W.N. 1901, 194, 24 A. 44, F.B., 25 M. 300, F.B., 5 O.C. 82, 25 M. 244, F.B., 27 M. 40, 1 A.L.J. 300, 2 N. L.R. 137, 36 C. 122 = 8 C.L.J. 547 = 13 C.W.N. 36; *D.*, 3 Bom. L.R. 667, 5 M.L.T. 76.]

(89)—*Mortgage—Redemption suit—Limitation prior to Act XIV of 1859.*—Before the enactment of cl. 15, s. 1, Act XIV of 1859, there was no limitation to suits for the redemption of mortgage of landed property. So that, assuming the factum of a mortgage prior to that enactment, it would be unnecessary to enquire when the mortgage was effected; and, when there is an acknowledgment prior to 1859, the proof of the mortgage itself would be unnecessary. **DAIA CHAND v. SARFRAZ ALI, 1 A. 425.** [*R.*, 12 C. 267; U.B.R. 1892—1896, Vol. II, 462; *Not F.*, 82 P.L.R. 1903.]

(90)—*Suit for—Set off equitable—Rent due by mortgagor to mortgagee—Rent, barred by limitation—Set off from what date allowable—Zuripeshgilease.*—In a suit for redemption of an usufructuary mortgage, the mortgagee is entitled to claim, as against the mortgagor by way of equitable set off, any surplus amount of rents and profits that may be in the mortgagee's hands after paying the interest and other charges provided in the mortgage-deed, only from the date when such surplus begins to accumulate in his hands, and deduct the same on account of rent due to him from such date by the mortgagor in respect of any tenancy held by the mortgagor within the mortgaged premises, even if the claim for such rent is barred by limitation, although strictly speaking, the cross-claims do not arise out of the same transaction but are closely connected with each other. **SHEO SARAN SINGH v. MAHABIR PERSHAD SHAH, 2 C.L.J. 73 = 32 C. 576.** (2 M.H.C. 296, *F.*; 5 C. 333, *R.*)

(91)—*Mortgage—Adverse possession—Estoppel—Limitation Act, IX of 1908, sch. I, art. 148—Mortgagee taking possession as trespasser—Redemption after 12 years.*—It would be going too far to say that in no possible case can a mortgagee set up an adverse title to the mortgaged property. Where a mortgagee has once got possession of the mortgaged-property as mortgagee, he cannot alter the nature of his possession by a mere assertion, or by a wrongful decree, or by getting himself recorded in the nature of mutations; nor can the original character of the possession as mortgagee be changed by the assertion of an absolute purchase of the property, unless the alleged purchase is valid and binding. (14 M. 38, 65 P.R. 1908 = 90 P.L.R. 1908 = 113 P.W.R. 1908, 32 C. 296 = 32 I.A. 23 = 2 A.L.J. 71 = 9 C.W.N. 201 = 1 C.L.J. 584 = 7 Bom. L.R. 1, 28 P.R. 1908 = 141 P.L.R. 1908 = 41 P.W.R. 1908, *R.*) The 60 years' period allowed for redemption is applicable only to a suit to recover possession from a person who has obtained possession as mortgagee, and not to a suit to recover possession

Mortgage—continued.**—9.—Redemption—continued.**

from a trespasser, even though the land may have been hypothecated as security for a debt payable to the trespasser. The mere fact of the person who takes possession being also the creditor, does not convert his possession into that of a mortgagee. A hypothecated some land to D, in 1859. In 1863, D sued A, and the Court, wrongly treating the deed as a deed of conditional sale, gave D, a decree, and after one year D was put in possession as owner. In a suit for redemption of the land after more than 40 years—*Held*, that as D was not entitled to possession under the deed and as he illegally got possession as an owner, his possession was not that of a mortgagee but as a trespasser, and as such he could not be ejected after he had been in possession for over 12 years. **JIWA KHAN v. LAKHMI CHAND, 232 P.L.R. 1911=146 P.W.R. 1911=11 Ind. Cas. 429.**

(92)—*Decree for redemption—Application for possession by mortgagor, whether one on execution of the decree—Form of application—Civ. Pro. Code, s. 235—Limitation Act, art. 179.*—There is no section in the Civ. Pro. Code, under which an application for possession under a decree for redemption could be made. Such an application by the mortgagor, on payment of the amount due, is not one in execution of a decree, to which the period of limitation prescribed by art. 179 of the Limitation Act is applicable. Such applications should not be in the form prescribed in s. 235, Civ. Pro. Code. And they should be filed on the record of the suit, not in execution proceedings. **MAUNG PE v. MA BAW, 4 L.B.R. 83. (17 A. 106, 10 M. 22, 16 B. 294, 21 M. 261, 19 C. 132, R.; 22 C. 924, 29 C. 651, 8 C.W.N. 102, F.)**

(93)—*Redemption—Undisturbed possession.*—For instruments of mortgage executed before the 1st May, 1863, the mere expression of a wish to redeem is not a challenging of possession sufficient to take the case out of the special rule of limitation prevailing in this province. **MI BEIN v. NGA SHWIN, L.B.R. 1872=1892, 75.**

(94)—*Birt rights, enjoyment of, by one heir of mortgagee adversely to other heirs—Limitation.*—This was a suit for redemption by the representative of the mortgagor, and the question for decision was, which of the parties claiming to represent the original mortgagee was entitled to the mortgage-money. *Held*, that the right of a Hindu to birt was in the nature of immoveable property, and that its enjoyment by one heir of mortgagee adversely, in his own right, for more than 20 years, extinguished the title of rival claimants to the subject-matter of the mortgage, and debarred them from claiming any share of the sum payable on redemption. **MOHAN LAL v. JANKI, 34 P.R. 1908=96 P.W.R. 1908=163 P.L.R. 1908.**

(95)—*Construction of s. 1, cl. 15, Act XIV of 1859—Acknowledgment of mortgagor's title—*

Mortgage—continued.**—9.—Redemption—continued.**

Limitation.—The words "if in the meantime an acknowledgment of title of the mortgagor," contained in cl. 15. s. 1 of Act XIV of 1859, refer to the period intervening between the date of a mortgage and the expiry of the 60 years, the normal period of limitation, and not to the period between the date of the mortgage and the institution of a suit in respect thereof. **MOHAMED ABDOL RUZZAH v. SAID ASIF ALISHAH, 3 N.W.P. 119.**

(96)—*Limitation Act (XIV of 1859), s. 1 (12) —Mortgage made while Regulation XV of 1793 in force—No accounting agreed upon—Suit for redemption more than twelve years after satisfaction of mortgage—Whether mortgage redeemed and cancelled—Accounts can be taken.*—The possession of a mortgagee does not become adverse to the mortgagor, merely because the mortgagee remains in possession after the mortgage-money has been satisfied out of the usufruct or has been otherwise paid off. The provision in s. 10 of Regulation XV of 1793 that a mortgage shall be deemed to be cancelled and redeemed does not mean redeemed in the full sense of the word. On the passing of the Limitation Act of 1859, the mortgagor's right of redemption became subject to s. 1 (15) of that Act, and a suit for redemption of a mortgage made before the passing of that Act could be brought at any time within sixty years of the mortgage, and it is not barred by limitation within the meaning of cl. 1 (12). (7 A.L.J. 963, F.) A mortgage was made while Regulation XV of 1793 was in force. One of the terms was that the mortgagee will remain in possession in lieu of interest and other charges, and there will be no accounting on either side. *Held* that the mortgage being subject to Regulation XV of 1793, the mortgagor was entitled to an account of profits. **HABIB-ULLAH v. ABDUL HAMID, 9 A.L.J. 131=34 A. 261=13 Ind. Cas. 963. (7 A.L.J. 787, 2 A. 593, D.)**

(97)—*Transfer of Property Act (IV of 1882), s. 92—Redemption, decree for, time—Mortgage by conditional sale—Time for redemption, if the essence of such decree—No time fixed—Limitation for execution.*—It is of the essence of a decree for redemption, in the case of a mortgage by conditional sale, that a time should be fixed and that an order should be passed for foreclosure in case of default. Where no such time is fixed, it is an ordinary decree, to the execution of which the period of limitation specified in art. 179, sch. II of the Limitation Act, would apply. **KRISHNA CHANDRA MANDAL v. JAKERAL HUQ, 10 C.L.J. 115=1 Ind. Cas. 71. (13 B. 567, 13 I.A. 66=10 B. 461, Rel. on.)**

(98)—*Mortgage by conditional sale.—Bye-bil wafa—Stipulation for redemption within seven years—Suit for redemption—Limitation—Starting point.*—In 1845 the plaintiffs executed a sale-deed in favour of the defendants who executed simultaneously an agreement to re-convey.

Mortgage—continued.**—9.—Redemption—continued.**

The deed provided that, at any time within seven years (*andar miad sat baras*) when the vendors paid the vendee, the latter would reconvey. The present suit for redemption was brought on 22nd January, 1907. The lower Court held that the transaction amounted to a mortgage by way of conditional sale, and the suit was not barred, as time ran from the expiry of 7 years after 1845 and not from the date of execution. On appeal, *held*, that time did not begin to run until after 7 years from the execution, as it was not obligatory upon the mortgagors to pay the money before them. **KALKA PRASAD v. BHUIYAN DIN, 6 A.L.J. 222=31 A. 300=2 Ind. Cas. 180.**

(99)—*Suit for redemption—Improvements—Compensation.*—Generally, a mortgagee cannot obtain compensation for improvements effected without the mortgagor's consent. But, where a mortgagee who, for 30 years, had *bona fide* believed himself to be the owner under the idea that it was unnecessary to take any steps to convert his mortgage by conditional sale into an absolute sale and dealt with the property as owner without objection by the mortgagor living close by, he may claim compensation for all reasonable improvements. **LADHA MAL v. JAGANNATH, 123 P.R. 1888.**

(100)—*Recovery of money paid to redeem mortgage of his predecessor-in-title, Suit against reversionary heir for—Contract Act, ss. 69 and 70—Reimbursement of person paying money due by another—Compensation for act done for benefit of another—Money payable to plaintiff for money paid for defendant, suit for—Limitation Act, art. 61.*—B mortgaged certain land, which after his death his widow sold to R. The plaintiff sued the widow and R to enforce his right of pre-emption, but his suit was finally dismissed on the 9th June 1896. In the meantime, the plaintiff obtained a decree for redemption and redeemed the mortgage paying the mortgagee Rs. 134-9-0. The defendant in the present suit was the reversionary heir of B. The widow having died he sued R to set aside the sale of the land by the widow and to recover possession of the land, and obtained a decree on the 19th February, 1900. On the 18th September, 1900, the plaintiff sued the defendant for recovery of Rs. 157-7-0 as charged on the land, the amount consisting of Rs. 134-9-0, paid to redeem the mortgage and Rs. 16-14-0, costs of the suit for redemption. The first Court decreed Rs. 134-9-0 to be realized by the sale of the land. The Court of first appeal modified the first Court's decree and passed a decree against the defendant personally for that amount. *Held*, that unless the plaintiff's case fell under s. 69 or s. 70, Contract Act, he was not entitled to any decree against the defendant. His case did not fall under s. 69, because the defendant was not bound by law to pay the mortgage-debt, and even if it fell under that section, the claim would be barred under art. 61, Limitation Act,

Mortgage—continued.**—9.—Redemption—continued.**

as the money was paid before June, 1896, and the suit was not instituted till the 18th September, 1900. S. 70 also was not applicable as it was found that the redemption of the mortgage was not an act done for the defendant. **GANGA SINGH v. SANGAM LAL, 6 O.C. 212.**

(101)—*Redemption, Suit for—Deficiency in the profits of the property mortgaged by virtue of decree passed in favour of third person—Covenant that profits should be taken in lieu of interest, effect of—Partition—Substitution of inferior land—Compensation.*—One A made a mortgage in favour of one B. The mortgage was with possession, with a covenant that, if, after a particular period, the mortgage-money was paid, the property would be redeemed. In a suit brought by the son of the mortgagor, his right to one-third of the property mortgaged was established, and the mortgagee was compelled to pay away to him one-third of the profits of the mortgaged property. In a suit for redemption, the mortgagees claimed the amount so paid before the mortgagor could be allowed to redeem: *Held*, that there being no stipulation to that effect in the mortgage deed, the mortgagee was not entitled to claim the said amount (24 A. 521, 25 A. 115, F.) Where a mortgage-deed provides that, if, on account of any partition, any portion of the mortgaged land is taken from the possession of the mortgagee, other land of the same value will be given to the mortgagee, or the annual loss sustained by the mortgagee will be made good to him, the mortgagee is entitled to compensation for the loss suffered by him by the substitution of inferior land in partition. **AJUDHIA SINGH v. KUNWAR BAHADUR, 12 Ind. Cas. 407.**

(102)—*Usufructuary mortgage—Redemption—Cost of improvements—Consent of mortgagor.*—A usufructuary mortgagee who has expended a sum of money in improvements of the mortgaged properties without the consent of the mortgagor is not entitled to be compensated for on redemption by the mortgagor, especially when such improvements are not necessary for the maintenance or preservation of the mortgaged property. **SAMMO v. ABDUL WAHID, A.W.N. 1883, 208.**

(103)—*Mortgage—Security for repayment of loan—Redemption after time fixed for payment—Improvements by mortgagee, claim for—English Law—Equity.*—Although there may be a provision in a mortgage instrument that the entire estate should be deemed as transferred to the mortgagee if the mortgage money be not paid within a fixed day, yet if it appears clearly to have been entered into by the parties to it for securing the re-payment of a loan, the mortgagor, making the security subservient for the purpose for which it was created, the mortgagor may, in equity and good conscience, redeem the property by paying off the principal debt and the interest, though the stipulated time

Mortgage—continued.**—9.—Redemption—continued.**

for payment has been allowed to pass by. [*F.*, 3 B.H.C. A.C. 160, 5 B.H.C. A.C. 217, 9 B.H.C. 69; *R.*, 5 B.H.C. A.C. 107, 9 B.H.C. 79, 9 B.H.C. 65, 9 B.H.C. 53, 2 B. 1, 1 M. 1, P.C. = 2 I.A. 241, 2 B. 113, 2 B. 231, 11 B. 174, 14 B. 19, 14 B. 78, L.B.R. 1872—1892, 549, 27 B. 297 = 5 Bom. L.R. 140, 6 Bom. L.R. 38, 6 Bom. L.R. 630, 11 Bom. L.R. 1145 = 4 Ind. Cas. 264.] In England, the established rule is that when mortgaged property is allowed to be redeemed after the expiry of the time fixed, the mortgagee will be allowed for *all repairs necessary for the support of the property*, but not for general improvements made without the acquiescence and consent of the mortgagor, which enhance the value of the estate, especially, if they are of such a nature as may cripple the right or power of redemption. But the decisions in India have been in contravention of this rule, and to apply this rule at once and without modification to cases in which mortgagees (relying on the law as understood to be settled by the late Sadr decisions) have laid out considerable sums in improvements on mortgaged property, would obviously not be equitable. Ultimately, however, the English rule is that which should prevail; but until sufficient time has been allowed for the law, as laid down in the present decision, to become generally known, the determination of each case must be left, in a great measure, to depend on an equitable consideration of all the circumstances attending it. The rule was however applied to the present case in view of the facts that the sum claimed for improvements was very small, and the time that had elapsed since the fixed period for payment was very inconsiderable. *RAMJI TUKARAM v. CHINTO SAKHARAM*, 1 B.H.C. 199.

(104)—*Malabar Kanom—Redemption—Compensation for improvements—Deterioration before actual redemption.*—Where a decree for redemption of a Malabar *kanom* mortgage fixed a certain sum as the ascertained value of the improvements, the mortgagor cannot be asked to pay the entire sum decreed, when the value of the improvements has deteriorated within the period of six months provided for redemption in the decree. Similarly, the mortgagee will also be entitled to any excess of value which the improvements might be worth at the time of the actual redemption. It is not correct to say that the property in the improvements not yet paid for vests in the mortgagor, and there is no authority for holding that the *kanomdar* cannot remove trees planted by him. *KRISHNA PATER v. SRINIVASA PATER*, 20 M. 124. [*R.*, 24 M. 47, F.B.]

(105)—*Suit for redemption—Necessary repairs effected by mortgagee—Re-imbursement by mortgagor.*—As a mortgagee in possession of the property is bound to keep it in necessary repair, he must be re-imbursed by the mortgagor at the time of redemption for sums spent by him

Mortgage—continued.**—9.—Redemption—continued.**

on such repairs. *BHAG v. GHASITA MAL*, 55 P.R. 1890. [*R.*, 23 P.R. 1909 = 197 P.L.R. 1908.]

(106)—*Unnecessary improvements by mortgagee—Compensation—No consent of mortgagor.*—A mortgagee will not be entitled to compensation for improvements made unnecessarily for his own benefit, without the consent of the mortgagor, though they might bring in a profit. *SHER SINGH v. NIHALU*, 67 P.R. 1896. (67 P. R. 1893, *R.*)

(107)—*Improvements to keep up the security—Right to recoup*—A mortgagee has a right to keep up his security from deteriorating in value and for that purpose to spend anything upon it. So, he would be entitled to recoup from the mortgagor the amount prudently and necessarily spent by him on the property and also to an extent to which the mortgagor would derive benefit therefrom. *BELI RAM v. CHUHA RAM*, 18 P.R. 1898.

(108)—*Claim to compensation for improvements before allowing redemption in absence of express condition to that effect in mortgage deed—Necessity of proving established and acknowledged custom controlling contract of mortgage accordingly—Madras mortgages.*—As a matter of equity, however, it does not appear why mortgagors should be required to pay compensation for trees which they did not want, which were not needed for the preservation or maintenance in proper condition of the property in any way, and which were put down without any reference to their wishes, while the mortgagee was enjoying the sole benefit of the land and everything it could produce. His object was of course to make the land as profitable to himself as possible, and if he sought this object without coming to an understanding with the mortgagors to whom he was liable to restore the land after a limited term, he took the risk on himself. *MAUNG O v. MAUNG SAN KO*, U.B.R. 1892—1896, Vol. II, 548. [*R.*, U.B.R. 1897—1901, Vol. II, 213, 286.]

(109)—*Redemption suit—Accounting, principle of—Katkina lease by mortgagee*—After the execution of a mortgage, the mortgagees executed a *katkina* lease in favour of the mortgagors. The conditions of *katkina* were that the plaintiffs, the mortgagors, would remain in possession, pay Government revenue, pay also to themselves Rs 265 as *huq-ajiri*, and pay to the mortgagees Rs. 375 as *katkina* rent which would include the interest, viz., Rs. 300 payable on the principal amount. The plaintiffs remained in possession, of the land for four years without paying anything as *katkina* rent, after which the mortgagees took possession. The plaintiffs then brought a suit for redemption. *Held*, that, in taking the account, the mortgagees were entitled to interest Rs. 300 per annum, with interest at the rate of 12 per cent. per annum, and not the profit Rs. 75, for the period of four years when the plaintiffs were in possession, but the plaintiffs would get

Mortgage—continued.

—9.—Redemption—continued.

Rs. 265 as *huq-ajiri* with annual interest for the period they were out of possession. Rs. 265 should be deducted annually, in the first instance, from the sum of Rs. 1,200 with such interest as might accumulate on it at the rate of 12 per cent. per annum; when the sum of Rs. 1,200 was paid off by deductions of Rs. 265 per annum, this sum to be deducted annually from the principal amount and interest calculated at the bond rate. **NANDU SAHU v. RAM LAKHAN SINGH, 9 C.L.J. 633 = 2 Ind. Cas. 633.**

(110)—*Suit for redemption—Making up of accounts necessary for, before passing decree.*—In a suit for redemption, a decree could not be passed until the accounts had been made up, for, it could not until that time be ascertained whether or not the mortgage had been paid off by the usufruct and whether or not the mortgagors were entitled to mesne profits. **MUTTRA DOSS v. MAGH SINGH, 2 N.W.P. 207.**

(111)—*Suit to redeem one particular mortgage—Decree for redemption of later mortgage—Cause of action different—Prayer for "any other relief"—Construction of document—Entry settling accounts and recording amount due under mortgage.*—In a suit for redemption, it is imperative that plaintiff should say, in the event of there being more mortgages than one, which mortgage he is seeking to redeem. When a plaintiff sued to redeem a certain mortgage, that particular mortgage is his cause of action, and to shift the attack to a later mortgage is to change the suit into one based on a different cause of action. A prayer "for any other relief" may well cover any other relief arising out of the same cause of action, but does not cover a relief arising from a different cause of action. An entry relating to a mortgage already existing, in which accounts are settled and a sum is entered as the amount due under the mortgage, does not constitute a new mortgage. **KARAM CHAND v. SULTAN, 72 P.W.R. 1912 = 92 P.L.R. 1912 = 13 Ind. Cas. 650.**

(112)—*Usufructuary mortgage—Account.*—In a suit for redemption of land brought on the allegation that the principal and interest of the mortgage consideration had been recovered from the usufruct and a surplus had been realised in excess thereof, the revenue payments made by the mortgagee should, under the terms of the mortgage, be considered as part of the original mortgage-money repayable before redemption of the land could be claimed. The account should therefore show on the one side the mortgage money and the payment of the revenue with interest thereon, and on the other the mesne profits realised by the mortgagee. **CHITBAHAL RAI v. JAYA RAI, A.W.N. 1881, 66.**

(113)—*Suit for redemption—Practice—Plaintiff suing as also heir—Death of plaintiff—Abatement of suit.*—One P, sister of the respondent D, sued the appellant for redemption of mortgage, executed by P's father in favour

Mortgage—continued.

—9.—Redemption—continued.

of the appellant, on the ground that she, as an unmarried daughter, had obtained the sole right to the property of her father to the exclusion of her married sister, to whom along with herself, when a minor, the mortgaged property had, in a previous litigation between the parties interested in the mortgage, been surrendered by the order of the Court, which had held the mortgage debt to have been satisfied. In the present suit D was made a *pro forma* defendant. P having died during the pendency of the suit, D applied to have her name removed from the array of defendants and substituted as plaintiff. *Held*, that the right claimed by P being a personal right and adverse to that of her sister D, the suit abated after P's death, and D could not get her name substituted as plaintiff and continue the suit. **BALAK PURI v. MUSAMMAT DURGA, 4 A.L.J. 783 = A.W.N. 1908, 6 = 3 M.L.T. 181 = 30 A. 49.**

(114)—*Suit for redemption—Appeal—Mortgagor's death pending suit—His legal representatives not brought on record—Abatement.*—Where, in a suit for redemption, a decree was passed, and pending an appeal preferred by the first mortgagee and others, the mortgagor (Jenmi) died and the legal representatives of the mortgagor were not brought on record, *held* that the appeal abated. **SESHU PATTAR v. UNNI VALIA KAIMAL, 9 M.L.T. 356 = 9 Ind. Cas. 940 = 1 M.W.N. 1911, 148. (25 M. 568, R.)**

(115)—*Interest beyond principal—Deposit of amount in Court—Interest for year of grace—Deposit—Foreclosure proceedings—Suit—Review—Subsequent ruling being different.*—The deposit in Court of the principal sum and of a sum equal to the principal by way of interest was sufficient under the law applicable to the case; the mortgagee could only claim so much. In such a case, it was not necessary to add further interest for the time or any portion of the time of the year of grace. The law prohibited the recovery of interest beyond the principal, and no sum could legally accrue due as interest during the year of grace under such circumstances. The foreclosure proceedings which lead to the deposit of the mortgage amount in Court are not like a suit. A review of an old judgment of some years' standing, on the ground of subsequent decisions laying down a different rule, cannot be admitted. **SHEOBURT v. DHAREE THAKOOR, 2 Agra, 394.**

(116)—*Mortgage by conditional sale—Interest—Charge.*—Where, in a deed of conditional sale, it was stipulated that the mortgagee should have no claim to interest, the latter could not claim it in consequence of not having been put in possession under the contract, so as to make it a charge on the property and the payment of it a condition precedent to redemption. **ALLAH BAKHSI v. SADA SUKH, 8 A. 182 = A.W.N. 1886, 47. (3 A. 653, R.) [F., 8 P.R. 1890.]**

Mortgage—continued.**—9.—Redemption—continued.**

(117)—*Transfer of Property Act*, (IV of 1882), ss. 83, 84—*Deposit of entire mortgage money, cessation of interest on—Right of mortgagee to crops sown by him.*—On a previous deposit, made by the mortgagor, having been found inadequate, he made a further deposit on a subsequent date, and the whole amount was then found to be all that was due on the mortgage on that date. The Courts below had rightly disallowed interest to the defendant only after the plaintiff-mortgagor had, with due knowledge of the defendant, deposited the whole money due to him on the mortgage. Under s. 84 of the *Transfer of Property Act*, when a mortgagor has duly made deposit, in accordance with s. 83, of all that is due on the mortgage, the interest on the mortgage money is to cease. The decree given to plaintiff, in this case, should not have been rendered by the Courts subject to the condition that the defendant was not to be evicted till the crops he had sown were cut. The rule, in such cases, as enunciated in the last paragraph of s. 51 of the *Transfer of Property Act*, creates no bar to eviction in such a case, but only lays down that the transferee is entitled to the crops sown by him, and to free ingress and egress to gather and carry them. *DEO DAT v. RAM AUTAR*, 8 A. 502 = A.W.N. 1886, 149.

(118)—*Mortgage—Decree for possession obtained by mortgagee—Omission for three years to execute decree—Redemption—Interest for the three years not allowed to mortgagee.*—A mortgagee obtained a final decree for possession on the 16th January, 1880. The decree-holder did nothing further until the 18th April 1883, when he obtained possession. In 1887, the mortgagor brought a suit for redemption, and the Court of first instance gave him a decree conditioned on his paying the principal money with interest calculated up to April, 1883. This decree was modified by the lower Appellate Court. *Held* that the mortgagee was not entitled to interest for the period between the date of the decree in January, 1880, and the date when the mortgagee obtained possession in April, 1883, the claim to such interest not being based on the terms of the mortgage, and the mortgagee's want of possession being due to his own omission to take it by executing his decree. *BANSIDHAR v. HADI ALI*, A.W.N. 1889, 177.

(119)—*Mortgage-deed, Construction of—Mortgagee accepting profits in lieu of interest, clauses as to, modified by a later clause providing for compound interest—Compound interest, liability for—Redemption, sum payable at the time of.*—A mortgage deed, after providing for payment of interest annually and means for realizing the same, stipulated that "if as a mark of favour the mortgagor lets the interest remain unrealized, the same shall be added to the principal and compound interest run thereon." There were two subsequent clauses, (6) "after taking possession, the mortgagee will be entitled to

Mortgage—continued.**—9.—Redemption—continued.**

receive the net profits in lieu of interest and during the time of his possession, the interest and profits shall be deemed equal," (11) "if the profits do not cover the amount of interest, we the mortgagors will make good the deficiency from our pockets"—the deficiency, if not so made good, being made payable "with interest at the rate mentioned above at the time of redemption." The mortgagee took possession under the mortgage. *Held*, that, although cl. (6) standing by itself might be construed as constituting an ordinary usufructuary mortgage, its *prima facie* meaning was qualified by cl. (11). The two clauses should be read together and the latter clause should not be rejected on the ground that it was inconsistent with the former. They both had the effect of making the principal money payable with compound interest, and, on the proper construction of the deed, the mortgagor was liable to pay compound interest on the amount of unpaid interest, which he had stipulated to pay under cl. (11). *THAKUR JAWAHIR SING v. SOMESHWAR DATT AND OTHERS*, 10 O.C. 92 = 10 C.W.N. 266 = 1 M.L.T. 66 = 3 C.L.J. 354 = 28 A. 225, P.C. = 33 I.A. 42.

(120)—*Mortgage—Suit for redemption—Possession on default of payment of interest, stipulation for—Interest—Construction of mortgage deed.*—This was a suit for redemption of a mortgage deed, the material portions of which were as follows:—"That I will pay interest... year after year, and, should there be a default in payment of interest for any year, the mortgagee can at once take possession of the mortgaged property. That whatever profits may be left after payment of the Government Revenue, etc., will be appropriated by the mortgagee in lieu of the interest. That whenever I pay off the principal sum and the remaining interest, the mortgaged property will be redeemed." The mortgagee did not take possession until several years after the first default. *Held*, that the mortgagee was entitled to get interest for the period he was out of possession. *RAM DIN v. RAM PRASAD*, 11 O.C. 323. (10 O.C. 29, 19 A. 39; R., 17 B. 425, 9 O.C. 144, D.)

(121)—*Decree for redemption—Rate of interest after date fixed for redemption—Contract rate whether compulsory after such date.*—On the question of what rate of interest should be allowed after the date fixed for redemption by the decree in a mortgage-suit, *held*, (21 M. 364, 23 M. 637, F.; 11 M.L.J. 7, Diss. 26 C. 39, 23 A. 181, R.) that there is no authority making it compulsory on the Court to allow the contract rate after the above date. *SAMI-NATHAN CHETTIAR v. SWAMIAPPA NAICKER*, 29 M. 170 = 16 M.L.J. 133.

(122)—*Mortgage-deed—Construction—Interest—Post diem interest.*—A mortgage-deed provided that the mortgage-money shall be payable in two years, and that the property would be liable to redemption on the payment

Mortgage—continued.**—9.—Redemption—continued.**

of the principal money together with the interest due till then, and that, in case money was not paid at the proper time, the property shall stand foreclosed in lieu of the principal and the interest due: *Held*, that, on a proper interpretation of the deed, *post diem* interest was payable till the date of the actual redemption. **BHAGWANDAT v. BANSI DUBE**, 12 Ind. Cas. 352. (19 A. 39, 23 I.A. 138, 1 C.W.N. 52, F.)

(123)—*Of mesne profits, etc., kept by mortgagee unsatisfactory—Bengal Regs. XV of 1793, ss. 11 and I of 1798, s. 3.*—When the account of the mesne profits and expenditure by the mortgagees in possession is unsatisfactory, an account, whether as incidental to the question of foreclosure, or redemption, is to be taken, as provided by Ben. Regs. XV of 1793, ss. 11 and I of 1798, s. 3. If the interest of the mortgagor in the mortgaged estate has been sold under a decree, and the sale takes place before the notice of foreclosure was filed, such notice, to be effectual, must be served on the purchaser or decree-holder. **MOHUN LALL SOOKOOL v. GOLUCK CHUNDER DUTT**, 1 W.R. 19, P.C. = 10 M.I.A. 1.

(124)—*Deposit by mortgagor — Wassilat.*—A mortgagor, who, in order to prevent a foreclosure, deposits the amount of the mortgage money is entitled to wasilat; and if, while liable for only portion of property, he pays in the whole amount to secure himself, he is entitled to wasilat for the whole. **BABOO GOBIND PERSHAD v. DWARKANATH**, 25 W.R. 259.

(125)—*Suit for redemption—Mortgage with possession—Duties of mortgagee in the choice of lessees.*—In a suit for redemption, where the mortgagor seeks to charge the mortgagee with possession, with monies that he might have realized by way of rent, on the ground that he (the mortgagee) had been grossly negligent in leasing out the estate, and that he had let the mortgaged property at a lower rate than could be obtained, and where it was further found that the mortgagor, with knowledge of their low rates, did not inform the mortgagee of whom and where to obtain the higher rates, *held*, that the mortgagor could not be given credit for sums that the mortgagee might have realised. **RAMPARTAP RAGHUNATH DAS v. SHER ALI**, 3 N.L.R. 106.

(126)—*Personal contract to pay the mortgage money—Personal liability in a mortgage, test of—Document, Construction of.*—The terms of a mortgage-deed were as follows:—"I . . . agree to pay within one year the said money with interest . . . If perchance I fail to pay the said money with interest within the year the said . . . shall be competent to realise the entire amount with interest from the said house . . . This deed of mortgage shall be deemed to be a deed of sale." On a construction of the above deed, *held*, that the mortgage created by it was a mortgage by way of

Mortgage—continued.**—9.—Redemption—continued.**

conditional sale and that it contained no personal contract to pay the mortgage money. *Held*, further, that a mere promise to pay the money within a certain fixed period does not *per se* import a personal liability; for such a covenant is entered into in every form of mortgage. The test in each case is the remedy provided in the deed for satisfaction of the mortgage debt. **MUSAMMAT KURAISHI BEGAM v. MUMTAZ MIRZA**, 12 O. C. 275 = 3 Ind. Cas. 871. (10 C. 740, 16 C. 540, 22 C. 434, R.)

(127)—*Mortgage — Money-decree—Equity of redemption—Sale—Injunction.*—An equity of redemption cannot be attached under an ordinary money decree. **RAMLOCHUN SIRKAR v. KAMINEE DEBEE**, 10 B.L.R. 60, Note. (On appeal from, 5 B.L.R. 460, Note.) [Appr., 5 B.L.R. 450, 10 B.L.R. 57, 23 W.R. 338; R., 22 B. 624, 35 C. 61, F.B. = 11 C.W.N. 1011 = 6 C.L.J. 320; D., 26 B. 88 = 3 Bom. L.R. 628.]

(128)—*Redemption by purchaser—Sale held invalid—Recovery of money paid for redemption.*—The purchaser in possession, who pays off an incumbrance in the estate which he has purchased, can recover the amount paid by him. **CHAMA SWAMI v. PADALA ANANDU**, 3 M.L.T. 395 = 18 M.L.J. 306 = 31 M. 439. (10 C. 1035, 21 M. 143, F.; 21 C. 142, 5 C.L.J. 611, R.)

(129)—*Mortgage—Sale of equity of redemption—Decree for redemption—Payment of mortgage-debt.*—A purchaser of the equity of redemption who has obtained a decree for possession in satisfaction of the mortgage debt against the person to whom the mortgage was made by his vendor, is bound to pay the mortgage debt only to the mortgagee and is not bound to see whether the mortgagee has made any subsequent transfer of his interests, or effected any other mortgage. **MUKHOO CHOWDHRAIN v. RAM BUKSH SAHOO**, 11 W.R. 53.

(130)—*Mortgage—Equity of redemption—Purchase.*—Where the plaintiff as puisne mortgagee obtaining a decree for the redemption of a former mortgage to S pays it off and gets a final decree for foreclosure, on his mortgage, and then sues to set aside a patni granted by the mortgagor to the defendant between the dates of the two mortgages, *held* that, not having kept on foot the first mortgage as a distinct and distinguishable security, defendant's patni lease is valid and binding on him. **GAUR NARAYAN MAZUMDAR v. BRAJA NATH KUNDU CHOWDHRY**, 5 B.L.R. 463 = 14 W.R. 491. [R., 10 C. 1035 = 11 I.A. 126.]

(131)—*Mortgage—Putnee-lease by mortgagee—Redemption—Possession—Under-tenures—Rent.*—The plaintiffs-mortgagors brought a suit for redemption against the mortgagee and certain other persons to whom the mortgagee had granted a portion of the estate in putni, and obtained a decree for possession, and under this decree, they were put in possession. The plaintiffs then brought the present suit for

Mortgage—continued.**—9.—Redemption—continued.**

declaration of their right to receive rent from A and B, their under-tenants, who had given them a kabuleut. The defendant, alleging that these two persons were his tenants, had sued them for rent in the Collector's Court under the provisions of Act X of 1859. The plaintiffs had intervened, and the Deputy Collector had made a decree in favour of the present defendant. Hence the present suit. The defendant's case was that within the plaintiff's talook there was a jumma formerly held by C who had sold it to defendant and after the purchase of these interests, the defendant settled A and B in the dwelling house which had formerly belonged to C, paying a certain rent. *Held* that the real question was whether the jote jumma formerly held by C and his predecessors, which had since passed into the hands of the defendant by purchase, was a jumma which gave the defendant a right to possession of the land as against the plaintiffs, who had re-entered after the decree for redemption. **MOULVIE AHMED ALI v. BHOOBUN MOHUN DASS, 15 W.R. 517.**

(132)—*Redemption suit—Limitation—Issues.*—A redemption suit against the representatives of a mortgagee brought beyond 12 years from the date on which the mortgaged property was wrongfully sold away by the mortgagee is not barred. In a suit for redemption against the auction-purchaser from a mortgagee, it is necessary to determine whether the defendant obtained the land under such circumstances that he is bound by the mortgage-deed. **JEECHOO SAHOO v. SYUD MUSSEEOOLLAH, 21 W.R. 13.**

(133)—*Mortgage—Redemption—One of the defendants in possession not a mortgagee—Suit in ejectment—Dekkhan Agriculturists' Relief Act (XVII of 1879).*—Plaintiff sued three persons for the redemption of a mortgage. He alleged in his plaint that the mortgage was to the father of the first two defendants, and the third defendant was added as a party simply because he was in possession of the land. There was no allegation of any mortgage made in favour of the third defendant or relied upon by him. *Held* that the suit, while undoubtedly a suit for redemption of mortgaged property as against the first and second defendants, must be treated merely as a suit in ejectment as against the third defendant. **SAKHARAM v. SHRIPATHY, 16 B. 183. (P. J. 1884, p. 308, R.)**

(134)—*Registration Act (III of 1877), s. 7—Interest in immoveable property.*—A document entitling a person to redeem a mortgage of immoveable property on payment of money creates an interest in immoveable property, and its registration is compulsory under s. 7 of the Registration Act. **MUTHA VENKATACHELAPATHI v. PYANDA VENKATACHELLAPATHI, 27 M. 348.**

(135)—*Equity of redemption—Mortgagee buying equity of redemption at Court-sale—Contribution—Apportionment—Transfer of Property Act (IV of 1882), s. 99—Marshalling.*—Three

Mortgage—continued.**—9.—Redemption—continued.**

fields and a house were mortgaged to plaintiff's uncle V, by defendants 2, 3 and 4, for Rs. 2,000. In execution of a money-decree obtained by V against these defendants the property was sold subject to the mortgage. V purchased the three fields for Rs. 340 and defendant 1 the house for Rs. 300. At the time of the sale the mortgage debt amounted to Rs. 3,100, but at the date of the institution of suit it had increased to Rs. 4,000, by accretion of interest. The plaintiff, having succeeded to his uncle V's rights after his death, brought this suit against defendant 1 and defendants 2 to 4 to recover the proportionate share of the mortgage debt which fell on the house. The fields were valued at Rs. 3,600 and the house at Rs. 340. Defendant 1 contended that as the value of the fields purchased by the plaintiff was more than sufficient to recover the mortgage debt the whole debt had been extinguished, and the house should be freed from liability to discharge any portion of it; and that the apportionment ought to be made of the balance due under the mortgage bond, not on the date of the present suit but on the date of the Court sale at which the plaintiff's properties were sold. The Court of first instance gave the plaintiff a decree for Rs. 345, but on appeal the District Court found that, as at the time of the auction sale the amount of the mortgage debt was Rs. 3,100, the plaintiff had been repaid and was not entitled to contribution from defendant 1:—*Held*, by *Jenkins, C.J.* and *Candy, J.*, *Fulton, J.*, *dissentiente* (reversing the decree of the lower Appellate Court) that the plaintiff was entitled to get Rs. 345 from defendant 1 as each purchaser in the Court sale bought subject to a proportionate share of the burden and must discharge it. *Per Fulton, J.*—Where the mortgagee instead of enforcing his mortgage and bringing the property to sale free of encumbrance (when such course is open to him as it was in the present case) brings to sale the equity of redemption in part of the mortgaged property and buys it himself, an equity arises which entitles the mortgagor, or the person who purchases the right, title and the interest of the mortgagor, to require the satisfaction of the debt first out of the property bought by the mortgagee, because, otherwise, the action of the mortgagee in causing the sale subject to mortgage must almost necessarily secure to him an undue profit at the expense of the mortgagor. **FAKIRAYA v. GADIGAYYA, 3 Bom. L.R. 628=26 B. 88.**

(136)—*Mortgagee, Position of—Whether a trustee—Power to grant leases or make other dispositions of mortgaged property in his own favour—Grant of the property to undivided son—Presumption—Trusts Act, s. 90—Right of mortgagor on redemption.*—A mortgagee is in the position of a trustee and cannot grant leases or make other dispositions of the mortgaged property in his own favour, and of such a kind as to give rise to a possible conflict between his interest and his duty. Where a

Mortgage—continued.**—9.—Redemption—continued.**

person in the position of a trustee makes a grant of the trust property to his undivided son, the relation of the parties is sufficient to raise the presumption that he is himself interested, and to bring the case within the mischief of the rule. *VENKATA CHARAR v. SRINIVASA AIYANGAR*, 7 M.L.T. 148.

(137)—*Suit for redemption—Decree, form of—T.P. Act, s. 92—Mortgage with possession.*—In a suit for redemption of a mortgage with possession, the Court decreed possession by redemption on payment of the mortgage money, adding that, if the plaintiff failed to do so, the right of redemption would be barred. *Held*, that the decree of the Court was contrary to the provisions of s. 92 of the T.P. Act, and that the mortgage not being a mortgage by conditional sale, the Court in default of payment of the money was bound to decree that the property be sold. *ZOHRA BIBI v. SHEIKH MUSI RAZA*, 2 O.C. 196.

(138)—*Stipulation against transfer in mortgage deed—Subsequent sale of mortgaged property—Suit by purchaser for possession after second mortgage to original mortgagees—Purchaser whether could claim to pay mortgage debt by instalments.*—K who had mortgaged two villages to the defendants sold them along with others subsequently to the plaintiffs in breach of a condition in the mortgage bond prohibiting any transfer of the property. It was stipulated in the sale deed that the purchasers should pay the mortgage debt due to the original mortgagees by instalments. The mortgagor two months later mortgaged 27 villages (including the two villages already mortgaged and sold) to the original mortgagees. *Held*, in a suit by the purchasers for possession of the two villages and for cancelment of the later mortgage-deed, that they would be entitled to possession of the said villages only after payment of the mortgage debt in full to the original mortgagees, and that the ruling in *Agra (F.B.) 7*, dated 4th August 1866 (that a stipulation in a mortgage deed prohibitory of the transfer of the mortgaged property does not prohibit a transfer thereof in good faith for the purpose of discharging the original mortgage-debt), is applicable to cases in which the debt is at once discharged by means of the transfer, and does not sanction a gradual discharge of it by instalments, such as was provided by the sale-deed in question. *MAHOMED ZAKOOLLAH v. BANEE PERSHAD*, 1 N.W.P. 135.

(139)—*Zuripeshgee mortgage—Suit by heirs of mortgagee (a Mahomedan)—Parties—Division of liability.*—In a suit by the heirs of a zuripeshgee mortgagee to recover the amount due under the mortgage, all the heirs of the mortgagee must be represented either as plaintiffs or as defendants, or those who sue must claim in proportion to what they are entitled to under the Mahomedan Law. There can be no division in liability in respect of money advanced

Mortgage—continued.**—9.—Redemption—continued.**

on a mortgage. *MUSSAMAT MUJEEDOO-NISSA v. SYUD DILDAR HOSSEIN*, 14 W.R. 216.

(140)—*Mortgage constituting charge on entire estate—Entire debt payable before redemption of any part.*—The decree in this case showed that the mortgage was a charge upon the whole estate, and consequently, no person could claim the right to take away a portion of the estate from the mortgagee unless upon payment of the whole amount due upon the mortgage, because, before the mortgage could be removed from any part of the estate, the whole mortgage-debt must be paid off. *BOODHOO SINGH v. KISHEN CHUNDER GHOSE*, 3 W.R. Mis. 4.

(141)—*Transfer of Property Act, 1882, s. 60—Redemption of a mortgage cannot be split up and effected piecemeal.*—It is an ordinary rule which must be observed and is the same as that laid down in s. 60 of the Transfer of Property Act, that the redemption of a mortgage cannot be split up and effected piecemeal, because for one thing at least, the mortgagee is entitled to retain the entire security for the entire debt. Otherwise he might be seriously prejudiced. Moreover, any other system would be apt to lead to the greatest confusion. *MAUNG TUN U v. MA PE*, U.B.R. 1897—1901, Vol. II, 505. [R., U.B.R. 1897—1901, Vol. II, 518.]

(142)—*Mortgagee acquiring right of redemption in a portion of the property—Procedure.*—Where a mortgagee in possession of properties belonging to co-owners, acquires a right to a share in the property, no suit will lie to redeem the whole or part of the property, by payment of the whole or part of the debt, and the only remedy is by a suit for partition to ascertain the respective shares, at the instance of the mortgagor. *MAMU v. KUTTU*, 6 M. 61. [Diss., 15 B. 24, 21 B. 619; F., 20 M. 295; R., 10 B. 648; D., 2 P.R. 1904=48 P.L.R. 1904.]

(143)—*Transfer of Property Act (IV of 1882), s. 60—Suit for partial redemption not maintainable.*—As has been expressly enacted in the last clause of s. 60 of the Transfer of Property Act, a purchaser of a portion of the mortgaged property cannot be permitted to redeem that portion alone without redeeming the rest. There is nothing in s. 82 of the Act which can be relied on as permitting the redemption of a mortgage piecemeal. *KUPPUSAMI CHETTI v. PAPATHI AMMAL*, 21 M. 369=8 M.L.J. 6.

(144)—*Mortgage—Purchase by one of several mortgagees of a share of the mortgaged property—Redemption by one of several mortgagors of his share.*—Where one of several mortgagees has purchased the share of one of the mortgagors in the mortgaged property, this of itself cannot entitle another of the mortgagors to claim to redeem his share in such property. *MAHTAB RAI v. SANT LAL*, 5 A. 276=A.W.N. 1883, 31. (5 N.W.P. 148, D.; 2 A. 565, 13 M.L.A. 404, R.) [R., 21 B. 619, 20 A. 23, F.B.=A.W.N. 1897, 163.]

Mortgage—continued.**—9.—Redemption—continued.**

(145)—*Joint mortgage—Purchase of a share by a mortgagee—Redemption of share.*—The right of one mortgagor to redeem the whole of a joint mortgage rests upon its joint character; and when that is broken by the mortgagee purchasing the share of one of the mortgagors, the right ceases, and one of the mortgagors cannot redeem more than his share against the will of the mortgagee. *KURAY MAL v. PURAN MAL*, 2 A. 565. (13 M.I.A. 404, F.) [F., 28 A. 155=A.W.N. 1905, 225, 29 A. 262=A.W.N. 1907, 49=4 A.L.J. 74; R., 21 B. 619, 20 A. 23, F.B.=A.W.N. 1897, 163, 6 O.C. 223, 6 O.C. 279; D., 5 A. 276=A.W.N. 1883, 31.]

(146)—*Mortgage with possession to co-owner—Right of some co-owners to redeem without partition.*—Where several co-owners of undivided property mortgage their shares with possession to another co-owner, a few of these mortgagors cannot claim to redeem the whole property mortgaged, unless there has been a partition of such mortgaged property among the several co-owners. *THILLAI CHETTI v. RAMANATHA AYYAN*, 20 M. 295. (6 M. 61, F.; 10 B. 648, D.) [Not F., 2 P.R. 1904=48 P.L.R. 1904.]

(147)—*Mortgage with possession—Stipulation for discharge of mortgage-debt out of the usufruct, redemption not possible before such discharge.*—Where an instrument of mortgage provides for the mortgagee paying himself the debt from the rents and profits of the estate and for the surrender of possession when the debt is so paid off, the event, on which the obligation to surrender has been made to depend, is the realization of the principal money and interest by the mortgagees themselves from the rents and profits of the mortgaged property and the possession by the mortgagees, until that event occurs, is of the essence of the transaction. The transaction is a *vivum vadium* in which no time is fixed for redemption and the mortgage could be redeemed only after the discharge of its amount by means of the rents and profits from the property, so that the mortgagees could claim to retain possession until the discharge of their debt in the above manner. *TIRUGNANA SAMBANDHA PANDARA SANNADHI v. NALLATAMBI*, 16 M. 486=2 M.L.J. 272. [R., 20 B. 677, 11 C.P.L.R. 103, 23 M. 33; D., 16 C.P.L.R. 59.]

(148)—*Right of redemption—Insufficient tender of mortgage-money.*—Where, by the terms of the mortgage, the mortgagor was, on payment of the whole of the principal and interest, entitled to redeem at the end of the second year of the mortgage, he is not entitled to a decree for redemption at the end of that year on showing merely that the principal money was deposited in Court in the first half of the second year and that the mortgagee had, before the redemption suit, obtained decrees for the interest due for both the years. Under such

Mortgage—continued.**—9.—Redemption—continued.**

circumstances, there is no deposit or tender at the proper time of the mortgage money including the interest due. *HEWANCHAL SINGH v. JAWAHIR SINGH*, 16 C. 307, P.C. [R., 20 A. 401, 5 O.C. 127.]

(149)—*Mortgage—Redemption—Suit in ejectment—Equities.*—Plaintiff's ancestor purchased certain property at a sale held in execution of a decree obtained by T in 1848 against R and M, and got possession. In 1861, A obtained a decree against the representatives of R in a suit brought against them on a mortgage-bond, the decree not directing the sale of the mortgaged property. A took out execution, bought the right, title and interest of his judgment-debtors in the property brought to sale, which were purchased by the defendants, who having paid the consideration, got possession. Plaintiff subsequently sued the defendants in ejectment, alleging that the latter obtained no title to the property under their purchase. Held that defendants were entitled to stand in A's shoes as an encumbrancer so far as their money had gone to pay off the charge which A had on the land, and that, the suit being in its nature a redemption suit, the plaintiff could not recover the property unless he paid the defendants the amount found due to them on taking accounts. *BABOO RAMESSUR PERSHAD NARAIN SINGH v. DOOLEE CHAND*, 19 W.R. 422.

(150)—*Mortgage—Joint mortgagors—Redemption.*—The mortgagors in a joint mortgage transaction are jointly liable to the mortgagees for the whole of the mortgage-debt. Some out of the number cannot maintain a suit for redeeming their own shares of the mortgaged property by payment of a proportional amount of the mortgage-debt. *SALIG RAM SINGH v. BARUN RAI*, 4 N.W.P. 92.

(151)—*Mortgage—Purchase of equity of redemption of part by stranger—Remaining part purchased by one of several mortgagees—Suit for redemption of part whether maintainable.*—Where one of several mortgagees purchases the equity of redemption as to a part of the property jointly mortgaged, the purchaser of another part is not thereby entitled to redeem the part purchased by him, unless he discharges the whole mortgage-debt. *SOBHA SAH v. INDERJEET*, 5 N.W.P. 148. [D., 5 A. 276=A.W.N. 1883, 31; F., 6 A.L.J. 387=31 A. 335.]

(152)—*Mortgage—Redemption—Tender.*—A mortgagor cannot get a decree for redemption, unless he tenders in full the mortgage-money. *JOYGOBIND ROY alias BHOJRAJ ROY v. BUNDHOO SINGH*, 17 W.R. 342.

(153)—*Redemption by co-mortgagor—Suit by other mortgagors for their shares—Civ. Pro. Code, s. 103—Civ. Pro. Code, Act VIII of 1859, s. 114—Effect of dismissal of suit for redemption.*—Some of the representatives of a deceased mortgagor sued another representative (defendant in the present suit) for possession of their shares of the mortgaged property

Mortgage—continued.**—9.—Redemption—continued.**

on payment of the proportionate mortgage-amount. It appeared that a suit of the father of the present plaintiff for redemption, in 1866 was dismissed under s. 114, Act VIII of 1859=s. 103 of Act XIV of 1882. In 1899, the present plaintiffs and the defendant sued jointly for redemption, with the result that there was finally a decree for redemption of the whole mortgage, in favour of defendant alone. The defendant redeemed the whole mortgage. In the present suit, which was brought by the plaintiffs as against defendant for redemption of their shares of the mortgaged property, the lower Appellate Court found that the plaintiffs were entitled to a decree for redemption of half of the mortgage, on the ground that the defendant was a trustee for the plaintiffs. *Held*, that the dismissal of the suit in 1866, had given the original mortgagee an absolute title, (15 C. 422, P.C., F.) that the defendant, who, by the redemption of the whole mortgage, stood in the shoes of the mortgagee, was entitled as against his co-mortgagors (plaintiffs), to all the rights and privileges of the mortgagee, and was entitled to oppose the claim of the plaintiff on the ground that he was an absolute owner of the property (8 A. 295, 11 A. 423, F.B., F.) that the defendant was not a trustee for the respondents, that the fact of the appellant and the respondents having brought a joint suit did not affect his right to state all the defences, the mortgagee has to the suit of the plaintiffs. The suit was dismissed. *IMDAD ALI v. HURMAT ALI*, 32 P.R. 1905=39 P.L.R. 1905. [R., 43 P.R. 1907.]

(154)—*Usufructuary mortgage—Liability of mortgagor and mortgagee—Part of mortgaged property taken out of mortgagee's possession—Mortgagee remaining in possession of the rest for a long time, effect of—Interest—Redemption.*—A executed an usufructuary mortgage in favour of B in 1880. At the time of the mortgage, a suit was pending in respect of a prior mortgage of 1874, by virtue of which a portion of the mortgaged property passed out of B's hand in 1886. B remained in possession of the remaining property for over 24 years, without taking any steps in respect of the portion which had gone out of his possession under the prior mortgage. In 1910 the mortgagor brought a suit for redemption: *Held*, (1) that, under the circumstances, mortgagee was not entitled to claim the loss of interest which he had sustained owing to a part of the mortgaged property having gone out of his possession in 1886 under the prior mortgage; (2) that the mortgagor was not entitled to claim a proportionate reduction of the principal money, because the mortgagee was not in a position to deliver to him the entire mortgaged property at the time of redemption. *BIHARI LAL v. DURGA DAS*, 13 Ind. Cas. 156. (24 A. 521, 29 I.A. 148, 27 A. 313, R.)

(155)—*Consolidation of mortgages—Right to redeem.*—Where the effect of the transaction

Mortgage—continued.**—9.—Redemption—continued.**

subsequent to two separate mortgages of separate lands is to consolidate the two, the mortgagor cannot redeem without paying the whole amount due, under the mortgages nor can he have the amount apportioned on the two lands according to the consideration mentioned in the original deeds. *BANNU MAL v. RAMJUS*, 33 P.R. 1899.

(156)—*Redemption. Suit for—Mortgagor and mortgagee, relation between—Payment of a portion of mortgage-money, effect of—Discharge of a portion of mortgaged property by a proportionate payment of the mortgage-money—Arrangement to hand over property other than the mortgaged property for payment of mortgage-money, effect of, when unregistered—Variation or modification of the terms of contract, what amounts to—Evidence Act, s. 92, cl. (4).*—K. D. and S. each owned a third share in the property in dispute. On the 15th June, 1880, K and D mortgaged with possession their 2/3rd share in favour of the defendant. On the death of S, he was succeeded by his widow J., who on the 7th July, 1885, mortgaged her 1/3rd share to the same defendant excepting the village B. On the 5th June, 1901, K, alone mortgaged with possession his 1/3rd share excepting the village B. Half the mortgage-money due under the deed of 1880 was set off as part of the consideration of this mortgage. After the death of the widow, the sons of D sued for redemption of the mortgage of 1885 as her heirs. They contended that by the mortgage of 5th June, 1901, K's share in the mortgage of 1880 had been paid up and the latter mortgage, so far as it related to K's share, had been discharged. They also alleged that about six years ago the mortgagor and the mortgagee entered into an agreement by which the share of J, in village B. as also the share of K. in the said village had been placed in the possession of the mortgagee, on the understanding that he was to collect the rents and the profits thereof and apply them to the reduction of the principal amount due on his mortgage. The questions for decision were whether K's liability under the mortgage of 1880 had been discharged and whether the arrangement alleged by the plaintiff could be proved in law under s. 92, cl. 4, of the Evidence Act, in the absence of a registered document to evidence the same. *Held*, that the mere fact that K's share on account of the mortgage of 1880 was set off against the amount secured under the latter deed of 1901 was not enough to show that any part of the mortgaged property had been released from liability for the remainder of the money due under the deed of 1880. In the absence of an express contract to the contrary, the mortgagee was entitled to retain the whole of the property mortgaged as security for what was due to him. *Held*, further, that the arrangement relied upon by the plaintiff did not require registration, as it would not in any way

Mortgage—continued.**—9.—Redemption—continued.**

affect the mortgagee, nor could such an arrangement modify or vary the terms of the mortgage, and that, therefore, it would be proved in spite of s. 92, cl. 4, of the Evidence Act. **KEDAR SINGH v. SUMER SINGH, 10 Ind. Cas. 196.** (10 C. 1035, 11 I.A. 126, 9 A. 249, R.)

(157) — *Parties — Redemption suit—Subsequent mortgage — Redemption of portion of mortgaged property not allowable—Transfer of Property Act (IV of 1882), ss. 60, 85—Rajinamah petition — Evidence — Admission—No necessity of document for transfer of immoveable property before Transfer of Property Act—Costs — Mortgagee to get costs in redemption suit unless guilty of misconduct—Redemption suit dismissed for default of payment—Res judicata—Second suit barred.*—It is necessary, in a suit for redemption of a prior mortgage, to make a subsequent mortgagee a party to it, as he is clearly interested in the properties. Also, all the persons interested in all the properties mortgaged must be made parties. Where this is not done, the suit must fail. A suit to redeem only a portion of the properties mortgaged is not maintainable under s. 60, Transfer of Property Act. Where a *rajinamah* petition filed by the mortgagor stated that, being unable to pay the mortgage-money, she had arranged with the mortgagee to execute in his favour a deed of sale in respect of 4/5th of the property, and she retained the remaining 1/5th, and the suit was decided in pursuance of the terms of the *rajinamah*, but, although no deed of sale was afterwards executed, the mortgagor's name was registered in respect of 1/5th and the mortgagee's name in respect of 4/5th of the property, and the mortgagor dealt with the 1/5th as her absolute property, by mortgage and gift: *Held*, that as the *rajinamah* did not purport to release the equity of redemption or to declare, create or extinguish any right in immoveable property, it was admissible in evidence as an admission by the mortgagor of the agreement at which she had arrived with her mortgagee, and no question of want of stamp or registration really arose. (12 C.W.N. 854, D.) No document was necessary for the transfer of immoveable property before July 1, 1882, when the Transfer of Property Act came into force. In a redemption suit the mortgagee is entitled to his costs, unless he is guilty of misconduct. *Obiter dictum.*—Where the decree in a redemption suit provided that, in default of payment within a specified time, the plaintiff's suit should stand dismissed, if it was dismissed in default of payment, the matter would be *res judicata* between the parties, and a second suit would be barred. **AUGHORE KUMAR GANGOOLI v. MAHOMED MUSSA, 2 Ind. Cas. 662.** (22 W.R. 172, 25 M. 300, 24 A. 44, F.B., R.)

(158) — *Sale of portion of mortgaged property — Redemption by vendee.*—A mortgagee is entitled to hold possession till every pice of the debt secured by the mortgage has been fully paid

Mortgage—continued.**—9. — Redemption—continued.**

and satisfied: and no person representing the original mortgagor and claiming any fractional portion in the mortgaged property can sue to redeem his separate share without proof of the satisfaction of the entire debt. **MOULVIE RAZEEOD-DEEN alias SYED HOSSEIN v. JHUBBOO SINGH, W.R. 1864, 725.** [R., 2 W. R. 214, 21 B. 619.]

(159) — *Redemption in part—Validity—Portion of mortgaged-property, Sale of, Effect on right to redeem.*—The general rule that a mortgagor cannot redeem a share of the mortgaged property and that the mortgagee is entitled to retain the whole property mortgaged until the debt is paid is not affected by a sale of part of the lands mortgaged for arrears of revenue. **SYUD HASHIM v. BABOO AUJEET SINGH, W. R. 1864, 216.**

(160) — *Zuripeshghee mortgage, Rights of.*—A *Zuripeshghee* mortgagee has the right to retain the whole of the property pledged to him until the repayment of his debt *in toto*. If he agrees to relinquish any portion, either on receiving a proportionate amount of what is due to him or otherwise, he may do so. **HURREEHUR SINGH v. DABEE SAHAY, W. R. 1864, 260.** [R., 21 B. 619.]

(161) — *Mortgage—Zur-i-peshghee mortgage—Enjoyment of mortgagees in moieties—Right of mortgagor to claim partial redemption.*—Where subsequent to the execution of a *Zur-i-peshghee* mortgage, the mortgagees took possession of the mortgaged property in moieties, that circumstance would not enable the mortgagor to claim piece-meal redemption of the mortgage. The mortgagor cannot recover possession of any portion of the mortgaged property until he has paid the entire amount due under the mortgage. **SHAIKH IMAM ALI v. OOGRAH SINGH, 22 W.R. 262.**

(162) — *Sale of share of mortgaged property towards mortgage decree—Suit for accounts and redemption of such share—Contribution.*—The share of one only of several joint mortgagors can be sold in execution of a decree on the mortgage; and any claim by the owner of such share, that it must be made liable only to the extent of his share of the debt, must be urged, if at all, in the execution proceedings, and not by a separate suit for the ascertainment of the amount due by him and for redemption of his share. Where, under such circumstances, owing to other shares in the mortgaged property having been sold and purchased by the mortgagor in execution of other decrees, against the owners of such shares, the plaintiff's share alone of the mortgaged property, together with some other property of a third party also comprised in the mortgage, was purchased by the mortgagor in execution, of his mortgage decree; *held*, that a suit was not maintainable by plaintiff for the ascertainment of the amount due by him under the mortgage and for redemption of his share on payment of such amount. *Held*, also, that, if any excess amount

*Mortgage—continued.**—9.—Redemption—continued.*

had been realised by the sale of the plaintiff's share over and above the sum ascertained to be due by him, he was entitled to recover a contribution of his portion of such excess by the sale of the third party's property purchased by the mortgagor. *BHAGIRATH v. NAUBAT SINGH*, 2 A. 115. [R., 26 A. 407, F.B., A.W.N. 1904, 74.]

(163)—*Mortgage — Right to redeem before expiry of term.*—The general principle is that, in the absence of any stipulation, expressed or implied to the contrary, the right to redeem and the right to foreclosure are co-extensive. Where, therefore, a date is fixed in a mortgage-deed for redemption, no suit could be brought for redemption within that date, notwithstanding the fact that the deed mentions that the mortgage amount is payable "within" that date. *VADJU v. VADJU*, 5 B. 22. [Not F., 201 P.R. 1889, 137 P.W.R. 1908; F., 8 A. 95; Cons., 10 A. 602, 23 M. 33; R., 16 M. 486, 20 B. 677, 16 C.P.L.R. 59, 29 A. 471=4 A.L.J. 375=A.W.N. 1907, 133, 18 M.L.J. 235.]

(164)—*Construction—Suit for redemption brought before expiration of term.*—In a deed of mortgage, it was stipulated that "the interest should be paid every year and the principal in ten years," that "the principal shall be paid at the promised time and the interest every year" and that, on failure by the mortgagor to pay the principal and interest "at the stipulated period," the mortgagee might realise the amount from the mortgaged property and from the other property and the person of the mortgagor. *Held* upon a construction of the document, that the advance of the amount was for a period of ten years certain; and that, while on the one hand, the mortgagee could not enforce his rights during the period, on the other hand, the mortgagor was not entitled, before the period, to sue for redemption of the property. The case was essentially one in which, looking to the merits of the matters between the parties, their obligations were mutual and reciprocal, and there was nothing in the terms of the deed to take it out of the ordinary rules applicable to documents of the kind. *RAGHUBAR DAYAL v. BUDHU LAL*, 8 A. 95=A.W.N. 1886, 13. (5 B. 22, R.) [Not F., 201, P.R. 1889; Cons., 10 A. 602; R., 20 B. 677, 16 C.P.L.R. 59, 29 A. 471=4 A.L.J. 375=A.W.N. 1907, 133; D., A.W.N. 1901, 36.]

(165)—*Reg. I of 1798, s. 5—Mortgage—Contract to pay principal on specified date—Interest—Payment of interest a condition for redemption.*—Reg. I of 1798, s. 5, is not intended to alter the terms of a contract settled between the parties (illegal interest excepted). Where there is a contract between a mortgagor and a mortgagee for the payment of the principal sum on a specified date and for the payment of interest thereon in the meantime, the mortgagor cannot have a partial redemption of the property under the Regulation. There is nothing unreasonable in a mortgagee stipulating that, if the principal sum or part of it is paid off before

*Mortgage—continued.**—9.—Redemption—continued.*

the time fixed or without the requisite notice, six months' interest on it shall be paid. A mortgagee consenting to allow the principal sum, or a part of it, to be paid off before the time fixed, would not be entitled, when agreeing to this, to make the payment of interest a condition of such redemption. *BURNO MOYEE DOSSEE v. BENODE MOHINEE CHOWDHRAIN*, 20 W.R. 387.

(166) *Mortgage—Mortgagee's right to possession—Mortgage-money, Payment of, before expiry of term of mortgage—Mortgagor's right to redeem—Possession, Suit for.*—A mortgagee brought a suit against the mortgagor for possession of the mortgaged property, a grove, alleging that the mortgagor had promised to deliver possession of the same and had refused to do so, and that, up to the time of the institution of the suit, Rs. 35-11-3 were due to him. The mortgagor offered to pay the mortgagee this amount and costs, saying that the mortgagee would, if possession were given to him, cut down the trees, and he paid the money into Court. The mortgagee refused to take the money, claiming to be entitled to possession of the property. The mortgage was for a term of three years and when the suit was instituted, the term had not expired. *Held* that there had been a transfer to the mortgagee of the right of possession and the mortgagee was entitled by virtue of such transfer to possession. The mortgagor had not a right to elect whether possession should be delivered or the mortgage should be redeemed. *Held*, further, that the mortgagor had not the right to redeem within the term for which the mortgage was made. *FAKIRA KHAN v. BADULLAH KHAN*, 5 O.C. 148. [R., 10 O.C. 218.]

(167)—*Redemption before expiration of fixed day for redemption whether allowable—Transfer of Property Act (IV of 1882), s. 60.*—The right of redemption and the right of foreclosure are co-extensive in the absence of any stipulation, express or implied, to the contrary; and when a day is fixed for payment, the mortgagor is not at liberty to insist on redemption before the expiration of the period named. *RAMTARAK ROY v. AUSHTOSH MAITY*, 8 Ind. Cas. 707. (10 A. 602, Not F.; 5 B. 22, 16 M. 486, 7 M.I. A. 323, 4 W.R. P.C. 37, Rel. on.)

(168)—*Mortgage for 20 years—Right of mortgagor's representative to redeem before expiry of the term.*—A term of 20 years agreed upon between a mortgagor and his mortgagee is neither inequitable, nor one fixed without legal necessity and cannot be set aside as unenforceable, especially where the term was fixed by the mortgagor, in good faith, with due regard to his best interest and to that of his heirs; and the representative of the mortgagor cannot be allowed to redeem before the expiry of the term. *PURAN SINGH v. KESAR SINGH*, 39 P.R. 1907=119 P.L.R. 1907. (131 P.R. 1894, 6 P.R. 1902, 40 P.L.R. 1903, 20 B. 677, 21 M. 110, R.) [R., 92 P.R. 1909.]

Mortgage—continued.**—9.—Redemption—continued.**

(169)—*Redemption—Right of mortgagee to refuse redemption.*—As a mortgagor is not entitled to redeem before the principal money has become payable, the mortgagee is justified in refusing to allow him to do so. *URJOONI KUNBI v. HARBAJI JAGANNATH*, 1 C.P.L.R. 1. [Diss., 16 C.P.L.R. 59.]

(170)—*Usufructuary mortgage for 90 years—Stipulation not to redeem before expiry of 90 years—Validity.*—Where, under a usufructuary mortgage deed, dated 5th March 1861, one of the terms was that the mortgagee was to hold for 90 years and that, immediately on the expiry of the 90 years, and not before, the mortgagor must redeem or lose his rights; *Held* that the term was one that could be enforced and that a suit for redemption before the expiry of the period of 90 years was premature. *MUHOMED IBRAHIM v. MUHOMED AZIZ KROSHI*, 9 M.L.T. 462 = 8 Ind. Cas. 1068 = M.W.N. (1910) 792.

(171)—*Mortgage—Redemption and foreclosure not always co-extensive.*—The right of redemption and the right of foreclosure or sale are not always and under all circumstances co-extensive. The right of redemption may be postponed during a certain period, just as the right of the mortgagee to call in his debt may be limited. Both these rights rest upon the terms of the document itself, and where a restriction is not unfair or unduly onerous, redemption will not be allowed before the expiration of the term of the mortgage. A usufructuary mortgage, under which the mortgagee was empowered to be in possession of the mortgaged property for 15 years, enjoying the profits in lieu of interest, provided that "if the property be found to have been mortgaged or hypothecated or transferred to any one, or if there should arise any cause which might be considered likely to cause the total or partial loss of the principal mortgage money and interest, the mortgagee shall have power to realize the entire mortgage money, with interest thereon at the rate of Rs. 3—2—0 per cent. per mensem" from the mortgagor and his property, without waiting for the expiration of the term. *Held* that this condition in the mortgage deed was neither unreasonable nor oppressive, and it did not therefore give a right to redeem before the expiry of the term of the mortgage. *BHAWANI v. SHEODIHAL*, 26 A. 479 = 1 A.L.J. 133 = A.W.N. 1904, 60. (20 B. 677, 22 B. 375, R.) [R., 126 P.L.R. 1908.]

(172)—*Suit for redemption of mortgage before expiration of term—Mortgagor's remedy for balance of mortgage money—Act XXVIII of 1855.*—A mortgage executed subsequent to Act XXVIII of 1855, for a fixed period, the mortgagee taking possession in lieu of interest, cannot be redeemed until the period for which the mortgage was effected, has expired; and, under the circumstances, the mortgagor's proper course would be to sue for the balance of the mortgage loan which had not been paid to him. *MUN PEAREY v. SHIVA DEEN*, 1 Agra 91. [F., 11 W. R. 408.]

Mortgage—continued.**—9.—Redemption—continued.**

(173)—*Usufructuary mortgage—Redemption before stipulated period.*—Where a person executed an *ikrarnama* by way of mortgage and the *ikrar* was to the effect that the mortgagee was to remain in possession of the mortgaged property for a period of eight years without any objection on the part of the mortgagor or his heirs and that the amount due was to be realized from the usufruct of the land mortgaged, and that, at the end of these eight years, if anything should still be found due, the mortgagee was to recover that amount from the mortgagor: *Held*, that neither the mortgagor nor any person claiming under him was entitled to bring a suit for redemption before the expiry of the period of eight years mentioned in the *ikrar*. *CHANDRA KUMAR BANERJEE v. ISWAR CHANDRA NEWJI*, 6 B.L.R. 562 = 14 W.R. 455.

(174)—*Mortgage—Redemption before period fixed therefor.*—Where the intention of the parties to a mortgage is that there should not be any right of redemption until the expiration of a certain term, and it is so expressed in the mortgage deed, *held* that both under the English and the Indian law, the mortgagor cannot redeem before the expiration of the fixed period, unless the mortgagee consents thereto. This rule is based on the principle that, in the absence of stipulation, either express or implied, to the contrary, the right to redeem and the right to foreclose are regarded as co-extensive. *SAKHARAM N. SARPESAI v. VITHU L. GOUDA*, 2 B.H.C. 225 = 1 Ind. Jur. N.S. 250. [Appl., 5 B. 22; R., 9 B.H.C. 79, 20 B. 677.]

(175)—*Mortgage—Lease by mortgagor to mortgagee—Redemption—Act XXVIII of 1855.*—In a suit to recover possession of the entire 16 annas of certain properties by redemption of a mortgage dated 1862, on deposit of a sum which the plaintiff alleged to be the balance of the peshgi money, principal and interest, due to the defendant (lender), it appeared that it was arranged between the parties that the principal sum of Rs. 19,300 was to be paid off in 1874 and that a lease was given to the mortgagee by the mortgagor, the term of which was from 1864 to 1874. At the foot of the deed of *zuripeshgi*, there was a calculation which showed that the assets of the properties leased were assumed to be Rs. 2,830; a small payment was to be made by the lessee to the lessor, apparently to mark the tenancy and it was stipulated that the lessee, was to clear off both the principal and interest of the amount advanced from the said Rs. 2,830 and that, at the commencement of 1875, on payment of Rs. 1-2-0 by the borrower which would be the amount then due as per calculation at the foot of the deed, the lessee (the lender), would have to surrender possession. The transaction took place subsequent to the passing of Act XXVIII of 1855. *Held*, that the plaintiff was not entitled to ask for possession before the expiry of the term of the lease and that the transaction

Mortgage—continued.**—9.—Redemption—continued.**

between the parties was not a simple usufructuary mortgage but a mortgage coupled with an engagement that bore all the characteristics of an ordinary case. **SURJAN CHOWDHRY v. MUSSAMAT IMAMBANDI BEGUM, 6 B.L.R. 566, Note=12 W.R. 527.** [*Rel. on, 6 B.L.R. 562=14 W.R. 455; R., 10 A. 602.*]

(176)—*Onerous condition—Condition as to mortgage being not redeemable for 60 years enforced.*—The mortgagor specifically agreed with the mortgagee that he should not be entitled to redeem until after the expiry of 60 years. The purchaser of the mortgaged property from the mortgagor sued for redemption and contended that the condition as to redemption was so inequitable and onerous that relief from it should be given on equitable grounds, and it should be struck out. *Held*, that the contention was not valid and redemption could not be allowed to the plaintiff before the expiry of the stipulated period. **RALLA v. AMIN CHAND, 126 P.L.R. 1908.**

(177)—*Usufructuary mortgage—Redemption—Time for redemption fixed—Suit before the fixed period, maintainability of.*—Where a mortgage-deed fixed a period of ten years for redemption, a suit to redeem prior to the expiration of that period is premature. **INDERJIT v. BHARAT SINGH, 4 Ind. Cas. 407.**

(178)—*Mortgage — Mortgage for a certain fixed term—Suit for redemption before expiry of term—Inequitable condition.*—Where the mortgage-deed provided that the term of the mortgage was to be fifty years, and the mortgagor could redeem after the expiry of the period of the mortgage on payment of the amount due, and in a suit for redemption brought before the expiry of the term of the mortgage, it was contended on behalf of the mortgagor that, by the mortgage-deed, he was entitled to redeem at any time he liked, and the condition as to the term of the mortgage being fifty years was inequitable: *Held*, that, upon the construction of the deed, the mortgagor was not entitled to redeem before the expiry of fifty years, the term fixed in the mortgage-deed, and that the condition was not *per se* inequitable. The ordinary presumption is that the period for redemption is fixed for the convenience of the mortgagor, and not for the benefit of the mortgagee. But the presumption is rebuttable, and does not arise in a case where the provisions of the deed clearly show that the mortgagee intended to secure his possession for a definite period. **MILKHI v. FATTU, 40 P.L.R. 1903.**

(179)—*Loan on mortgage—Mortgagee in possession—No interest—Redemption not to be at any time.*—It is incompetent to a mortgagor, who borrowed money on no stipulated rate of interest and on condition that the mortgagee was to remain in possession, to claim back the mortgaged land before the stipulated time. **SREEMUNT DUTT v. KRISHNA NATH ROY, 25 W.R. 10.**

Mortgage—continued.**—9.—Redemption—continued.**

(180)—*Usufructuary — Mortgagor cannot ordinarily be compelled to redeem.*—In Upper Burma, mortgages must be construed as far as possible in accordance with the intention of the parties. (U.B.R. 1897—1901, Vol. II, 502, *F.*) In the case of a usufructuary mortgage, where the security remains unimpaired, if there is no covenant for the repayment of the mortgage-money, the mortgagee cannot sue to compel the mortgagor to redeem the mortgage. **MAUNG THA TE v. MAUNG TAUNG BO, U.B. R. 1897—1901, Vol. II, 516.** [*F., U.B.R. 1897—1901, Vol II, 518.*]

(181)—*Mortgage — Redemption — Non-payment—Possession until payment—Suit for account—Maintainability.*—A decree obtained by a mortgagee provided that the mortgagor should pay a certain sum to the mortgagee for redemption, and, on failure, the mortgagee should take possession of the property mortgaged until the sum due be discharged. *Held* that, in the face of such a decree, no suit was maintainable by the mortgagor against the mortgagee for accounts and possession. The mortgagee was entitled to continue his possession till the decretal amount was paid to him by the mortgagor. **TANAI BAGAVAN v. HARI bin BHAVANI DUBAL, 16 B. 659, F.B.=P.J. 1887, 315.** [*F., 26 B. 312=3 Bom. L.R. 939, 13 Bom. L.R. 30; R., 16 B. 656, 19 B. 140.*]

(182)—*Mortgage—Redemption decree—Non-payment of mortgage money—Recovery of possession by mortgagee—Suit for account by mortgagor — Maintainability.*—A mortgage-decree directed the mortgagor to pay a certain sum for redemption, and, on his failure to do so, the mortgagee was to recover and retain possession till the amount was paid off. The former having failed to pay the amount, the latter took possession of the mortgaged property. The mortgagor subsequently brought a suit for account and possession. *Held*, that the suit was not maintainable against the mortgagee. The only means by which the plaintiff could recover possession from the defendant was by paying the amount of the decree. **RAMBHAT v. RAGHO KRISHNA DESHPANDI, 16 B. 656.** (8 B. 303, 16 B. 659, *R.*) [*F., 6 Bom. L.R. 1100, 13 Bom. L.R. 30.*]

(183)—*Redemption, Suit for — Deposit of mortgage-money by mortgagor—Deposit of mortgage money in Court, what amounts to valid—Transfer of Property Act, ss. 83 and 84—Mortgagor, suit by, to recover surplus collection made by mortgagee after mortgagee has been satisfied—Limitation Act, arts. 105, 109 and 120.*—The plaintiffs who owned certain shares in a village mortgaged them separately to the mortgagees on the 9th November, 1876. The mortgagees were authorised to pay themselves, from the rents and profits, the interest of the principal monies. On the 13th May, 1890, the mortgagors separately deposited in Court certain sums. In the applications under which the deposits were made, it was stated: "Let the

*Mortgage—continued.**—9.—Redemption—continued.*

Court know that some items of money are due to the petitioner from the mortgagees for the recovery of which he will sue after redemption has been effected." Notices were issued to the mortgagees, but they refused to accept these amounts on the ground that they were not sufficient. On the 4th September, 1890, the plaintiffs instituted separate suits for redemption. They obtained decrees and in execution thereof obtained possession on the 8th January, 1892. The decrees were set aside and possession was restored to the mortgagees on the 1st August, 1893. On the suits being retried, the mortgagors on the 31st March, 1896, obtained decrees for redemption and, having paid the amounts found due from them by the Court, they obtained possession of their shares on the 4th November, 1896. On the 24th April, 1899, the plaintiffs separately instituted the present suits, alleging that from the 13th May, 1890, the mortgagees ceased to be entitled to interest and that consequently they were not entitled to appropriate the rents and profits of the share from that date to the 7th January, 1892, and from the 1st August, 1893 to the 3rd November, 1896. They claimed the rents and profits for these periods and the value of certain trees alleged to have been sold by the mortgagees as part of the profits. On behalf of the mortgagees, it was contended that the deposits were not valid and that the claim as regards the profits was governed by arts. 105 and 109, Limitation Act, and was beyond time. *Held*, that the deposits were made in good faith with the intention that the mortgagees should, if they were willing to do so, take the amounts. All that the language of the applications under which the deposits were made showed was that the plaintiffs reserved their right to dispute that the whole amounts deposited were due to the mortgagees. *Held*, further, that article 105 was applicable to the suits as regards both the periods for which profits were claimed. *Held*, therefore, that, while the claim for profits for the period from the 13th May, 1890, to the 7th January, 1892, was barred by limitation, that for the period from the 1st August, 1893, to the 3rd November, 1896, was within time. *Held*, further, that the claims in respect of the trees were claims for surplus profits and were governed by art. 105. **SALIK RAM v. ASHIK HUSAIN, 4 O.C. 355.**

(184)—*Mortgage with possession—Redemption—Directions for accounts.*—Plaintiffs sued for redemption of a mortgage for Rs. 225 executed by their father to the father of the defendant, alleging that they were ready to pay Rs. 186 which was the sum received under the mortgage. The defendant answered that the plaintiffs' father had received Rs. 225 and mortgaged the land in dispute as security for Rs. 100 out of that sum with the condition that, on non-payment of Rs. 100 within 10 years, the mortgage was to be foreclosed. It was further pleaded that, the payment not having been made, the defendant had become the owner of

*Mortgage—continued.**—9.—Redemption—continued.*

the property, and that he had spent Rs. 6,000 in erecting buildings on the land. *Held* that the rule of Courts of Equity in England as to allowances to a mortgagee with possession could not apply, as the course of decisions in the late Sadler Court, and the general understanding of the law caused by those decisions, as well as those of subordinate Courts, may reasonably have led the mortgagee to believe that upon non-payment of the money at the time fixed, he had become the absolute owner of the property and might deal with it in any way he thought fit. The mortgagee was therefore allowed all sums of money laid out or expended by him in buildings or other permanent improvements on the mortgaged premises, making all reasonable deductions for depreciations by lapse of time or other causes, in addition to the amount due under the mortgage. **ANANDRAV v. RAVJI DESHRATH, 2 B.H.C. 214. [F., 3 B.H.C. 11, 9 B.H.C. 69.]**

(185)—*Bengal Regulation XV of 1793—Construction—Interest—Construction of Bengal Regulation XV of 1793 as to usurious interest—Mortgage—Redemption—Accounts.*—A mortgage, lease, and agreement, held to constitute one mortgage security, the three instruments being entered into as a device to avoid the usury laws within the meaning of s. 9, Bengal Regulation XV of 1793. Interference with the rate of interest was a thing of positive law and cannot be extended beyond the provisions of Regulation XV of 1793. [*R.*, 5 A 419.] The mortgagors in this case were entitled to redeem at any time before the expiration of the term created by the lease on payment of what might be due on the mortgage security for principal and interest at 12 per cent. per annum. In a suit by mortgagors under a usufructuary mortgage to establish their right to cancellation of the mortgage-deed, to the possession of the lands, and to payment of the surplus, *held* that the *onus* lay on the plaintiffs to show that the mortgagees in possession were paid in full by receipt of the profits. Bengal Regulation XV of 1793, s. 2, *re* non-production of accounts of receipts by mortgagees in possession is still in force and unrepealed by Act XVIII of 1855. A mortgagee is not an assurer of the continuation of the same rate of profit which his mortgagor was able to raise; therefore an estimate of a proceeding rental does not suffice to show actual receipt. The duty to which the mortgagees are bound by s. 11, Reg. XV of 1793, is to keep accounts of gross receipts from the property mortgaged, and also the expenses of management and preservation. The gross receipts must be such as the mortgagor himself, would have been entitled to; and if he could not, by reason of an intervening lease, call for an account of the collections, neither can his mortgagee, and if a valid engagement is made, qualifying the usufructuary possession, the account of the receipt must be subject to that modification. The mortgagee need not personally attest the accounts if he has no persona

Mortgage—continued.**—9.—Redemption—continued.**

knowledge of them. The Legislature never intended that a man should swear positively to knowledge of that of which he can have no personal knowledge. Presumption against mortgagees for non-production of accounts must have reasonable limits, and not be mere conjectures based on inexact data. *SHAH MAKHANLAL v. SRIKRISHNA SINGH*, 2 B. L. R. P. C. 44=11 W. R. P. C. 19=12 M. I. A. 157. [R., 14 W. R. 66, 4 M. 113, 26 B. 363; D., 16 W. R. 251.]

(186) — *Mortgage—Suit for redemption—Mortgage amount alleged by plaintiff to be due being below the sum really due—Dismissal of suit.*—The appellants sued for redemption of mortgage alleging that the mortgage amount was Rs. 20, but the respondents alleged that the land had been mortgaged for Rs. 400. The lower appellate Court held that the appellants had failed to prove that the land had been mortgaged for Rs. 20 and dismissed the suit. Held that, as the appellants did not ask for an account nor did they offer to pay any such sum as might be found by the Court, to be due, the lower appellate Court was not wrong in dismissing the claim of the appellants which had admittedly not been substantiated. *BHAGWANDIN v. BACHHU*, A. W. N. 1882, 137.

(187) — *Redemption of, prior to Regulation XVII of 1806.*—When there is neither deposit nor tender of money prior to the date fixed for the payment of a mortgage in the nature of a *bye-bil-wuffa*, the right of redemption is lost to the mortgagor under Regulation I of 1798. Held also that the benefit of Regulation XVII of 1806 could not be applied to mortgages made prior to the passing of that enactment. *MUSSAMUT BEEBEE RUHMAN v. SHEIKH SHUM-SOODDEEN HYDER*, W. R. 1864, 183.

(188) — *Redemption impracticable if any balance due on mortgage—Interest.*—If anything be found due on a mortgage a mortgagor cannot obtain a decree for redemption. *GOPEE LALL v. BEEBEE MOHAFUZZUN*, W. R. 1864, 349.

(189) — *Mortgage—Stipulation that mortgage should become a sale if not redeemed within given time—Razinamah in favour of, and transfer of possession to, mortgagee—Effect of razinamah in extinguishing equity of redemption—Subsequent purchaser of equity from mortgagor not entitled to redeem—Conveyance when vitiated by mistake of law—Indian Contract Act, s. 21.*—In pursuance of the stipulation in a mortgage-deed that, on the mortgagor's failure to redeem within the time specified in the deed, it should become a sale, the mortgagor executed a *razinamah* without any reservation surrendering the property in favour of the mortgagee. The *razinamah* was, under the circumstances, held to have extinguished the mortgagor's equity of redemption irrespective of any ignorance or mistake of law on the part of the mortgagor as to his rights as such. The principle has been

Mortgage—continued.**—9.—Redemption—continued.**

laid down in the Indian Contract Act that an error of law does not, by itself, vitiate a contract. Much less will it annul a conveyance after the lapse of several years, unless there has been some fraud or misrepresentation. The plaintiff, in this case, relying on his purchase of the alleged equity of redemption of the mortgagor subsequent to his surrender in favour of the mortgagee, instituted this suit for redemption of the property, and this suit was dismissed on the ground of the equity having become extinguished previous to the alleged sale thereof to him by the mortgagor. *VISHNU SAKHARAM PEATAK v. KASHINATH BAPU SHANKAR*, 11 B. 174.

(190) — *Bengal Regulation, XVII of 1806, ss. 7 and 8—Mortgage by conditional sale—Non-payment of amount due within time—Redemption.*—In the part of India where the Regulation is in force, the right to redeem depends entirely upon it, irrespective of the construction of the mortgage-deed. Where, in the case of a mortgage by conditional sale without possession, the mortgagor did not pay the whole amount within the year of grace, as required by s. 7, but paid only the principal amount and the last year's interest, as required by the mortgage bond, the conditional sale became conclusive and the mortgagor was not entitled to redeem. *MANSUR ALI KHAN v. SARJU PRASAD*, 9 A. 20=13 I. A. 113, P. C. =4 Sar. 749. [R., 103 P. R. 1893.]

(191) — *Decree for redemption—Failure to pay within the time fixed, of the mortgage amount.*—The pendency of an appeal by the mortgagee cannot have the effect of relieving the mortgagor from redeeming within the proper time. *GOVINDAN v. CHAPPUTTI*, 15 M. 171, Note. [R., 15 M. 170.]

(192) — *Failure of mortgagor to redeem within time fixed in consent decree in a redemption suit—Mortgagor's application for extension of time refused—Mortgagor's application to foreclose—Mortgagor's right—S. 93, Transfer of Property Act, 1882.*—The scheme of the Transfer of Property Act is that a mortgagor getting a decree for redemption is liable to foreclosure, if he fails to pay within the time limited, unless he gets an extension under s. 93 of the Act. A mortgagor, who fails to redeem by a certain time fixed by a consent decree passed in a redemption suit, and whose application to extend time, after the time fixed for redemption has elapsed, is refused, will not when the mortgagee applies to foreclose, be entitled to redeem. An order absolute, in such a case, is not rendered unnecessary by the fact of the decree being a consent decree. *DESU CHETTY v. GHANSHAM DOSS*, 5 M. L. T. 76=2 Ind. Cas. 616. (19 M. 43, 36 M. 354=18 M. L. J. 259, D.)

(193) — *When suit for redemption may be instituted.*—There can be no suit for redemption, unless a time for payment of the principal money has been expressly or impliedly fixed.

Mortgage—continued.**—9.—Redemption—continued.**

The mortgagor may sue for accounts and possession, but, if it be found that the mortgage money has not been repaid from the rents and profits of the property, his suit must be dismissed. *KALU v. LALJEE*, 11 C.P.L.R. 103. (16 M. 486, F.; 4 C.P.L.R. 43, Appr; 3 M.H. C. 366, R.)

(194)—*Right of redemption, bar of by limitation, on expiry of twelve years from year of grace.*—In this case, the Lower Appellate Court had correctly found that the conditional sale relied upon by the respondent was duly foreclosed. More than 12 years having elapsed from the date of the expiration of the year of grace, the appellants had lost their right of redemption. *LOTF HOSSEIN v. ABDOL ALI*, 8 W.R. 476. [R., 6 C. 564 = 7 C.L.R. 583.]

(195)—*Tender, when valid—Time—Amount—Deposit—Notice.*—In order that a payment may be a valid tender, the whole of the money due must be deposited within the time stipulated under the agreement for payment, and due notice of the deposit must be given to the obligee. *NITA NUND v. MYA RAM*, 3 N.W.P. 80.

(196)—*Usufructuary mortgage—Stipulation as to time of redemption—Time of the essence of the contract.*—In a usufructuary mortgage of agricultural land, it was stipulated that the mortgage might be redeemed by the payment of a certain sum in the Jeth of any year. *Held* that, having regard to the agricultural conditions of the country, the time of payment was of the essence of the contract, and that the mortgagor would not be entitled to redeem in any other month. *BANSI v. GIRDHAR LAL*, A.W.N. 1894, 143.

(197)—*Mortgage—Redemption, Suit for—Second mortgagee's right to redeem, Effect of decree for redemption of first mortgage by mortgagee upon—Representative in interest of mortgagor, if mortgagee is—Liabilities of second mortgagee when no party to suit for redemption of prior mortgage by mortgagor—Foreclosure, Decree for—Res judicata.*—G mortgaged with possession a certain village to B in 1880. In June 1894, G mortgaged the same village to the plaintiff. It was stated in the deed of mortgage that the mortgagee "is at liberty to redeem the property" from B, "former mortgagee," and that for that purpose the mortgagor had left "in deposit" a certain sum of money with the mortgagee and had received the balance in cash etc., etc. In July, G sued B for the redemption of the latter's mortgage. The plaintiff (the second mortgagee) was not made a party to the suit. G obtained a decree for redemption on payment of a certain sum of money. At the time when the plaintiff instituted his suit against G and B, in which he claimed to foreclose the second mortgage and to redeem the first mortgage, the amount found due on the first mortgage had not been paid. Holding that the plaintiff, as the representative

Mortgage—continued.**—9.—Redemption—continued.**

in interest of the mortgagor was debarred from suing to redeem the mortgage by reason of the decree obtained by G against B, and that the mortgaged property was "out of reach" of the plaintiff, the District Judge dismissed the suit for redemption of the first mortgage and foreclosure of the second mortgage and passed only a money-decree against G. *Held*, that the mortgagee is not a representative in interest of the mortgagor, as he does not succeed to the position of the mortgagor as regards the property. A second mortgagee is entitled to redeem the first mortgage whether or not in his mortgaged-deed provision is made for his doing so. All persons claiming under the mortgagor such as purchasers, lessees, and second mortgagees have as such a right to redeem. *Held*, therefore, that the plaintiff, merely because he claimed under G, was not bound by the decree made between G and B (the first mortgagee). *Held*, further, that, even if as found by the District Judge, the plaintiff in his own interest instigated G to bring the suit against B and made over to him the money left with him to redeem B's mortgage, in order to enable G to prosecute the suit, the plaintiff was not really and substantially a party to that suit, was not bound by the decree passed therein, and was not debarred from suing to redeem B's mortgage; and that, as a necessary consequence, he was not liable to pay the amount found due by that decree. *Held* further, that there was nothing in the plaintiff's mortgage deed, which cast on him, in the circumstances, the duty of paying the amount found due on the decree obtained by G against B, although it might have been open to him to pay it. *Held*, further, that the plaintiff was entitled to a decree for foreclosure. *SHEO GHULAM SINGH v. GHULAM SARWAR*, 4 O.C. 100.

(198)—*Mortgage with possession, suit for redemption of—Decree not providing period for payment nor consequences of non-payment—Acquiescence—Second suit for redemption by the sons of the mortgagor, maintainability of—Res Judicata—Civ. Pro. Code (Act V of 1908), ss. 11 and 47—Transfer of Property Act, ss. 92 and 93—Cause of action.*—In the case of a usufructuary mortgage the mortgagor obtained a decree for redemption of the property mortgaged on payment of a certain sum of money, but the decree as framed was defective and improper, inasmuch as it fixed no period for payment nor contained any provision as to the consequences of non-payment, as required by s. 92, Transfer of Property Act. The mortgagor never took out execution of the redemption decree nor was the amount due from him ever paid by him into Court. The sons of the mortgagor brought a second suit for redemption. *Held per Piggot, A.J.C.*—(1) That the responsibility of acquiescence in the defective decree should be shared by the defendant mortgagee. (2) That, the apparent object of the Legislature in providing for sale under s. 92, Transfer of Property Act, being to secure to the

*Mortgage—continued.***—9.—Redemption—continued.**

mortgagor the difference between the market value of the property and the amount for which it was mortgaged, to hold that the second suit was barred would amount to giving the mortgagee a decree for foreclosure—a result which the Legislature never contemplated. (3) That, as the mortgagee could have avoided this contingency by seeing that the decree was passed in conformity with law, the principle of *res judicata* should not be applied in a doubtful case of this kind. *Per Evans, J. C. and Lindsay, A.J.C.* (1) That the main question to consider in cases of this kind was not whether any legal relation subsisted between the parties, assuming the same to subsist, to the suit, but whether the plaintiff was not precluded from seeking to enforce his rights by reason of his having sued upon the same cause of action and obtained an adjudication. (2) That the former suit and the adjudication thereupon exhausted the original cause of action, and the suit was therefore barred under ss. 13 and 244, Civ. Pro. Code, (1882) (ss. 11, 47, and Act V of 1908). (3) That the suit being one for recovery of property as also for payment of a debt, the sons were in no better position than the father, who could not have re-opened proceedings in consequence of which property passed out of the family. *Per Lindsay, A.J.C.* (1) That the second suit was based on the same cause of action, though the plaintiff might have had to pay a larger sum than he was ordered to pay in the first suit in order to be able to get possession of the mortgaged property. (2) That it was the mortgagors who were seeking the decree, and the form of the decree was their concern and not that of the mortgagees and in view of their laches in not taking out execution of a perfectly valid decree, the mortgagors were not entitled to any consideration. **BHOLA SINGH v. JAI GOVIND TIWARI, 14 O.C. 257.** (16 B. 480, 23 B. 592, 25 A. 214, 6 O.C. 101, 10 O.C. 82, S.C. No. 256, 6 O.C. 367, 10 B. 461, 25 M. 300, 24 A. 44, 32 A. 45, 15 C. 422, 19 A. 202, R.)

(199)—*Mortgage—Agreement in subsequent deed postponing redemption until payment of another debt, if valid.*—An agreement embodied in a mortgage deed to postpone redemption of the mortgage until payment of another debt which had not been made a charge on the land, is valid (12 B. 231, R.). And the law is the same even in cases where a similar agreement is contained in a subsequent deed executed for a fresh consideration. **KRISHNAJI v. MAHESHWAR LAKSHMAN GONDHALEKAR, 20 B. 346.** [R., 9 C.W.N. 789, 8 O.C. 132, 11 Bom. L.R. 318; D., 6 Bom. L.R. 313=28 B. 349.]

(200)—*Stipulation in the bond postponing the period of redemption in case the mortgagor fails to redeem within a specified period—Valid agreement—Penalty.*—In a usufructuary mortgage, there was a stipulation that the mortgagor could redeem on the expiry of 13 years, and that, if he failed so to redeem, then, the mortgage would hold good for another period of 13 years. The mortgagor

*Mortgage—continued.***—9.—Redemption—continued.**

did not redeem at the expiry of the first 13 years, but brought a suit to redeem about a year after the expiry of the first term of the years: *Held*, that his suit was premature, as the stipulation postponing the period of redemption was enforceable at law and not penal. **RAMBARAN SINGH v. RAMKER SINGH, 10 Ind. Cas. 243.**

(201)—*Mortgage—Decree for redemption directing payment of mortgagee's costs on a certain date, or in default, foreclosure—Effect of default—Enlargement of time fixed for redemption, in execution proceedings.*—It is not competent to a Court in execution proceedings to enlarge the time for redemption where the redemption decree states that the effect of not redeeming within a certain time fixed is that the mortgagor's right of redemption should remain foreclosed (13 B. 106, R.). In the present case, plaintiff sued for redemption of a certain land, and it was found that the mortgage debt was paid off out of the rents and profits, and a decree was therefore passed awarding possession to the plaintiff, with a direction that each party was to bear his own costs. On appeal, this decree was modified to the effect that the plaintiff should pay the defendant's costs of the suit as well as of the appeal on or before 1st April, 1888, that the defendant should deliver up the land to the plaintiff, and that in case the plaintiff failed to pay the costs as directed, he should for ever be foreclosed. This decree was in 1887, but before this decree, the plaintiff in execution of the first Court's decree had taken possession of the land. The plaintiff failed to pay the defendant's costs as directed by the appellate Court within the time fixed by it. Thereupon, the defendant applied to the Court for restoration of the property into his possession, urging that the property had now vested in him by reason of the plaintiff's default in paying his costs on the appointed day. *Held* that the defendant ought to be restored to possession, that the fact that the plaintiff was in actual possession at the time of the appellate Court's decree did not in any way affect the foreclosure decree of that Court, and that the Court cannot now in execution proceedings pass any order extending the time for payment of the redemption money; and that the effect of the failure of the plaintiff to pay the amount of defendant's costs which became part of the mortgage money, within the time fixed in the decree, was to render the plaintiff finally foreclosed. **SUBBANA v. KRISHNA, 15 B. 644.** [R., L.B.R. 1893—1900, 175, L.B.R. 1893—1900, 420, 17 C.P.L.R. 62.]

(202)—*Mortgage—Redemption—Decree—Appeal—Payment by mortgagor after time fixed—Withdrawal of appeal—Order of withdrawal not a decree—Decree not containing foreclosure clause—Right to bring another redemption suit.*—A mortgagor sued for redemption and obtained a decree which provided three months for payment of the mortgage amount. The mortgagee appealed against the decree. Pending

Mortgage—continued.**—9.—Redemption—continued.**

this appeal and after the expiration of the three months allowed by the decree the mortgagor paid the amount into Court. The Court made an order allowing the payment and granted execution. On appeal, the High Court discharged this order on the ground that the Court executing a decree had no power to enlarge the time. Then the mortgagee withdrew his appeal against the redemption decree. The mortgagor then applied for execution and contended that the order for withdrawal of the appeal was equivalent to a decree of the appellate Court and that, where there was an appeal, the time prescribed by the original decree ran from the date of the appellate decree. *Held* that the date of the withdrawal of the appeal would not afford a fresh starting point for the three months within which he could redeem. The withdrawal rendered it unnecessary for any decree to be drawn up, and the only decree which could be executed was that passed by the original Court. [R., 22 B. 500, 6 O. C. 48, 5 N.L.R. 88=3 Ind. Cas. 61.] *Quære*:—When the decree in a redemption suit contained no foreclosure clause, whether the mortgagor could file another suit to redeem? CHUDASAMA MANABHAI MADARSANG v. MAHANT ISHWARGAR BUDHAGAR, 16 B. 243.

(203)—*Mortgage by conditional sale—Equity of redemption—Redemption after specified time.*—The doctrine of the English Law with respect to the equity of redemption, after default of payment of the mortgage-money, is unknown to the ancient law of India prevailing in Madras, which, in the absence of any Regulation or Act of the Legislature altering such law, determines the interest of mortgagor in favour of the mortgagee under a conditional sale made absolute by failure of the mortgagor to redeem at the time specified in the deed. The provisions of Bengal Reg. XVII of 1806, allowing, in respect of *bye-bil-wafa*, the mortgagor, or his representatives, to redeem at any time before the foreclosure, have not been extended to Madras. In this case, the suit to redeem was instituted in 1853, and the suit was held not maintainable after the time fixed in the deed. PATTABHIRAMIER v. VENKATAROW NAIKHAN, 7 B.L.R. 136, P.C.=13 M.I.A. 560=15 W.R. 35. [F., 3 M. 26, 8 M. 185; Appr., 1 M. 1=2 I.A. 241, P.C.; R., 22 W.R. 475, 2 B. 231, 6 C. 564, 4 M. 179, F.B., 11 M. 403, 20 B. 677, 22 A. 149, P.C., 14 M.I.A. 347; D., 9 B.H.C. 69, 13 B.L.R. 205, P.C.]

(204)—*Mortgage—Law of foreclosure in Bengal as established by Regulations and factors—Benamsee lease—Error in plaint no bar to relief really sought—Conditional sale—Foreclosure—Suit for possession and mesne profits—Necessity for mortgagee in possession to produce account books in Court—Reg. XV of 1793, s. 11.*—Up to the year 1806, the rights of the holder of a *bye-bil-wafa* (conditional sale) were enforceable according to the strict terms of the contract. It was then necessary for the

Mortgage—continued.**—9.—Redemption—continued.**

mortgagee, if he wished to save his estate from forfeiture, to tender the amount due, or to pay it into Court, pursuant to the provisions of Regulation I of 1798, within the period stipulated for the repayment of the loan. Regulation XVII of 1806 first introduced a modification of the strict rights given by the contract. S. 7 of that Regulation gives the mortgagor a right of redemption within one year after an application by the mortgagee to the Court under s. 8 of that Regulation. After such an application, the mortgagor must either pay or tender the money lent, or the balance then due, if any part of the principal sum has been discharged, and if the mortgagee has not been in possession, any interest that may be due, or he must make a deposit pursuant to s. 2 of Regulation I of 1798. The general effect of these Regulations is, that if anything be due on the mortgage and the mortgagor makes no deposit or an insufficient deposit, the right of redemption is gone at the expiration of the year of grace. The title of the mortgagee, however, is not even then complete. A mortgagee after having done all that Regulation XVII of 1806 requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession. In that suit the mortgagor may contest the validity of the conditional sale, or the regularity of the proceedings taken under Regulation XVII of 1806 in order to make it absolute. He may also allege and prove that nothing is due or that the deposit which he has made is sufficient to cover what is due, but the issue, in so far as the right of redemption is concerned, will be whether anything, at the end of the year of grace, remained due to the mortgagee, and if so, whether the necessary deposit had been then made. If that is found against the mortgagor, the right of redemption is gone. [Appr., 15 W.R., P.C., 35=7 B.L.R. 136=13 M.I.A. 560; Expl., 3 Agra 358; R., 13 W.R. 44, 17 W.R. 197, 3 A. 610=A.W.N. 1881, 31, 3 A. 770=A.W.N. 1881, 66, 6 A. 344=A.W.N. 1884, 110, 12 B. 36, A.W.N. 1893, 209=16 A. 59; D., 16 W.R. 251, A.W.N. 1892, 108=14 A. 405.] The defendant's husband gave the plaintiff an instrument which purported to be an absolute bill of sale of certain lands in consideration of a certain sum advanced. On the same day, the plaintiff executed to the defendant's husband an *ikrar* importing that on payment of the said sum with interest on a specified date, the sale should be void; but that in the event of the seller not paying the principal and interest according to his engagement, the *ikrar* was to be null and void, and the purchaser was to become the absolute proprietor of the property. On the day before the date of the bill of sale, the defendant's husband had granted a lease of the mortgaged premises *benamsee* to the plaintiff's son, but really

Mortgage—continued.**—9.—Redemption—continued.**

to plaintiff who, under colour of it, obtained possession of the mortgaged premises. Plaintiff commenced this suit in order to complete his title under the foreclosure. Treating the lease to his son as a subsisting lease to that person, and himself as out of possession, plaintiff asked to have possession decreed to him together with mesne profits. *Held* that, as the real object of the suit was to perfect plaintiff's title as absolute owner of the property, he was not debarred from that relief, if he was otherwise entitled to it, because, under an erroneous view of the lease, he had asked for it by his plaint in a somewhat different form and with something to which he was not entitled. That the lease did not save the plaintiff from the liabilities whilst it gave him the advantages of a mortgagee in possession, still less could it be taken to modify the terms of the conditional sale. That the plaintiff was entitled to possession of the mortgaged premises as absolute owner by virtue of the conditional sale which had been duly made absolute but was not entitled to a decree for any mesne profits. [*Cons.*, 6 C. 564=7 C.L.R. 583.] Under s. 11, Regulation XV of 1793, the production of accounts by a mortgagee in possession seeking to foreclose, cannot be called for when there is neither plea nor proof that the usufruct had liquidated the principal and interest, and where no deposit had been made to cover the balance admitted to be due. The necessity for a mortgagee in possession to produce his accounts arises:—First, when the mortgagor has deposited the principal money, leaving the question of interest to be settled by an adjustment of the account. Secondly, when the mortgagor has deposited all that he admits or alleges to be due; and thirdly when he pleads and undertakes to prove that the whole of the principal and interest had been liquidated by the usufruct of the mortgaged premises. *FORBES v. AMEEROONISSA BEGUM*, 1 Ind. Jur. N.S. 117=5 W.R.P.C. 47=10 M.I.A. 340. [*F.*, 11 W.R.P.C. 19.]

(205)—*Right where mortgagee has purchased equity of redemption—Act VI of 1855, Construction of—Sale of legal and equitable rights of judgment-debtors.*—Cl. 1, s. 1, Act VI of 1855, shows that the statute was designed for the benefit of creditors, and that it authorized sale of both the legal and equitable rights of judgment debtors. Under this clause, therefore, an equity of redemption was a kind of property that might be seized and sold. A, a mortgagee who takes from B as security an existing mortgage from C to B, stands in the same position towards, and is subject to the same equities in respect of, the mortgagor B, who has assigned that mortgage to him by way of sub-mortgage, as B himself, a mortgagee, does to the original mortgagor C. A mortgagee, at a sheriff's sale held under a writ of *fi. fa.* sued out by him upon his mortgagor's bond and a warrant to confess the mortgage-debt, purchased his

Mortgage—continued.**—9.—Redemption—continued.**

mortgagor's equity of redemption and obtained a conveyance thereof from the Sheriff under cl. 3, s. 1, Act VI of 1855. *Held*, in a suit by the mortgagor against the mortgagee for redemption of the mortgage, that the latter was entitled under that Act to hold the mortgaged estate against the mortgagor freed from the equities existing in him previous to sale and conveyance of his rights and interests under the mortgage. *TOYLUCKOMOHUN TAGORE v. GOBIND CHUNDER SEN*, 1 Ind. Jur. O.S. 128=1 Hyde 289.

(206)—*Heir of mortgagor, Right of, to redeem—Right of purchaser—Limitation—Suit to redeem against transferee, or (in alternative) to enforce terms of purchase.*—The form of mortgage was the usual indigo planter's mortgage, with power of sale. After heavy losses, the agents (mortgagees) stopped the factories, and sold them, informing the planter (mortgagor) of the sale, and suggesting his concurrence. He, in a written acknowledgment, gave reluctant assent: he was not called on for any formal confirmation or act; the mortgagees wrote off the greater part of the debt to profit and loss, credited the purchase-money, and closed the account. The purchaser took and retained possession. After two years the mortgagor died, leaving a will, in which he described his property, but did not mention the mortgaged factories. The conveyance to the purchaser was produced, in which the mortgagor was made a party, but which was dated and executed after the mortgagor's death. It purported to be, not an exercise of the power of sale, but a transfer of the legal estate by the mortgagees at the request of the mortgagor: it was executed by the mortgagees and purchaser. *Held*, firstly, that the mortgagor's heir was not entitled to redeem (see also *Sreemulmoney Bebee v. Goberdhone Bermono*, 2 Ind. Jur., N.S., 319); also that, on dismissal of the redemption suit, no terms or conditions could be imposed on the defendant, who in this case held under the original contract of sale to which the mortgagor assented. *Held*, secondly, that even had the contract included (as argued for appellants), an undertaking to indemnify from liabilities, the payments sought to be reimbursed were beyond six years, and no fraud was proved; therefore as to these the suit was barred. *DOUCETT v. WISE*, 2 Ind. Jur. N.S. 280.

(207)—*Redemption—Charge—Title through owner of charge—Title based on second mortgage—Priority.*—Where B, a purchaser of certain property under a simple money decree, has redeemed the whole mortgaged property, he has a charge on the shares of the other mortgagors but his right to enforce that charge dates from the day when he paid off the entire mortgage and does not, therefore, take priority over the right of one claiming directly under a mortgage executed after the mortgage redeemed by B, but prior to that redemption. *MAHESH DATT PANDEY v. BABU DAN BAHADUR PAL*, A.W.N. 1906, 179.

Mortgage—continued.**—9.—Redemption—continued.**

(208)—*Civ. Pro. Code (Act XIV of 1882), s. 244—Mortgage—Money decree by mortgagee—Execution—Sale of mortgaged property in execution—Purchase by mortgagee at the sale—Mortgagor's remedy to set aside the sale lies in application under s. 244 and not in a separate suit—Property purchased at the sale by stranger—Stranger obtaining possession and retaining it for some time—Stranger selling the property to mortgagee—Mortgagee can rely on his vendor's title—Suit for redemption by mortgagor.*—Five Survey Nos. 68, 71, 75, 76 and 77 were mortgaged by the plaintiff's predecessors to the defendant's predecessors in 1873. The interest was payable every year. The mortgagee obtained a decree for Rs. 500 in 1876 against the mortgagor on account of arrears of interest. In execution of the decree, Survey Nos. 68 and 75 were put up for sale and purchased by the mortgagee in 1877. About the same time Survey Nos. 71, 76 and 77 were put up for sale and purchased by B who obtained possession. In 1879 B sold the Survey Numbers to the mortgagee, who remained in possession of all the Survey Numbers ever since. In 1907, the plaintiffs filed a suit to redeem the five Survey Numbers; *Held*, (1) that, as regards Survey Nos. 68 and 75, the only remedy which the plaintiffs had was in the first instance to get the sale set aside under proceedings taken in execution under s. 244, *Civ. Pro. Code* (1882); and that, having failed to do so, they could not maintain their suit for redemption, because the sale was not void but only voidable. (2) That, as to Survey Nos. 71, 76 and 77, they passed into the possession of a stranger to the decree, whose sale was confirmed and who obtained possession and enjoyed it for two years; and that the mortgagee who subsequently purchased from him was entitled to rely on the title of his vendor. The ruling in 22 B. 624 has no application to the case of a purchase by a stranger. **SAHADU MANAJI SHINDE v. DEVLIA JABA MAHAR, 14 Bom. L.R. 254=14 Ind. Cas. 780.**

(209)—*Suit for redemption by a purchaser of mortgagor's interest in execution of simple money-decree—Right of puisne mortgagee to get the amount paid for prior mortgage.*—A simple mortgage of certain property was made to a certain person. Subsequently, one of the mortgagor's sons usufructually mortgaged the same property to the defendants. In execution of a decree obtained in the suit on the simple mortgage, to which the puisne mortgagees were not parties, three-fourths of the mortgaged property were sold and purchased by the heirs of the decree-holder. Against the puisne mortgagees in possession, a suit for possession was successfully brought by the auction purchasers. Thereupon, the puisne mortgagees brought a suit for redemption and obtained possession of the property in execution of their decree. Plaintiffs, the purchasers of the interests of the usufructuary mortgagee and some of his brothers, in execution of a simple decree

Mortgage—continued.**—9.—Redemption—continued.**

for money, brought this suit to recover possession of the property comprised in the usufructuary mortgage upon payment only of the amount due on that mortgage. *Held*, that the plaintiffs were not entitled to recover possession upon payment of the amount of the usufructuary mortgage alone, but were bound also to pay the amount of the simple mortgage which had been redeemed by the defendants. **KIRAT v. DERI SINGH, 27 A. 308=A.W.N. 1904, 268.**

(210)—*Prior and subsequent mortgagees—Sale of mortgaged property held in execution of prior mortgagee's decree—Subsequent mortgagee no party thereto—Price to be paid by subsequent mortgagee on seeking to redeem.*—A subsequent mortgagee is not entitled to redeem the prior mortgage by simply paying the price for which the mortgaged property may have been purchased at an auction sale held in execution of a decree obtained by a prior mortgagee without joining the subsequent mortgagee as a party; but such subsequent mortgagee must, if he wishes to redeem, pay to the prior mortgagee the full amount due on the prior mortgage. **PHULMANI CHAUDHRAIN v. NAGESHAR PRASAD, 8 A.L.J. 155=9 Ind. Cas. 670=33 A. 370. (19 A. 597, Appl.)**

(211)—*Mortgage by tenant of his holding—Right of landlord to redeem mortgage.*—A landlord has no such interest as would entitle him to redeem a mortgage of his holding by an absolute occupancy tenant. **GANPAT v. BHANGI, 15 C.P.L.R. 175. (6 B. 139, R.)**

(212)—*Mortgage—Grove-holder, mortgage by—Zamindar's rights to redeem—Transfer of Property Act, s. 91.*—Where a person holding a grove as a tenant is alive and resident in the village and has mortgaged the grove, the zamindar as such has not such an interest within the meaning of s. 91 of the *Transfer of Property Act* as would entitle him to redeem the mortgage. **IKBAL HUSAIN v. SHEO CHARAN, 12 O.C. 201 (B.)=3 Ind. Cas. 521.**

(213)—*Equity of redemption—Court-auction—Purchase by mortgagee with leave to bid in execution of his own money decree—Suit by mortgagee to proceed against unpurchased property—Mortgagor, a party—Mortgagee allowed to take purchased portion in satisfaction of his debt—Mortgagor standing by without contest—Mortgagor's right to redeem in a subsequent suit—Estoppel by conduct—Sale in contravention of terms of s. 99 of Transfer of Property Act, 1882—Effect—Applicability of s. 99 to Sind.*—In May 1888, plaintiffs mortgaged certain property to defendants for Rs. 4,000. In March 1890, they passed a second mortgage on the same property to secure unpaid arrears due under the first deed. In 1892, the mortgagees sued under the second deed to recover Rs. 3,030, praying for the sale of the property subject to the first mortgage. The suit resulted in the passing of a money-decree for Rs. 2,705. In execution of this

Mortgage—continued.**—9.—Redemption—continued.**

money-decree, the mortgaged property was put up for sale subject to the first mortgage. The mortgagees obtained leave to bid at the auction, and purchased a portion of the property in auction sale, which was confirmed later on. The mortgagees were put in symbolical possession of the property in June 1896. Sometime in 1896, the mortgagees instituted a suit on their first mortgage and prayed for realising the mortgage amount from the portion of the property not purchased by them. It was held in that suit that the mortgagees should have recourse first to that portion which was purchased by them. In that suit the mortgagors did not contest the validity of the sale, but contended that the portion of the property purchased by the mortgagees should bear the whole burden of the mortgage. By upholding the sale, the mortgagors succeeded in protecting the rest of the mortgaged property. In 1900, the mortgagees filed a suit to recover by partition the share purchased by them, and a decree was granted. Plaintiffs (mortgagors) now sued for redemption of the share purchased by the mortgagees. *Held, per Lucas, J.C., Crouch, A.J.C. (concurring)*, that, if the only previous litigation between the parties had been the suit in which the equity of redemption was purchased by the mortgagee, and the suit for partition and possession of the property purchased, the Court would be inclined to hold that the plaintiffs (mortgagors) had not lost their right to redeem, but the fact that, in the subsequent suit of 1896 to which the plaintiffs (mortgagors) were parties, the right to redeem was decreed to the mortgagees, altered the situation, and that therefore the plaintiffs (mortgagors) are now barred from claiming the right to redeem. *Held also per Lucas, J.C.*, that a mortgagee, who puts up the mortgaged property to sale in execution of a money decree and himself purchases the equity of redemption, cannot thereby avoid the liability to be redeemed, even though the sale of the equity of redemption has been duly confirmed by the Court. (1 C. 337, 32 C. 296, P.C., 22 B. 624, 22 M. 647, 23 M. 377, 17 M.L.J. 163, R.; 35 C. 61, Cons) *Held, per Crouch, A.J.C.*, (1) that, if there is a sale in contravention of the terms of s. 99 of the Transfer of Property Act, the sale is not a nullity, but is merely an irregularity, but may be set aside if the proper procedure be followed within the time allowed by the law (32 C. 296, P.C., 35 C. 61, R.) and that, in Sind where s. 99 is not in force, a sale in contravention of the equitable principle embodied therein can be nothing more than an irregularity, and is good until set aside (5 B.L. R. 450, 35 C. 61, D.; 5 C. 198, P.C., 16 C. 682, P.C., 32 C. 296, 22 B. 624, 23 B. 119, 23 M. 377, 24 M. 96, 30 M. 313, R.) Where an equity of redemption has been sold at a Court sale, and such sale is not a nullity, a mortgagor can claim redemption, without getting the sale first set aside, only on the theory that the purchaser of the equity of redemption is a trustee for him, or, in other words, only where

Mortgage—continued.**—9.—Redemption—continued.**

the purchaser of the equity of redemption is guilty of "constructive fraud." *Held also per Crouch, A.J.C.*, (2) that a mortgagee, is ordinarily, under no disability to purchase the equity of redemption from his mortgagor, and that, if he purchase it under circumstances which negative any presumption that he has taken an unfair advantage of his position, the sale is good. *Held that*, therefore, if a mortgagee take the precaution of obtaining the permission of the Court, before the purchase of the equity of redemption, in a sale held in execution of a money-decree, even though passed in respect of the mortgage-debt, he cannot be held guilty of constructive fraud, unless there be other circumstances constituting it, and hence does not take the property subject to redemption. **WADERO SUMAR WD. WADERO RAHIMDINO v SAJANMAL WD. JEOMAL, 3 S.L.R. 17=1 Ind. Cas. 952.**

(214)—*Mortgage—Mokurruredar—Redemption.*—A mokurruredar holding under a mortgagor is not entitled to redeem when the mortgage comes to an end. **LALLA DOORGA PERSHAD v. LALLA LUCHMAN SAHOY, 17 W. R. 271. [F. & Appl., 9 C. 643.]**

(215)—*Property purchased from heir of owner—Suit by purchaser against mortgagee from owner—Certificate of heirship under Act XXVII of 1860 not binding on defendant—Pleas open to mortgagee defendant.*—Plaintiff, as purchaser from a daughter of one M, sued for possession of certain property which stood formerly in the name of M and was mortgaged by him to the defendant. Defendant alleged that M was only a trustee for three other persons who had subsequently executed a bond to him to secure a further sum of Rs. 350, arranging to charge the interest thereon upon the land. Plaintiff put in a certificate obtained by the daughter, under Act XXVII of 1860, enabling her to collect the debts of her deceased father M. The lower appellate Court refused to try the question whether the plaintiff's vendor was the daughter of M, and holding that the plaintiff failed to establish that M was a mere nominal party, affirmed the decision of the first Court dismissing the suit. On appeal by the defendant, the High Court *held*, in the first place, that, although, as between the daughter and any other immediate heir of M who could have appeared, the granting of the certificate under Act XXVII of 1860 might have been conclusive evidence that she was the daughter and heir of M, it was not so as against the defendant, who was not a party to, and not bound by, that proceeding, and that he was at liberty to show that plaintiff's vendor was not the daughter of M, and secondly, that although the original purchase in the name of M was *prima facie* evidence that he was the party legally interested in the purchased property and although the defendant, who took a mortgage from him, ought not to be allowed to

Mortgage—continued.**—9.—Redemption—continued.**

defeat his claim to redeem, simply by setting up the title of a stranger, still, this could not bar the right of the defendant to show the true rights and interests of the parties at the time of the suit. *BHUNDOO BUGUT v. SYED MAHOMED HOOSSEIN*, 2 W.R. 70.

(216)—*Purchaser of rights of mortgagor's heirs—Suit for possession of property bought—Onus on plaintiff, of proving right to equity of redemption and to possession on payment.*—Plaintiff sued for possession of property alleged to have been mortgaged to the predecessor in title of the appellant. Plaintiff, the present respondent, claimed as purchaser of the rights of the heirs of a person to whom the rights of the original owner, the mortgagor, were alleged by the plaintiff to have been transferred by a sale in execution of a decree. The defence was that when plaintiff purchased he bought nothing, his vendors having had no interest whatever in the property. The lower Court gave the plaintiff a decree for an account of what was due on the mortgage, with order for possession if nothing should, on taking the account, be found to be due, or on immediate payment of the balance, due from him, if any balance should be found still due. The High Court, on appeal, reversed the decision of the lower Court and dismissed the suit. Before he could be entitled to a decree, he had to prove that the mortgage still existed and that he, as occupying the position of his vendors, was entitled to the equity of redemption and to possession on payment of what remained due. The High Court expressed that it could not concur in the conclusion of law at which the Judge of the lower Court had arrived. He had overlooked the important point that the plaintiff came into Court suing to eject those who were in possession, and who had been many years in possession, and that it was upon him to prove a strict legal title to the relief sought to be obtained by him. *ASHRUFFOONNISSA BEGUM v. RAGHOONATH SAHOY*, 2 W.R. 267. [R., 24 B. 591=2 Bom. L.R. 386.]

(217)—*Mortgage—Redemption—Burden of proof.*—Where the plaintiffs brought a suit against the defendants for their share in the land in dispute, on the ground that the parties were representatives of the original mortgagors and the defendants had redeemed the land, and offered to pay contribution, *held*, that as the plaintiffs had failed to prove their title, they were consequently not entitled to the relief claimed by them. *THAKUR DAS v. JOWALA MAL*, 61 P.L.R. 1904.

(218)—*Suits on mortgages—Prior mortgages not impleaded in puisne mortgagee's suit—Vice versa—Purchases by mortgagees under their respective decrees—Possession delivered to puisne mortgagee-purchaser—Suit by prior mortgagee-purchaser for possession or his being redeemed—Maintainability of suit—Lis pendens, applicability of doctrine of.*—The plaintiff was the assignee of a decree obtained by his assignor in

Mortgage—continued.**—9.—Redemption—continued.**

a suit brought on a mortgage-bond. The defendants took a mortgage from the mortgagor of the plaintiff's assignor. The defendant's mortgage was of a subsequent date and it included the lands comprised in the plaintiff's decree. Subsequent to the date of the plaintiff's decree, the defendants obtained a decree upon their mortgage-bond. Both parties brought the mortgaged properties to sale and themselves purchased the lands. But the sale to the defendants was prior to that of the plaintiff. The defendants obtained possession of the lands purchased by them. At the time when the plaintiff's assignor brought the suit on his mortgage, he had no knowledge of the defendant's mortgage and, in consequence he did not make the defendants parties to his suit. But the defendants, though they had knowledge of the prior mortgage, failed to include the prior mortgagee in their suit. In the present suit, the plaintiff prayed for possession of the property or in the alternative that the defendants might redeem him or give up possession. *Rampini and Brett, JJ.*, having held different views as to the maintainability of the suit, the appeal was referred to *Mitra, J.* *Held*, the decree obtained by the first mortgagee was valid in law, notwithstanding that the present defendants were not impleaded as defendants in the suit, which resulted in the decree. It was, however, imperfect and the sale under it had the same imperfection. The defendants, on the other hand, purchased under a decree for sale on their own mortgage. They took the property in the same condition as it stood at the date of the mortgage to them. If they desired to continue in possession, they were bound to satisfy the mortgage-debt which was imposed on the property before any right accrued to them under their mortgage. The respective rights of the parties could be adjusted in this suit. The plaint contained all the necessary allegations of fact and the reliefs, claimed in the alternative were all that could be demanded. There was no necessity for a fresh suit for sale. *Held*, further, that the doctrine of *lis pendens* did not apply in this case. If the title of the defendants was created, or the devolution of interest in their favour took place, during the pendency of the first mortgagee's suit, the doctrine of *lis pendens* would have applied. But the defendant's title related back to a date anterior to the first mortgagee's suit. There was thus no alienation *pendente lite*, *Mitra, J.*, agreed with *Brett, J.*, in dismissing the appeal and allowing the suit. *HAR PERSHAD LAL v. DEI MARDAN SINGH*, 9 C.W.N. 728=1 C.L.J. 371=32 C. 891. (7 C.W.N. 11, *Appr.*; 5 C. 265, 5 C. 269, 22 B. 939, 31 C. 737, 23 W.R. 187, R.) [R., 5 C.L.J. 315=11 C.W.N. 403, 6 C.L.J. 612=12 C.W.N. 107.]

(219)—*Mortgaged property, sale of—Rights and liabilities of mortgagee and purchaser—Prior encumbrances.*—On the death of G, who granted certain mouzabs in *zur-i-peshgi* lease to the

Mortgage—continued.**—9.—Redemption—continued.**

ancestor of the plaintiff, his heir F pledged one of the mouzahs, Becharampore, with others as collateral security, in a bond in favour of plaintiff; and some years later executed a zur-i-peshgi pottah in favour of defendant who obtained possession by paying to plaintiff the money due under the first zur-i-peshgi lease. Plaintiff then sued F alone on his bond and obtained a decree, in execution of which he sold a share in Becharampore and purchased it himself. He now sues for possession and to have the superiority of his lien declared over defendant's zur-i-peshgi. *Held* that plaintiff is not entitled to possession before he pays off the whole of the amount advanced by the defendant to clear off the debt due under the first zur-i-peshgi lease, and that the holder of a subsequent encumbrance, by paying off a prior encumbrancer, acquires all the rights of the latter, to the extent of the amount actually paid by him for that purpose. **BEKON SINGH v. BABOO DEEN DYAL LALL, 24 W.R. 47.**

(220)—*Attaching creditor—Right to redeem mortgage—Civ. Pro. Code (1877), ss. 282, 295.*—An attaching-creditor has not, as such, any right to redeem a mortgage subsisting prior to the attachment. The position of an attaching-creditor and his rights with respect to the land are dependent entirely upon certain sections of the Civ. Pro. Code. **SOOBHUL CHUNDER PAUL v. NITYE CHURN BYSACK, 6 C. 663 = 7 C.L.R. 201. [F., 14 M. 491; Compared, 30 M. 207 = 17 M.L.J. 84]**

(221)—*Redemption, Suit for—Mortgage of joint property which subsequently became separate property of mortgagor—Sub-mortgagee having interest in mortgaged property—Mortgagee, right of, to redeem sub mortgage—Transfer of Property Act, ss. 43, 85, 86 and 92—Mortgage.*—In a suit for redemption of mortgage, the plaintiff's case was that R. D. owned a four *biswa* share in a village which included six plots of *sir* lands, that R. D. in 1850 mortgaged the share and the *sir* lands to one R. N., who in turn sub-mortgaged to J. G.; that R. D., died leaving a son B., during whose minority A. P. in virtue of his position as a co-sharer in the village, paid off the mortgage effected by R. D., obtained possession of the property and held it as a mortgagee himself, that thereafter on June 28th, 1875, A. P. mortgaged the six plots above-mentioned with four others to C, father of defendants 1 and 2. This was the mortgage which the plaintiff sought to redeem. As regards the first six plots, he alleged that, on February 20th, 1880, B redeemed the mortgage of the share but did not obtain possession of the plots which were in possession of the sub-mortgagee C.; that on January 20th, 1887, B's widow R. acquired from A. L., the son of A. P., the right to redeem the sub-mortgage of 1875 and that on May 30th, 1892, R. sold all her rights to the plaintiff. The plaintiff further alleged that he obtained from A. L., on March 23rd, 1893, a sale-deed of any

Mortgage—continued.**—9.—Redemption—continued.**

rights that he might still have had in the six plots first mentioned as the heir of A. P. He contended that, either, under his purchase from R. in May, 1892, or under the deed of March, 1893, he acquired the right to redeem the mortgage of 1875 as far as the six plots were concerned. *Held*, that the first mentioned six plots having been mortgaged by R. D., as a separate property and sub-mortgaged to the father of defendants 1 and 2, and, having become on partition the separate property of the owner of the share, the mortgage and sub-mortgage were as valid, as if the plots had all along been the separate property of the owner of the share. *Held*, also, that a sub-mortgagee is a person, who has an interest in the mortgaged property within the meaning of s. 85 of the Transfer of Property Act, and that he should be made a party to a suit for redemption of the original mortgage. In such a suit, the mortgagor should first be given an opportunity of redeeming the mortgage made by him and securing possession of the whole property, and, if he fails to do so, the mortgagee should be given an opportunity of redeeming the sub-mortgage made by him and securing possession of the property affected by it. *Held*, further, that the sale-deed of May 30th, 1892, executed by R. in favour of the plaintiff, included the right to redeem that portion of his share which was held in mortgage by the father of the defendants 1 and 2. As regards the remaining four plots, the plaintiff said that A. P., was the superior proprietor and A. L. the under-proprietor of them; that A. P., by the deed of 1875, mortgaged both his own and his son's right; that he, the plaintiff, purchased the under-proprietary right from A. L., on August 17th, 1896, and thus acquired the right to redeem the mortgage of 1875 in respect to these plots. It was proved that the defendants 1 and 2, by deeds of November 1877 and July 1879, had purchased the superior proprietary right in these plots. In the mortgage of 1875, A. P., did not specify exactly what sort of right he was mortgaging. Regarding the first six plots, it was found that they did not originally form part of the four *biswas* share of R. D., but were the joint property of all the co-sharers; that R. D., had no right to mortgage them but did so; that the mortgage was taken over by A. P., and redeemed by B. who then obtained possession of the share. The six plots in question were subsequently upon a partition of a village allotted to R. as part of the four *biswas* share. *Held*, that the acquisition by the plaintiff of the under-proprietary right in the four plots above mentioned, could not entitle him to redeem the mortgage of the superior right. **LACHMI NARAYAN v. BABU SHEO DAYAL SINGH, 5 O.C. 335. [R., 9 O.C. 233.]**

(222)—*Mortgage—Sub-mortgagee's right to redeem previous mortgage.*—A sub-mortgagee, who is not an assignee of the mortgagee's rights, has no right to redeem a previous mortgage effected by the original mortgagor, in favour of

Mortgage—continued.**—9.—Redemption—continued.**

a third person, even if the sub-mortgagee may have obtained a decree against the original mortgagor establishing his charge on the property mortgaged. *Held*, further, that, though a suit for redemption brought on a title which was incomplete at the time of the filing of the plaint, but ripened into maturity during the suit, should not be dismissed yet a claim cannot be allowed on a new title based on purchase of rights made after the suit was filed. **DEVI CHAND v. BASHO RAM, 23 P.L.R. 1900.**

(223)—*Redemption, Suit for—Assignment of mortgage—Actionable claim—Transfer of property Act (IV of 1882), ss. 131 and 135.*—A mortgage was made on the 2nd February, 1882. It was assigned on the 20th February 1886. The assignees obtained possession of the mortgaged property on the 1st July, 1886, in accordance with the provisions of the mortgage. The mortgagors claimed to redeem the property on the payment of Rs. 14,000, the price paid for the assignment. The assignees claimed to be paid the principal sum secured by the mortgage, and interest and compound interest amounting to Rs. 9,727-8-0 from the date of the mortgage to the 30th June, 1886, i.e., up to the time they obtained possession of the property. The Court of first instance decreed the claim on payment of the price of the assignment. Its judgment was silent as to the question whether the assignees were entitled to any interest on the price. The point raised in appeal was whether a claim to a debt secured by the mortgage of immoveable property was an "actionable claim" within the meaning of the Transfer of Property Act, 1882, before the amendment of that Act by Act II of 1900. *Held*, that a claim to a debt secured by a mortgage of immoveable property was not an 'actionable claim' within the meaning of s. 131; *held*, therefore, that s. 135, Transfer of Property Act, 1882, was not applicable to the present suit. *Held*, further, that, in order to redeem the mortgage, the mortgagors must pay the principal sum secured by the mortgage and the interest due for the period from the 2nd February, 1882, to the 30th June, 1886, namely, Rs. 9,727-8-0. **JAWAHIR SINGH THAKUR v. PARWAN SINGH, 4 O.C. 210 (B).**

(224)—*Redemption of mortgage by one having no title to mortgaged-property—Personal liability for mortgage-debt created by one having no title to mortgaged property—Redemption—Liability of persons not parties to mortgage-deed—Transfer of Property Act.*—M mortgaged his village for Rs. 16,000 by a deed, dated the 4th July, 1873, in favour of certain mortgagees. After his death, his widow U. K. executed on the 25th July, 1881, another mortgage-deed for Rs. 24,000 in favour of the mortgagees for the money due on the former deed. On the death of U. K., the dispute among the reversionary heirs of M was settled in 1887 so far as the mutation proceedings went by the entry of the name of the defendant's father as owner of 8 annas and of the father of R and his brothers

Mortgage—continued.**—9.—Redemption—continued.**

and one D as owner of 4 annas each. On the 28th May, 1893, R and his brothers deposited, Rs. 24,000 in Court and had notice, under s. 83, Act IV of 1882, issued to G who had become assignee of the mortgage calling on him to take the money and let the mortgage be redeemed. On the 16th June, 1893, the defendant executed a deed of mortgage of his 8 annas share for Rs. 12,000 in favour of the sons and a partner of the assignee, the terms of which were that the "mortgage should be redeemable at the end of ten years; if the mortgagor failed to pay the interest then after 5 years, the mortgagees would be entitled to possession." It was further stated in the deed that the money was borrowed to pay off the debt due on the defendant's share under the deed of the 25th July, 1881. The assignee after this intimated to R and his brothers that only Rs. 6,000 was due from them on the mortgage, the rest having been redeemed as he had also secured Rs. 6,000 from D. He, therefore, took out Rs. 6,000 of the Rs. 24,000 deposited by R and his brothers and returned the deed of the 25th July, 1881, to R and his brothers. Thereafter the defendant R and his brothers and D got possession of the village according to their recorded share, subsequently R and his brothers obtained Civil Court decree for the shares of the defendant and D and thus got possession of the whole village sometime in 1898. The plaintiffs who are the representatives of the sons and partner of the assignee G brought a suit on the 7th October, 1898, against the defendant and also R and his brothers and D for possession as mortgagees of the 8 annas share mortgaged by the deed of the 16th June, 1893, on the allegation that the interest had not been paid for 6 years and they were entitled to possession, and that, if they could not have possession, for sale of the mortgaged property. The Court decreed the claim against the defendants personally and dismissed the suit as against the other defendants and as to possession or sale. The defendant appealed from this decree and the question at issue was simply whether the defendant had been properly made personally liable for the money due under the mortgage-deed of the 16th June, 1893, or whether the decree should have been one capable of being enforced against the property by possession or sale and against the defendants actually in possession of the same. *Held* that the defendant was the sole person liable under the deed of the 16th June, 1893; the other defendants (R and his brothers, etc.) were not parties to it nor they were his representatives. Though the debt, for satisfaction of which the mortgage-money of the deed of 1893 purported to have been borrowed, was no doubt an ancestral debt on the property, yet the defendant had no right to redeem any part of that debt or to create a further charge on the property for that purpose, as he had no title to any part of the property and was not in legal possession of it at the time and that, therefore, that pro-

*Mortgage—continued.***—9.—Redemption—continued.**

erty was not liable for the mortgage debt due under the deed of 1893. The defendant must be held to have borrowed the money of the deed of 1893 to pay off his share of the mortgage-money of the deed of 1881 and he must be held to have received and applied the money to that purpose. The consideration received by the defendant was redemption in his favour and restoration of actual possession to him of the share he claimed, and he was, therefore, liable to fulfil his obligations under the deed. **CHANDRIKA BAKSH SINGH v. BRIJ BEHARI LAL, 4 O.C. 320.**

(225)—*Suit by prior mortgagee—Right of puisne encumbrancers not impleaded as parties to suit.*—The plaintiffs, prior mortgagees, brought the present suit against the puisne encumbrancers and the mortgagor for sale of the mortgaged property. Previous to this, the present plaintiff had brought a suit against the mortgagor only, without impleading the puisne encumbrancers as parties, and obtained a decree. But, the puisne encumbrancers obtained a declaration that the decree was not binding on them. Hence the present suit. *Held* that the puisne mortgagees, if they sought to redeem, must pay the full amount of principal found to be due on the mortgage, with interest at the stipulated rate up to the date of payment, notwithstanding the fact that the former decree did not allow him interest at this rate. **RAM PERSHAD v. GOBINDI, 1 A.L.J. 207.**

(226)—*Suit for redemption, who are to be joined as parties to, in places where the Transfer of Property Act is not in force.*—Even in cases where the Transfer of Property Act is not in force at the time when a suit for redemption is filed, the spirit of the rules contained in it ought to guide the Courts, whose plain duty, in such a case, therefore, is, to insist on the joinder of all the parties that are interested in the subject-matter of the suit. (U.B.R. 1892-1896, Vol. II, 586, U.B.R. 1892-1896, Vol. II, 581, *F.*; 21 W.R. 428, *R.*) Under Buddhist Law the heir of a deceased husband is his widow, and, though the eldest son may have a limited interest to the extent of one-fourth during the widow's lifetime, it is not competent for him to bring, by himself, a suit for redemption of the estate. **SHWE THE v. THA KADO, 3 L.B.R. 169.**

(227)—*Raiyati interest, right of purchaser—Right to redeem—Ss. 91, sub-s. (a), 60, 85, Transfer of Property Act (1882)—‘Interest in or charge upon the property,’ meaning of—Purchaser of portion of equity of redemption—Right to redeem whole—Mortgagee's willingness, necessity for—Suit for redemption—Necessary parties not impleaded—Dismissal of suit—Review, to bring in necessary parties.*—The words “any person having any interest in or charge upon the property,” in sub-s. (a) of s. 91, Tr. P. Act, means any person having an interest in or charge upon the property which is affected by the

*Mortgage—continued.***—9.—Redemption—continued.**

mortgage, and a *raiya* interest is not such an interest. Consequently, the purchaser of a *raiya* interest in the mortgaged property is not entitled to redeem it. [*D.*, A.W.N. 1907, 227 = 4 A.L.J. 703 = 29 A. 679, 12 O.C. 271.] The purchaser of a portion of the equity or redemption must be restricted to the redemption of that share and is not entitled, against the will of the mortgagee, to redeem the whole (13 M.I. A. 401, *R.*) [*F.*, 2 C.L.J. 202, 29 A. 262 = 4 A.L.J. 74 = A.W.N. 1907, 49; *R.*, 6 O.C. 223.] Under s. 85 of the Transfer of Property Act, the plaintiff in a suit for redemption is bound to bring on the record all persons interested in the mortgage. Where the Court of first instance was wrong in allowing the suit to proceed in the absence of the heirs of the first defendant, it is justified in granting a review of its order and in allowing the plaintiff to bring on record the necessary parties. **GRISH CHANDER DEY v. JURAMONI DE, 5 C.W.N. 83.**

(228)—*Redemption—Interest, Non-payment of—Right of assignee of mortgagee to foreclosure in default of payment.*—Where the mortgagor covenanted to pay to the mortgagee the principal sum at a given date and interest in the meantime, and in default of payment of the principal on the date mentioned, interest on so much as should remain due at the same rate, the mortgagee covenanting to reconvey on payment on the given date, and in default of payment of principal or interest at their respective due dates the whole sum to become due, *held* that the assignee of the mortgagee had a right to foreclose on default of payment of an instalment of interest before the date on which the principal was made payable. **PROSADDOSS DUTT v. RAMDHONE MULLICK, 1 Ind. Jur. N.S. 255.**

(229)—*Mortgage by father—Subsequent purchase of equity of redemption by mortgagee in execution of decree in favour of third party—Mortgagee's son not entitled to redeem.*—Where certain property is mortgaged by a father, and subsequently the equity of redemption is sold in execution of a decree against the father in favour of a third person and is bought by the mortgagee, and it is found that both the sale and the mortgage are binding on the family, the mortgagor's son is not entitled to redeem on the contention that the sale of the equity of redemption had not been effected in a suit for sale by the mortgagee on his mortgage. **IKKOTHA v. CHAKKIAMMA, 27 M. 428. (23 M. 377, Not F.)**

(230)—*Mortgage—Redemption suit—Tender.*—The same reason which rendered it necessary that all the mortgagors should be made parties to the suit which any one of them may bring for the purpose of redeeming the mortgaged property, leads necessarily to the conclusion that a tender by one or more of several mortgagors would not be good and would not be such a tender as a mortgagee is bound to accept, unless it were made conjointly by the

Mortgage—continued.**—9.—Redemption—continued.**

whole of the mortgagors, or on their behalf and with their consent. **RAM BAKSH SINGH v. MOHUNT RAM LALL DOSS**, 21 W.R. 428. [Cited., 3 L.B.R. 15.; R., 3 L.B.R. 169.]

(231)—*Suit for possession by mortgagee—Prior purchases of mortgagor's interest in portions of mortgaged property—Redemption and apportionment of liability of purchaser for the mortgage charge—Parties—Mortgage account—Form of decree.*—When a suit for foreclosure, on failure by the mortgagor to redeem, was dismissed as against a person, who was added as co-defendant on account of his having purchased the mortgagor's right in a portion of the mortgaged property in execution of a prior decree against the mortgagor, on the ground that his claim to a portion of the mortgaged property, under a title prior to, and independent of the mortgagee's title, could not be decided in the suit, *held*, in a subsequent suit by the mortgagee, after his purchase of the equity of redemption, for possession of the portion retained by the above purchaser's representative, that as the purchaser had disclaimed in the prior suit the right to redeem the portion, alleging a paramount title, himself and those claiming under him were precluded from afterwards claiming to redeem. [Cons., 8 C.W.N. 365] It was also *held* that the proportion of mortgage charge for which he was liable could not be apportioned by the taking of an account as between him and the mortgagee alone, in the absence of the purchasers of the other portions of the mortgaged property. (13 M.I.A. 404 R.) [R., 19 C. 401, 3 C.L.J. 205=33 C. 425, 35 C. 701=12 C.W.N. 657=7 C.L.J. 563, 28 B. 153] Also *held* in the above case, that a decree, ordering that the representatives of the purchaser should retain possession of the portion purchased, clear of the proportion of the mortgage-debt chargeable on it, on payment by them to the mortgagee of the amount paid by him for the equity of redemption, without any account being taken at all, was incorrect. **NILAKANT BANERJI v. SURESH CHANDRA MULLICK**, 12 C. 414=12 I.A. 171, P.C.=4 Sar. 685. [F., 5 C.L.J. 315=11 C.W.N. 403; Rel. on, 33 C. 590=10 C.W.N. 592; R., 20 A. 23, F.B.=A.W.N. 1897, 163, 5 C.L.J. 527.]

(232)—*Mortgage—Razinama, Abandonment—Equity of redemption—Mirasi or gatkuli tenure—Abandonment—Razinama—Government whether necessary party—Suit founded on abandonment by razinama.*—In accordance with a stipulation in a mortgage deed of gatkuli land, the mortgagor gave a razinama of the land, and the mortgagee held the land subsequently from the Government. *Held* that no equity of redemption could remain in the mortgagor after abandonment. There is always a distinction between razinamas with express words of unreserved abandonment and razinama without such words. The former are total abandonments of all the interests of the holder in the land. In suits based on the abandonment

Mortgage—continued.**—9.—Redemption—continued.**

of miras land by razinama, Government have no interest and need not be made a party, except when the mirasi or gatkuli tenure of the land is a point for determination. **RANU valad AVAJI MALI v. RAMABAI kom MAHADU MALI**, 6 B.H.C. A.C. 265.

(233)—*Suit between mortgagor and mortgagee—Recognition of transfer of mortgage right—Liability of mortgagor to pay transferee.*—Where, in a suit between the mortgagor and mortgagee, it was decided that the mortgagee's rights had been transferred to another, the mortgagor was bound to pay the transferee and could not treat the rights of the transferee as an open question. **SADASHEO BALKRISHNA v. KRISHNA RAO DEORUS**, 2 C.P.L.R. 9.

(234)—*Mortgage—Anomalous mortgage—Transfer of Property Act, s. 98—Right to redeem, restriction or clog on—Penalty, condition in mortgage-deed amounting to—Hard and inequitable condition—Pecuniary compensation for breach of Contract Act, IX of 1872, s. 74—Act VI of 1899—Possession, suit for.*—The appellant sued the respondent for possession as mortgagee of a share in a village on the basis of a mortgage-deed. The principal terms of the deed were that the mortgagor should pay the principal within three years, that he should pay interest until the principal was paid, that he should not alienate the mortgaged property until the principal and interest had been paid, that if he did not pay the principal and interest on the promised date he should place the mortgagee in possession of the property, that if he failed to do so the mortgagee might obtain possession through the Court, that from the date of the mortgagee's obtaining possession the mortgagor should not have any claim to the profits of the property and the mortgagee should not have any claim to the interest, and that after twenty years in the month of Jeth the mortgagor should pay the principal and arrears of interest and redeem the mortgaged property. The respondent pleaded that he was willing to pay the amount due on the deed, that the appellant therefore was not entitled to the possession of the property, that the twenty years' period fixed for payment by the deed of mortgage was very hard and in view of the provisions of s. 74 of Act IX of 1872, as amended by Act VI of 1899, could not be enforced in a Court of equity. *Held*, that the provisions of s. 74 of Act IX of 1872, as amended by Act VI of 1899, were not applicable, as they applied to cases in which pecuniary compensation was sought for breach of contract. *Held*, that the mortgage was an anomalous mortgage and not a combination of a simple mortgage, and usufructuary mortgage and that therefore according to the provisions of s. 98 of the Transfer of Property Act, the rights and liabilities of the parties must be determined by their contract as evidenced by the mortgage-deed. *Held*, that according to the contract as evidenced by the deed, the mortgagee was entitled to possession

*Mortgage—continued.***—9.—Redemption—continued.**

of the mortgaged property in the event of the mortgagor failing to pay the mortgage-money within three years from the date of the deed and on obtaining possession to retain the same for a period of twenty years, and the mortgagor could not redeem until that period had expired. *Held*, further, that the condition in the mortgage-deed that if the mortgagor failed to pay the mortgage-money within the time fixed, the mortgagee should be entitled to possession of the property for twenty years and that the mortgagor should not be entitled to redeem within such period was not a restriction or "clog" on the right to redeem. **TIKAM SINGH v. MAKRAND SINGH, 6 O.C. 167. [R., 7 O.C. 11, 10 O.C. 218.]**

(235)—*Redemption—Usufructuary mortgage—Mashrut-ul-raham—Charge—Covenant to pay the money under two mortgage deeds simultaneously—Clog—Construction of document.*—A executed a usufructuary mortgage in favour of B. Subsequently B advanced a further sum to A, to secure which A executed a *Mashrut-ul-raham* bond, which recited the fact of the previous mortgage and that the mortgagee was in possession of the property mortgaged under the former usufructuary mortgage. It was also stated that the mortgagor had taken a further advance and covenanted that he would not redeem the usufructuary mortgage unless he would also pay the money under the second bond: *Held*, that the second bond created a charge upon the property, and that, in face of the covenant contained in the bond, the mortgagor was not entitled to redeem the first mortgage, unless and until he would pay the money due under the second bond. **MUSAMMAT PANCHU v. DEO KARAN, 6 Ind. Cas. 165. (A.W.N. 1906, 267, Rel. on.)**

(236)—*Clog on redemption—Second mortgage on same property—Agreement to redeem both mortgages simultaneously.*—Certain mortgagors, having taken a further advance on the security of a second mortgage of the same property, covenanted in the second mortgage that they should not be at liberty to redeem it, without, at the same time, redeeming the first. *Held*, that this was a valid covenant and did not amount to a clog or fetter on the right of redemption. **MUHAMMAD ABDUL HAMID v. JAIRAJ MAL, A.W.N. 1906, 267 = 3 A.L.J. 768. [R., 6 A.L.J. 255, 6 A.L.J. 654 = 31 A. 482.]**

(237)—*Mortgage—Consolidation—Clog on equity of redemption—Mashrut-ul-rehn.*—A executed an usufructuary mortgage in respect of certain property in favour of B. Later on A executed another mortgage-deed styled *Mashrut-ul-rehn* in which he stipulated that he would not be entitled to redeem the original mortgage without at the same time paying off the further debt:—*Held*, that both the mortgages were consolidated together, and that A could not redeem the earlier mortgage without redeeming the later. **HARGOBIND v. TULARAM, 10 Ind. Cas. 222. (7 A.L.J. 821, 7 Ind. Cas. 115, R.)**

*Mortgage—continued.***—9.—Redemption—continued.**

(238)—*Redemption—Clog—Covenant to redeem earlier and subsequent mortgages together—Mortgages executed by different persons—Hindu law—Joint family—Right of after born son to contest alienation.*—J, P and C were members of a joint Hindu family. J and P executed a mortgage in 1871 in respect of certain joint property in favour of B. In 1877 J and C executed another mortgage in favour of the same mortgagee in respect of the same property. In the mortgage of 1877 they entered a covenant that the earlier mortgage could not be redeemed unless the amount of the subsequent mortgage was also paid. The son of J, who was not born at the time of the execution of either of the mortgages, wanted to redeem the mortgage of 1871 only. *Held*, that, in the face of the covenant contained in the subsequent mortgage, he could not redeem the earlier mortgage alone. *Held*, further, that the plaintiff, who was not in existence at the date of the mortgage of 1877 and had no interest in the property to which it related, could not contest the validity of that mortgage. **SHEO KUMAR UPADHYA v. JITTU SINGH, 9 Ind. Cas. 52.**

(239)—*Suit for redemption—Adverse possession of third party.*—A suit for redemption will fail, if it is found that actual possession of the property was, not with the mortgagee, but with a third person deriving title from one who had enjoyed the property adversely against the mortgagor and the mortgagee for more than 12 years. **NIHAL SINGH v. MUTSADDI, 161 P.R. 1889. (2 M. 226, Appr.; 124 P.R. 1883, R.)**

(240)—*Civ. Pro. Code, 1892, s. 43—Previous suit for redemption dismissed—Subsequent suit on admission of mortgage—Suit to redeem—No specific mortgage alleged—Effect.*—Where a previous suit for redemption had been dismissed on the ground that the specific mortgage alleged had not been proved and that no decree could be passed on the admission by defendant of some other previous mortgage, *held* that a subsequent suit for redemption on the basis of the admission made in the previous suit was barred under s. 43, Civ. Pro. Code. There was only one cause of action, and the plaintiff, having sued on a false claim while aware of his true right, should be taken to have relinquished his real claim. [*Overruled*, 29 M. 153, F.B. = 16 M.L.J. 48; *Diss.*, 28 M. 406; *Disc.*, 26 M. 760 = 13 M.L.J. 448; *R.*, 17 C.P.L.R. 178, 31 M. 385.] It is not necessary that a plaintiff suing to redeem should allege and prove a specific mortgage. He can get a decree on an admission of mortgage previously made by the defendant. (*Obiter*). (*Note*. This case was a sequel to the case reported in 18 M. 462). **RANGASAMI PILLAI v. KRISHNA PILLAI, 22 M. 259.**

(241)—*Redemption, second suit for, in case when decree in first suit did not provide for foreclosure on non-payment by decree-holder—Mortgage.*—In 1871, A mortgaged his share in a certain village to the appellant. Subsequently

Mortgage—continued.**—9.—Redemption—continued.**

he sold the share to the second respondent, who sued for redemption of the mortgage and in August 1881 obtained a decree against the appellant for possession of the share on payment of a certain sum in 1290 Fasli. The decree did not provide for foreclosure in case of non-payment by the decree-holder. An application for execution of the decree was dismissed in 1886 as being barred by limitation. In 1900, the second respondent joined with the third respondent in selling the entire village to the first respondent. The appellant sued for pre-emption of the share of the third respondent alleging that, in the event which had happened, he had become the proprietor of the share which had been mortgaged to him. One of the questions for decision was whether a second suit for redemption was maintainable. *Held*, that a second suit for redemption was not maintainable against the appellant. **RAM DAYAL v. RAJA RAMPAL SINGH, 6 O.C. 367. [R., 10 O.C. 81.]**

(242)—*Suit for—Mortgage of 1849 in which no time for redemption was fixed, redemption of—Act XIII of 1866, s. 3—Limitation Act (XV of 1877), sch. II, arts. 134 and 144—Res judicata.*—R and others, who constituted a joint-Hindu-family mortgaged with possession the property in dispute to U in 1849, but did not deliver possession. After R's death, D became the head and manager of the joint-family and he got his name alone entered in settlement papers as the sole proprietor of the property. U sued D alone for possession of the mortgaged property and got a decree in 1865. In 1865, another member of the joint-family sued D the Settlement Court to have his name entered along with that of D in equal half shares and got a decree in 1873. A similar suit was brought by K, one of the present plaintiffs, in 1866, which was finally decided in 1883. In 1868, D alone sued U for redemption unsuccessfully. In 1871, U mortgaged the property as his own absolute property to, J, but remained in possession till 1875, when, in execution of a decree obtained against his son H, it was sold by auction and purchased by J and came into his possession in 1880. The present suit for redemption of this property was brought by the plaintiffs, K and others, against D, H, J and others, defendants after more than 12 years from the date of J's purchase. The cause of action, according to the plaintiffs, arose out of the decree of 1865. The Counsel for the appellants admitted before the lower Court that, if the plaintiffs had to rely on the mortgage of 1849, as the starting point, their case must fail. *Held*, that the suit must be considered to be one for redemption of the mortgage dated 1849, that an erroneous admission of the plaintiff's Counsel before the Court on a point of law was not binding on the plaintiffs. *Held*, that, as the mortgage-deed did not fix any time when the mortgage must be redeemed, Act XIII of 1866 did not apply and the suit was not barred under s. 3 of that Act. *Held*, that art. 134 of

Mortgage—continued.**—9.—Redemption—continued.**

the Indian Limitation Act was no bar as the word "purchase" in that article did not include a "Mortgage." *Held*, that the suit, having been brought after more than 12 years from the date of J's purchase, was barred by art. 144 of the Limitation Act. *Held*, further, that the suit, which was brought by D for redemption of the mortgage in 1868 and which was decided against him, operated as *res judicata* in the present suit. **THAKUR KALKA v. THAKUR DEBI SINGH, 8 O.C. 233 (B.)**

(243)—*Res judicata—Suit for redemption—Two appeals in the lower Court—Two decrees passed—Appeal against one—Limitation—Acknowledgment—Joint mortgagees—Signature of khewat by one of them.*—In a suit for redemption, the Court of first instance decreed it in respect of one-third of the property and dismissed it as to the rest. Both the plaintiff and the defendants appealed to the Court below which decided the appeals in one judgment. In the result the plaintiff's appeal was dismissed and the defendant's appeal was decreed. The plaintiff filed one appeal to the High Court:—*Held* that the whole appeal was not barred by the rule of *res judicata*. The result of the dismissal of the plaintiff's appeal by the Court below was that it was not open to the plaintiff to ask for the redemption of the property to the extent of two-third. (7 A.L.J. 861, F.B., D.) The mortgage was made in favour of three persons jointly. In the *Khewat* of 1875, L, G, and H were set forth as mortgagors, and, B, P and Bh, were set out as mortgagees. The *wajib-ul-arz* which referred to the *Khewat* was signed by B alone. The date of the mortgage was alleged in the plaint to be 1849, but the plaintiffs failed to prove when the mortgage was made. *Held*, that one only of the joint mortgagees having signed the *Khewat*, there was not a sufficient acknowledgment as against all the mortgages, and consequently the suit was barred by limitation. (1 A. 117, D.) *Quære*.—Whether the signing of a lengthy *wajib-ul-arz*, which refers among many other things to the *khewat*, can be considered an acknowledgment of the title of the mortgagor within the meaning of the Act? **CHUNNI v. HUKUM SINGH, 8 A.L.J. 605 = 10 Ind. Cas. 238.**

(244)—*Code of Civil Procedure (Act XIV of 1882), s. 43—Suit for redemption decreed—Second suit for surplus profits recovered by mortgagee during mortgage not maintainable—Effect of art. 105, Limitation Act (XV of 1887).*—Art. 105 of the Limitation Act must not be construed so as to conflict with the provisions of s. 43 of the Code of Civil Procedure, and must be deemed to refer to cases in which the mortgagor has got possession of the mortgaged property otherwise than by a suit for redemption. (7 W.R. 564, 34 C. 223, R.) Where a mortgagor brings a suit and obtains a decree for redemption, he cannot maintain a second suit for recovery of surplus collections made by the mortgagee, during the

Mortgage—continued.**—9.—Redemption—continued.**

period of the mortgage, s. 43 of the Code of Civil Procedure being a bar to the maintenance of that suit. *Per Karamat Husain, J.*—The right to claim the surplus profits is synchronous with the right to claim possession of the mortgaged property, and to hold that the cause of action for claiming excess collections accrues when the mortgage-debt has been satisfied, is inconsistent with the principles on which the law of redemption is based. **RAM DIN v. BHUP SINGH**, 5 A.L.J. 192 = A.W.N. 1908, 96 = 30 A. 225. (26 B. 616, 31 B. 527, 34 C. 223, 4 A.L.J. 763, 6 B.H.C. 97, 8 C. 593, 19 C. 615, R.) [R., 12 O.C. 152 = 2 Ind. Cas. 834, 13 C.W.N. 669 = 4 Ind. Cas. 534; D., 6 Ind. Cas. 336 = 14 C.W.N. 1001.]

(245)—*Practice—Proceedings subsequent to preliminary decrees for redemption and sale—Limitation Act (XV of 1877), sch. II, arts. 178 and 179—Civ. Pro. Code (Act XIV of 1882), s. 232.*—Proceedings subsequent to preliminary decrees for redemption and sale are not governed by the Civ. Pro. Code or the Limitation Act. The appellant was the assignee of a mortgage-decree passed against the two respondents on the 22nd June, 1904 by the Sub-Divisional Court of Toungoo. The property to which the decree related was in the Pegu District. The original decree-holder applied to the Sub-Divisional Court of Pyu in the Toungoo District to execute the decree on the 29th January, 1906, but this application was dismissed for non-payment of process fees. The appellant next applied on the 9th August, 1907 to the Sub-Divisional Court of Toungoo describing himself as the assignee of the decree, and asked for a certificate of non-satisfaction to be forwarded to the Pegu Sub-Divisional Court in whose jurisdiction the mortgaged property was situated. The application was granted and in the certificate the appellant was described as decree-holder. The proceedings in Pegu were successful and the appellant took no further steps till the 4th August 1908, when he applied to the Sub-Divisional Court of Toungoo to issue notices under proviso (4 L.B.R. 83, F.) to s. 232 of the Civ. Pro. Code, 1882. The Sub-Divisional Court held that the application was time-barred as the application of the 29th January, 1906 was made to the wrong Court and more than three years had elapsed from the date of the original decree. This decision was confirmed by the Divisional Court: *Held*, that the application which was dismissed by the Sub-Divisional Court was not an application to enforce the decree for sale, but a preliminary application for issue of notice under s. 232 of the Civ. Pro. Code, which did not apply to those proceedings, and that the proper course was for the assignee to apply to the Court for an order of sale in pursuance of the preliminary decree, as the assignee's status had already been recognized by the Toungoo Court in the earlier proceedings of 1907 and his name had been substituted for that of the original decree-holder. *Held*, further, that the application of the 4th August,

Mortgage—continued.**—9.—Redemption—continued.**

1908 was unnecessary and that the lower Court was technically right in dismissing it; but that the dismissal did not affect the appellant's right as assignee of the original mortgagee to obtain an order absolute for sale of the property in continuation of the decree of 22nd June, 1904, and that, if he applied for such an order, his application would not be governed by art. 178 or 179, Limitation Act. **AHMED ALI v. MAUNG TON**, 8 Ind. Cas. 986.

(246)—*Suit to redeem kanom—Contract of renewal, barred—Right of redemption.*—Where the manager of a Malabar Edom brought a suit in 1890 to redeem a *kanom* which had expired in 1885, and the defendant set up an agreement which the former manager had entered into with him for a renewal of the *kanom* for another twelve years, *held* that the renewal was intended to take effect from 1885, and that, therefore, the defendant's right to set up the agreement was barred by limitation and that, consequently, the plaintiff was entitled to redeem. *Held* also that, if the defendant could maintain a suit for specific performance, plaintiff would not be entitled to a decree for possession. **PANGUTCHAN v. PARAMESWARA PATTAR**, 6 M.L.J. 33. (16 M. 464, Diss.) [Overruled, 29 M. 336, F.B. = 16 M.L.J. 395 = 1 M.L.T. 153.]

(247)—*Execution of deed of sale and agreement to re-sell on same day—Transaction not amounting to English or anomalous mortgage.*—Where, on one and the same day, two documents were executed, one of which purported to be a deed of sale and the other an agreement to re-sell the property to the vendor, if the amount of the consideration were re-paid in a certain number of years, the two documents together would not constitute either an English or an anomalous mortgage and the transaction amounted to a deed of sale on the one side and an agreement to re-transfer on the fulfilment of a certain condition on the other side. Prior to the passing of the Transfer of Property Act, there was no law in force in the Central Provinces providing for the foreclosure or redemption of an English mortgage between Natives. **PARMANAND SARAF v. WASUDEORAO RAMCHANDER RAO**, 7 C.P.L.R. 29. (12 C. 614, R.) [R., 8 C. P.L.R. 113.]

(248)—*Mortgage money—Court deposit—How far can be accepted as security for mesne profits.*—*Abdur Rahim, J.*—The redemption money deposited in Court by plaintiff may be accepted as security for mesne profits to be furnished by him, as the liability to pay mesne profits would arise only if the decree for redemption is set aside in appeal, in which case plaintiff will become entitled either to draw the money deposited in Court or to compel the defendants to refund the same. *Per Sundara Iyer, J., contra.* The money deposited in Court cannot be accepted as security, as plaintiff was no longer the owner of the money and

Mortgage—continued.**—9.—Redemption—continued.**

had no disposing power over it. Defendants were the present owners of the money and the reversal of the redemption decree will only create a debt in favour of plaintiff as from the date of reversal. A mere possibility of a debt cannot be transferred and could not be accepted as security. *SINGARAM CHETTIAR v. KALYANASUNDARAM PILLAI*, M.W.N. 1912, 397=11 M.L.T. 248=15 Ind. Cas. 383.

(249)—*Purchase by mortgagee of equity of redemption in portion of mortgaged property—Right of mortgagee to enforce his lien over the rest.*—A mortgagee does not, by purchasing the equity of redemption in a portion of the mortgaged property, lose his lien over the rest. Every part of the mortgaged property being liable for his debt, he can enforce his right under the mortgage over the remaining portion of the property. *GANPAT RAO v. RAMCHAND*, 2 C.P.L.R. 90.

(250)—*Mortgagee not put in possession entitled to claim interest—Arrears of unpaid interest, to be paid at the time of redemption—Covenant to pay interest not recoverable out of the profits of the property.*—Held, that, where, in a mortgage-deed, there was a distinct undertaking, on the part of the mortgagor, to pay any amount on account of interest, which was not recoverable out of the profits of the property, and the mortgagor failed to deliver possession of the property to the mortgagee, the latter was entitled to refuse redemption, until the whole of the interest due during such period was paid. *PHUL CHAND v. MR. H. H. SANDILANDS*, 10 O.C. 29. (17 B. 425, 9 O.C. 144, D.) [R., 11 O.C. 323.]

(251)—*Usufructuary mortgage—Covenant by mortgagor to pay mortgagee arrears of rent due at time of redemption—Payment by mortgagee of arrears of revenue—Right of mortgagee to reimbursement before redemption.*—Where a second mortgagee of a certain property sued for redemption of a prior usufructuary mortgage, held he was not entitled to do so, unless he paid, along with the mortgage-money, the arrears of rent due as per covenant in the prior mortgage-deed, and also the amount of the arrears of Government revenue paid by the prior mortgagee to save the property from revenue-sale, although this latter provision was not in the deed itself. *GIRDHAR LAL v. BHOLA NATH*, 10 A. 611=A.W.N. 1888, 238. [Appr., 22 B. 410; R., 28 A. 593=3 A.L.J. 435=A.W.N. 1906, 150, 13 A. 195.]

(252)—*Mortgage—Right to claim redemption in suit for ejectment.*—The plaintiff in a suit for ejectment cannot be permitted to redeem a mortgage on the property. *RAMASAMI PILLAY v. VELLAYA PILLAI*, 2 M.L.J. 48.

(253)—*Lease—Ticca and Zur-i-peshgee—Usufructuary mortgage—Redemption before expiry of term—Act XXVIII of 1855—Reg. XV of 1793, s. 10.*—A lease granted by a debtor to his creditor for a certain term at a fixed *jumma*,

Mortgage—continued.**—9.—Redemption—continued.**

provided that the lessee after paying the Government revenue and a certain sum to the lessor annually without claiming any abatement, should apply the balance of the *jumma* in reduction of the principal and interest of the debt till the expiry of the term, when the balance of the debt remaining unpaid should be paid in a lump sum, and if it was not so paid the lease was to continue. It was also provided that the lessor should not alienate the property until the debt was paid. Held that the transaction was partly in the nature of a *ticca*, and partly in the nature of a *zur-i-peshgee* and was not a pure usufructuary mortgage, and that the debtor could not redeem the lands by paying the principal and interest before the expiry of the term. Held, also, that even if it be considered as a usufructuary mortgage, it having been executed after the passing of Act XXVIII of 1855, the terms of s. 10 of Reg. XV of 1793, would not apply, and the mortgagor could not redeem before the expiry of the term. *KHAJAH LOTF ALI v. GUJRAJ THAKOOR*, 11 W.R. 408. [F., 12 W.R. 527.]

(254)—*Purchase by prior mortgagee in execution of his decree—Right of redemption of subsequent mortgagee on paying mortgage amount.*—A subsequent mortgagee is not entitled to redeem the prior mortgage by simply paying the price for which the prior mortgagee may have purchased the mortgaged property at an auction-sale held in execution of the decree obtained by him on his mortgage, without having joined the subsequent mortgagee as a party. Where he elects to redeem the prior mortgage under such circumstances, he, like the mortgagor, will not be entitled to do so save upon tender or payment of the full amount due on it. The omission to make the subsequent mortgagee a party to the prior mortgagee's suit has the effect of relegating the subsequent mortgagee to the position in which he was before the institution of that suit. It is on that ground that it is open to the second mortgagee to redeem the first mortgage, but he could not do so except on the terms on which he could have obtained redemption before the institution of the first mortgagee's suit or under the decree passed in that suit, namely, by payment of the whole amount due under that mortgage. *DIPNARAIN SINGH v. HIRA SINGH*, 19 A. 527=A.W.N. 1897, 147. (21 C. 366, 16 B. 486, A.W.N. 1895, 45, D.) [Appr., 25 A. 388; R., 8 M.L.J. 298, 22 A. 453, 25 A. 446=A.W.N. 1903, 150, 26 A. 185=A.W.N. 1903, 219, 33 C. 590=10 C.W.N. 592, 5 C.L.J. 315=11 C.W.N. 403, 1 S.L.R. 172, 4 N.L.R. 168, 12 O.C. 133.]

(255)—*Suit for redemption—Decree for possession—Failure to execute decree in time—Fresh suit for redemption.*—A mortgagor who has obtained a decree for possession of the mortgaged property by redemption of an usufructuary mortgage of it, but has, by his own

Mortgage—continued.**—9.—Redemption—continued.**

neglect, lost his right to execute such decree, cannot be permitted to revert to the position which he held before the institution of the suit in which he has obtained the decree, and to bring a fresh suit for possession. *ANRUDH SINGH v. SHEO PRASAD*, 4 A. 481 = A.W.N. 1882, 114. (3 N.W.P. 62, F.B., F.) [Not F., 15 M. 366; R., 8 M. 478, 11 A. 386, 3 Bom. L. R. 94, 24 A. 44, F.B. = A.W.N. 1901, 194, 25 M. 300, F.B.]

(256)—*Conveyance in consideration of payment of all debts of owner—Right of mortgagee to claim unsecured debt along with mortgage-debt—Tacking allowed to avoid multiplicity of actions.*—The main question in this case was, whether the plaintiff was entitled to redeem the property in question without also paying the amount of a simple contract debt owing to the mortgagee by the original mortgagor, K, from whom the plaintiff derived his title. Although, admittedly, K could have redeemed the mortgage without paying the unsecured debt due by him, it was held that, as K had, by a voluntary conveyance in favour of the plaintiff, made over in his life-time all his property to the plaintiff with the obligation of paying all his (K's) debts, and as due effect could not be given to the whole of the instrument executed by K, unless it be construed as a conveyance to plaintiff charged, as between him and K, with the payment of all debts of K, the mortgagee should be allowed to tack the unsecured debt in question with the mortgage-debt, for the purpose of avoiding circuitry of actions on the same principle as, by English Law, a mortgagee is entitled to tack on a simple contract debt as against executors or volunteers under the mortgagor. *RAGHO GOVIND PARAJPE v. BALVANT AMRIT GOLE*, 7 B. 101. [D., 18 M. 368.]

(257)—*Suit for redemption of mortgage—Decree without clause directing foreclosure—Omission to execute decree—Bar of fresh suit for redemption.*—In this case, a mortgagor obtained in 1858, in a suit to redeem the mortgage, a decree for possession of the mortgaged property on payment of a particular sum. No time was fixed in the decree for payment, nor did the decree provide for foreclosure in the event of the non-payment of the mortgage money. The decree was never executed, but in 1878 a second suit was brought to redeem the mortgage; and it was held that, by reason of default in the payment within the time prescribed by law for execution of decrees, the order for redemption must be taken to have operated as a judgment of foreclosure so that the mortgagor's second suit for redemption was not maintainable. *GANSAVANT BAL SAVANT v. NARAYAN DHOND SAVANT*, 7 B. 467. [Diss., 8 M. 478; Overruled by 25 M. 300; Diss., 93 P.R. 1908 = 164 P.L.R. 1908 = 133 P.W.R. 1908; F., 23 B. 592; Appr., 13 B. 567, 16 B. 243, 16 B. 480, 15 M. 366, 3 O.C. 371, 24 A. 44 = A.W.N. 1901, 194, 25 M. 300, 43 P.R. 1907 = 169 P.L.R. 1908 = 101 P.W.R. 1907; D., 14 B. 327.]

Mortgage—continued.**—9.—Redemption—continued.**

(258)—*Sale by mortgagor pending suit for redemption—Omission to redeem in enforcement of decree—Purchaser pendente lite—Subsequent suit for redemption, not maintainable.*—One M. had sued for partition, and the Court, finding a mortgage set up by R, passed a decree for redemption, on payment by M, of the amount due under the mortgage. Plaintiff who had purchased from M a portion of the property pending the suit, brought this present suit for redemption against M and R, since M who had sold away the whole property did not execute the former decree for redemption. He lodged the amount found to be due on account of the equity of redemption of which he had become assignee, and, relying on this as a sufficient tender, claimed restoration of the land from R. The lower appellate Court held that the plaintiff was entitled to redeem the property, but the High Court decided that the plaintiff's suit was unsustainable. If the rights of M centred in the plaintiff by the sale to him, they came to him subject to the vent of the suit then pending, in which he did not choose to get himself made a co-plaintiff. The assignment to the plaintiff having been made *pendente lite*, and he not having been a party to the suit by the assignor, he was bound by the decree against the latter and had no right to bring a separate suit, and the plaintiff and his assignor having failed to redeem within six months from the decree, as ordered thereby, both were foreclosed. Nor could the plaintiff, by any step, prevent the right of the mortgagee against M from growing and perfecting itself during the six months allowed for redemption. *RAMCHANDRA KOLATKAR v. MAHADAJI KOLATKAR*, 9 B. 141. [Not F., 10 A. 1.]

(259)—*Redemption—Proof of mortgage other than one sued on—Right to claim redemption of mortgage so proved.*—Where, in a suit for redemption, the plaintiff was unable to prove the specific mortgage alleged by him but there was proof of the existence of another subsisting mortgage on the property, a decree for redemption could not be passed in favour of the plaintiff on the footing of the mortgage so proved. *VASUDEVAN NAMBUDERI v. KRISHNA PISHARATI*, 13 M.L.J. 274. [F., 17 M.L.J. 122 = 2 M.L.T. 65.]

(260)—*Equity of redemption, sale of, in satisfaction of decree—Non-appearance of debtors after notice—Extinction of equity of redemption.*—Where, in execution of a decree, the equity of redemption is put up and sold and the debtors, although duly warned by notice that their property would be put up to sale, never appear and take any steps to satisfy the debt so as to retain the equity of redemption, the equity, in the absence of proof of fraud, is liable to be legally extinguished. *SREENATH MOOKERJEE v. NERTO KALLEE DOSSEE*, 4 W.R. 5.

(261)—*Mortgage—Suit for redemption—Claim by mortgagee to hold land as Inam—Evidence.*—Where plaintiff sued for redemption

Mortgage—continued.**—9.—Redemption—continued.**

of certain land on the allegation that the defendant held it as mortgagee, and the defendant claimed to hold it as Inam free from payment of Government revenue, and it was found that he held it under this title since 1824 up to the commencement of the suit, *held*, that the title of the defendant, which is thus fortified by long enjoyment, could not be disturbed without clear and unmistakable proof of the mortgage. **RAMRUDEEGOWDA v. DESSAI SAHEB**, 17 W. R. 8, P. C.

(262)—*Decree for redemption—Time fixed for payment of mortgage amount—Omission of consequences of default—Order allowing payment after date fixed—Validity.*—Where a decree for redemption of mortgage, prescribed the time within which to redeem but did not say in terms that if the amount were not paid within that time, the right to redeem should become barred,—and the decree-holder was allowed to deposit after the time fixed, *held*, on an application for revision, that the order of the Court was not one to call for interference under s. 622, Civ. Pro. Code, as it was only ministerial and did not prejudice the right of the mortgagee, if any, owing to non-payment within time. **BANDHU v. SHAH MUHAMMAD TAKI**, A. W. N. 1888, 119. [R., 14 A. 520.]

(263)—*Mortgage—Redemption of one of several prior usufructuary mortgages held by one mortgagee—Position of subsequent mortgagee.*—K. N. and G. were joint owners of a *khata*—K's share being half and N's and G's the other half. In 1887, the three mortgaged half the *khata* to M. for Rs. 600. The mortgage was to be without possession, unless default in payment of interest was made. On the 20th January, 1900, M. obtained a consent decree for possession of the land mortgaged, on the condition, that the land would be released on payment of Rs. 650. B. the defendant in the present suit deposited in Court Rs. 650/- to the credit of M, who on the 17th August, 1900, withdrew the money without prejudice to his rights under the second mortgage which K. had executed on the 22nd March, 1899, creating a further charge on the one-fourth share of the *khata* already mortgaged by him, providing that, on failure to pay interest as agreed therein, M. would recover possession. Default having occurred, M., on the 29th August, 1900, sued for possession. B., who was impleaded as a co-defendant, pleaded that he had paid off the first mortgage and stood in the shoes of the mortgagee in respect of that mortgage, having on the 11th July, 1900, got a mortgage of 3/4ths of certain specified fields in the *khata*. *Held*, that the plaintiff's claim was valid and B's plea was not maintainable, as B had notice of the existence of the prior and mesne mortgages before the execution of his mortgage and no equities arose in his favour. There is no authority for the proposition that, where two mortgages have been executed in favour of one mortgagee, the mortgagor may redeem the prior mortgage and use it as a shield against

Mortgage—continued.**—9.—Redemption—continued.**

the puisne mortgagee. **BAGGA MAL v. MOTI RAM**, 54 P. L. R. 1903 = 32 P. R. 1903. [D., 30 P. R. 1904 = 139 P. L. R. 1904.]

(264)—*Decree for redemption—Deposit by decree-holder towards redemption—Subsequent attachment of same amount for costs and withdrawal of same from Court—Judgment-debtor's right to recover possession.*—In a suit for redemption, there was a decree in favour of plaintiff, with costs. The plaintiff having had to pay a certain amount into Court towards his redemption, he did so. He afterwards, got a certain portion of the amount, attached in execution of his decree for cost, and withdrew the attached amount. Thereafter, he got possession under the decree for redemption. Subsequently, the judgment-debtor-mortgagees applied for restoration of possession of the mortgaged premises, on the ground that the amount deposited had been reduced by the attachment, and the lower Court put them in possession. *Held*, on appeal, the lower Court's order giving possession to the judgment-debtors was wrong; and that the decree-holder was entitled to deduct the amount due to him for costs out of the amount he had to deposit, and that, if, instead of doing so, he attached a portion of the amount deposited, the procedure would not be wrong or illegal; the High Court directed the judgment-debtors to put the decree-holder back in possession. **PARMANAND v. LOKMANDASS**, 2 A. L. J. 10 = 27 A. 392 = A. W. N. 1904, 283.

(265)—*N. W. P. Tenancy Act (II of 1901), s. 20—Mortgage of occupancy holding—Redemption of a prior valid mortgage—Rights of mortgagees.*—A usufructuary mortgage of an occupancy holding was executed after the passing of the North-Western Provinces Tenancy Act. The mortgagee sued to redeem a prior mortgage of the same holding, whose mortgage was executed before the passing of the Act. *Held*, that the mortgage, under which the plaintiff claimed, was invalid and unlawful, as contravening s. 20 of the Act, that the plaintiff had acquired no right under his mortgage and was not entitled to redeem the prior mortgage, whose mortgage was valid under the law. **BANMALI PANDE v. BISHESHAR SINGH**, 3 A. L. J. 731 = A. W. N. 1906, 300 = 29 A. 129. (A. W. N. 1906, 182 = 3 A. L. J. 476, F.; 15 A. 219, 26 A. 78, R.) [F., 29 A. 327 = 4 A. L. J. 306 = A. W. N. 1907, 76.]

(266)—*Mortgage by some members only of Hindu joint family—Mitakshara Law of the Benares School—Foreclosure decree against mortgagors only—Subsequent suit for redemption by other members—The rights of the mortgagors and mortgagees in such suit—Fresh account to be taken—Irrespective of account in the foreclosure decree—Rules for the calculation of interest.*—Certain immoveable property, belonging to the joint estate of a Hindu family governed by the Mitakshara Law of the Benares School, was mortgaged by A, B and C,

Mortgage—continued.**—9.—Redemption—continued.**

three of the members of the above family. To the foreclosure suit brought by the mortgagee against A, B and C, the sons and grandsons of the mortgagors, A, B and C, were not made parties. After the foreclosure decree was made absolute, when the mortgagee sought possession, the co-parceners, who had not been made parties to the former suit, instituted a suit for redemption. The lower Court, while decreeing redemption, held that the price of redemption should be fixed at what was found payable in the former suit. *Held*; If it be taken as a general proposition that the price of redemption, to persons, who should have been, but were not, made parties to the foreclosure decree is to be limited to the sum fixed by that decree, regardless of the time which may have passed since the decree was made, then the rule laid down would be at variance with the principle enunciated in 15 C.P.L.R. 26. It is difficult to see how a foreclosure-decree could be regarded as non-existent with respect to the redemption rights of the plaintiffs, and yet be used against the correlative rights of the defendants. No undue advantage would be given to the defendants, if a fresh mortgage account, unconnected with the account which formed the basis of the foreclosure-decree, is now made the foundation of the redemption-decree. The mortgagees are not under any legal obligation to create an opportunity for redemption, by the mortgagors or any person claiming under them, at any particular time. Their obligation is limited to this—that whenever they might claim to foreclose against any such person, they must give him a period to be fixed by the Court, within which to exercise his right of redemption. The mortgage-debt remains a debt which the plaintiffs are bound to pay according to the terms of the deed, and they are therefore liable for daily increasing interest while they choose to leave the debt unpaid. This increase of interest is not due to any fault of the defendants. The plaintiffs are not bound to await a foreclosure-suit by the defendants before they seek redemption. They could have paid and redeemed on any day after the due date fixed by the bond. A decree, which is a dead letter so far as it grants relief to the decree-holders, is equally ineffective to bind them, in respect of the rights of persons not parties to such decree. (18 C. 164, 19 A. 527, 31 M. 258, R.) No Court of equity, justice and good conscience, would allow redemption in 1908, on payment only of the amount declared due in 1901, the mortgagees having in the meantime been kept out of possession of the mortgaged property. If the defendants obtained physical possession for any time, they must account for the profits, if any, taken by them during that period, or lose their interest therefor. If, though in possession for a term, they, in fact, obtained no produce from the land, they are still liable to allow something for their use and occupation of it. If the physical possession of

Mortgage—continued.**—9.—Redemption—continued.**

the plaintiffs has never been disturbed, under cover of foreclosure-decree, by the defendants or any person claiming under them, then the calculation will be one of unbroken interest from the date of the bond to the date of redemption. The account must be made without any reference to the foreclosure decree, which, for the purpose of this case, must be regarded as having no existence. It is not permissible to make any assumption or conjecture as to what would have been the precise result—redemption or foreclosure, if plaintiffs had been joined in the foreclosure suit. GHASIRAM v. JHINGWA, 4 N.L.R. 168.

(267)—*Forgery of plaint bond—Decree on the basis of earlier bond, validity of.*—A redemption suit based on a forged mortgage bond should be dismissed, and redemption cannot be decreed on the footing of a prior mortgage bond. MARANGAL TARWATTIL KARANAVAN v. MOOTHEDATH PALASSERI KESAVAN NAMBUDRI, 2 M.L.T. 65=17 M.L.J. 122. (13 M.L.J. 274, 18 M. 562, F.)

(268)—*Redemption of whole by person interested in part of mortgaged property—Transfer of Property Act (IV of 1882), s. 60.*—A person interested only in part of the mortgaged property is entitled to redeem the whole of the property and seek contribution from others. He cannot be compelled to redeem his share of the mortgaged property, his right being to redeem the whole subject to the equities of the other persons interested. JATHEVEDAN NAMBOODRI v. PARAMESWARAN NAMBOODRI, 8 M.L.J. 309. (16 M. 328, R.)

(269)—*Interest—Delay in suing—Redemption by co-mortgagor of his share in the property—Right of mortgagee to allow partial redemption—Jurisdiction of Civil or Revenue Court—Mortgage with possession—Mortgagor undertaking to assist mortgagee in recovering produce, status of.*—Mere delay in suing is no sufficient reason for refusing to allow a mortgagee full interest at the stipulated rate. A mortgagee is legally entitled to allow redemption by a co-mortgagor of his share of the mortgaged property only. Where a mortgage deed recites that possession is given to the mortgagee and the mortgagor only agrees to assist the mortgagee in recovering produce from the tenants who are in cultivating possession of the mortgaged land, a suit for recovery of possession by the mortgagee against the mortgagor is cognizable by a Civil Court. A mere engagement by the mortgagor to assist the mortgagee in recovering produce from tenants does not make him a tenant under the mortgagee; he is at most in some sort an agent for the mortgagee. AHMAD KHAN v. RATAN CHAND, 53 P.W.R. 1912=100 P.L.R. 1912=50 P.R. 1912=13 Ind. Cas. 539. (46 P.R. 1894, F.B., D. & Expl.)

(270)—*Right to redeem one of two properties separately mortgaged.*—R. L. and R.B. mort-

Mortgage—continued.**—9.—Redemption—continued.**

gaged certain property to B.G. and M. Subsequently R.L. alone mortgaged certain other property to them, stipulating that he would not redeem the first mortgage till he redeemed the second. R. L. and the heirs of R. B. sold a portion of the property comprised in the first mortgage to the plaintiff. In a suit for redemption of the first mortgage prior to the second:—*Held*, that the second mortgage created no charge upon the property comprised in the first mortgage, but merely fixed the time for payment of the money due under the second mortgage, and consequently the suit was maintainable. *GANGA RAM v. KIRTARTH RAI*, 8 A.L.J. 158=9 Ind. Cas. 319=33 A. 393.

(271)—*Mortgage-debts, not divisible—Specification of separate shares—Redemption by co-mortgagor.*—Mortgage debts are indivisible except where there is a distinct notice on the face of the mortgage-deed of the separate shares of the mortgagors. One of two co-mortgagors or their representatives can redeem the entire estate, where such estate is joint and undivided, by payment of the whole of the mortgage money. *RAM KRISTO MANJHEE v. MUSSAMUT AMEERONISSA BIBEE*, 7 W.R. 314.

(272)—*Mortgage—Subsequent mortgagee's right to redeem prior mortgage—Inconsistent plea taken up by defendant—Suit to redeem part of mortgaged property.*—In September 1879, K, P and B executed a usufructuary mortgage in favour of S for Rs. 16,000. In February 1880, S executed and registered a deed by which he permitted the mortgagors to retain possession of a part of the mortgage property by way of maintenance. In December 1880 K mortgaged a one-fourth share of the property to J for Rs. 8,700. The term was thirty years. J paid S Rs. 12,000 and obtained possession of three-fourths of the mortgaged property, P at the same time paying Rs. 4,000 and obtaining possession of his one-fourth share. In 1897 B executed a mortgage in favour of the plaintiff, under which the latter became entitled to two-fourths of the property as the interest of B. The plaintiff sued J, for possession of such interest on payment of Rs. 8,000 out of Rs. 12,000, the money which J had paid S. J pleaded that the plaintiff could not redeem a part of the property and must sue to redeem the whole of it on payment of Rs. 12,000, and the plaintiff's suit was dismissed on this plea, when the plaintiff brought another suit for possession of the whole property on payment of Rs. 12,000, against J., the latter contended that the plaintiff as the mortgagee of B's interest could redeem those interests only and could not redeem those of K. *Held*, that the plaintiff, having been forced to take up the position which J assigned to him, could not afterwards turn round and say that plaintiff could only redeem B's interest and not the whole property. *Held*, further, that, the plaintiff, who was seeking to redeem S's mortgage, was not

Mortgage—continued.**—9.—Redemption—continued.**

affected by K's mortgage to J. for thirty years. *Held* further, that, at the time at which J paid off S's mortgage, S had as mortgagee no right to the profits of the lands, and therefore J by paying off the mortgagee did not acquire any right to the same. *JAWAHIR SINGH v. BALDEO BAKHSH SINGH*, 4 O.C. 199 (B).

(273)—*Transfer of Property Act, IV of 1882, s. 60—Suit by purchaser of right of—Redemption in part of hypotheca to redeem whole mortgage—Principle.*—A suit, by a purchaser of the right of redemption in one of several items of property mortgaged, to redeem the whole mortgage, is maintainable, when he has made the other mortgagor party to the suit. The character of indivisibility of a mortgage exists with reference both to the mortgagee and the mortgagor. Except as a matter of special arrangement and bargain between all the persons interested, neither the mortgagee nor the mortgagor, nor persons acquiring through either a partial interest in the subject, can get relief under the mortgage except in consonance with the principle of indivisibility. *HUTHASANAN NAMBUDRI v. PARAMESWARAN NAMBUDRI*, 22 M. 209. [R., 6 O. C. 223, 2 N.L.R. 116.]

(274)—*Usufructuary mortgage—Discharge by usufruct—Suit for redemption of whole property by some of several co-mortgagors.*—In a suit for redemption of the whole of a mortgage, on the ground that the mortgage-debt had been satisfied out of the usufruct, brought by some only of several co-mortgagors, the plaintiffs can claim their shares only, and the extent of their shares should be determined after making the other co-mortgagors parties. *FAKIR BAKHSH v. SADAT ALI*, 7 A. 376=A.W.N. 1885, 63. [F., 16 A. 254.]

(275)—*Transfer of Property Act (IV of 1882), s. 60—Mortgagee receiving payment of part of mortgage amount—Mortgage whether broken up.*—It would be contrary to public policy to hold that a mortgagee, by allowing a mortgagor to pay off a portion of the mortgaged debt and so release a portion of the mortgaged property, thereby breaks up the mortgage contract so as to allow the mortgagor or any one else interested to redeem the remainder of the mortgaged property piecemeal. Otherwise, a hardship would be imposed on mortgagors, for mortgagees would be induced to refuse to receive payment of a debt on condition of releasing a part of the mortgaged property. *LACHMI NARAIN v. MUHAMMAD YUSUF*, 17 A. 63=A.W.N. 1895, 6. (3 M. 230, 9 M. 453, Not F.) [R., 18 A. 189, 2 O.C. 344, 28 A. 155=A.W.N. 1905, 225; D., 6 A.L.J. 387, 31 A. 335.]

(276)—*Purchase of a part of mortgage property by mortgagee—Right of one mortgagor to redeem his share only—Transfer of Property Act, 1882, s. 60.*—When the mortgagees purchase the equity of redemption in a portion of the

Mortgage—continued.

—9.—Redemption—continued.

mortgaged property, the integrity of the mortgage is broken up, and one of the several mortgagors is entitled to redeem only his share of the mortgaged property. *MUNSHI v. DAULAT*, 4 A.L.J. 74 = A.W.N. 1907, 49 = 29 A. 262. (13 M.I.A. 404, 2 A. 565, 5 C.W.N. 83, R.) [Appl., 31 A. 335 = 6 A.L.J. 387 = 1 Ind. Cas. 779.]

(277)—*Mortgage-decree—Several parcels of mortgaged property—Apportionment of debt.*—When, in execution of a decree, property subject to a mortgage was sold in several parcels and purchased by several persons, one parcel being purchased by the mortgagee himself, the purchaser of a parcel is entitled to redeem on taking an account of the whole debt and a valuation of the several parcels and payment of his proportion of the debt. *GOSSYEN LUCHMEE NARAIN POORI v. BICRAM SINGH*, 4 C.L.R. 294. (13 M.I.A. 404, F.) [R., 8 C. 690.]

(278)—*Mortgage of fractional share of joint estate—Duty of mortgagee to see to receipts and expenses—One of several joint mortgagors, right of, to sue by himself to redeem.*—It is the duty of a mortgagee of a fractional share of an estate held in joint tenancy to see that he receives out of the estate all that the mortgagor ought to have received. It is his duty to see, not only that all assets are realised and brought to account, but also that the expenses are regulated with care. There is nothing to preclude one of several mortgagors from redeeming and if one of the mortgagors chooses to pay the full debt upon the mortgage, the mortgagee must take it, and release the property, no matter what his share may be. *MIRZA ALI REZA v. TARASOONDAREE*, 2 W.R. 150.

(279)—*Suit for redemption by one of several mortgagors—Purchase by mortgagee.*—Where a mortgagee purchases the interest of some of the mortgagors, the remaining mortgagors are entitled to redeem on paying their just proportion of the monies advanced. *KESREE v. SETH ROSHUN LAL*, 2 N.W.P. 4. [Appl., 13 C.L.R. 272; R., 20 A. 23, F.B. = A.W.N. 1897, 163, 21 B. 619.]

(280)—*Purchase by mortgagee of share in equity of redemption—Right of one joint mortgagor to redeem—Partition among mortgagors, if necessary.*—It is not necessary that the owner of a share in the equity of redemption should sue for partition for the ascertainment of his share before he sues for redemption. He has a right to redeem the whole mortgage, and the circumstance that the mortgagee had acquired a share in the equity of redemption cannot defeat his right. *MORA JOSHI v. RAMCHANDRA DINKAR JOSHI*, 15 B. 24. [R., 21 B. 619; D., 28 A. 155 = A.W.N. 1905, 255] See also *BHIKAJI DAJI v. LAKSHMAN BALA*, 15 B. 27, Note.

(281)—*Redemption, where mortgagor and mortgagee have both acquired interests in the*

Mortgage—continued.

—9.—Redemption—continued.

mortgaged property—Mortgagor cannot redeem whole against the will of the mortgagee—Adverse possession of mortgagee—Held, that, in a redemption suit, the general rule is that a person interested in part only of the mortgaged property may insist upon redeeming the whole of it, but where the mortgagee has acquired part of the mortgaged property, a purchaser of part only cannot redeem more than his own share, against the will of the mortgagee. *B. MUSTAFA KHAN v. SHADI LALL*, 10 O.C. 81. (6 O.C. 223, 28 A. 1, P.C., 6 O.C. 279, R.; 13 M.I.A. 404, Overruled.)

(282)—*Mortgagee acquiring part of equity of redemption by inheritance—Right of another part-owner to redeem the whole mortgage—Partition not necessary before redemption—Mortgagee's right to maintain his possession till partition—Custom—Common land.*—Where a mortgagee has acquired a share in the equity of redemption, a part owner of the equity of redemption can only redeem his own share and not the shares of his co-owners, because the security has been broken up. (5 C.W.N. 83, 28 A. 150 = A.W.N. 1905, 225, 29 A. 262 = A.W.N. 1907, 49, 4 A.L.J. 74, F.) There is no distinction between acquisition by purchase and acquisition by inheritance on the part of a mortgagee. (1 Ind. Cas. 779 = 6 A.L.J. 387 = 31 A. 395, F.) A, as the sole owner of certain property, mortgaged it to B. A subsequently died and left no heirs. The land then became *shamditatdeh*, and so the property of the whole body of the proprietors of the village, of whom B was one. Plaintiff sued to redeem the whole land asserting that, as one of the proprietors, he was an interested person and had the right to redeem the whole. Held, (1) that the plaintiff could only redeem his own share of the property but not the shares of other proprietors, as the mortgage-security had been broken and no co-sharer was an interested person as regards his fellows. (10 B. 648, 15 B. 24, 21 B. 619, Expl. & Not F.) (2) that it was not necessary for plaintiff to partition the *shamlat* before redeeming his own share of the mortgage. (15 B. 24, Rel. on; 6 M. 61, 20 M. 295, Diss.) (3) that, being in possession not as a co-sharer but as a mortgagee, he could not take advantage of the rule of customary law that no other co-sharer could interfere with his actual possession until partition. *SHANKAR DAS v. GOBIND RAM*, 197 P.L.R. 1911 = 11 Ind. Cas. 100 = 62 P.R. 1911.

(283)—*Mortgage—Redemption—Accretions—Right to recover—Omission to adjudicate—Second suit—Act VIII of 1859, s. 7.*—In suing for redemption of his estate, a mortgagor sues for it without specification of all conceivable details in the state in which it exists at the time. Such a suit must be deemed to include a claim for restoration of all accretions and improvements which the estate might have received while in the hands of the mortgagee. Where the Government sold certain fruit trees

Mortgage--continued.**—9.—Redemption—continued.**

to the mortgagee as occupant, such trees must be held to form a portion of the mortgaged estate, and as such, liable to redemption on payment of the mortgage amount, of the money laid out in purchasing the trees and of other reasonable expenses. [*Appr.*, 11 B.H.C. 32; *R.*, 14 C.P.L.R. 170.]. Where a Court omits to adjudicate upon part of the claim, it is competent to the mortgagor to bring a second suit in respect of that part. S. 7 of Act VIII of 1859 does not bar such a suit. In this case, a second suit for the trees was held not to be barred. **BAKSHIRAM GANGARAM v. DARKU TUKARAM**, 10 B.H.C. 369. [*D.*, 28 B. 115=2 Bom. L.R. 781.]

(284)—*Mortgage by three persons—Equity of redemption subsequently partitioned among them—Suit for redemption by two sharers—Effect—Sale of entire equity of redemption—Suit by purchaser for redemption of one-third share of the property—Set-off.*—A, B, and C (three undivided brothers), after mortgaging their common family property, effected a partition of the equity of redemption among themselves. Two of the mortgagors (A and B) then redeemed their two shares on paying two-thirds of the principal and interest due and also two-thirds of a sum said to be due on account of excess assessment paid by the mortgagee in respect of the mortgaged lands. The plaintiff, as purchaser at Court-sale of the whole of the mortgaged property, sued to redeem the remaining one-third portion of the property, and was met by the defence that he must pay, together with the mortgage-money, one-third of the sum which the defendant alleged he had paid as assessment. The lower Appellate Court having found that the mortgagee-defendant had not proved the alleged payment of assessment, gave a decree in plaintiff's favour, on payment by him of one-third of the mortgage-money less the amount paid as assessment by the two mortgagors (A and B.) On appeal, the High Court varied the lower Court's decree and held that the amount should not be deducted from the mortgage-money. The mortgagors had severed their interests under the mortgage and the mortgagee had chosen to recognise their partition as shown by his allowing two of them to redeem their two-thirds shares and by giving them possession. The plaintiff's right to redeem his one-third share was perfectly distinct from the former transaction and there was no longer any joint account to which the sums previously paid could be credited. **LAKSHMAN GIRIRAYA NAIK v. MADHAV KRISHNA SHENVI**, 15 B. 186. [*R.*, 6 C.L.J. 46, 10 C.L.J. 150.]

(285)—*Purchaser, mortgagee, remedy of, in suit against person excluded in the mortgage suit—Mortgage sum, mode of adjustment of—Proportionate amount payable, ascertainment of—Amendment—Converting suit of one nature to another.*—When the mortgagee, in execution of a decree obtained against the owners of the

Mortgage--continued.**—9.—Redemption—continued.**

equity of redemption except one, has brought the mortgaged property to sale and purchased it, he may bring an action for declaration of his title as purchaser at the mortgage sale and for recovery of possession, subject to the exercise of the right of redemption of the person excluded. *Quære.*—Whether it is open to a mortgagee, who has omitted to implead a necessary party, to maintain another suit to enforce his security against the party excluded. If the mortgagee has purchased some of the mortgaged properties, the defendant is entitled to redeem his own share in the disputed property, upon payment of a proportionate part of the amount due on the mortgage (5 C.L.J. 315=11 C.W.N. 403, *R.*) To find out the proportionate amount payable by the defendant, the value of all the properties comprised in the mortgage security at the date of the execution thereof should be first determined, as also the value of the disputed property. The principal amount of mortgage must then be distributed over all the properties comprised in the mortgage and the amount fairly chargeable to the share of the disputed property, proportionate to its value, will have to be calculated. The amount so fixed is the principal, which the defendant may be called upon to pay. Interest on this amount will run at the rate specified in the mortgage contract, from the date of the mortgage to the date fixed for re-payment, in the decree made in the mortgage suit, and further interest at the Court rate, between the date fixed for re-payment and the date of actual realization. The principle is equally applicable whether the decree in the mortgage suit was upon contest or by consent. Against the sum so found due to the plaintiff should be set off the profits, if any, which may have been realised by the plaintiff by his possession of the disputed share (31 I.A. 57=31 C. 332=8 C.W.N. 609, 3 C.L.J. 611, *R.*). When the mortgagee, who, in execution of his decree, purchased the mortgaged property, was subsequently deprived of it, then instituted a suit for recovery of the purchase-money against the person who was not made a party in the mortgage suit, on the ground that the effect of the previous litigation between the parties had been to deprive him of the disputed property, as also on the ground that the institution was due to the *dictum* in the judgment of the High Court, leave was granted to the plaintiff to amend his plaint and convert the suit into one for recovery of possession of the disputed share, subject to the exercise of the right of redemption of the defendant. **JUGDEO SINGH v. HABIBULLAH KHAN**, 6 C.L.J. 612=12 C.W.N. 107. (1 C.L.J. 337, *D.*) [*R.*, 10 C.L.J. 189=36 C. 726=1 Ind. Cas. 549, 10 C.L.J. 150=1 Ind. Cas. 264.]

(286)—*Mortgage—Redemption—Co-sharers—Construction.*—Where several share-holders in an estate have executed a joint mortgage of it, and have all subsequently executed deeds of further charge to which one or more have been

Mortgage—continued.

—9.—Redemption—continued.

parties, a purchaser of a portion of the estate from all the co-sharers, suing for redemption of the whole estate, must discharge all the debts which they jointly or severally charged on the property, for he represents all the co-sharers. A mere agreement in a bond executed by a mortgagor subsequently to a mortgage, to the effect that "after the expiry of the mortgage, when the time comes for payment of the mortgage money, first I will pay this bond with interest and after that I will pay the amount of the mortgage," is sufficient to create a charge on the mortgaged estate. **BHUGWAN DASS v. MAHOMED JAFER**, 4 N.W.P. 161.

(287)—*Decree obtained by prior mortgage—Part of mortgaged property sold in execution—Sale subject to subsequent mortgage, effect of, on right of redemption of remaining properties—Right to redeem on payment of proportionate mortgage debt.*—In 1874, plaintiffs had mortgaged various lands without possession. In 1876, they again mortgaged to defendants 1 and 2, 6 plots of land and 5 houses and placed them in possession. At the sale held in execution of a decree obtained by the prior mortgagee, the said defendants 1 and 2, the subsequent mortgagees with the 4th defendant, purchased the right of the plaintiffs to redeem 3 of the said plots. Plaintiffs brought this suit for redeeming the rest of the property. The lower Court had allowed them to do so but only on payment of the full mortgage-debt. The High Court held that this was wrong. The lower Court had ignored the fact that the property purchased by the defendants was sold subject to the mortgage and was still burdened with the mortgage-debt. The plaintiffs were entitled to redeem part of the mortgaged property since the mortgagees had themselves acquired the share of their mortgagors and so severed their interests under the mortgage. The suit was, in the result, remanded to the lower Court for the purpose of ascertaining what proportionate amount of the mortgage-debt was charged on the property purchased by the defendants for the purpose of deducting that from the whole mortgage amount in order to ascertain the amount payable by the plaintiffs. **PIRJADA AHMADMIYA PIRMIYA v. SHA KALIDAS KANJI**, 21 B. 544. [R., 6 Bom. L.R. 284; D., 24 M.96.]

(288)—*Mortgage—Suit for redemption of part of property—Objection to frame of suit—Subsequent suit avoiding objection.*—The equity of redemption in a *Talooqua* comprising 16 villages was sold in auction in satisfaction of a decree against the original proprietor and mortgagor and his heirs. Defendant, the sub-mortgagee of the *Talooqua* purchased twelve villages. Three villages were brought by other parties and the remaining villages by the plaintiff. The latter sued to redeem the village they had bought, without making the purchasers of the other three villages parties to the suit. Defendant objected *inter alia* that the purchasers of the other three villages ought to have been

Mortgage—continued.

—9.—Redemption—continued.

made parties to the suit, and this objection was eventually upheld. The plaintiffs then sued to redeem three villages and one-fourth of another, making the owners of the three villages defendants. The lower Courts decreed the claim. On special appeal, the defendant questioned the plaintiff's right to redeem the three villages. *Held* that the defendant having forced the plaintiffs to bring the present suit, could not turn round upon them and object to their doing what they were absolutely directed to do by the Court, i.e., that they were bound to redeem the other three villages if they proposed to redeem the village they had bought. **NAWAB AHMED ALI KHAN v. JAWAHIR SINGH**, 1 Agra 3. [Overruled on appeal, 13 M.I.A. 404; Not F., 2 A. 565.]

(289)—*Mortgage of whole village—Suit for redemption by one of the joint mortgagors or his representatives—Right to sue.*—The defendants who were mortgagees of an entire village subsequently purchased the equity of redemption in respect of a portion of it. Plaintiff claiming to represent the joint purchasers of the equity of redemption in another portion of the village, one by purchase and the other by descent, sued to redeem the entire estate. The defendants questioned the validity of the sale to the persons through whom the plaintiff claimed and impugned his right as heir. *Held*, that the defendants (mortgagees) were not entitled to question the sale as they did not contest it when the sale took place but had only preferred their claim to a right of pre-emption, and inasmuch as the estate was jointly purchased by the persons through whom the plaintiff claimed, the right of the plaintiff to one-half of it by purchase being unquestioned, his title to redeem the whole of the joint estate was established. **BITTHUL v. TOOLSEE RAM**, 1 Agra 125.

(290)—*Owner of portion of equity of redemption, right of, to redeem whole property—Lien on other portions in favour of redeeming co-owner.*—In cases where there are two owners of parts of the equity of redemption, the mortgagee could enforce his rights under the mortgage against both together, or against either of the two, leaving that one, if forced to pay the whole sum, to recover the proper rateable contribution from the other. On the other hand, it is competent to either of such part-owners to redeem the whole and seek contribution from the other. Whichever of the two redeemed, he would have a lien on the share of the other for the proportional contribution of that share to the sum expended in redemption, and this right or interest would be as capable of transfer as the aggregate group of interests called ownership. The vendor to the plaintiff, in this case, having purchased only a portion of the property mortgaged, the mortgagor having retained his equity of redemption, even after the Court-sale, the mortgage of the property again by him to the defendant was valid so that the plaintiff could not recover

Mortgage—continued.**—9.—Redemption—continued.**

possession of the property mortgaged to the defendant without paying the amount of his lien. *VITHAL NILKANTH PINJALE v. VISHVASRAV*, 8 B. 497. [R., 13 B. 45, 3 N.L.R. 92.]

(291)—*Owner of part of an estate—Redemption—Right of one who redeems the whole estate.*—The owner of the equity of redemption of part of an estate under mortgages is entitled to redeem the whole of the mortgaged estate, if the mortgagee insists upon his right to have it so redeemed. [R., 21 B. 619, 21 M. 18, 61 P.L.R. 1904; D., 9 M. 92.] When a part owner so redeems the whole estate, he thereby puts himself in the place of the mortgagee redeemed, and acquires a right to treat the original mortgagor as his mortgagor, and to hold that portion of the estate, in which he would have no interest but for the payment, as a security for any surplus payment he may have made. *ASANSAB RAVUTHAN v. VAMANARAU*, 2 M. 223.

(292)—*Suit to realize balance of mortgage-debt—Purchase of equity of redemption—Proportionate share of the debt.*—Where the plaintiff, purchaser of a mortgage-deed, sought to sell a share of one of several properties comprised in the mortgage, to satisfy the balance due on the mortgage, the defendant, who had purchased the equity of redemption in that share, would no doubt be entitled to insist that the property should be burdened with no more than a proportionate amount of the original mortgage-debt and might claim to redeem that share upon payment of that quota; but, where it had not been shown what that proportion was, nor had the money been paid into Court, the plaintiff would be entitled to enforce the attachment. *HIRDY NARAIN v. SYED ALLAOOLLAH*, 4 C. 72=2 C.L.R. 580. (13 M.L.A. 404, F.)

(293)—*Mortgage—Court sale of equity of redemption—Portion only purchased by mortgagee—Suit for redemption—Partial redemption.*—A mortgagee is entitled to say to each of several persons who may have succeeded to the mortgagor's interest that he shall not be entitled to redeem a part of the property on payment of part of the debt, because the whole and every part of the land mortgaged is liable for the whole debt. But a mortgagee who has acquired by purchase a part of the mortgagor's rights and interests is not entitled to throw the whole burden of the mortgage-debt on the remaining portion of the equity of redemption in the hands of one who has purchased it as a sale in execution of a decree against the mortgagor. Such a purchaser would be entitled to redeem the portion of the property purchased by him on payment, not of the whole but such portion of the debt as is proportionate to the relative value of the mortgaged properties. *MAHTAB SINGH v. MISREE LALL*, 2 Agra 88. [F., 24 W.R. 24, 12 C.W.N. 745; R., 2 A. 565 20 A. 23=A.W.N. 1897, 163, 22 A. 284, F.B.=A.W.N. 1900, 69, 26 A. 72=A.W.N. 1903, 190.]

Mortgage—continued.**—9.—Redemption—continued.**

(294)—*Mortgage by some members of a joint Hindu family, suit for foreclosure of, omission to implead other members in—Right of omitted members to sue to redeem entire property.*—In a suit for redemption of the whole of a mortgaged property brought by some members of a joint Hindu family, it appeared that the defendant-mortgagee had, in a previous suit by him for foreclosure of the same mortgage, omitted to implead the plaintiffs as parties thereto, though he had notice of their interests. On a contention by him, however, that the plaintiffs ought not to be allowed to redeem the whole property, but must be limited to their shares alone, held, the character of indivisibility exists not only with reference to the mortgagee, who may generally be more benefited thereby, but also with reference to the mortgagor and persons acquiring through either any partial interest in the subject; none of whom therefore, can get relief under the mortgage, except in consonance with the principle of its indivisibility. Further, on general principles, the mortgagee should not be allowed to utilize his own neglect of a duty imposed by law and his failure to implead proper parties, to gain for himself a better position than he would otherwise occupy; and the plaintiffs, therefore, had the right to redeem the entire property mortgaged and such right ought not to be restricted to what would have been the share of each of them on partition. *DINDAYAL v. SHEORAJ SINGH*, 2 N.L.R. 116. (22 M. 209, F.; 3 C.P.L.R. 82, 28 C. 517, R.) [R., 5 N.L.R. 117, 5 N.L.R. 103; Diss., 4 N.L.R. 168.]

(295)—*Redemption of part.*—A mortgagor of an undivided share may redeem the entirety, at any rate if the mortgagee does not object, and may be compelled to do so if required by the mortgagee. *CHAUDHRI AHMAD BAKHSH v. SETH RAGHUBAR DAYAL*, 7 Bom. L.R. 912=2 C.L.J. 413=28 A. 1=10 C.W.N. 115=15 M.L.J. 407=2 A.L.J. 813=32 I.A. 229=8 Sar. 882.

(296)—*Right of a prior mortgagee to compel puisne mortgagee to redeem the whole—Redemption of a portion of the mortgaged property where the mortgagee refuses to allow redemption of the whole—Estoppel by defence raised in the previous case.*—Under a mortgage of September, 1879, and a subsequent agreement, S became the mortgagee in possession, for a term of 12 years, of a 4 annas share of K and an 8 annas share of B in two villages. In December, 1888, K mortgaged his 4 annas share for 30 years to the plaintiff, who redeemed the mortgage of 1879 and took possession of both shares. In 1897, B mortgaged his 8 annas share to the defendant, who then sued the plaintiff for redemption of that share on the payment of the amount due on it under the mortgage of 1879. The plaintiff insisted on the defendant redeeming the whole share of 12 annas, and the defendant's suit was dismissed. In 1899, the defendant brought another suit for redemption of both shares, obtained a decree and took pos-

Mortgage—continued.

—9.—Redemption—continued.

session. In 1901, plaintiff sued for redemption of the 4 annas share of *K* only, on payment of the amount due on it under the mortgage of 1879, but offered to redeem the share of *B* also. The defendant did not accept the offer. *Held*, that the plaintiff was entitled to redeem *K*'s 4 annas share. **JAWAHIR SINGH v. BALDEO BAKHSI SINGH**, 10 O.C. 193, P.C. = 6 C.L.J. 672 = 12 C.W.N. 515.

(297)—*Mortgage—Redemption of mortgage by one of co-mortgagors—Charge upon co-mortgagors, share of mortgage debt—“Obtains possession,” meaning of—Transfer of Property Act, s. 95—Joint decree against several mortgagors.*—H mortgaged a two annas share to R for Rs. 1,000 with interest at the rate of Rs. 1-8 per cent. On his death he left as his heirs his brother the plaintiff, and the defendants who were his widow and three daughters. The plaintiff paid Rs. 1,000 on account of the mortgage-debt and subsequently Rs. 480-6-0 more in satisfaction of a simple money decree obtained for the balance of that debt. The plaintiff then brought a suit against the defendants alleging that he had a charge on the mortgaged property for the share of the mortgaged debt which was due from them and which he paid, and that he was entitled to a decree for sale of their share in default of payment. He further alleged that the defendants were jointly liable. *Held*, that the plaintiff had a charge on the share of each of the defendants for the latter's proportion of what the former had paid to redeem the mortgage. The liabilities of the defendants were however separate and the plaintiff was not entitled to a decree for the sale of their share jointly on their failure to pay their proportion of the mortgage-debt, but he was entitled to separate decree against each of them in proportion to her share of that debt. *Held*, further, that as all the money, by the payment of which the debt was discharged, was paid by the plaintiff, it must be held that he redeemed the mortgage. It did not matter that part of the debt was paid before the mortgagee was entitled to recover it, or that, for the other part, the mortgagee had obtained a simple money decree which the plaintiff satisfied. *Held*, further, that in s. 95, Transfer of Property Act, the words, “obtains possession” may be interpreted to mean “obtains possession when the mortgagee had possession under his mortgagee.” **GHULAM MAULA KHAN v. MUSAMMAT BANNO KHANAM**, 4 O.C. 273.

(298)—*Bombay Regulation I of 1800, s. 13—Limitation for redemption of mortgage of land made prior to Act XIV of 1859—Limitation Act XV of 1877), s. 19—Acknowledgment—When mortgage property is split up, acknowledgments by different sharers are valid in respect of the whole property.*—No period of limitation was fixed, by any Act or Regulation, for redemption of a mortgage made prior to the passing of Act XIV of 1859. S. 13 of Bombay Regulation I of 1800, did not apply to redemption or other mortgage suits. A condition in a mortgage

Mortgage—continued.

—9.—Redemption—continued.

deed, that the mortgagor shall not redeem before he has paid off a personal loan, shall be given effect to in cases not governed by the Transfer of Property Act, 1882. But such a condition is a clog on the equity of redemption and not enforceable in cases governed by this Act. Where the mortgaged property having been split up into two, each sharer represented his own share and made an acknowledgment in respect of it, and the two acknowledgments put together comprised the whole property, it was held that those were valid acknowledgments within the meaning of s. 19 of the Limitation Act, 1877, although they were not signed at one time by all the mortgagees of that time or by each one in respect of the whole of the mortgaged estate. **HIRALAL ICCHALAL MAJUMDAR v. NARSILAL CHATURBHUIDAS DESAI**, 11 Bom. L.R. 318 = 2 Ind. Cas. 469. (17 B. 173, 18 A. 458, D.)

(299)—*Transfer of Property Act (IV of 1882), s. 60—Partial redemption of a puisne mortgage—Puisne mortgagee not party to prior mortgagee's suit and vice versa—Second mortgage only of a portion of property—Independent decrees obtained by both mortgagees—Property sold in both decrees—Puisne mortgagee's right to redeem only that portion which was mortgaged to him—Effect of second sale on mortgagor's right of redemption—Prior mortgagee not allowed to redeem the puisne mortgage.*—A prior mortgagee brought a suit on his mortgage and got a decree for sale of the mortgaged property. Plaintiff, who was a puisne mortgagee in respect of a portion of the same property, was not made a party to this suit. In execution of the decree under the first mortgage, the whole mortgaged property was purchased by the defendant. Subsequently the plaintiff brought a suit on his second mortgage and got a decree for sale, without impleading the prior mortgagee or the auction-purchaser as a party to his suit. In execution of his decree, the plaintiff himself purchased the share mortgaged to him. He then brought a suit to redeem this share on payment of a proportionate amount due on the first mortgage. *Held*, that the plaintiff was entitled to redeem the share on payment of a proportionate amount due on the first mortgage, and he had not lost the right of redemption obtained by his mortgage. *Held*, further, that the defendant was not entitled in virtue of his purchase to redeem the plaintiff. Even if it were assumed that the prior mortgagee stood in the shoes of the mortgagor, the mortgagor's right of redemption no longer existed, inasmuch as a decree was passed on the puisne mortgage and the property sold in execution of that decree. **HAR SAHAI v. MUKKARRAM HUSSAIN**, 1 Ind. Cas. 505. (28 B. 153, D.)

(300)—*Share in patti—Partition—Mortgaged property entered as a share in new mahal but alleged by mortgagor to consist of separate plots—Decree to which mortgagor is entitled.*—

Mortgage—continued.**—9.—Redemption—continued.**

Certain property was mortgaged as a share in a *patti*. After the mortgage, a partition took place and the mortgaged property was transferred to another *mahal* and again described as a share in the *mahal*. The mortgagors sued for redemption, but claimed possession of certain specific plots of land as representing the share originally mortgaged. *Held*, that in such a suit, the plaintiffs could only get a decree for possession of an undivided share, and if they wanted the specific plots must apply to the Revenue Courts for a partition. **CHANDAN SINGH v. RAM SINGH, A.W.N. 1906, 7.**

(301)—*Ex-proprietary tenancy—Mortgage of proprietary rights—Rights sold and purchased by mortgagee—Amount payable on redemption.*—After a usufructuary mortgage of certain *sir* lands, the mortgagee purchased the *sir* and Zamindari rights, the mortgagor becoming an ex-proprietary tenant. On a suit for redemption being brought, *held* that, the mortgagee having himself broken up the integrity of his security, he cannot be permitted to cast the whole burden of the debt upon the ex-proprietary rights. **CHUNI LAL v. SIKISHAN SINGH, 8 A.L.J. 227=33 A. 434=10 Ind. Cas. 729.**

(302)—*Redemption—Mortgagor cannot be compelled to redeem the whole property—Relinquishment of one portion—Transfer of Property Act (IV of 1882), s. 85.*—A mortgagor cannot be compelled to redeem the whole of the mortgaged property. He is bound to pay the whole of the mortgage debt before he can redeem any portion of the mortgaged property; but subject to this condition there is nothing to prevent his relinquishment of the right to redeem one portion of the property while suing to redeem other portions. **VENKATVARAHACHARYA v. KOTRAPA, 3 Bom. L.R. 935.**

(303)—*Redemption of whole mortgaged property when portion of it purchased by mortgagee, suit for—Redemption of whole mortgage by owner of part of the equity of redemption.*—A person interested in part only of mortgaged property may insist upon redeeming the whole; but when a mortgagee purchases a part of the property, the latter can insist upon retaining the portion so purchased but he is not entitled to have the redemption restricted to the interest of the plaintiff who seeks to redeem. **PARWAN SINGH v. BISHESHAR SINGH, 9 O.C. 63. [R., 12 O.C. 205.]**

(304)—*Redemption of whole of mortgaged property by owner of part of equity of redemption—Failure of plaintiff to tender the mortgage money as required by mortgage-deed—Circumstances under which tender may be excused.*—A share in a village was subject to a mortgage in favour of 3 persons C, L and B for Rs. 3,000, of which C and L were entitled to Rs. 1,685 and B was entitled to Rs. 1,315. The mortgagees obtained possession of the share when Rs. 10,000 were due upon the mortgage. The same amount was due at the date of a suit for

Mortgage—continued.**—9.—Redemption—continued.**

redemption against B by a person in whom the rights of C and L were vested and who with one of the defendants had acquired all the rights of the mortgagor. The mortgage-deed provided that the mortgage-money should be tendered or paid in the *khali fasl* but the plaintiff had made no tender in the *khali fasl*. *Held*, that, under the circumstances, the plaintiff could maintain a suit for redemption, though he had made no tender in the *khali fasl*. *Held*, also, that the plaintiff representing C and L as mortgagees was entitled to the same proportion of the sum due as of the principal sum secured. *Held* also that although the plaintiff was at the date of suit only part owner of the right to redeem, he was entitled to redeem the whole of the mortgage. The general rule is that a person who owns a part only of the equity of redemption can claim, and if the mortgagee so wishes, is bound, to redeem the whole mortgage, but when both the plaintiff and the defendant have acquired parts of the equity of redemption, the plaintiff cannot redeem the whole against the will of the defendant. **B. SIDH GOPAL v. NANHU KHAN, 6 O.C. 223. [R., 9 O.C. 63, 10 O.C. 81.]**

(305)—*Redemption, suit for—Joint mortgages—Right of person interested in part only of equity of redemption to insist upon redeeming whole property—Validity of mortgage signed by third party for mortgagor with his authority—Personal signature of mortgagor on mortgage-deed—Transfer of Property Act, s. 59.*—M and G owned a three-fourths and a one-fourth share respectively in certain land. In 1872, they jointly mortgaged the whole to the defendant. G's share became vested in his three grandchildren A., A.J., and A.H. In 1893, M mortgaged his share again to the defendant by a deed which was signed for him at his request by another person and which postponed the redemption of the mortgage of 1872 from 1296 to 1350 Fasli. M died having devised his share to A.J. After 1296 F. the plaintiff as purchaser of the right of A., A.J. and A.H. sued for redemption of the entire land. *Held*, that joint character of the mortgage of 1872, had been destroyed by the deed of 1893 and therefore the plaintiff, so far as he represented G, could not insist upon redeeming the entire land, that so far as he represented M, he was bound by the provision in the deed of 1893 and could not as yet redeem M's share but that, under the circumstances, he was entitled as the representative in interest of G to redeem G's share alone. *Held*, also, that s. 59 of the Transfer of Property Act, does not require the personal signature of the mortgagor but a mortgage is signed by the mortgagor within the meaning of that section, if his signature is affixed for him with his authority. Therefore, the deed of 1893 had been validly executed. **MIRZA HAIDAR ALI v. RAJA JANG BAHADUR KHAN, 6 O.C. 279. [R., 10 O.C. 81, 11 O.C. 73.]**

Mortgage—continued.**—9.—Redemption—continued.**

(306)—*Mortgage—Redemption—Purchase of share in mortgaged property—Right of purchaser to redeem his share.*—Where a share in property usufructually mortgaged was sold and the purchaser sued for redemption of his share on the ground that the mortgage-debt had been completely satisfied, the suit could not be held unmaintainable on the ground that the plaintiff's claim related only to a portion of the mortgaged property. **LALLA DAIBEE PERSHAD v. BEHAREE LALL, 3 Agra 33.**

(307)—*Two mortgages over same property—Mortgagor entitled to redeem separately—Transfer of Property Act (IV of 1882), s. 61*—There is nothing in the Transfer of Property Act, limiting the right to recover possession, which, under s. 62 of the Act, is given to the mortgagor, in the case of a usufructuary mortgage where it is usufructuary *qua* interest, when, after the expiry of the term for payment of the mortgage-money, the mortgagor pays or tenders the same as provided by the Act. S. 61 of the Act has been enacted with the object not of indicating that there might be some other restriction on such rights of a mortgagor, but of prohibiting the application of the principle of consolidation to India, except where the parties had by contract agreed that such consolidation should take place. A mortgagor, therefore, unless otherwise bound by contract, cannot be prevented from redeeming one of two or more mortgages held by his mortgagee over the same property without redeeming the other or the others. **TAJJOBIBI v. BHAGWAN PRASAD, 16 A. 295=A.W.N. 1894, 93. (6 B.H.C. 90, R.) [R., 27 A. 313=A.W.N. 1904, 273=1 A.L.J. 715, 31 A. 482=6 A.L.J. 654.]**

(308)—*Mortgage of several items—Sale of equity of redemption of one item—Second mortgage of some items and redemption of one by mortgagor—Transfer of Property Act, s. 60—Redemption by purchaser of equity, on payment of proportionate sum.*—Where a mortgagee accepts proportionate amount of the mortgage due on one item of the land, and lends a further sum on the remaining items, he destroys the indivisibility of the original contract, and, therefore, the purchaser of the equity of redemption of one of the items, who had purchased before the redemption by the mortgagor, is entitled to redeem it upon payment of the proportionate amount due thereon. **SUBRAMANYAN v. MANDAYAN, 9 M. 453. [Not F., 17 A. 63.]**

(309)—*Construction of wells—Covenant to pay cost of wells—Mortgagee acquiring part of equity of redemption—Act IV of 1882, s. 72—Enhancement of revenue—Mortgagor's liability.*—Where a mortgage-deed provided that, in case of redemption, the mortgagee would be entitled to the costs of constructing wells, if any, and the mortgagee acquired the equity of redemption in a part of the mortgaged property, *held* that it would be in the highest degree inequitable that he should not only have the benefit of the wells but also recover

Mortgage—continued.**—9.—Redemption—continued.**

the money he spent in constructing them. S. 72 of the Transfer of Property Act only reproduces the doctrines which the Courts had adopted before the passing of that Act. Hence, where a mortgage was made before 1882 and the Government revenue was enhanced and the mortgagee had to pay the enhanced revenue, the mortgagor was *held* liable to pay the enhanced revenue with interest at the time of redemption. **THE COLLECTOR OF ALIGARH v. BOHRA THAKUR DAS, 3 A.L.J. 435=28 A. 593=A.W.N. 1906, 150. (10 A. 611, R.) [R., 3 A.L.J. 441=A.W.N. 1906, 161, 29 A. 233=A.W.N. 1907, 31=4 A.L.J. 66, 11 C.L.J. 639; Discharged, 12 C.L.J. 272, P.C.]**

(310)—*Mortgage by two Hindu co-widows—Equity of redemption sold for a money-decree by a third party—Redemption by the other—Her share.*—In execution of a money-decree against one of two Hindu co-widows the mortgagee purchased the whole equity of redemption in spite of the other widow's objections, *held* the other widow could redeem her half share then and the other half on the death of the co-widow. **ARIYAPUTRI v. ALAMELU, 11 M. 304. [D., 22 M. 209=8 M.L.J. 309.]**

(311)—*Redemption of mortgage by one of several tenants in common, how far allowed.*—In the case of a mortgage of property held by several tenants-in-common with undivided shares in the entire property, one of such tenants-in-common may redeem the whole, except as to the share purchased by the mortgagee. **SAKHARAM NARAYAN v. GOPAL LAKSHUMAN, 10 B. 656, Note. [R., 10 B. 648.]**

(312)—*Redemption of whole mortgaged property by one of several owners—General rule and exception.*—The general rule is that one of several owners of the equity of redemption has a right to redeem the whole of the mortgaged property. But, where the mortgagee has become by inheritance the owner of a fourth share in the property, the plaintiff will be entitled to redeem the remaining three-fourth share only leaving the one-fourth acquired by the mortgagee. **ALIKHAN DAUDKHAN v. MAHAMAD KHAN SAMSEKHKHAN DESHMUKH, 10 B. 658, Note. [R., 10 B. 648, 15 B. 24, 21 B. 619.]**

(313)—*Mortgage—Right to redeem—Purchaser of equity of redemption of a portion.*—It requires a clear expression of intention to deprive a mortgagor of his right to redeem at any time on the payment of the debt. **[F., 201 P.R. 1889; R., 10 A. 602.]** The purchaser of the equity of redemption of a portion of the mortgaged property is entitled to redeem his portion on payment of a proportionate amount of the mortgage money, when the mortgagee himself has destroyed the indivisibility of the original contract. **MARANA AMMANNA v. PENDYALA PERUBOTLU, 3 M. 230. [F., 9 M. 453; Not F., 17 A. 63=A.W.N. 1895, 6; R., 21 B. 619.]**

Mortgage—continued.**—9.—Redemption—continued.**

(314)—*Mortgage—Common land — Redemption—Right of assignee from some of mortgagors to redeem whole mortgage.*—Certain proprietors in the *shamlat* of a village mortgaged their shares in it to the defendants who were also co-sharers in the *shamlat*. The plaintiffs as purchasers from some of the mortgagors, sued the mortgagees, impleading the other proprietors as co-defendants, for redemption of the whole mortgage on payment of the whole of the mortgage-debt. It was contended for the mortgagee defendants that since they were co-sharers in the land, the plaintiffs could not redeem without first effecting partition. *Held*, that the plaintiffs were entitled to redeem the whole mortgage and enter into joint possession with the mortgagees upon payment of the whole amount of the mortgage money. **BAHRAM KHAN v. SAIDAL KHAN, 48 P.L.R. 1904=2 P.R. 1904.**

(315)—*Suit by one of several joint mortgagors for redemption of his share—Indivisibility of mortgage.*—Though it is a general rule of law that the integrity of a mortgage is to be maintained for the purposes of fulfilment of the security, still, a co-sharer in the equity of redemption can sue the mortgagees for redemption of his own share if the mortgagee, by his own conduct in purchasing a portion of the equity of redemption, destroys the indivisibility or integrity of his mortgage himself. Whilst it is perfectly true that a mortgagor is not entitled to redeem any portion of the property mortgaged without the whole debt being liquidated, the mortgage transaction being one and indivisible, it is equally true that when the mortgagee or mortgagees by their own act break up the indivisibility of the mortgage, they can no longer insist upon the integrity of their security, and they are liable to be sued by each individual mortgagor for redemption of his own share by payment of the proportionate amount remaining due on the mortgage. **KISHEN LAL v. CHUNNA LAL, A.W.N. 1887, 250. (3 M. 230, 2 A. 565, 5 A. 276, 13 M.L.A. 404, F.)**

(316)—*Prior and subsequent mortgagees—Redemption—Subsequent mortgagee made party in prior mortgage suit—Subsequent mortgagee not redeeming within time fixed—Suit by subsequent mortgagee—Res judicata.*—A prior mortgagee sued for sale on his mortgage making the subsequent mortgagee a party, and obtained a decree, but did not bring the property to sale, nor did the subsequent mortgagee redeem the prior mortgage within the time fixed by the Court. Subsequently the latter sued to redeem the prior mortgage: *Held* that the suit was not barred by *res-judicata*. *Held*, also, that, so long as the property was not sold in execution of the decree obtained by the prior mortgagee, the subsequent mortgagee's right to redeem did not extinguish. **SAHU SHIAMSUNDAR LAL v. HARNARAYAN, 9 Ind. Cas. 158.**

Mortgage—continued.**—9.—Redemption—continued.**

(317)—*Transfer of Property Act, 1882, s. 62—Satisfaction of debt by usufruct before stipulated period—No provision for redemption in such case—Right of mortgagor to redeem at once.*—Where, under a mortgage deed, the usufruct of the property is to be applied in satisfaction of the mortgage money and the debt has been paid off by the usufruct before the stipulated period, the mortgagor is entitled to redeem at once under s. 62, Transfer of Property Act, even though there has not been any express provision to that effect in the mortgage-deed. **MT. KUNDAN v. THAKURLAL, 6 C.P.L.R. 43. [R., 11 C.P.L.R. 103.]**

(318)—*Decree, for redemption with foreclosure clause added—Power to enlarge time—Principles and practice of Chancery Court—Decree for redemption with foreclosure clause added.*—Power to enlarge time for payment depends, where the Transfer of Property Act (IV of 1882) is not in force, upon the principles and practice of the Court of Chancery under which the practice of adding a foreclosure clause to a decree for redemption has been introduced. The adoption by the Indian Legislature in any Act of the principle on which any such practice may be founded does not cause such principle to have less weight, even though that Act may not be generally in force. If the principle applies, then, it is not necessary that the Act should also be shown to apply. Right of mortgagor to retain possession free of the mortgage affirmed, where the mortgagor having paid into Court the sum specified in his redemption decree 20 months after due date, the mortgagee did not apply for (the foreclosure to be made absolute) an order directing him to be placed in possession of the mortgaged property till 18 months later. **MAUNG KYA GAING v. MA NYEIN THA, L.B.R. 1893—1900, 174. (7 B. 532, 13 B. 106, 15 B. 614 and 17 B. 547, which was not a mortgage case; 16 C. 246, F.)**

(319)—*Mortgage-money deposited by mortgagor—Mortgagee accepting as deposited within time, not competent to subsequently sue for possession—A mortgagee who has once taken the mortgage-money as deposited in time by the mortgagor should be held bound by his election to take the money. It is not competent to him to sue for possession subsequently, asking that his own waiver in favour of the mortgagor by his election should be set aside, on the mere grounds that the deposit had not been made before the expiry of the year of grace and that he had been misinformed by his agent that the deposit was made within time. The fraud or mistake of the agent would give no right to the mortgagee to set aside his own act.* **KHOND-KAR NOWAZUSH HOSSEIN v. MUSSAMUT WOOSULOONISSA BIBEE, 6 W.R. 249.**

(320)—*Foreclosure—Extension of time for payment by mortgagor—Court closed on due date—Option of mortgagor to deposit in Court or tender mortgage money—Deposit by mortgagor on next open Court-day, sufficiency of, to*

Mortgage—continued.**—9.—Redemption—continued.**

save estate from foreclosure.—The mortgagee in this case allowed by petition a further term of payment to the mortgagor extending to the 25th November, 1863; if the mortgagor had tendered the mortgage money and interest, to the mortgagee on the 25th November he would have been in time; so he would have been clearly in time if he had taken his money into the Judge's Court on the 25th November. The Judge, however, had closed his Court on that day and extended the holiday until the Monday following. On that Monday, the plaintiff took his money into the Court, and deposited it there for the purpose of preventing a foreclosure of his estate. The question was whether the absence of the Judge from his Court was a sufficient answer to the mortgagor for not having deposited the money in the Judge's Court to prevent foreclosure. The High Court held that, although the mortgagee had extended the time for the payment to the 25th November, the mortgagor was prevented by the closing of the Court—a circumstance to which he was no party, and which was not caused by any default or misconduct on his part—from depositing the money in the Judge's Court on that day. He, therefore, had a reasonable excuse for not doing so, and consequently it would be contrary to any principle of justice, equity and good conscience to allow the mortgagee to take advantage of the mortgagor's inability to deposit the money in Court, and to treat the mortgage as foreclosed. It was further contended in this case that, inasmuch as the plaintiff was unable to deposit the money in Court on that particular day, he was bound to then make a tender to the mortgagee. But the High Court was of opinion that, when the Judge's Court was not open, the mortgagor was not bound to make tender to the mortgagee. The plaintiff had the option, either of depositing the money in the Judge's Court, or of tendering it; and if there was a sufficient excuse for not depositing it in the Judge's Court he was not bound to tender the money and prove that tender. **DABEE RAWOOT v. HEERAMUN MUHATOON, 8 W. R. 223.** [*F.*, 7 C. 690; *Appr.*, 5 C. 906=6 C. L R. 239; *R.*, 1 N.W.P. 81, 14 C. 451, 21 M. 385, 10 C.W.N. 535=3 C.L.J. 339, 6 C.L.J. 176, 7 N.L.R. 176.]

(321)—*Right to redeem within the period fixed for the mortgage.*—In a suit in which the deed of mortgage contained the words "*rahn dar rahn bil qabza miyadi chalis sal harke*," and also the stipulation that "*fak-i-irazi hali fasal ba adai kul zar-i-rahn hoga*." Held, that the fixation of the period was not of the essence of the contract, for the contract contains no condition which expressly prohibits the debtor from redeeming the mortgage during the currency of the period fixed therefor. The general rule is that a mortgagor is at liberty to discharge the mortgage-debt at any time; and the mortgage-deed in the present case contains no stipulation which would impede the operation

Mortgage—continued.**—9.—Redemption—continued.**

of this general rule. **FAIZ TALAB KHAN v. FAZAL, 4 P.W.R. 1912 (N.W.F.P.)=203 P.L.R. 1912.** (201 P.R. 1889, 10 A. 602, 2 M. 33, 17 M.L.J. 83, *F.*)

(322)—*Suit for redemption—Previous dismissal of suit for non-joinder—Foreclosure proceedings—Expiry of year of grace—Suit for redemption—Res-judicata.*—One of the sons of a mortgagor sued for redemption, but it was found that another suit for redemption had been previously brought by another son of the mortgagor and, on the defendant's objection in that suit that the plaintiff could not sue alone, he alleged that he sued on behalf of his brothers also and undertook to produce the brother, the plaintiff in the subsequent suit in person or produce a power of attorney from him and, on his failing to do either, the suit was dismissed. Held that the present suit was not *res judicata*, that, as a foreclosure proceeding is merely a ministerial one without any final judicial sanction, a mortgagor can sue and get a decree for redemption on proving his claim and on showing that foreclosure proceedings were not good and were final against him for some cause or other. A mortgagor need not take notice of defective foreclosure proceedings nor need he wait till the mortgagee sues to complete his title to plead irregularity in the proceedings and may claim redemption even after the lapse of the year of grace. **GURDITTA MAL v. SANDHI KHAN, 27 P.R. 1900.**

(323)—*Fixing of term for redemption—Suit before the expiry of term.*—The fact that a period is fixed for the redemption of a mortgage does not prevent the mortgagor from redeeming it before the expiry of the stipulated period as such fixing of the period is only for the convenience of the mortgagor. **MAULA v. KUTBA, 201 P.R. 1839.** (5 B. 22, 8 A. 95, *Not F.*; 2 M. 314, 3 M. 230, 10 A. 602, *F.*)

(324)—*Mortgagor and mortgagee—Time for payment of mortgage debt, mortgagors right to redeem not postponable beyond.*—The mortgage in this case contained the following clause:—"Should you for any reason not wish to carry on the management of the mortgaged property, then either before the time or thereafter (that is to say, whenever you may demand your money) I will pay off the whole amount according to the above agreement. Should I not pay the same, you are to recover the same in full from the mortgaged property." Held that the clause was inoperative as amounting to a stipulation having the effect of postponing the mortgagor's right to redeem beyond the time when the mortgagee can call in his money. **SARI v. MOTIRAM, 22 B. 375.** (20 B. 677, *F.*) [*R.*, 26 A. 479=1 A.L.J. 133=A.W.N. 1904, 60.]

(325)—*Transfer of Property Act, 1882, s. 92—Decree for redemption of usufructuary mortgage—Mere direction for payment of mortgage money*

Mortgage—continued.**—9.—Redemption—continued.**

within seven days without any penalty or condition by way of debarring redemption or otherwise without effect—Insufficiency of time allowed for payment.—In a suit for redemption of land under usufructuary mortgage, the Court of First Instance gave a decree for redemption and directed payment in 7 days. It added nothing, however, either as penalty or condition. The mortgagor (respondent) was said to have failed to make payment in 7 days and the mortgagee (appellant) applied to the Court to declare that the mortgagor was debarred from redemption. In this case he succeeded in the Court of First Instance, but the decree was reversed in first appeal and he brought this second appeal. *Held*, dismissing the second appeal with costs, that the mortgagee was not entitled to put matter into the decree which was not there. The direction for payment within a limited time had no practical effect upon the decree for redemption as no condition was imposed or penalty attached to non-compliance. Seven days was far too short a time to allow for payment anyhow; and further, the omission to add any penalty by way of debarring redemption or otherwise was right in result as this was a usufructuary mortgage, the rules of the Transfer of Property Act applying as rules of practice in such matters. **MAUNG SHWE BIN v. MAUNG CHAN MYA, U. B. R. 1897—1901, Vol. II, 514. [R., U. B. R. 1897—1901, Vol. II, 582.]**

(326)—*Mortgage deed fixing term for redemption—Right of mortgagor to redeem before expiry of term.*—A mortgagor or puisne mortgagee may redeem at any time, unless it appears from the nature of the mortgage or from other circumstances that the term was created in favour of the mortgagee as well as of the mortgagor. **JIVAN LAL v. DHUNDE, 16 C.P.L.R. 59. (23 M. 33, F.)**

(327)—*Mortgage of property not in the possession of the mortgagor, effect of—Long term for redemption fixed in the mortgage-deed, validity of—Redemption not allowed by the assignee of mortgagor in a suit for possession by the mortgagee—Mortgagee bound to pay money paid for redemption of prior mortgage—Suit for possession not a suit for specific performance.*—In 1886 one K mortgaged a share in a village with possession to one J. Subsequently, in 1898, the same share was mortgaged with possession to the plaintiff for a term of 80 years, it being expressly stipulated that the mortgagor shall not redeem until the expiry of the said period. In 1905 K sold the property to the defendants who then paid off J's mortgage of 1886 and took possession of the property mortgaged. The plaintiff now brought a suit for possession on the basis of the mortgage of 1898. The defendants contended that the mortgagor, not being at the date of transaction in possession of the mortgaged property, had no right to mortgage it with possession and that the plaintiff could not claim possession on the strength of the

Mortgage—continued.**—9.—Redemption—continued.**

deed. It was also contended that the condition in the mortgage-deed that the mortgagor shall not redeem for 80 years should not be enforced and the defendants should be allowed to redeem the plaintiff's mortgage: *Held*, that although the property was not in the possession of the mortgagor in 1898 when he mortgaged it to the plaintiff, yet that circumstance could not prevent the plaintiff from asserting her right under the terms of her mortgage-deed and that, therefore, she was entitled to recover possession of the property mortgaged to her: *Held*, further, that the present suit for possession could be treated as a suit for the specific performance of the contract, and that the defendant could not be allowed to redeem in the present suit inasmuch as the defendants had not offered to redeem the plaintiff's mortgage, nor had they paid the Court-fee which would be payable on a prayer for redemption of the mortgage: *Held* also, that it was premature to consider whether the provision that the mortgage shall not be redeemed for 80 years should be enforced or not, as the plaintiff had not yet obtained possession of the property and no question of redemption could till then arise. *Held*, lastly, that the plaintiff, before obtaining possession of the property mortgaged, must pay to the defendants the amount of money paid by them to the mortgagee of 1886. **KANCHAN SINGH v. JAFRI BEGAM, 10 Ind. Cas. 190. 10 O.C. 218, R.)**

(328)—*Construction of the deed—Provision to make over land on failure to redeem at a certain time, effect of—Right of redemption—Transfer of Property Act, s. 60, applicability of, to Burma.*—A mortgage document ran as follows:—On the 11th Tazaungmon Lazok, 1261, U.E. and his daughter, Mi Kywe..... said to Ko Yunut and his wife, Ma Paw, "We wish to mortgage our land, called *Maubin*, yielding 600 baskets of paddy, situated on the north of Ywagauk and bounded as shown below, for Rs. 430. We will redeem it in *Tabaung*, 1262, by payment of an extra sum of Rs. 70, i.e., Rs. 500 in all. If while the land is in Ko Yunut's possession there be any interference on the part of Government or others, we will bear the responsibility thereof with costs. If, on the arrival of the date (specified), we fail to redeem, we will make over outright to Ko Yunut and wife, Ma Paw, the land within the (aforesaid) boundaries for Rs. 430, the money advanced." Whereupon Ko Yunut and wife, Ma Paw paid over Rs. 430 and accepted the *Maubin* land in mortgage, etc. The mortgagors sued for redemption after the expiry of the stipulated time. *Held* (1) that, in Burma, the Courts have nothing to do with the ancient law of India in relation to mortgages, that they are bound by equity, justice and good conscience, and that the rules contained in the Transfer of Property Act have been commended to the Courts as rules of equity, justice and good conscience (26 C. 1, F.; U.B.R. 1897—1901, Vol. II, 502, U.B.R. 1897—1901, Vol. II, 509, R.)

Mortgage—continued.**—9.—Redemption—continued.**

(2) that the equitable principle contained in s. 60, Transfer of Property Act is in favour of the conservation of the right to redeem; (U.B.R. 1897—1901, Vol. II, 509, *F.*); (3) that the intention to extinguish that right should be clearly expressed or should be deducible unmistakably from the words of the deed, or the conduct of the parties (U.B.R. 1897—1901, Vol. II, 509, *F.*); (4) and that the contract in the case was not intended to execute itself, but that a further transaction was necessary before the land could become the property of the mortgagees. **NGA KYAW v. NGA YU NUT, U.B.R. 1907, Third Quarter, Mortgage, 1.** [*R.*, U.B.R. 1909, Mortgage, 5.]

(329)—*Deposit of mortgage money after expiry of time fixed by decree—Order absolute for foreclosure—Mortgagor's right to redeem—Act IV of 1882 (Transfer of Property Act), ss. 86 and 87.*—A decree was passed in favour of the respondent on a mortgage by conditional sale that the appellant should pay the mortgage money within six months, and in default of payment the appellant should be debarred of all rights to redeem the property. The appellant deposited the mortgage money in Court after the expiry of the period fixed by the decree. The respondent applied under s. 87 of the Transfer of Property Act, for an order absolute for foreclosure. The Munsif refused to grant the order prayed for; on appeal by the mortgagee, the Subordinate Judge decreed foreclosure: *Held*, that the appellant could redeem the mortgage:—*Held*, further, that the decree under s. 86, Act IV of 1882 (Transfer of Property Act) is a decree *nisi*, and can have no final force and effect until completed by an order absolute under s. 87. **BUTA alias GOTI v. USMAN, 1 O.C. 91.** (16 C. 246, *F.*; 19 A. 180, *Diss.*)

(330)—*Right to redeem on mortgage debt being satisfied.*—The right of foreclosure and the right of redemption are co-extensive, in the absence of a contract to the contrary. If the whole of the mortgage debt has been satisfied from the rents and profits of the property, the mortgagor has a right to redeem the property at once. **MT. KUNDAN v. THAKUR LALL, 6 C.P.L.R. 28.**

(331)—*Suit for—Further charge, paying off of, before redeeming original mortgage—Penalty in case of default in payment at the stipulated time.*—R mortgaged the village of Gangapur on the 2nd January, 1869 to S. and B. On the 19th July, 1869, R executed another deed in their favour which recited that he had borrowed Rs. 387 from them bearing interest at one per cent. *per mensem* which was to be paid in full by *Baishakh, 1277 Fasli* at the time of redemption of Gangapur. The deed went on, "That unless the aforesaid bond-debt is paid, I shall not be in a position to redeem the village Ferozepur; that, in case, I fail to pay the amount due under the bond with interest on the date fixed for repayment, I shall pay Rs. 1-8 per day from the date of such default, and interest shall cease to run from the

Mortgage—continued.**—9.—Redemption—continued.**

date of such default." On 9th January, 1872, R executed a third deed in favour of S and B. This set forth that the villages of Gangapur and Ferozepur were mortgaged to them, that Rs. 3,000 were due to them on account of profits, and that R would pay and discharge the sum of Rs. 3,000 in two years—the creditors abovenamed would have the power to realise their money from all the moveable and immoveable property of whatsoever kind; that the creditors would further have the power to realize their money with interest in full from whichever of the mortgage property they liked, after payment of the money due to the previous mortgagee as well as from all other property. It was admitted that Gangapur was a hamlet of Ferozepur. The plaintiff, who was, the son of the mortgagee, S. and who had acquired R's equity of redemption, sued the defendants 1, 2 and 3, sons of the mortgagee, B, and to redeem that part of Gangapur which was in their possession on payment of half the mortgage-money due under the deed dated 2nd January, 1869. The defendants claimed that in addition to the mortgage-money, money was due to them under two deeds of further charge, (1) dated 19th July, 1869 and (2) dated 9th January, 1872. *Held*, that the deed of the 19th July, 1869, was intended to create a further charge on Gangapur and the plaintiff was bound to pay it off at the time of redeeming Gangapur. (9 A. 158, *R.*) *Held*, further, that the penalty of Rs. 1-8 per day from the date of default was an unconscionable one and should not be enforced in full. *Held*, that the plaintiff was entitled to redeem the mortgage of Gangapur of the 2nd January, 1869 without paying off the mortgage of the 9th January, 1872. **CHANDRIKA PERSHAD v. JAGANNATH, 8 O.C. 227.**

(332)—*Expiry of fixed time—Payment within time—Proof of—Suit for recovery of land.*—Where a mortgagor proves that he had in fact paid the mortgage debt within the year of grace after the time fixed, he will be entitled to a decree for possession; else his suit for recovery of possession will be dismissed, even though he may offer further payment. **MANA SINGH v. KAHAN SINGH, 75 P.R. 1883.** (21 P.R. 1870, 84 P.R. 1882, *R.*)

(333 & 334)—*Payment into treasury by Court's order—Redemption of mortgage.*—Where a mortgagor pays the mortgage debt into the Collector's treasury before the expiration of the year of grace as per orders of the Court, *held*, that such payment was a deposit in Court entitling him to redeem. **MOONSHEE ABDOL HUQ v. MUSSAMUT MYAH BEWAH, W. R. 1864, 184.**

(335)—*Mortgage deed silent about interest—Foreclosure.*—Where a mortgage deed is silent as to interest, payment of the bare principal within the year of grace is sufficient to bar foreclosure. **RADHANATH SEIN v. BUNGO CHUNDER SEIN, W.R. 1864, 157.**

Mortgage—continued.**—9.—Redemption—continued.**

(336)—*Clog on the equity of redemption—Profit—Interest.*—Held that the following terms contained in a usufructuary mortgage did not constitute a clog on the mortgagor's right of redemption:—"The interest of the mortgage money and the profits of the lands mortgaged, have been declared to be equal. We shall obtain redemption of the mortgaged property from the possession of the mortgagee on payment of the whole of the mortgage money in a lump sum in the month of *Jeth* when the land is unoccupied by crops. The mortgagee is at liberty to cultivate the land mortgaged himself or have it cultivated by any other person. We shall have no objection. Should the whole or part of the land mortgaged be cultivated by us in any year, we shall pay the arrears due by us at the time of harvest and before the Government instalment has fallen due. If we raise any objection the mortgagee shall be at liberty to recover the same from us and our mortgaged and other movable and immovable properties by means of distress or a suit. Should any part thereof remain unpaid we shall pay it together with interest at one rupee per cent per mensem and the mortgage money in a lump sum at the time of the redemption of the mortgage. We shall not be entitled to redemption without its payment." *SETH CHHATAR MAL v. LALA BAIJ NATH*, A.W.N. 1906, 202=3 A.L.J. 634=28 A. 712. (26 A. 559, D.).

(337)—"*Ubhayapattam*" mortgage, meaning of—Clog on redemption—Covenant to renew mortgage perpetually—Transfer of Property Act, s. 98, Application of, to anomalous mortgage made before the passing of the Act.—An "*Ubhayapattam*" is equivalent to a *Kanam* mortgage. A covenant to renew perpetually is a clog on the mortgagor's right to redeem and is inoperative, if it is entered into simultaneously with the mortgage. Where an anomalous mortgage was created prior to the Act, the question of its redemption has to be determined with reference to the law in force prior to that Act. It was observed that it was unnecessary to express any opinion as to the effect of s. 98, Transfer of Property Act, on similar covenants in anomalous mortgages executed after the passing of the Act. According to the rules of Equity, which formed the basis of the course of decisions prior to the Act, but subsequent to 1858 any agreement entered into at the time of mortgage, having the effect of clogging the right of redemption, was inoperative. *MURTHI KHANDAN v. ANANTANARAYANA PATTAR*, 16 M.L.J. 462=1 M.L.T. 426=30 M. 61.

(338)—Redemption, clog on the equity of—Two mortgages—Covenant to pay the second mortgage before the first—Consolidation—Amending plaint in second appeal.—If the parties to a mortgage transaction agree so to consolidate the mortgage securities as to preclude the mortgagor from redeeming one without redeeming the other, their contract in that respect would be enforced. Where the

Mortgage—continued.**—9.—Redemption—continued.**

mortgagors, while executing a second mortgage of their property in favour of prior mortgagees, covenanted that "we shall repay the amount due under this bond before payment of the mortgage money due under the earlier mortgage, held that the covenant was valid and did not amount to a clog or fetter on the equity of redemption, and that both the mortgages must be redeemed at the same time. In second appeal, the plaintiffs, mortgagors, were allowed to amend their plaint so as to include a prayer for redemption of both the mortgages. *BRIJ LAL SINGH v. BHAWANI SINGH*, 7 A.L.J. 821=7 Ind. Cas. 115=32 A. 651. (A.W.N. 1906, 278, D.; A.W.N. 1906, 267, R.)

(339)—Clog on—Contract to pay off subsequent mortgages before redeeming prior mortgage—Validity—Contract to pay off an unsecured debt—Transfer of Property Act (IV of 1882), s. 61.—In a suit for redemption by a mortgagor, the mortgagee set up, by way of defence, a contract entered into at the time of the execution of four bonds of later dates, to the effect that the mortgage in suit was not to be redeemed without paying off the sums due under the subsequent bonds. One of these bonds was a simple bond, others, mortgage bonds secured on the same property. Held, that so far as these mortgage bonds were concerned, the contract was enforceable and must be given effect to, but as regards the simple bond, the contract was a clog on the equity of redemption and was not enforceable. *DURGA PERSHAD v. DUKH ROY*, 9 C.W.N. 789. (26 A. 559, 9 B. 235, 12 B. 231, 20 B. 346, 18 M. 368, R.)

(340)—Clog on equity of redemption—Mortgage for twenty years—Condition as to interest for the period to be paid in lump sum at the time of redemption.—The condition in the mortgage-deed for a term of twenty years, which required the mortgagor to pay the interest for the full term of the mortgage along with the principal at the time of redemption, and not as he pleased within the term, was a clog on the equity of redemption and should not be enforced. *BISHEN SINGH v. JAIMAL SINGH*, 128 P.L.R. 1910=8 Ind. Cas. 553. (131 P.R. 1894, 6 P.R. 1905, 19 P.L.R. 1905, R.)

(341)—Mortgage—Redemption—Right of redemption and foreclosure co-extensive—Power expressly given to mortgagee to call his money before expiry of term—Validity of such power—Right to redeem fettered by confining it to particular time or description of persons—Clog on redemption—Redemption—Stipulation as to period, not void on ground of lengthiness.—In the absence of any express stipulation to the contrary, the right of redemption and the right of foreclosure are always co-extensive, and if the right of the mortgagor to redeem were postponed, the right of the mortgagee to foreclosure would be held by the Court to have been equally postponed by

*Mortgage—continued.**—9.—Redemption—continued.*

necessary implication. But where the mortgage deed expressly gives the mortgagee power to call in his money at any time, any stipulation for postponement of redemption becomes unilateral and void of consideration, and, consequently, invalid. [*F.*, 22 B. 375; *R.*, 21 M. 110=8 M.L.J. 62, 16 C.P.L.R. 59, 26 A. 479=1 A.L.J. 133=A.W.N. 1904, 60, 137 P.W.R. 1903, 126 P.L.R. 1908=54 P.W.R. 1903.] A mortgagor cannot, by any contract entered into with the mortgagee at the time of the mortgage, give up his right of redemption or fetter it in any manner by confining it to a particular time or to a particular description of persons. Where, therefore, a mortgagor stipulated that the mortgage was not redeemable for 50 years, but that, after 15 years, if the mortgagor himself his son or daughter, i.e., any one of these three, should pay whatever may be due on the mortgage, redemption should be allowed, *held* that this latter provision as to redemption cannot be taken as a purely personal concession, but that an alienee of the mortgagor can enforce redemption after the period of the stipulated 15 years. [*R.*, 154 P.L.R. 1901, 13 O.C. 128.] The Limitation Act, 1877, gives 60 years as the period within which suits for redemption or foreclosure, can be brought, and the Courts in India will never hold any period fixed by the parties to be bad on the ground of its being unreasonably long. *SAYAD ABDUL HAK v. GULAM JILANI*, 20 B. 677. [*R.*, 40 P.L.R. 1903, 39 P.R. 1907=119 P.L.R. 1907, 127 P.L.R. 1908=54 P.W.R. 1908.]

(342)—*Subsequent agreement of sale.*—Law does not permit any clog on the equity of redemption; but it is open to the mortgagor and mortgagee to enter into a contract subsequently to the mortgage for the sale of the mortgaged property to the mortgagee. *KANHYALAL v. NARHAR*, 5 Bom. L.R. 140=27 B. 297.

(343)—*Mortgage deed—Clog on equity of redemption—Charge.*—A debtor executed a mortgage for Rs. 1,500. The deed recited that a debt of Rs. 5,000 due on a previous *khata* had become payable under the bond; the debtor undertook to pay this latter sum within two years from the date of the bond from out of the moneys which he expected to receive from a third party; and the debtor covenanted in the mortgage deed that he would not redeem the mortgage until both the sums of Rs. 1,500 and Rs. 5,000 were paid. The deed was stamped as for Rs. 6,500. The question arose whether the stipulation about the payment of Rs. 5,000 was a clog on the equity of redemption: *Held*, that the debt of Rs. 5,000 was secured on the property as a charge by way of mortgage, and that no question as to a clog on the equity of redemption could arise in the case. *HARI v. VISHNU*, 6 Bom. L.R. 313=28 B. 349.

(344)—*Lease to mortgagee—Public charitable property—Alienation.*—On the 21st November 1866, two officers of the Bene Israil Community, Haskell Abraham and Samuel Elijah, mort-

*Mortgage—continued.**—9.—Redemption—continued.*

gaged for the sum of Rs. 39,520-15-0, property which consisted of seven warehouses in Shamji Hussaji Street in Bombay, and a jamatkhana and four warehouses in Don Tad third row. The seven warehouses were also let to the mortgagee for the sum of Rs. 1,500 per annum, and a house at Shamji Hussaji Street, which was not comprised in the mortgage-deed at all, was also let to the mortgagee at the rate of Rs. 1,100 per annum. On the 13th November 1901, the plaintiffs, deriving his title from the mortgagee, filed a suit against the officers and some of the members of the Bene Israil Community and the Advocate-General, as representing the charity, for an account to be taken under the mortgage of the 21st November 1866; and for the relief, among others, that on default of payment by the Bene Israil Community of the amount found due, it may be foreclosed of all equity of redemption in the said premises or that the mortgaged premises may be sold and the proceeds applied towards payment of the debt. It was contended for the defendants that the agreements by which the premises were let to the mortgagee were bad being clogs on the equity of redemption: *Held*, overruling the contention, (1) that the objection that the collateral advantage of the mortgage was to last after the redemption of the premises was not applicable to the case, for there was express provision to the effect that the mortgagee should have the premises at Rs. 1,500 and Rs. 1,100 per annum, only during the term of the mortgage; (2) that there was nothing in the agreements for lease or in the mortgage deed which prevented the mortgagors from redeeming the property. A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt, or the discharge of some other obligation for which it is given. This is the idea of a mortgage and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is, therefore, void. It follows from this, that "once a mortgage is always a mortgage" but this principle does not involve the further proposition that the amount or nature of the further debt or obligation, the payment or performance of which is to be secured, is a clog or fetter within the rule. *MAHOMED v. EZEKIEL*, 7 Bom. L.R. 772.

(345)—*Clog on the equity of redemption.*—The doctrine that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption, is void, might be expressed in this form: "Once a mortgage always a mortgage, and nothing but a mortgage." The meaning of this is, that the mortgagee shall not make any stipulation which will prevent a mortgagor, who has paid principal, interest and costs, from getting back his

Mortgage—continued.**—9.—Redemption—continued.**

mortgaged property in the condition in which he parted with it. *RAJMAL v. SHIVAJI*, 4 Bom. L.R. 966=27 B. 154.

(346)—*Onerous condition in mortgage-deed accepting mortgagee as perpetual tenant—Right of redemption—Condition not enforceable in Court.*—Objection was taken to the condition in the mortgage deed in this case, that if the mortgagor redeemed the land, the mortgage right only should be extinguished, but the land should remain in the hands of the mortgagee on his paying a fixed rent to the mortgagor; and it was held that such a condition, although it did not affect the right of redemption, fettered it with the onerous obligation of accepting the mortgagee as a perpetual tenant and was not, therefore, enforceable in a Court. *MAHOMED MUSE v. JIJIBHAI BHAGVAN*, 9 B. 524. [*F.*, 6 Ind. Cas. 707; *R.*, 131 P.R. 1894, 20 C. 464, 21 B. 793, 21 M. 110=8 M.L.J. 62.]

(347)—*Mortgage—Covenant for pre-emption of mortgaged property in favour of mortgagee—Fettering redemption—Collateral advantage.*—A provision in a mortgage which has the effect of preventing the redemption of the mortgaged property on payment of principal, interest and costs, in accordance with the terms of the mortgage, is a void provision which cannot be enforced; but a covenant conferring on the mortgagee a collateral advantage is enforceable, provided that it is not objectionable on the ground of unfairness or unreasonableness. (*Biggs v. Noddinott*, 1878, 2 Ch. 307; *Stantley v. Wilde*, 1899, 2 Ch. 474, *Orby v. Frigg*, 1722, 19 M. 12, *R.*) In a suit for pre-emption by a mortgagee in respect of the mortgaged property on the basis of a covenant in the mortgage-deed which did not impose an absolute bar upon the mortgagor's right to transfer the mortgaged property to any person other than the mortgagee, but simply gave the mortgagee a preferential right to purchase the property at the price specified in the covenant, held, that the covenant was neither void for vagueness or uncertainty nor without consideration, and that the plaintiff was entitled to pre-empt, unless the covenant was oppressive or unfair. *BIMAL JATI v. BIRANJA KUAR*, 22 A. 238= A.W.N. 1900, 49. [*F.*, 3 S.L.R. 130; *R.*, 24 M. 449, 2 L.B.R. 108, 7 Bom. L.R. 772, 10 C.L.J. 626=14 C.W.N. 295=4 Ind. Cas. 743.]

(348)—*Mortgage—Right to redeem before expiry of period fixed, on payment of interest for unexpired portion—Clog on equity of redemption.*—Where a mortgage-deed provides that the mortgagor would be competent to redeem the mortgage before the expiry of the full term of the mortgage, only upon payment of interest for the unexpired term, held, that such a provision cannot be regarded as a clog on the right of redemption. It only empowers the mortgagee to obtain from the mortgagor that amount which the mortgagor would have been bound to pay, had he redeemed the mortgage on the expiry of the term

Mortgage—continued.**—9.—Redemption—continued.**

stipulated for payment. *KAULESHAR SINGH v. RAGHUBIR SINGH*, 1 A.L.J. 224.

(349)—*Redemption—Clog on the equity of—Further advances on old security—Stipulation to the effect that the later advance will be paid at redemption of earlier mortgage—Fresh lien.*—Where in a suit for redemption, the mortgagee set up five other later bonds and claimed that before redemption of the original mortgage could be affected, those bonds should also be redeemed, the bonds being described as *mushrut-ul-rehanwa quabz-ul-wazu moblighan*, held, that those documents purported to create fresh charges on the property and the mortgagee was entitled to get the money due thereunder, they not being clogs on the equity of redemption. A full discussion of all the authorities by *Alston, J.* *RANJIT KHAN v. RAMDHAN SINGH*, 6 A.L.J. 654=2 Ind. Cas. 859=31 A. 482.

(350)—*Redemption—Usufructuary mortgage—Subsequent simple mortgages—Covenant to pay the amount of the simple mortgages first and then to redeem the prior mortgage—Consolidation of mortgages—Clog on redemption—Limitation Act (IX of 1908), s. 31—Time within which the mortgagee to institute suit.*—A mortgagor executed an usufructuary mortgage in 1886, and in respect of the same property he executed two other subsequent simple mortgages in favour of the same mortgagee, in which he covenanted to pay the amounts due under these bonds first, and then to redeem the usufructuary mortgage. Held, that the mortgagor contemplated simultaneous payment of the amounts of the three consolidated mortgages, and that the two later documents placed a further charge on the property which was the subject of all the three mortgages. There was only a consolidation of the three mortgages, and no clog or fetter was imposed on the equity of redemption. (A.W.N. 1906, 267; 1 Ind. Cas. 345; 6 A.L.J. 255, *F.*; A.W.N. 1906, 278, *D.*) Held, further, that, under s. 31 of Act IX of 1908, a mortgagee had the right to bring a suit for sale within two years of the passing of the Act, unless 60 years from the date when the mortgage became due would elapse before the expiry of the two years. *RAM DAS CHOUBE v. MUSAMMAT SIMIRKHA KUAR*, 2 Ind. Cas. 144.

(351)—*Mortgage—Covenant for mortgage-money being paid up from the surplus profits—Mortgagor's right to redeem by making payment—Equity of redemption, clog on.*—A mortgage deed provided as follows:—When the entire mortgage-money is paid up from the surplus profits, property can be redeemed in the month of Jeth. So long as the entire mortgage-money...is not paid up, the mortgaged property cannot be transferred to any one else, nor will the executant repay the mortgage money by borrowing elsewhere. Held, that this covenant did not debar the mortgagors from redeeming the mortgage by payment of any sum remaining due whenever convenient to them.

Mortgage—continued.**—9.—Redemption—continued.**

Held, further (*per Evans, A.J.C.*) that, even if the covenant did clog the equity of redemption so as to bar redemption by any payment in cash, such conditions being in restraint of the right of redemption should be disregarded by a Court of Equity. **KANDHAI SINGH v. BABU-AIN BIRANJ KUNWAR, 13 O.C. 128 (B).**

(352)—*Puisne incumbrancer not made party to suit upon prior incumbrance—Right of redemption not affected.*—If a prior incumbrancer, having notice of a puisne incumbrance, does not, when he puts his mortgage in suit, join the puisne incumbrancer as a party, the latter is in no way affected or prejudiced by the decree as regards his right to redeem the prior incumbrancer. **NAMDAR CHAUDHRI v. KARAM RAJI, 13 A. 315 = A.W.N. 1891, 90. (10 B. 224, 9 A. 125, 10 A. 520, R.) [R., 17 A. 537, 20 B. 390, 132 P.W.R. 1908 = 64 P.R. 1908, 22 B. 761.]**

(353)—*Decree for redemption — Execution barred by limitation—Second suit to redeem.*—Where by a razinama decree, in a suit for redemption of a mortgage, the mortgaged property was redeemable on payment of a certain sum on a certain date, but there was no provision for foreclosure on default of payment, and execution of the decree was allowed to be barred by limitation, the purchaser of the right, title and the interest of the mortgagors in the property, in execution of a decree against them, is entitled to sue the mortgagees to redeem the land. **PERIANDI v. ANGAPPA, 7 M. 423. [Overruled, 25 M. 300; Diss., 19 A. 202; Doubted, 43 P.R. 1907 = 101 P.W.R. 1907 = 169 P.L.R. 1908; F., 15 M. 366; R., 16 B. 243, 19 B. 140, 19 M. 40, F.B., 21 M. 18, 24 A. 44 = A.W.N. 1901, 194, 100 P.R. 1905 = 16 P.L.R. 1906, 93 P.R. 1908 = 164 P.L.R. 1908 = 133 P.W.R. 1908.]**

(354)—*Suit upon mortgage—Previous patnidar of zemindari—Party to suit—Redemption.*—To a suit by the mortgagee of a zemindari upon the mortgage, the patnidar, who had taken a patni lease of the zemindari previous to the mortgage, should be made a party, so that he might have an opportunity to redeem. **KASEEMUNNESSA BIBEE v. NITRATNA BOSE, 8 C. 79 = 9 C.L.R. 173 = 10 C.L.R. 113. [Appr., 21 C. 116; Cons., 13 A. 432, F. B.; R., 12 C. 414, P.O., 24 C. 575, F.B. = 1 C.W.N. 406, 1 O.C. 105, 10 C.W.N. 592 = 33 C. 590, 5 C. L. J. 527, A.W.N. 1907, 227 = 4 A.L.J. 703 = 29 A. 679, 5 C.L.J. 315 = 11 C.W.N. 403; D., 6 C.L.J. 609.]**

(355)—*Parties to mortgage suit—Redemption of part of mortgaged property—Transfer of Property Act (IV of 1882), s. 60.*—Where a mortgagee brought a suit on the mortgage against the original mortgagor and upon the death of the mortgagor which took place during the pendency of the suit, did not bring upon the record all his legal representatives, and the mortgaged property was sold in execution

Mortgage—continued.**—9.—Redemption—continued.**

of the decree thus obtained, *held* in a suit by the heirs not on the record, that they were entitled to redeem their share of the mortgaged property upon payment of a proportionate share of the mortgaged debt. **SURYA BIBI v. MONINDRA NATH ROY, 4 C.W.N. 507. [F., 2 C. L. J. 202.]**

(356)—*Transfer of Property Act, s. 85—Vendee of mortgagor not made party—Suit to redeem—Civ. Pro. Code, 1882, s. 43—Previous suit for declaration and ejectment—Subsequent suit for redemption—Res judicata.*—Where a mortgagee sues on his mortgage without making the purchaser from the mortgagor a party, and purchases the mortgaged property in execution of his decree for sale, the vendee is entitled to redeem, whether the mortgagee was aware of the sale at the time of his suit or not. Where the private purchaser first sued to have the Court-sale in execution of the mortgage decree, above referred to, declared invalid against him and to eject the mortgagee-purchaser, and the suit was dismissed, a subsequent suit by him for redemption is not bad either under s. 13 or under s. 43 of the Civ. Pro. Code. The first suit was only to avoid the effect of the sale, and did not extinguish the inherent right to redeem. **KUPPU NAYUDU v. VENKATA KRISHNA REDDI, 20 M. 82 = 6 M.L.J. 229.**

(357)—*Redemption of mortgage, Suit for—Parties—Persons interested in equity of redemption.*—The plaintiff brought a suit against the defendant to redeem certain *khoti* lands mortgaged by the plaintiff's father to the uncle of the defendant. The defendant contended *inter alia* that the plaintiff could not sue alone as there were eight co-sharers of the plaintiff who ought to be made co-plaintiffs. The co-sharers were the plaintiff's uncle and the sons of another uncle, who had ceased to be members of the undivided family of the plaintiff at the time the plaintiff's father executed the mortgage. These relations did not claim any interest in the equity of redemption. *Held* that the plaintiff's uncle and cousins were not necessary parties to the suit. The mortgage did not purport to have been made by the plaintiff's father as manager of the family and the plaintiff's uncle and cousins did not claim any interest in the equity of redemption. In the absence of all evidence to that effect, it could not be presumed that the plaintiff's father effected the mortgage otherwise than in his individual capacity. If the defendant had made out that the plaintiff's father and uncles were undivided at that time, it might have been presumed that the mortgage was for and on behalf of them as well as himself, but this the defendant had failed in doing. The mere fact of their relationship did not give them any interest in it. **RAGHO VINAYAK v. SHEIKH DAUD, 13 B. 51.**

(358)—*Mortgage—Agreement not to alienate equity of redemption—Alienation—Suit for redemption by alienee—Debt contracted in particular currency—Re-payment—Redemption suit for*

Mortgage—continued.**—9.—Redemption—continued.**

—*Parties—Co-heir of plaintiff.*—A mortgagor undertook that he would not alienate the equity of redemption and that the mortgagee should not be obliged to receive the money from any one but the original mortgagor. *Held* that the undertaking should not be given effect to. It absolutely forbids alienation and thus deprives the mortgagor of a right which is an essential incident of the estate which he has in the land by virtue of his equity of redemption. A Court of Equity will not give effect to any such collateral restriction on the equity of redemption. [*R.*, 20 B. 677; 6 Bom. L.R. 630.] A debt contracted in a particular currency should, in the absence of a contract to the contrary, be paid in that currency. [*R.*, 11 Bom. L.R. 318.] A co-heir of the plaintiff who has an interest in the mortgaged property at the time of the redemption suit is a necessary party to the suit, but not otherwise. *TRIMBAK JIVAJI DESHAMUKHA v. SAKHARAM GOPAL*, 16 B. 599.

(359)—*Grove-holder, mortgage by—Equity of redemption—Escheat—Zamindar's right to redeem.*—Where, according to custom of the village, a person holding a grove as a tenant loses his right in the trees by abandoning the village, the fact that the tenant may have mortgaged the trees and placed the mortgagee in possession cannot prevent the equity of redemption from resting in the zamindar and giving him a title to redeem the mortgage. *DEBI SAHAY SINGH v. SUMER SINGH*, 12 O.C. 197 (B) = 3 Ind. Cas. 519. (1 O.C. 42, overruled).

(360)—*Redemption—Parties—Misjoinder of parties and causes of action—Mortgage by widow—Effect of one of the reversioners purchasing the mortgagee's rights—Competency of vendee of share of one of the reversioners to redeem.*—Where a widow succeeds to her deceased husband's holding for his life and effects two valid mortgages of a part of that holding, one, to one of the reversioners of her husband and the other to a stranger; and the rights of the stranger are afterwards purchased by the said reversioner of her husband, the purchaser stands in the shoes of the mortgagee, and when on the natural or civil death of the widow the succession opens and the holding is mutated in the names of, and is partitioned among, the reversioners subject to the payment of the mortgage money in proportion to the share of each; and also on the death of the mortgagee-reversioner his heirs alienate a portion of the holding to other persons, and one of the reversioners assigns the plot allotted to him on partition, to one of his relations, the assignee can successfully maintain a suit for redeeming the plot against the mortgagee's heirs, the alienees and the assignor, who are necessary parties to such a suit, and this is but one cause of action and there is no misjoinder of parties also. *JAGAT SINGH v. BUTA*, 98 P.W.R. 1911 = 189 P.L.R. 1911 = 11 Ind. Cas. 512.

Mortgage—continued.**—9.—Redemption—continued.**

(361)—*Mortgage—Suit by first mortgagee—Subsequent mortgagee not a party—Right to redeem.*—The defendant, the first mortgagee, obtained a decree against the mortgagor for sale. He failed to add the plaintiff, a subsequent usufructuary mortgagee of the property, as a party to his suit. In execution of his decree, the defendant purchased the property himself and obtained possession. Now the plaintiff sued to recover the property. *Held* that that the plaintiff was entitled to redeem the defendant's prior mortgage and that the decree and sale could not affect the right of the plaintiff as he was not made a party to the previous suit. *RAGHUBANS KUAR v. RAMSAHALI*, A. W.N. 1883, 193. (1 A. 240, 4 A. 518, D.; 9 I.A. 21, 3 A. 682, 4 B. 83, 6 B. 11, F.)

(362)—*Foreclosure by first mortgagee—Redemption of first mortgagee by second mortgagee—Right of mortgagor to redeem second mortgagee.*—If the first mortgagee forecloses his mortgage without making the second mortgagee a party to the action, the latter may redeem the first mortgagee; and he cannot in turn be redeemed by the mortgagor, who has already been foreclosed. *SONBA TELI v. LAHANOO*, 15 C P.L.R. 188. (24 A. 185, 16 M. 121, R.)

(363)—*Mortgage—Redemption—Mortgagee's right to dispute title of mortgagor.*—In a suit for redemption, the mortgagee cannot dispute the mortgagor's title to the land comprised in the mortgage on the ground that a claim to it is asserted by other proprietors. *MAHOMED ABDOOL RUZZAK v. SADIK ALI*, 3 Agra 142.

(364)—*Mortgage—Contract not to alienate—Second mortgage for payment of first mortgage.*—A mortgage contract being a security for obtaining the repayment of a loan does not incapacitate the mortgagor from any other dealing (except in defeasance of the rights of the mortgagee) with the property. A stipulation not to alienate cannot operate to annul a *bona fide* conveyance to a third person by the mortgagor for the purpose of paying off the original mortgage debt. When the second mortgagee is the medium of paying over to the first mortgagee the amount of the latter's debt, and to that extent takes the place of the mortgagor, it cannot with propriety be said that there has been a breach of the agreement. A *zur-i-peshgee* lease was granted to D for nine years to secure the payment of a sum of money. The mortgage deed contained the ordinary provisions to the effect that the mortgagee should be entitled to the profits and collections in lieu of interest; that the mortgagor on repayment of the principal, at the expiration of the lease or subsequently at the appointed period, should obtain possession; that the mortgagor should not alienate or mortgage the land, and that any such attempted transfer should be void, and D took possession of the property. A second *zur-i-peshgee* mortgage was given to H for paying the first mortgage, and

Mortgage—continued.**—9.—Redemption—continued.**

he brought a suit after the expiration of the period of the first mortgage to redeem the first mortgage. *Held*, that H was entitled to redeem the first mortgage. **DOOKHCHORE RAI v. HAJEE HIDAYAUT-OOL-LAH, Agra F.B. 7=Ed. 1874, 5.** [R., 3 A. 369, F.B., D., 1 N.W.P. 135.]

(365)—*Redemption decree not executed—Fresh suit for redemption.*—The mere omission to execute a redemption decree within the period prescribed for execution does not cause the interest remaining in the mortgagor to cease to exist. In respect of such remaining interest, the mortgagor or his representative may maintain a fresh redemption suit even if all rights under the old suit have been lost. **CHAITA v. PURUM SOOKH, 2 Agra 256.** [R., 11 A. 386=A. W. N. 1889, 136, 24 A. 44 F. B.=21 A. W. N. 194, 25 M. 300, F. B.]

(366)—*Mortgage—Redemption—Suit by purchaser from mortgagor—Right of mortgagee to resist suit on ground that full purchase-money has not been paid.*—Default by a purchaser in payment of the purchase-money or any portion of it does not necessarily invalidate the sale, and in a suit brought to redeem the property-purchased, the mortgagee cannot avail himself of the objection that the full amount of purchase-money has not been paid. The mortgagee has only the right to be satisfied that the person claiming redemption is not a stranger but one to whom the equity of redemption has been transferred by a *bona fide* sale. **HEERA SINGH v. RAGHO NATH SUHAI, 3 Agra 30.**

(367)—*Two simultaneous mortgages—Suit on one of them—Mortgagee of the other not made party, effect of—Redemption.*—Two mortgages of Rs. 50 and Rs. 96 respectively were executed on the same day in respect of the same property in favour of the ancestors of the plaintiffs and the defendant who were members of a joint Hindu family. Subsequently, at a partition, the bond of Rs. 50 was allotted to the defendant and that of Rs. 96 was allotted to the plaintiffs. The defendant brought a suit for sale of the property on the basis of the mortgage bond allotted to him. He did not make plaintiffs a party to the suit. In execution of the decree obtained in the suit, defendant purchased a portion of the mortgaged property himself. *Held*, in a subsequent suit brought by the plaintiffs on the basis of the mortgage bond of Rs. 96, that the whole of the mortgaged property was liable to be sold and that the defendant had only a right to redeem. **MAGGAN LAL v. ANAND SINGH, 10 Ind. Cas. 422.**

(368)—*Mortgage—Suit on prior mortgage—Puisne mortgagee not made party—Sale in execution—Right of puisne mortgagee to redeem prior mortgage—Redemption of prior mortgage by subsequent mortgagee—Right of assignee of equity of redemption to redeem subsequent mortgagee.*—Where a prior mortgagee institutes a suit on his mortgage without making the puisne mortgagee a party thereto, the only effect

Mortgage—continued.**—9.—Redemption—continued.**

of a sale held in execution of the decree obtained therein will be to transfer to the purchaser the equity of redemption of the mortgagor. The puisne mortgagee does not by the sale lose his right to redeem the prior mortgage. If, in such a case, the puisne mortgagee exercises his right of redemption, the purchaser under the prior mortgage may in his turn institute a suit as owner of the equity of redemption and redeem the puisne mortgagee on paying him the amount due to him under the mortgage. Where a puisne mortgage comprised several items of property not included in the prior mortgage, and the puisne mortgagee in the exercise of his right as such redeemed the prior mortgage, as assignee of the equity of redemption in respect of the item comprised under the prior mortgage would be entitled to redeem such puisne mortgagee on payment of the amount of the mortgage on the item of property comprised under the prior mortgage and the proportionate amount of the subsequent mortgage chargeable on the said item of property. **SIVARAMAN CHETTY v. KUPPUMUTHU CHETTY, 13 M. L.J. 72.**

(369)—*Mortgage of family property by manager—Money-decree obtained by mortgagee—Sale of mortgaged property in execution—Purchase by mortgagee without leave to bid—Right of redemption of other members of family.*—Plaintiff and an uncle of his were the undivided members of the family of the deceased original mortgagor, being his son's son and son respectively. The present defendant, the mortgagee sued the uncle and obtained a money-decree and attached the mortgaged property in execution. *Held* that the decree obtained against the uncle as manager of the property and representative of his father was binding upon the plaintiff as though he had been made a party defendant to perfect the representation. The defendant notifying or disclosing his mortgage-lien caused several of the mortgaged properties to be sold in execution of his money-decree, and, without obtaining leave from the Court to bid at the sale, purchased several of them in the names of other persons. Plaintiff now sued to redeem the mortgaged properties brought by the defendant making the several *benami* purchasers as well as his uncle parties to the suit. Questions arose as to whether the plaintiff was debarred by the previous sales in execution from redeeming, and whether he could redeem without having the execution sales set aside. *Held*, that the mortgagee, having attached the mortgaged property in execution of a money-decree against the mortgagor and having himself purchased the property at the sale in execution of the decree without obtaining the leave of the Court to bid at the auction, had not thereby freed himself from the liability to be redeemed by the mortgagor. The sale was rendered nugatory, not by reason of the provisions of s. 294 of the Code (though permission granted under that section to bid might have validated the purchase), but by the impossibility of a mortgagee

Mortgage—continued.**—9.—Redemption—continued.**

by such sales and purchases as these freeing himself from his liability to be redeemed. The same reasoning applies to a mortgagee buying the equity of redemption under a decree obtained upon a claim independent of the mortgages as applies to a decree obtained upon a collateral instrument to secure the mortgaged debt. **MARTAND v. DHONDO, 22 B. 624.** [Diss., 30 M. 362=17 M.L.J. 325; *Not F.*, 27 A. 517=2 A.L.J. 210=A.W.N. 1905, 80; *F.*, 62 P.R. 1908=7 P.W.R. 1908; *Appr.*, 32 M. 242=5 M.L.T. 248; *Appl.*, 23 M. 377=10 M.L.J. 91, 4 A.L.J. 787=A.W.N. 1908, 1=3 M.L.T. 132; *R.*, 22 M. 347=9 M.L.J. 98, 22 M. 372=9 M.L.J. 113, 14 C.P.L.R. 17, 7 O.C. 307, 29 M. 421=15 M.L.J. 445, 8 O.C. 327, 157 P.L.R. 1906=2 P.R. 1907, 30 M. 313=17 M.L.J. 163=2 M.L.T. 181, 35 C. 61, F. B.=11 C.W.N. 1011=6 C.L.J. 320, 3 S.L.R. 17=1 Ind. Cas. 952, 14 C.W.N. 579; *D.*, 23 B. 119, 30 P.L.R. 1911=15 P.R. 1911.]

(370)—*Redemption decree obtained by a puisne mortgagee—Decree becoming inoperative—Assignment by mortgagor—Assignee's right to redeem first mortgage.*—A mortgaged certain properties to B and subsequently mortgaged the same to C with other properties. C got a redemption-decree against B, which however was not executed, and became inoperative. D got an assignment of the rights of A and C in the mortgaged properties and sued to redeem the mortgage in favour of B. *Held* that, though D could not sue as the assignee of C still, he could, as the assignee of A, sue after C's decree became inoperative. **RAMAN NAMBOODRI v. ACHUTHA PISHURODI, 35 M. 42=14 Ind. Cas. 415.**

(371)—*Mortgage by guardian of minor—Subsequent sale of same property by guardian to another—Right of purchaser to claim redemption and sue for profits from mortgagee.*—Where property belonging to a minor was by his guardian first mortgaged to one person and then sold to another, the latter was held entitled to sue for redemption of the mortgage and to recover any profits which the mortgagee had obtained or could have obtained in excess of the mortgage money and interest. In such suit, the mortgagee could not impugn the sale and contend that it was not made for the benefit of the minor, inasmuch as the interests of the minor were not concerned in the suit. **VITHOBA v. SAKHARAM, 4 C.P.L.R. 128.**

(372)—*Foreclosure by prior mortgagee without impleading puisne mortgagee—Right of latter to sue for redemption.*—A puisne mortgagee is entitled to institute a suit for redemption against the prior mortgagee who has foreclosed his mortgage without making the puisne mortgagee a party to his suit. **NARSINGH DASS v. MT. JAMNA BAI, 12 C.P.L.R. 86.** (3 C.P.L.R. 82, 7 B. 526, 13 A. 432, *R.*) [*R.*, 14 C.P.L.R. 177.]

(373)—*Civ. Pro. Code, Act VIII of 1859, s. 246—Claim proceedings under—Judgment—*

Mortgage—continued.**—9.—Redemption—continued.**

debtor—Not necessary party—No notice served—Party not bound by order—Party standing by—Estoppel—Suit for possession—Plaintiff's title—Onus of proof.—Plaintiff, as the assignee from the 12th defendant who claimed to be possessed of *jenmam* rights over suit property, sued to redeem a *kanom* demise executed by E, the 12th defendant's ancestor, as the *jenmi*, in favour of one L, the mother of B and C, defendants 1 and 2 in the suit. It was contended that, under the demise, the plaintiff had no right to redeem and that the plaintiff, on the date of the sale, had only a *kanom* interest for a small amount over the property and that the *jenmi* right belonged to another K. It was also contended that, it having been declared by order in claim proceedings under s. 246, Civ. Pro. Code, (1859), that E had no *jenmi* right over the lands, and the said order not having been challenged by regular suit, the plaintiff cannot claim to redeem the demise as *jenmi*. *Held*, that the order on the claim proceedings was not one which E was bound to impeach within one year or twelve years after it was passed. A judgment-debtor cannot be regarded as necessarily a party to an investigation under s. 246, Civ. Pro. Code, 1859. (15 I.A. 123, 4 M.H.C. 416, 25 M. 721, 1 M. 391, 3 A. 233, 14 W.R. 143, 16 W.R. 119, 6 M.H.C. 416, 11 B. 114, 4 B. 515, *R.*) Under the Codes of 1877 and 1882, it must be shown that notice of the claim was served on the judgment-debtor, before he can be held to be bound by the order of Court. (25 M. 721, 30 M. 335, 31 M. 163, 8 M.L.T. 417, *R.*) Where, as in this case, the defendants accepted the demise and held possession under it, they must be held to be estopped from disputing plaintiff's right to redeem. Where a plaintiff seeks to recover possession of lands which are in possession of another, the *onus* is on the plaintiff to prove his title and that the party in possession held under his demisees. **KURRIYIL PARKUM PUTHA KARGI KATTAYI v. YARANAKAT ILLATH GANAPATHI NUMBODRI, 9 M.L.T. 423.**

(374)—*Mortgage executed before T.P. Act—Notice of foreclosure given—Decree for possession—Puisne mortgagee not made party to foreclosure suit—Right of puisne mortgagee to redeem first mortgage—Right of first mortgagee to redeem first mortgage.*—Where, in respect of a mortgage executed before T.P. Act, a notice of foreclosure was given under the Regulation then in force and a decree for possession was thereafter obtained by the mortgagees against the debtor, without the subsequent mortgagee being made a party to the suit, the second mortgagee, not having been party to the foreclosure suit, was entitled to redeem the prior mortgage by having it revived; in which case, the first mortgagees become entitled to redeem the second mortgage. **PATIRAM v. GHASIRAM, 3 C.P.L.R. 82.** [*R.*, 12 C.P.L.R. 86, 11 C.P.L.R. 75, 2 N.L.R. 116, 12 C.P.L.R. 125.]

(375)—*Prior and subsequent mortgages—Suit by first mortgagee without impleading second—*

Mortgage—continued.**—9.—Redemption—continued.**

Decree and sale—Subsequent suit by second mortgagee—Purchaser entitled to priority—Second mortgagee bound to redeem—Form of decree—Secondary evidence—Recital in later deed—Presumption.—In a suit for sale upon a mortgage of June 4 1877, alleged to be in renewal of a mortgage of June 12 1875, against certain defendants who were in possession of the property by virtue of purchase in execution of their decree which had been obtained upon a mortgage of November 8, 1875, the latter pleaded that this mortgage was in lieu of an earlier mortgage of December 5, 1869. To the suit by the defendants on their mortgage the plaintiff had not been made a party. *Held*, that the plaintiff, as a subsequent incumbrancer, before he could sell the property, was bound to redeem the defendants who had been in possession since the date of their purchase. In a mortgage suit the Court ought to have the fullest power to direct what is right and equitable, having regard to the circumstances of the case and the interests of all the parties to the suit in the property. *Semble*:—In a suit by a subsequent incumbrancer to which the prior incumbrancer is a party, if the latter so desires, it will be convenient to direct redemption of the prior incumbrance. Where an earlier bond was fully recited in a later bond, but there was no evidence of the loss of the former, *held* that, under ordinary circumstances, it might have been given back, and secondary evidence to prove it was admissible. **MANOHAR LAL v. RAM BABU, 9 A.L.J. 323.**

(376)—*Suit for redemption—Joinder of parties claiming title to the property—Misjoinder.*—In a suit for redemption of a mortgage, it is competent to the Court to join as parties persons claiming title to the mortgaged property. Such a course is not tantamount to the introduction of a new cause of action, so as to make the case obnoxious to the rules of joinder. (33 C. 425, 3 C.L.J. 205, *D.*) In a suit for redemption defendants Nos. 4 and 5, who claimed title to the property, were impleaded, and it was found that the property belonged to them and not to the plaintiff. *Held*, that it was competent to the Court to pass such a decree. *In re KRISHNASWAMI PATHAN, 8 Ind. Cas. 885=9 M.L.T. 173.*

(377)—*Suit for foreclosure, right of redemption of puisne mortgagee not impleaded in.*—Where a plaintiff in a suit on his mortgage forecloses such mortgagors and incumbrancers as he has made parties to the suit, he will yet be liable to be redeemed by any incumbrancer, who might have been but has not been, made a party to his suit, whether he had any notice of that incumbrance or not, and the fact that the puisne mortgagee held an unregistered mortgage could not make any difference. Where in a suit to eject the defendants, the plaintiff was found to be only a puisne mortgagee, and one of the defendants a prior mortgagee, the plaintiff was allowed to change his case so as to be permitted to redeem the said defendant. **SANKANA**

Mortgage—continued.**—9.—Redemption—continued.**

KALANA v. VIRUPAKSHAPA GANESHAPA, 7 B. 146. [*R.*, 16 M. 121=2 M.L.T. 281, 20 B. 390, 28 B. 153, 5 C.L.J. 527; *D.*, 20 B. 158.]

(378)—*Puisne incumbrancer not party to decree upon prior mortgage—Purchase of equity of redemption by puisne incumbrancer before order absolute and under s. 89, Transfer of Property Act—Right of redemption.—Puisne encumbrancer purchasing equity of redemption.*—Where a prior mortgagee obtains a decree on foot of his mortgage without impleading a puisne mortgagee, and no order absolute for sale is obtained against the latter, though he has, between the date of the decree and and that of the order absolute made against the mortgagor, acquired the equity of redemption by purchase from the mortgagor, the puisne incumbrancer's right to redeem is not extinguished and a sale held in execution of such decree does not bind him. [*D.*, 3 A.L.J. 675=A.W.N. 1906, 283=29 A. 76.] The mere fact that a puisne incumbrancer purchases from the mortgagor the equity of redemption, the consideration being the amount due on his mortgage, does not extinguish that mortgage and he is entitled to redeem the prior incumbrancer. **KADIR BUKSH v. JWALA PRASAD, 1 A.L.J. 288=A.W.N. 1906, 285, Note.** [*D.*, 3 A.L.J. 675=A.W.N. 1906, 283=29 A. 76.]

(379)—*Possession given to prior mortgagee under foreclosure decree—Subsequent mortgagee not made party to suit—Right of subsequent mortgagee to redeem prior mortgage.*—Where a mortgagee obtained possession of the mortgaged property in pursuance of a decree for foreclosure obtained by him in a suit to which the subsequent mortgagee was not made a party, such subsequent mortgagee was not thereby deprived of his right to redeem the prior mortgagee, but he could not get possession by virtue of the said decree for foreclosure. **SHRIKISAN GAONTIA v. GADADHER GAONTIA, 12 C.P.L.R. 125.** (16 M. 121, 20 M. 120, *D.*; 3 C.P.L.R. 82, 11 C.P.L.R. 75, *Not F.*)

(380)—*Transfer of Property Act, s. 91—Mortgage—Redemption—Who may redeem—Perpetual lessee.*—In a suit for redemption of a mortgage, the plaintiff was a perpetual lessee of the mortgaged premises from the mortgagor, holding under a lease granted upon payment of a premium of Rs. 800, with a yearly rental of Rs. 40 odd. By the terms of the lease, the lessee was not liable to be ejected, even for non-payment of rent, while, if the title of the lessors proved defective, the lessee was entitled to a refund of the premium. *Held* that the lessee was, under the above circumstances, entitled to redeem. **RAGHUNANDAN PRASAD v. AMBIKA SINGH, A.W.N. 1907, 227=4 A.L.J. 703=29 A. 679.** (19 M. 151, 6 C. 317, 21 C. 116, 8 C. 79, 27 A. 472, *R.*)

(381)—*Mortgages, prior and subsequent—Suit by prior mortgagee for sale of mortgaged properties—Subsequent mortgagee not party—*

Mortgage—continued.**—9.—Redemption—continued.**

Subsequent mortgagee's right of redemption.—Where a prior mortgagee brought a suit for sale of mortgaged properties without making the subsequent mortgagee a party and purchased the property in Court auction, *held*, in a suit by him against the subsequent mortgagee for possession, that the latter should be allowed an opportunity to redeem the prior mortgagee, and the decree should be made subject to such right. **GANGA RAM v. TIKA RAM, A.W.N. 1888, 184.**

(382)—*Mortgage by widow for legal necessity—Decree for foreclosure—Appeal by the widow—Continuance of the appeal by the daughter after her death pending the appeal—Application for substitution by reversionary heir, rejection of—Dismissal of appeal—Suit for redemption by reversionary heir—Decree in the previous foreclosure suit, if a bar—Decree on appeal, effect of—Decree against the widow, if binding upon reversioners.*—Where a Hindu widow died during the pendency of an appeal by her against a decree for foreclosure upon a mortgage executed by her for legal necessity, and the Court, upon applications by the widow's personal representative, her daughter, and also by the reversionary heir of her husband for leave to continue the appeal, erroneously decided in allowing the daughter to be substituted, and the daughter continued the appeal which was dismissed, and subsequently the reversionary heir, the present plaintiff, brought this suit for redemption of the mortgaged property. *Held*, that the decree in the foreclosure suit was no bar to the plaintiff's claim to redeem as he was no party to it. That the question of *res judicata* was to be determined with reference to the decree on appeal and not with reference to that of the first Court. (13 C. 13, R.) *Quære?*—Whether a decree obtained in a suit against a Hindu widow to enforce a mortgage executed by herself will be binding as against the reversioner. **KAILASH CHANDRA BOSE v. SREEMATI GIRIJA SUNDARI DEBI, 16 C.W.N 658 = 14 Ind. Cas. 293 = 39 C. 925.**

(383)—*Mortgage — Conditional mortgage—Agreement between mortgagor and mortgagee after sale of equity of redemption—Effect of agreement on purchaser—Foreclosure—Sale of equity of redemption after proceedings taken—Notice by mortgagee—Fresh notice on purchaser, necessity for.*—Where a mortgagor, before the expiry of the year of grace and after the sale of the equity of redemption, agreed with the mortgagee that of the two villages conditionally mortgaged, one should be given to him and decree for foreclosure should be obtained by the mortgagee in respect of the other, such agreement did not bind the purchaser and he could not be prejudiced thereby, inasmuch as notwithstanding such arrangement he was at liberty to deposit the money in Court, or to tender it to the mortgagees, and the foreclosure proceedings could not be rendered invalid for such agreement having been made. Where a mortgagor sold his right or equity of redemption after

Mortgage—continued.**—9.—Redemption—continued.**

foreclosure proceedings had been applied for and notices duly served on him, it was not necessary for the mortgagee to issue fresh notice on the purchaser, and the requirements of the Regulation were satisfied by the service of the notice on the person who, at the time of service, was entitled to redeem. **MUHUNT JYRAM GIR v. RAJAH KRISHAN KISHORE CHUND, 3 Agra 307.**

(384) — *Mortgage — Redemption — Hindu widow—Reversioner suing to redeem—Lapse of time—Burden of proof—Evidence.*—In 1849-1851, R mortgaged three properties to defendants. In 1853, R died, and his widow S succeeded him. S, during her lifetime, incurred many small debts, but did not create any incumbrance on the property. S died in 1861, and was succeeded by her mother-in-law G. In 1866, G mortgaged the three properties and four others, to the same mortgagees for Rs. 1,473, which represented R's mortgage debts, S's debts and G's debts. G died in 1875. In 1896, the plaintiff, a reversioner, sued to redeem the lands from R's mortgage, contending that G's mortgage was not binding upon him. The lower appellate Court held that looking to the lapse of time between G's death and the suit, the plaintiff could not redeem without paying off G's mortgage-debt. *Held* (1) that G's mortgage could, as against plaintiff, only burden the properties, mortgaged by R if and so far as the mortgagees could show that the debts G purported to secure were incurred for those recognized purposes which justify the sale or mortgage of the inheritance by a female who had only a qualified estate; (2) that if plaintiff's contention as to the invalidity against him of G's mortgage was right, then, he could, immediately on G's death, have recovered possession of the four properties, but R's mortgage stood in the way of his recovering the three properties, thus, as to the four properties, the possession was adverse to the extent of the qualified interest claimed, as to the three properties it was not. Lapse of time is an element of consideration: it may absolve the mortgagee from the high standard of proof that would be required in relation to a recent transaction; but it cannot dispense with the necessity for some proof, or create a bar to redemption on payment of all that is legally due. **SUBHANRAO v. VINAYEK, 4 Bom. L.R. 465.**

(385)—*S. 2, Reg. I of 1798—Zur-i-peshgee mortgage—Rights of mortgagor*—In a *zur-i-peshgee* mortgage, the mortgagor is, under s. 2, Regulation I of 1798, entitled to demand back his land immediately after making his deposit and if, by mistake or otherwise, he demanded more land than was comprised in the mortgage, that was not a matter which in any way justified the mortgagee in keeping possession of land which is in fact comprised in it. **MOHUN LAL v. SHEIKH ALI AFZUL, W.R. 1864 219.**

Mortgage—continued.**—9.—Redemption—continued.**

(386)—*Mortgage by implication—Suit for redemption—Limitation—Adverse possession.*—Where an interest in the land is transferred to certain persons as trustees for the purpose of securing the payment of expenses incurred by them in managing the land, the transaction created a mortgage, redemption of which should be decreed on payment of the money due, though pleas of adverse possession and limitation be set up. **BUTA SINGH v. JHAGRA, 10 P.R. 1888.** (93 P.R. 1879, 57 P.R. 1883, R.) [R., 93 P.R. 1903=164 P.L.R. 1908; *Consd* 100 P.R. 1909.]

(387)—*Document, construction of—Mortgage by conditional sale—Time fixed for redemption—Redemption before due date—Maintainability of suit.*—On 23rd December 1881, the property in suit was sold to defendants, on condition that it was to be re-conveyed to the vendor, if the sale consideration and value of improvements were paid on 23rd December 1883. It was stipulated that the defendants were to enjoy the property till the said latter date. Then followed a proviso that, if before 21st December 1941 the property was not redeemed, the vendee's title would become absolute. Plaintiff offered to pay the sale price after 23rd December 1883, but within the time stipulated by the latter proviso. Defendants pleaded that they were entitled to hold on till 21st December 1941, and that the suit was premature. *Held*, that, though plaintiff was not at liberty to redeem before 23rd December 1883, he was entitled, under the terms of the sale-deed, to redeem at any time before 1941, and that the suit was not premature. **DASAPPALA-VA v. NANHAKKE, 1 Ind. Cas. 285.**

(388)—*Mortgagor's right to discharge mortgage-debt at any time.*—The general rule is that the debtor is at liberty to discharge the mortgage-debt at any time, unless the terms of the document clearly prohibit and fix a time before which it is not to be paid (2 M. 314, 10 A. 602, R.). The word "sariki" may be translated either as "at the end" or "within." **RADHA KRISHNA PANDA v. MADHAVA NAIK, 17 M. L.J. 83.**

(389)—*Mortgage—Redemption—Meaning of "Ta miyad das sal tak, girau rahn ba kabza rakha hai."*—*Right of mortgagor to redeem—Meaning of the term "foreclosure" in the Punjab.*—*Held*, that, in the absence of any words clearly signifying that the mortgagor is not to redeem for a certain period he can redeem it at any time; and that any phrase in the deed simply reciting that the mortgage is for a certain period should be regarded as a clause inserted for the benefit of the mortgagor and intended to protect him from foreclosure for a period and not to hinder him from redeeming within that period; and that the words "ta miyad das sal tak girau rahn ba kabza rakha hai" mean in the absence of any further words showing for whose benefit the period of ten years was fixed, that the mortgagee is not to

Mortgage—continued.**—9.—Redemption—continued.**

foreclose till the end of that period. (10 A. 602, 2 M. 314, F.; 40 P.L.R. 1903, R. and D.; 5 B. 22, 20 B. 677, Diss.) *Obiter Per Kensington, J.*—That in the case of mortgages in the Punjab, other than those containing a conditional clause, the term *foreclosure* denotes merely the right of a mortgagee to sue for his money and does not bear the technical meaning given to the term in other Provinces where the Transfer of Property Act IV of 1882 is in force, **FIROZE-UD-DIN v. FIROZE-UD DIN, 137 P. W.R. 1908.**

(390)—*Mortgage—Foreclosure—Equity of redemption—Reg. XVII of 1806, s. 8—Amount to be deposited by mortgagor.*—A mortgagor does not lose his right to redeem if he deposits the amount due under the mortgage within the time when the final foreclosure may be effected under s. 8 of Reg. XVII of 1806. Where the mortgagee had been in possession and had received the rents and profits of the property, the principal amount only should be deposited, that being the "amount due" under the mortgage. **ABDOOL KHAN v. UPENDRO CHUNDER BHUTTACHARJEE, 14 W.R. 278.**

(391)—*Mortgage—Lakheraj land—Subsequent assessment—Payment of revenue by mortgagee—Right to be reimbursed—Redemption.*—The land which was mortgaged was, at the time of the mortgage, treated as *lakheraj*. But subsequently it was assessed with Government revenue which the mortgagee was obliged to pay in order to save the land. Now the mortgagor sought to redeem the land on deposit of the principal sum. *Held* that the mortgagor could recover possession of his land only after he paid into Court the amount paid to Government for revenue with interest thereon. **JOYPROKASH ROY v. OORJHAN JHA, 3 W.R. 174.**

(392)—*Transfer of Property Act IV of 1882, s. 93, mortgagee's omission to get an order for sale under—Redemption decree, time for mortgagor to redeem.*—In the case of a decree for redemption of a usufructuary mortgage, directing surrender of the property on payment of the mortgage amount within a fixed date, but not containing a direction as required by s. 92 of the Transfer of Property Act, that, on default of payment on the day fixed, the property should be sold, the mortgagee has to obtain an order under s. 93 for sale of the property on the mortgagor's default. Until such an order, under s. 93, is secured by the mortgagee, the mortgagor's right of redemption cannot become extinct and it is till then open to him to obviate the necessity for the sale by payment of the mortgage amount before the passing of the said order under s. 93. **KANARA KURUP v. GOVINDA KURUP, 16 M. 214=3 M.L.J. 89.** [R., 19 M. 40, F.B., 11 C.P.L.R. 115, 25 M. 300, F.B., 28 B. 102; D., 19 A. 180.]

(393)—*Redemption—Payment within a year—Reg. XVII of 1806, s. 7—Interest.*—Where

Mortgage—continued.**—9.—Redemption—continued.**

interest is not reserved by the mortgage-deed, but it provides for repayment of the principal only, a payment into Court within a year after the institution of a foreclosure suit of the principal only without interest satisfies the 7th section of Regulation XVII of 1806, and entitles the mortgagor to the redemption of the property. **ROOPNARAIN SINGH v. MADHO SINGH, Marsh 617.**

(394)—*Redemption—Payment into Court of redemption-money—Costs.*—It is sufficient to bar a foreclosure suit that the principal money and interest due on the mortgage have been paid into Court within the year of grace, or an extended time agreed upon by the parties without costs incurred by the mortgagor in the matter of the mortgage. **ZALEM ROY v. DEB SHAHEE, Marsh 167=1 Hay 373.**

(395)—*Continuance of enjoyment—Material portion of contract—Mortgage—Mortgage for a term—Redemption—Intention of parties.*—Where the continuance of the enjoyment of the mortgaged property for a prescribed period forms a material part of the contract, it would be inequitable to deprive the mortgagor of this right on the mere ground that the contract is one of mortgage. Where parties agree that possession of the property shall be transferred to a mortgagee for a certain term, the mere creation of a term is by no means conclusive of the fact that redemption should take place only at the end of the term and not earlier. **SRI RAJA SETRUCHERLA RAMABADRA RAJU BAHADUR v. SRI RAJA VAIRUCHERLA SURYA NARAYANA RAJU BAHADUR, 2 M. 314.** [Appr., 10 A. 602, 16 C.P.L.R. 59; R., 201 P.R. 1889, 20 B. 677, 23 M. 33, 17 M.L.J. 83.]

(396)—*Transfer of Property Act IV of 1882, s. 60—Term fixed in mortgage-deed for repayment of mortgage-money, right of mortgagor to redeem before expiration of.*—While a stipulation in a mortgage deed for the postponement of payment of the mortgage-money is *prima facie* intended for the benefit of the mortgagor, the parties may, by the language of their contract, show their intention that redemption should take place only at the end of the given term, and that the mortgagor should be precluded from redeeming until after the expiry of such term. In the absence of any such contract, the liberty of redeeming at his pleasure should be deemed to have been reserved to the mortgagor. **ROSE AMMAL v. RAJA-RATHNAM AMMAL, 23 M. 33.** (5 B. 22, 16 M. 486, Cons.) [R., 16 C. P. L. R. 59, 16 M. L. J. 146, 17 M. L. J. 83, 17 M. L. J. 177, 18 M. L. J. 235.]

(397)—*Mortgage—Right to redeem before expiry of term—Right to foreclose whether co-extensive with redemption—Presumption as to the fixation of term in mortgage-bond.*—No such general rule of law exists in India as would preclude a mortgagor from redeeming a mort-

Mortgage—continued.**—9.—Redemption—continued.**

gage before the expiry of the term for which the mortgage was intended to be made, unless the mortgagee succeeds in showing that, by reason of the terms of the mortgage itself, the mortgagor is precluded from paying off the debt due by him to the mortgagee (5 B. 22, 8 A. 95, R.). Where parties agree that possession of the property shall be transferred to a mortgagee for a certain term, it may be inferred that they intended that redemption should be postponed until the end of the term, though the creation of a term is by no means conclusive on the point. [R., 9 A. W. N. 135, 16 C. P. L. R. 59, 17 M. L. J. 83=126, P. L. R. 1908.] The rule that the right of redemption and the right of foreclosure are co-extensive and coincident, as to the time when these rights may be respectively exercised by the mortgagor and the mortgagee, is not one recognized by the law of mortgage, at least in the N. W. P. (5 B. 22, Disappr.). [F., 137 P. W. R. 1908.] Where a mere fixation of the term for paying off the mortgage-debt occurs in a mortgage-deed, the presumption is that the date is fixed for the convenience of the debtor, and that he may repay the debt at an earlier period, unless a contrary intention is shown. **BHAGWAT DAS v. PARSHAD SINGH, 10 A. 602.** (2 M. 314, R.) [F., 137 P. W. R. 1908.]

(398)—*Conditional sale—Mortgagee entitled to possession on default in payment of mortgage-money within stipulated time—Right of mortgagor to redeem mortgage.*—Suit to recover certain property that had been mortgaged as security to the plaintiff. The right to the relief claimed by the plaintiff was based on the ground that the mortgage instruments operated as absolute sales to the plaintiff of the mortgagor's proprietary right upon default made as therein provided, and entitled the plaintiff to immediate possession. Held that where an instrument appeared clearly, as in the present cases, to have been entered into by the parties for the purpose of securing the repayment of a loan, the mortgagor, making the security subservient to the purpose for which it was created, could in equity and good conscience redeem the property by paying off the principal debt and the interest, though the stipulated time for payment had been allowed to pass by, and in a suit for possession by the mortgagee, the Court was bound to give a reasonable time to the mortgagor to pay the amount due under the mortgage. **VENKATAREDDI v. PARVATI AMMAL, 1 M. H. C. 460.** [F., 7 M. H. C. 219; R., 3 M. H. C. 363, 9 B. H. C. 69, 1 M. 1, 4 M. 179]

(399)—*Foreclosure action—Time for redemption—S. 87, Transfer of Property Act.*—The mortgagor in a foreclosure action is entitled to redeem at any time until the order absolute is made under s. 87 of the Act. **PORESHNATH MOJUMDAR v. RAMJODU MOJUMDAR, 16 C. 246.** [F., L.B.R. 1893—1900, 174, 1 O. C. 91, 27 C. 705, 3 C. L. J. 533; Appr., 21 C.

Mortgage—continued.**—9.—Redemption—continued.**

818, 20 A. 375=18 A.W.N. 78, 20 A. 446=18 A.W.N. 112; *Cons.*, 9 C.P.L.R. 78, 19 M. 40, F.B., 2 N.L.R. 137; *Diss.*, 13 M. 267, 13 A. 278, F.B., 19 A. 180=17 A. W. N. 11, 25 M. 244, F.B.; *R.*, 16 B. 243, 7 C.P.L.R. 40, 9 C.P.L.R. 75, 22 C. 931, 23 C. 682, 21 M. 364, 22 B. 771, 5 O. C. 251, 2 O.C. 37, 20 A. 358=18 A.W.N. 67, 12 C.P.L.R. 101, U.B.R. 1897—1901, Vol. II, 582, 5 O.C. 82, 8 C.W. N. 609=31 C. 332, P.C., 1 A.L.J. 300, 2 A.L. J. 180=A.W.N. 1905, 70=27 A. 501, F.B., 36 C. 122=8 C.L.J. 537=13 C.W.N. 36, Note.]

(400)—*Ss. 86, 87, T.P. Act, 1882—Mortgagor's right to redeem, until order for foreclosure absolute is made.*—Until an order for foreclosure absolute has been made under s. 87, T.P. Act, the mortgagor may be allowed, on a proper application, to redeem the mortgaged property. His right to redeem is not barred upon the expiration of the time fixed in the decree for payment. *SOMESH v. RAM KRISHNA CHOWDHRY*, 27 C. 705=4 C.W.N. 699. (16 C. 246, *R.*; 22 M. 133, *F.*) [*F.*, 25 A. 231, 3 C.L.J. 533; *R.*, 2 N.L.R. 137; *Diss.*, 3 N.L.R. 146.]

(401)—*Transfer of Property Act (IV of 1882), ss. 86, 87—Preliminary decree for foreclosure—Redemption may be at any time before passing of order absolute.*—Where a preliminary decree for foreclosure of a mortgage has been passed under s. 86 of the T. P. Act, the mortgagor can pay the money and obtain redemption at any time until the decree is brought to maturity by an order under s. 87 of the Act. *NIHALI v. MITTAR SEN*, 20 A. 446=A.W.N. 1893, 112. (16 C. 246, 20 A. 375, *R.*) [*F.*, 25 A. 231; *R.*, U.B.R. (1897—1901), Vol. II, 582, 24 A. 479, 2 N.L.R. 137.]

(402)—*Mortgage—Redemption, suit for—Decree of Settlement Court—Declaratory decree—Construction of decree—Res judicata—Code of Civil Procedure, ss. 13 and 244.*—B mortgaged his shares in certain villages to C. At the first regular settlement P, claiming through B, sued C in respect of the mortgages. He described his claim as one for redemption. He alleged that he had tendered the mortgage-money to C and that C had refused to receive it. He asked "that redemption be allowed after an investigation." On the 31st July, 1866, the Settlement Court passed a decree in the following terms:—"Ordered that the plaintiff's claim be decreed against the defendant on condition of his (plaintiff's) paying from his own pocket Rs. 775-8-0 in the month of *Jeth*, fallow season, that then he shall be entitled to possession of the mortgaged shares, but if default be made on his behalf in the fulfilment of either of these conditions, the decree shall be incapable of execution and the order for redemption shall be deemed not to have been passed." The plaintiff, claiming through B brought a suit to redeem the mortgages. In his plaint he described the decree dated the 31st July, 1866, as a declaratory decree. The defendants pleaded that the suit was barred by ss. 13 and 244, Civ. Pro. Code, a decree hav-

Mortgage—continued.**—9.—Redemption—continued.**

ing been obtained for redemption of the mortgages. *Held*, that the decree was not intended to grant consequential relief but was intended to be merely declaratory, and that the suit was consequently not barred by the provisions of ss. 13 and 244, Civ. Pro. Code, but was maintainable. *GUR PERSHAD v. RATTAN SINGH*, 6 O.C. 239. [*R.*, 8 O.C. 361.]

(403)—*Hindu Law—Mitakshara—Joint family—Mortgage by manager—Sale by mortgagee of mortgaged property in execution of money decree prohibited—Transfer of Property Act (IV of 1882), s. 99—Mortgagee's possession no adverse—Minor not bound by such sale—Modes of extinguishing right of redemption—Effect of mortgagor's acquiescence or silence.*—S. 99 of the Transfer of Property Act prohibits a sale of mortgaged property held in contravention of the provisions of that section. (21 C. 37, 30 C. 463, 17 A. 522, *F.*) In a joint Hindu family governed by the Mitakshara, a son is not deprived of his equity of redemption by virtue of a sale prohibited by law. (22 M. 372, *F.*; 22 B. 624, *Appl.*; 32 C. 296, *F.*) A suit for redemption is not barred merely by reason of silence or acquiescence on the part of mortgagor unless there is a release of the equity of redemption. The only modes in which a mortgagee can extinguish the right of redemption are either by getting the mortgagor to execute a release of the equity of redemption in his favour, or by a proper suit under the Transfer of Property Act. A mortgagee by erroneously representing himself as owner of the mortgaged premises cannot make his possession adverse to the true owners. *JHABBA LAL v. CHHAJJU MAL*, 4 A.L.J. 787=A.W.N. 1908, 1=3 M.L.T. 132.

(404)—*Right to redeem whether res judicata—Judgment containing secondary evidence of mortgage put in evidence by plaintiffs for purposes of res judicata—Defendant's duty to prove mortgage—Limitation Act, art. 134.*—The mortgagee's claim to redemption will not be *res judicata* in a subsequent suit, by reason of the decree in an earlier suit, where the parties were not the same and the plaintiff in the subsequent suit did not claim under the plaintiff in the earlier suit. Where, for the purposes of *res judicata*, the plaintiffs put in evidence a judgment containing secondary evidence of a mortgage, this would not absolve the defendants from the duty of proving their mortgage by original evidence or of making out a case for the admission of secondary evidence. Where the defendant's claim under art. 134, Limitation Act, did not ripen, and the plaintiff was not bound to redeem at the time of the former suit, the defendant is not debarred from subsequently putting forward his claim under that article. The point that a mortgage has not been formally proved, if not taken in the lower Courts, cannot be taken in second appeal. *KRISHNA PATTAR v. ARAPPATH VEETIL MAIVAPPA MUTHAN*, 4 M.L.T. 73.

Mortgage—continued.**—9.—Redemption—continued.**

(405)—*Second suit for redemption—Settlement Court decree, effect of—Civ. Pro. Code, ss. 13 and 244—Declaratory decree—Execution of decree—Res judicata—Mortgage.* Held, that where a Settlement Court decree did not fix a time within which the mortgage-money was to be paid, the decree was merely a declaratory decree and incapable of execution and in such a case, a subsequent suit for redemption was not barred. **RAJA PARTAB BAHADUR SINGH v. RAJA SURAL SINGH, 8 O.C. 361.** (1 O.C. 289, 6 O.C. 239, 10 B. 461 P.C., R.)

(406)—*Limitation Act (XV of 1877), sch. II, art. 144—Civ. Pro. Code (Act XIV of 1882), s. 13—Suit to declare a mortgage not binding on plaintiff and for possession of mortgaged property—Decree that mortgage was binding on plaintiff to the extent of a certain amount—Dismissal of suit on plaintiff's failure to deposit said amount—Subsequent suit for redemption—Adverse possession—Res judicata.*—In a previous suit, the plaintiff mortgagor sued for the cancellation of his mortgage and for possession of the property. The Court declared that the mortgage was good to the extent of Rs. 300, but the plaintiff being unwilling to pay that amount, his suit was dismissed. Then the plaintiff brought this second suit for redemption on payment of Rs. 300. The Lower Courts found that, as the plaintiff had ignored the mortgage in the previous suit, the defendant became a trespasser from the date of the mortgage, and that plaintiff's present claim was barred. Held, that the plaintiff's claim in the prior suit to declare the mortgage bad did not have the effect of enabling the defendant prescribe for title by adverse possession from the date of the mortgage to the extent of the interest, and that the present suit was not barred under art. 144 of sch. II of the Limitation Act. Held, also, that the present suit was not barred as *res judicata* by reason of the previous suit. **SANGAMMA NAICKER v. RAMASAWMY NAICKER, 5 Ind. Cas. 478=8 M. L. T. 252.** (26 M. 760, 27 M. 102, 27 M. 380, 28 M. 406, 29 M. 153, 16 M. L. J. 48, 31 M. 385, R.)

(407)—*S. 13—Civ. Pro. Code, 1882—Res judicata—Redemption—Second suit for—Conditional decree in the first suit not given effect to.*—Where a mortgagor brings a suit for redemption and obtains a conditional decree, but omits to fulfil the conditions imposed upon him, he is not debarred from bringing a second suit for redemption, unless the decree lays down that, if he fails to fulfil these conditions, the property will be sold or he will be debarred of all his rights to redeem. **NAKTA RAM v. CHIRANJI LAL, 7 A.L.J. 185=5 Ind. Cas. 269=32 A. 215.**

(408)—*Property undivided and subject to mortgage—Power of one sharer to redeem—Lien over other shares—Res judicata.*—If any property remains undivided, then that has to be divided between the co-sharers. When such

Mortgage—continued.**—9.—Redemption—continued.**

property is mortgaged, any of the sharers might redeem the whole mortgage and recover possession of his share, retaining a lien over the other shares in the property. Such a claim is not *res judicata*. **SHANMUGA PALLAVARAM v. SOOSAI UDAYAN, 8 M. L. T. 186.**

(409)—*Usufructuary mortgage—Redemption—First suit dismissed for default—Second suit not barred—Res judicata—Civ. Pro. Code (Act XIV of 1882), ss. 13, 102, 103—Transfer of Property Act (IV of 1882), ss. 60, 92, 93.*—The plaintiff brought a suit for redemption of a usufructuary mortgage in 1902. The suit was dismissed for default under s. 102, Civ. Pro. Code (1882). He brought a second suit for redemption of the same mortgage: Held, that the second suit was not barred by reason of the previous suit having been dismissed for default. The plaintiff could redeem, unless and until his right was extinguished by the acts of the parties or by an order of Court. **FATEH CHAND v. JAGAN NATH PRASHAD, 2 Ind. Cas. 630.** (15 C. 422=15 I. A. 66, 24 A. 44, R.)

(410)—*Mortgage—Redemption suit—Decretal money not paid within time fixed—Decree not in accordance with Transfer of Property Act—Subsequent suit for redemption—Not barred by s. 13 or 244, Civ. Pro. Code, 1882—Res judicata, when applicable.*—The decree in a redemption suit in respect of an usufructuary mortgage directed payment of the mortgage-debt within a certain time, and if payment was not so made "the judgment should be deemed to be non-existent." The decree did not direct, as it should have done under the Transfer of Property Act, that in default of payment on the due date the property should be sold. The plaintiff did not pay as directed. Held, that a second suit for redemption was not barred either under s. 13 or under s. 244, Civ. Pro. Code, or under the Transfer of Property Act. (19 A. 202, overruled; 6 M. 119, 7 M. 423, 8 M. 478, 15 M. 366, 17 M. 96, 19 M. 40, 21 M. 18, 4 A. 481, 11 A. 386; 21 A. 251; 7 B. 467; 10 B. 461; 13 B. 567, 13 M.I.A. 404, 22 W.R. 172, N.W.P. 1867, 256, N.W.P. 1868, 381, N.W.P. 1871, 62, R.) [Not F., 6 O.C. 367; F., 7 A.L.J. 185; Rellon, 24 A. 479; R., 6 O.C. 239, A.W.N. 1905, 107=2 A.L.J. 278, 5 C.L.J. 289, 93 P.R. 1908=164 P.L.R. 1908=133 P.W.R. 1908, F.B., 2 Ind. Cas. 630.] (Per Banerjee, J.):—If the decree in the first suit had provided in distinct terms that, in case of default of payment, the mortgagor would be debarred from redeeming the mortgaged property, a second suit would be clearly barred under the rule of *res judicata*. **SITA RAM v. MADHOLAL, 24 A. 44, F.B.=A.W.N. 1901, 194.** [R., 29 A. 481=A.W.N. 1907, 137=4 A.L.J. 447, 2 Ind. Cas. 662.]

(411)—*Suit for—Account—Transfer of Property Act, s. 92—Mesne profits—Res judicata—Civ. Pro. Code, s. 13.*—Held, that, in a redemption suit, where a decree is passed in plaintiff's

Mortgage—continued.**—9.—Redemption—continued.**

favour and a date is fixed for payment under s. 92 of the Transfer of Property Act, the plaintiff must get an account of the profits of the property taken up to the date fixed for payment and, if he fails in doing so, he is not entitled to bring a separate suit for the mesne profits of the period, for which he has failed to take such account. Such a suit is barred under the provisions of s. 13 of the Civ. Pro. Code. *SHEO NATH v. GAYA PERSHAD*, 8 O.C. 302. [F., 12 O.C. 152.]

(412)—*Decree for redemption—Second suit for redemption—Civ. Pro. Code, ss. 13, 244.*—A decree for redemption of a mortgage, which remained unexecuted for three years, is no bar to a fresh suit for redemption. *KARUTHASAMI v. JAGANATHA*, 8 M. 478. (6 M. 119, Appr.; 7 B. 467, Diss.). [Overruled, 25 M. 300; F., 15 M. 366; R., 13 B. 567, 16 B. 243, 19 M. 40, 21 M. 18; 21 A. 251; 3 O.C. 371; 24 A. 44=21 A.W.N. 194, 100 P.R. 1905=16 P.L.R. 1906, 93 P.R. 1908, F.B.=164 P.L.R. 1908=133 P.W.R. 1908.]

(413)—*Transfer of Property Act, ss. 58, 67, 92, 93—Mortgagor and mortgagee—Second redemption suit—Res judicata.*—In a suit for redemption, the mortgagee can never insist on an order for foreclosure when the mortgage is simple or usufructuary, and the order for sale on which he can insist under s. 93, Transfer of Property Act, does not operate to divest the mortgagor of his ownership in the property, until the sale has actually taken place. [R., 22 M. 350=9 M.L.J. 108, 25 M. 244.] When a mortgagor has obtained a decree in a suit for redemption of a mortgage, and the decree has become unexecutable in consequence of a period exceeding three years from its date having been allowed to pass without any step having been taken to execute it, and the decree contains no direction that the mortgage should be foreclosed in default of the mortgagor exercising the right of redemption thereby decreed to him, a subsequent suit by the mortgagor for redemption of the same mortgage is not barred as *res judicata* by reason of the previous decree. *RAMUNNI v. BRAHMA DATTAN*, 15 M. 366. [Overruled, 25 M. 300 F.B.; Diss., 19 A. 202; R., 19 M. 40, 21 M. 18, 3 O.C. 380, 24 A. 44, 21 A.W.N. 194, 43 P.R. 1907=101 P.W.R. 1907=169 P.L.R. 1908, 93 P.R. 1908=164 P.L.R. 1908=133 P.W.R. 1908.]

(414)—*Kanom mortgage, incidents of—Suit to redeem—Renewal clause, construction of—Kanomdar holding over, effect of—Effect of accepting renewal fee from Kanomdar—Transfer of Property Act, ss. 59 and 93—Covenant for perpetual renewal of lease.*—A *kanom* is an anomalous mortgage within the meaning of s. 98, Transfer of Property Act, with certain well-known incidents attached to it by the Customary Law of Malabar (27 M. 26, R.). In such a mortgage, the rights and liabilities of the parties should be determined by their con-

Mortgage—continued.**—9.—Redemption—continued.**

tract as evidenced in the mortgage-deed and, so far as such contract does not extend, by local usage. Where, in a *kanom*, the demisor says "you shall obtain a renewed demise on the expiration of every 12 years" and, in the corresponding *kychit*, the demisee says "I shall obtain a renewed demise on the expiration of every 12 years," held, that this stipulation was inserted for the protection of the demisor, not for the benefit of the demisee, and that the demisor does not thereby bind himself to grant a renewal every 12 years. The receipt of a renewal fee would evidence an agreement for a renewed *kanom* and such an agreement, accompanied by possession would in equity be considered as placing the *kanomdar* in the same position as if he had obtained a renewed *kanom*. This principle of equity can, however, only be given effect to in this country, so far as it is compatible with the Transfer of Property Act. A *kanom* being a mortgage, it requires registration under s. 59 of the Act. Consequently, possession under an agreement for a mortgage cannot be relied on, in the absence of a registered agreement, and the demisee, even if in possession, cannot resist the suit for redemption, unless he has actually obtained a renewed demise duly registered (29 M. 336, F.B., F.). *Per WALLIS, J.*—A *kanom* partakes of the nature of a lease as well as of a mortgage. The validity of a covenant for perpetual renewal in a lease having been long established in England, such a covenant in a *kanom* may be enforced, at any rate, in the case of *kanoms* entered into since the coming into force of the Transfer of Property Act. Such a covenant is, however, a serious derogation from the rights of the landowner, whether he is regarded as mortgagor or as lessor. And the authorities have imposed upon any one claiming such a right the burden of strict proof and are strongly against inferring it from any equivocal expressions, which may fairly be capable of being otherwise interpreted. It cannot be contended that, the *kanomdar* having been allowed to hold over after the expiration of the *kanom* period, he must be treated as a tenant from year to year and cannot be ejected except on due notice. Although the *kanom* may partake of the nature of a lease, that is no reason for importing into it the rules of English law as to holding over. *V.Y.L. GOPALAN NAIR v. P. KUNHAN MENON*, 2 M.L.T. 131=17 M.L.J. 189=30 M. 300. (3 M. 382, 16 M. L. J. 462, 24 M. 449, R.)

(415)—*Redemption suit—Suit for redemption upon one mortgage—Failure to prove the mortgage—Defendant alleging possession under different mortgage—Decree for redemption—Malabar Law—Othidar's right of pre-emption.*—The plaintiff, as the purchaser at a Court-auction of the rights of an *illam*, sued to redeem a *kanom* alleged to have been granted by the *illam* to the first defendant, and impleaded the second defendant as being in possession, though without any valid title. The first defendant

Mortgage—continued.**—9.—Redemption—continued.**

did not appear and the second defendant set up another mortgage from the same illam. *Held* that the Court, on finding that the first mortgage had not been proved, could grant a decree for the redemption of the mortgage, under which the second defendant was in possession. The othi-holder's right of pre-emption under the Malabar Law cannot be pleaded as a bar to the right of the purchaser at Court-auction of the illam to redeem without an offer to purchase that right. The othi-holder's right of pre-emption cannot be allowed in a suit brought to redeem him. **SANKARA MOOSAD v. USSAIN HAJI, 17 M.L.J. 329=2 M.L.T. 354=30 M. 388.** (24 M. 449, 29 M. 339, *F.*; 5 M. 198, 9 M. 371, 7 M. 309, 13 M. 490, 15 M. 401, 20 M. 305, *R.*)

(416)—*Malabar Law—Suit to redeem Kanom—Sub-mortgage in their favour set up by certain members of tarwad—Claim of title as mortgagees—Limitation Act, 1877, sch. II, art. 134.*—Plaintiff (karnavan) sued in 1904 to redeem a kanom of 1857. Certain members of the plaintiff's tarwad, set up a sub-mortgage of 1891 in their favour by the tarwad, and claimed to have acquired title as mortgagees against the plaintiff under art. 134, Limitation Act. *Held*, that it cannot be said that the members of the tarwad who set up the sub mortgage, are purchasers for value of the property mortgaged, as distinguished from the mortgage interest, and that the plaintiff was entitled to redeem. **KURUMATHOOR ILLOTH PARAMESWARAM NAMBU DRIPAD v. KEETHATHATH ALEEMA, 7 M.L.T. 187=5 Ind. Cas. 932.** (24 M. 471, *D.*)

(417)—*Anubhava Kanom—Document in discharge of—Creation of right to require renewal—Construction—Redemption—Right to resist claim for redemption until renewal.*—Where a document, which was executed in discharge of an *anubhava kanom* held by a third party subsequently assigned by the defendants created a mere right to require a renewal. *Held* that the defendants cannot resist the claim to redeem until such renewal is granted. **PANDARATHILE alias VAKKAYAL RARU NAIR v. NADURILE MADATHIL VISHNU BHARATHIGAL alias PAKARAVAR SWAMIER, 8 M.L.T. 234=7 Ind. Cas. 698.** (30 M. 300, 30 M. 61, 6 M.H.C. 258, *R.*)

(418)—*Malabar mortgages—Kanom, redemption of—Irredeemable or perpetual tenure—Anubhavam or Anubhogam—Purushantaram—Construction of deeds—Limitation Act, art. 134—Purchaser.*—Suit for redemption. A deed recited that the plaintiff granted to the defendant "a renewed writing" in respect of certain lands and added "The rent due by defendant for holding the land on lease is 55 paras. The prior Kanom and the value settled for the reclamation effected hitherto and credited to the defendant's accounts is 700 fanams. The interest on the 700 fanams is 35 paras and the amount allowed for *anubhavam* is 5 paras; the

Mortgage—continued.**—9.—Redemption—continued.**

balance left after deducting these (35 plus 5) 40 paras from the aforesaid rent of 55 paras is 15 paras." The tenant (defendant) agreed to pay rent calculated on this 15 paras and contested the plaintiff's right to redeem. *Held*, that no irredeemable tenure was created and that the defendant was entitled to recover 5 paras annually from the land, if the plaintiff should redeem the Kanom. The word "*Anubhavam*" or "*Anubhogam*" literally means "enjoyment." In grants, it ordinarily implies hereditary and therefore perpetual enjoyment; and when used as descriptive of tenure of land, it *prima facie* implies a hereditary or an irredeemable tenure; but, when used with reference to an allowance of money or grain to be deducted from the rent due to the grantor, it will not imply any tenure in favour of the grantee. In such a case, though the allowance may be perpetual or may operate as a rent charge of the land, it by no means follows that the tenure is irredeemable. Whether the word implies an irredeemable tenure or only a perpetual rent charge depends on the language of each document. If the amount of the grant is not specified and if the terms of the document indicate that only a fixed rent is reserved for the grantor and the rest of the produce is given as "*Anubhavam*" or "*Yavana*," the Court may treat it as creating an irredeemable tenure, so as to secure to the grantee the benefits intended for him by the grant. In order to have the benefit of art. 134, Limitation Act, the purchaser must show that he is the purchaser of an absolute title and not simply of the mortgagee's rights in the property. **VYTHILINGAM PILLAY v. KUTHIRAVATTATH NAIR, 16 M.L.J. 358=1 M.L.T. 290=29 M. 501.** (27 M. 202, *Expl.*; 14 M.I. A. 19, *R.*) [*F.*, 30 M. 203; *D.*, 7 M.L.T. 188.]

(419)—*Malabar law—Kaividu otti—Redemption.*—A demise of land on Kaividu otti is a mortgage and is redeemable. **KUNDU v. IMPICHI, 7 M. 442.**

(420)—*Verumpattom tenant—Transfer of Property Act, s. 91—Right to redeem.*—A verumpattom tenant in Malabar claiming under a lease executed by the ottidar is entitled to redeem the prior kanom. **PAYA MATATHIL APPU v. KOVAMELAMINA, 19 M. 151.** [*R.*, 29 A. 679=A.W.N. 1907, 227=4 A.L.J. 703.]

(421)—*Mortgage, gahan-lahan—Redemption after expiry of term*—A suit for redemption of a gahan-lahan mortgage, even where the mortgagee had possession for more than twelve years after the date on which the mortgage was, according to the deed of mortgage, to become an absolute sale, was governed by s. 1, cl. 15 of Act XIV of 1859. **SHANKARBHAI GULAB-BHAI v. KASSIBHAI VITHALBHAI, 9 B.H.C. 69.** [*R.*, 9 B.H.C. 79, 1 M. 1, 2 B. 231; *D.*, 2 B. 113.]

(422)—*Suit to redeem ghan-lahan mortgage—Limitation.*—A suit to redeem a gahan-lahan

Mortgage—continued.**—9.—Redemption—continued.**

mortgage is governed by s. 1, cl. 15 of Act XIV of 1859. KRISHNAJI alias BABAJI KESHAV v. RAVJI SADASHIV, 9 B.H.C. 79. [Commented on, 1 M. 1, P.C.]

(423) — *Dekhan Agriculturists' Relief Act* (XVII of 1879), *agriculturist mortgagor under—Right to redeem before time fixed for payment.*—The general rule that the right to redeem is co-extensive with that of foreclosure, and that, consequently, the right to redeem is postponed until the time fixed in the mortgage-deed for the payment of the mortgage-debt cannot be applied to cases falling under the Dekhan Agriculturists' Relief Act. It is competent, therefore, to a mortgagor who is an agriculturist under the Act to redeem the land mortgaged by him, before the period fixed for payment of the mortgage-debt. BABAJI v. VITHU, 6 B. 734.

(424) — *Suit for redemption of mortgage, amount of mortgage determines jurisdiction for—Mortgages—Gahan lahan clauses of conditional sale, whether affect right to redeem—Several mortgagees—One suit for redemption—Dekhan Agriculturists' Relief Act* (XVII of 1879), s. 13, *construction of.*—In this suit brought to redeem two mortgages for Rs. 1,250 and Rs. 3,000, objection was taken on first appeal that the District Judge had no jurisdiction to entertain the appeal, as the value of the subject-matter of the suit, calculating it as the amounts remaining due on the mortgages, was over Rs. 13,000, and that the Court of the Second Class Subordinate Judge had had no jurisdiction in the original suit before him; but it was held that, for the purpose of determining the value of the subject-matter of a suit for redemption, it is the amount of the mortgage the rights connected with which are the subject of contention in the suit, that must be taken as the basis, and that therefore the objection as to jurisdiction was untenable. [R., 14 C.P.L.R. 154.] The plaintiff's right to redeem was denied by the defendant who alleged that, by virtue of the *gahan lahan* clauses contained in the mortgages, the mortgaged lands had become his absolute property, but the lower Court had rightly recognised the plaintiff's right to redeem in spite of the *gahan lahan* clauses, the ruling in 1 B.H.C.R. 199, laying down that *gahan lahan* clauses are themselves of no avail, being in force in the Presidency of Bombay with regard to mortgages with conditional sale clauses. [F., 14 B. 78; Appr., 6 Bom. L.R. 38; R., U.B.R. 1897—1901, Vol. II, 502.] Another objection raised in this case, against the account of the two mortgages being taken as one, was upheld. The mortgages were perfectly distinct transactions relating to different lands, and there is nothing in s. 13 of the Dekhan Agriculturists' Relief Act of 1879, which could be taken as enabling the Court to treat the mortgages as one. The mere fact of their having been included in the same suit for redemption could not affect the question. RAMACHANDRA BABA SATHE v. JANARDAN APAJI, 14 B. 19. [F., 34 B. 260 = 12 Bom. L.R. 137.]

Mortgage—continued.**—9.—Redemption—continued.**

(425) — *Regs. XV of 1793 and I of 1798—Redemption—Mortgage—Account—Mesne profits—Costs.*—The estate in dispute was mortgaged to the defendant in the form of a zur-i-peshgee lease to continue so long as the mortgage-money remained unpaid. The mortgagee, having been evicted by the mortgagor, sued and obtained a decree for possession and wasilat (the latter to be assessed in execution). He never obtained possession under the decree, but recovered wasilat by execution. Two persons (the plaintiffs in these suits) claiming separate shares in the entire estate by purchase from the mortgagor subsequent to the mortgage, sued separately each to redeem his own share upon payment of a proportionate share of the mortgage-money. Held that the plaintiffs, as representing the original mortgagor, were entitled to redeem, but that, as the mortgage was of an entire estate, neither of them could redeem upon payment of less than the full amount of the mortgage-money. Held, also, that the defendant, having been wrongfully dispossessed, was not bound to account for the wasilat recovered under his decree, the wasilat or damages so recovered being different from the usufruct enjoyed by a mortgagee. MAHARANEE WUZUROONNESSA v. BEBEE SEEDUN, B L.R. Sup. Vol. 613 = 6 W.R. 240. [F., 7 W.R. 314, 364; R., 17 W.R. 238.]

(426) — *Civ. Pro. Code* (Act V of 1908), s. 2 (12) — *Mesne profits—Interest on mesne profits—Mortgage—Redemption decree—Transfer of Property Act* (IV of 1882), ss. 76, 83 — *Tender of mortgage money—Laches in instituting suit for redemption—Mortgagee's liability for mesne profits—Interest from date of deposit—Collection charges from date of deposit.*—The mortgagors deposited the mortgage money under s. 83 of Act IV of 1882, on the 25th of June, 1896. They brought the suit for redemption on the 16th of October, 1901, and obtained a decree, with a direction that the mesne profits should be determined by the execution Court. Application for ascertainment of mesne profits was made in October 1907. The judgment-debtors objected, among other things, that the decree-holders, being guilty of laches in instituting the suit, were not entitled to interest on mesne profits prior to the institution of the suit, and that they (the judgment-debtors) were entitled to a deduction of collection charges from the gross profits: Held, that the definition of mesne profits, in s. 2 (12) of Act V of 1908, included also the interest on mesne profits, and that the decree-holders were entitled to interest on mesne profits from the date of the deposit of the mortgage money in Court to the date of realization. Held, further, that, under s. 76 (i) of the Transfer of Property Act, 1882, the mortgagee-judgment-debtors were liable to account for the gross receipts from the mortgaged property from the date of the deposit, and were not entitled to any deduction on account of collection charges. BENI PRASAD TEWARI v. NARAIN DAS, 5 Ind. Cas. 529.

Mortgage—continued.**—9.—Redemption—continued.**

(427)—*Conditional sale—Foreclosure—Right of mortgagee to claim mesne profits—Reg. XVII of 1806, s. 7.*—Where a deed of conditional sale stipulated, that the vendor should not claim mesne profits, and that the vendee should not claim interest, and that he should recover mesne profits for the period during which he should be out of possession of the property, *held*, on the construction of the deed of conditional sale, that the deposit of the sale consideration alone by the mortgagor or his representative was sufficient to prevent the sale from becoming absolute, and for the redemption of the property, and that he was not bound to deposit mesne profits for the period during which the mortgagee happened to be out of possession. **RAMESHAR SINGH v. KANAHIA SAHU, 3 A. 653, F.B. = A.W.N. 1881, 42 [R., 8 A. 182.]**

(428)—*Extinction of charge—Prior incumbrance not extinguished by payment—First mortgage paid off with notice of second—Right of purchaser of equity of redemption—Right of purchaser at sale in execution—‘Res judicata’—Code of Civil Procedure (Act XIV of 1882), s. 13, Explanation—Mortgage suits—Omission of defendant in redemption suit to set up his claims—Transfer of Property (Act IV of 1882), s. 85—Necessary party—Limitation—Limitation Act (XV of 1877), sch. II, art. 132*—Whether a mortgage paid off is extinguished or kept alive depends upon the intention of the parties. A man having a right to act in either of two ways shall be assumed to have acted according to his interests. The purchaser of an equity of redemption in immoveable property situated in India, who, having notice of a second mortgage, paid off a first mortgage upon the property without an assignment of the first mortgage to him, must be assumed, according to the rule of justice, equity and good conscience, to have intended to keep the first mortgage alive, and consequently was entitled to stand in the place of the first mortgagee and to retain possession against the second mortgagee until re-payment. Where a mortgagee, who was made a defendant to a suit on a mortgage prior to his own, omitted to set up his rights under his mortgage and also under another mortgage, which was prior to the one sued on and which he had paid off, *held* that a suit subsequently brought by him to enforce those rights was barred under the Civ. Pro. Code (Act XIV of 1882), s. 13, Expl. II. On November 20, 1874, a mortgagor executed a Zarpeshgi deed in favour of a mortgagee, thereby mortgaging and hypothecating as security for the Zarpeshgi debt among other properties the property in suit. A condition of the Zarpeshgi deed was that, when the mortgagor should re-pay to the ticcadar, who was entitled to hold and be put in possession of the hypothecated properties, the Zarpeshgi debt in one lump sum at the end of September 1887, the ticca transaction should be cancelled and the mortgagor

Mortgage—continued.**—9.—Redemption—continued.**

should bring the leased properties into his direct possession, but in the case of the non-payment of the Zarpeshgi debt at the end of the stipulated period, the ticca transaction should stand good with all its conditions until the payment of that debt. On January 7, 1888, the mortgagor executed a simple mortgage of the property in suit. On February 17, 1888, the mortgagor executed in favour of one MA. a simple mortgage of the properties included in the Zarpeshgi deed. The mortgage-debt was repayable in two years and the money lent by MA. was, as previously agreed between the parties, applied in discharging the Zarpeshgi debt, and on July 15, 1888, the holders of the Zarpeshgi deed quitted possession and gave up the Zarpeshgi deed, which was delivered to MA. On September 6, 1888, the mortgage of January 7, 1888, was put in suit by the mortgagee, but he did not make MA. a defendant to it. In execution of the sale decree made in that suit, the representative of the defendant in the present suit purchased and was put in possession of the property in suit. On September 22, 1900, the plaintiffs, who were assignees of the heirs of M A, brought the present suit on the mortgage of February 17, 1888, and claimed *inter alia* that the properties covered by the mortgage deed and by the Zarpeshgi deed of November 20, 1874, were liable for the decretal amount. *Held*, that the charge created by the Zarpeshgi deed of November 20, 1874, was kept alive for the benefit of M A, who was, under s. 85 of the Transfer of Property Act, a necessary party to the suit of the mortgagee on the mortgage of January 7, 1888, and as MA was not made a defendant to that suit, the rights of MA, were not affected by it and s. 13 of the Civ. Pro. Code, did not bar the present suit. *Held*, also, that, as the Zarpeshgi debt was payable in September, 1887, and the present suit was not instituted until September, 1900, the claim of the plaintiffs to priority was barred under art. 132, Limitation Act, 1877, and all that they were entitled to was a decree entitling them to redeem the mortgage of January 7, 1888, on payment to the purchaser of the amount of the principal and interest in respect of which the property in suit was sold to him under the decree for sale in the mortgagee's suit of September 6, 1888. **SYED MAHOMED IBRAHIM HOSSEIN KHAN v. AMBIKA PERSHAD SINGH, 1912, M.W.N. 367 (P.C.) = 11 M.L.T. 265 = 9 A.L.J. 332 = 14 Bom. L. R. 280 = 16 C.W.N. 505 = 15 C.L.J. 411 = 22 M.L.J. 468 = 39 C. 527 = 14 Ind. Cas. 496 = 39 I.A. 68. (10 I.A. 62, 11 I.A. 126, 29 I.A. 9, F.).**

(429)—*Mortgage—Part of consideration void—Validity of mortgage to the extent of consideration passed—Mortgage prescribing for a larger interest—Redemption—Limitation Act (XV of 1877), sch. II, art. 148.*—Where a part of the consideration for a mortgage is void or fails, or the mortgagee makes default in paying it, the

Mortgage—continued.**— 9.—Redemption—continued.**

mortgage is good to the extent of the consideration that has validly passed. (18 M. 126, D.; 32 M. 281, 19 M.L.J. 280, 5 M.L.T. 84, 2 Ind. Cas. 612, 2 M. 79, 212, 35 C. 1051, 7 C. L. J. 586, 12 C. W. N. 761, 10 C. W. N. 932. R.). Plaintiff's predecessors executed a usufructuary mortgage to defendants for Rs. 24,600 in 1832, Rs. 17,000 of the consideration was amount due under previous decrees obtained against the mortgagors. For this, sanction of Court was not obtained under s. 257-A, Civ. Pro. Code, 1882. In a suit by plaintiffs for redemption: *Held*, (1) that the mortgage was not valid to the extent of Rs. 17,000; (2) that the suit was governed by art. 148 of the Limitation Act and was not barred; (3) that the mortgagees could not prescribe for a larger interest than Rs. 7,600, and time did not run in their favour for the acquisition of a larger interest by their mere assertion of it to the knowledge of the mortgagor. **TIRUMAL RAJU v. PANDLA MUTHIAL NAIDU, 9 Ind. Cas. 289 = 9 M.L.T. 286 = 21 M.L.J. 169.** (32 C. 296, 2 A. L. J. 71, 1 C.L.J. 584, 7 Bom. L.R. 1, 9 C.W. N. 201, 29 A. 640. A.W.N. 1907, 221, 4 A.L. J. 521, 1 A. 655, (13 M. 39, 14 M. 38, R.)

(430)—*Redemption after time fixed for payment without obtaining extension—Application for possession by mortgagor, limitation for—Step-in-aid of execution—Application to send notice to mortgagee to withdraw the mortgage-money—Limitation Act, sch. I, art. 182.*—On November 1st, 1904, the appellant obtained a decree for redemption against the respondents in which the period fixed for payment of the mortgage-money was six months. The decree was finally affirmed by the Judicial Commissioner on 9th July, 1906. On 8th July, 1909, the decree-holder deposited in Court the amount payable under the decree, and prayed that notice might be issued to the respondents requiring them to withdraw the money. On 13th July, 1909, he presented an application praying that he might be placed in possession of the mortgaged property. *Held*, that, up to the passing of Act V of 1908, the appellant had a right to redeem the mortgage at any time before the passing of an order absolute for sale without obtaining an extension of the time limited by the decree, and that his right to do so after the passing of that Act was saved by s. 6 of the General Clauses Act, 1897. *Held* also, that the application of July 13th, 1909, was governed by art. 182, Limitation Act of 1908. *Held* also, that the application to the Court to send notice to the respondents requiring them to withdraw the money was an application to the Court to take a step-in-aid of execution, and therefore the application of 13th July, 1909, was within time. **JAGESHAR SINGH v. RAJA BHAGWAN BAKHSI SINGH, 14 O.C. 10 = 9 Ind. Cas. 337.**

(431)—*Mortgage — Adverse possession as between mortgagor and mortgagee.*—*Held*, that, as between the mortgagor and mortgagee or their representatives, neither exclusive posses-

Mortgage—continued.**— 9.—Redemption—continued.**

sion by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, can constitute adverse possession or will be a bar or defence to a suit for redemption, if the parties are otherwise entitled to redeem. **AMIR ALI v. NIZAM ALI, 15 O.C. 39 = 14 Ind. Cas. 584.** (32 C. 296, R.)

(432)—*Prior mortgage—Sale pendente lite—Suit for redemption—Vendee pendente lite discharging another mortgage—No knowledge of suit mortgage—Proper decree.*—A purchased immoveable property from B, agreeing to discharge a prior incumbrance on the property in favour of C. B. represented that C's incumbrance was the only one on the property. Subsequently it turned out that D held another prior charge and that A's purchase was invalid because it was made pending D's suit on his mortgage. D became purchaser in the sale held in execution of his decree and sought to recover possession from A. *Held*, that the decree should have been made subject to D's redeeming C's mortgage which A paid off or allowing himself (D) to be redeemed by A. **BALASUBRAMANIAN v. RAMASAWMI, 9 M.L.T. 358 = 9 Ind. Cas. 789.** (21 M. 143, 31 M. 439, F.)

(433)—*Redemption — Onerous conditions — Interest — Unconscionable rate.*—*Held*, that onerous and inequitable conditions embodied in a contract of mortgage should not be enforced by the Courts against the mortgagor or his successors in title. (131 P.R. 1894, 6 P.R. 1902 = 154 P.L.R. 1901, 20 B. 677, 21 M. 110, F). When a stipulation in the mortgage-deed was that redemption shall not take place before the expiry of twenty years, and, in case a well was sunk by the mortgagees according to the terms of the mortgage, the mortgagor shall pay interest at the rate of 2 per cent. per mensem with the mortgage-money at the time of redemption. *Held*, that the condition as to interest was oppressive and should not be enforced. Interest at the rate of 6 per cent. per annum only was allowed. **REHANA v. ZAMAN, 128 P.L.R. 1911.**

(434)—*Mortgage containing unfair provisions as to redemption and rate of interest—Mortgagee entitled only to reasonable rate of interest.*—Where a mortgage, which was not to be paid off for ten years, carried interest at the rate of Rs. 1-12-0 per cent. on the cash advanced and 50 per cent on the value of the grain due and, on default in the payment of interest regularly, interest was to be at 2 per cent. on the cash, and, if the mortgage debt was not paid at stipulated time, the mortgage was to be foreclosed; *held*, that the transaction was iniquitous and unfair and the mortgagee could be awarded interest at 2 per cent. only on the mortgage-money. **DINONATH BIHARI LAL v. DHARMOLA, 4 C.P.L.R. 146.**

Mortgage—continued.**—9.—Redemption—continued.**

(435)—*Mortgage for cash and grain debt—Mortgagee to take possession on default—Terms of mortgage unfair and iniquitous—Mortgagee entitled to simple interest and Barhi for period he was not in possession.*—Where a mortgage executed for a grain debt and for some cash advanced contained a provision that, in default of payment of the principal and interest within the time prescribed, the mortgagee was to enjoy the profits of the mortgaged property in lieu of interest and the terms of the mortgage were otherwise iniquitous and unfair, the mortgagee was entitled only to simple interest on the cash debt and a Barhi on the grain debt for the period he was not in possession of the mortgaged property. **PURANCHAND SHEOLAL v. SETH BEHARI LAL, 4 C.P.L.R. 144.**

(436)—*Suit by mortgagee for foreclosure—Combination of prayer for redemption of prior mortgage.*—A mortgagee may combine in one suit a prayer for redemption of a prior mortgage and for foreclosure of his own mortgage. **LAKHMICHAND TILOKCHAND v. GANPATI, 14 C.P.L.R. 177. (12 C.P.L.R. 86, Cons.)**

(437)—*Mortgage by conditional sale—Right of mortgagor to sue for redemption.*—A mortgage by conditional sale does not convert by itself into an absolute sale and there remains to the mortgagor an equity of redemption after the expiry of the period fixed for payment of the debt. A suit for redemption of the mortgage is maintainable after the expiry of the period fixed for payment. **LAXAMAN DEVI-DEEN v. BAJU BAI, 8 C.P.L.R. 113. (7 C.P.L.R. 22 and 29, 13 B.L.R. 205, R.) [R., 16 C.P.L.R. 111.]**

(438)—*Redemption, suit for possession to be treated as one for—Zuripeshgi lease—Usufructuary mortgage—Transfer of Property Act, s. 62—Discretion of Court in decreeing redemption in suit for possession—Mortgage.*—The defendant No. 2 (the owner of the village in suit) executed in May, 1895, a *zur-i-peshgi* lease of the village in favour of the defendant No. 1, which authorized the latter to pay himself the money lent by him to the former, principal and interest, from the rents and profits of the property. The defendant No. 1 obtained possession of the village. In August, 1897, the second defendant executed an ordinary lease of the village in favour of the plaintiff. The term of the *zur-i-peshgi* lease having expired, the plaintiff brought a suit against the defendants Nos. 1 and 2, praying for the following reliefs: (1) a decree for possession of the village, (2) a decree for the amount, which he alleged was due by the defendant No. 1, under the *zur-i-peshgi* lease, and (3) a decree for possession on payment of such amount as might be found due to the defendant No. 1 under that lease. The Court of first instance decreed possession; the District Judge dismissed the suit, holding that it was not maintainable, inasmuch as it was not a suit for redemption. The *zur-i-peshgi* lease was treated by the parties in both the Courts as a usufructuary mortgage. *Held*, that the *zur-i-peshgi*

Mortgage—continued.**—9.—Redemption—continued.**

lease amounted to a usufructuary mortgage, and that, upon a reasonable interpretation of the plaint, the suit could be regarded as one for redemption of a mortgage. Under s. 62 of the Transfer of Property Act, in the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property, where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property, when such money is paid. *Held*, further, that, even supposing that the suit, as brought, was not one for redemption and was not treated as such a suit by the parties, the District Judge would have exercised his discretion wisely in allowing the plaintiff to redeem. **RIASAT HUSAIN v. GAURI PERSHAD, 4 O.C. 257. (20 B. 196, R.)**

(439)—*First and second mortgagees—Redemption—Mesne profits.*—The plaintiff, who was a second mortgagee, brought the rights and interests of the mortgagors to sale and purchased them himself, but without making the defendant, who was a prior mortgagee, a party to those proceedings. He then brought a suit for redemption against the defendant and obtained a decree conditioned on his paying into Court the sum of Rs. 12,000. That sum was paid in on the 22nd June, 1885. The defendant appealed, and, under the circumstances of the case, a conditional decree was given in his favour. The condition was not fulfilled and the plaintiff's decree accordingly became final. The plaintiff obtained actual possession of the mortgaged property on the 15th June, 1887, and on the 22nd June, 1887, he sued the defendant for two years' *mesne* profits. *Held*, that the plaintiff's title to the property being good at any rate from the time of payment into Court under his decree for redemption, the defendant was liable for *mesne* profits just as much as if he were a trespasser being sued in ejectment, and his liability extended to the amount of the normal profits of the property, and not merely to the actual sums which had come into his hands. He was not, however, liable for interest on such profits. **SAMI UDDIN KHAN v. KUAR MAN SINGH, A.W.N. 1891, 38.**

(440)—*Mortgage, redemption of—Limitation—Act IX of 1871, sch. ii, art. 148—Act XV of 1877, s. 19, sch. ii, art. 148—Acknowledgment.*—The plaintiffs were mortgagors under a usufructuary mortgage admitted to have been made by their predecessor in title over 100 years before suit. The contract provided that the mortgagor should be entitled to redeem whensoever he found himself ready to pay off the whole debt. The plaintiffs brought their suit in 1877 for redemption, and relied to save limitation upon an acknowledgment of their title as mortgagors made by the defendants mortgagees in 1841. *Held* that the suit for redemption was not barred by limitation. **JAMNA PRASAD v. GOKLA, A.W.N. 1894, 87. [Diss., 26 A. 167; R., 82 P.L.R. 1903, 5 Ind. Cas. 77.]**

Mortgage—continued.**—9.—Redemption—continued.**

(441)—*Mortgage of lands in Oudh—Application to Oudh of Punjab rules.*—A sued to redeem certain lands in Oudh mortgaged to B, shortly after the Province had been annexed by the British Government. C, B's wife, intervened, alleging that the land had been sold to her by B by way of settlement. *Held*, that the case stood on the mortgage deed itself without the sale to C; and the question was simply, what was the effect of the letter of the Government of India to the Chief Commissioner of Oudh after the annexation, declaring that the Punjab rules were to be considered to be in force in Oudh; and that by those rules the equity of redemption could not be taken away until proceedings for foreclosure had been adopted. **SHEO SINGH v. MUSSAMUT MIRIAM BEGUM, 8 M.J. 69.**

(442)—*Mortgage—Mortgagee to pay prior incumbrances and balance to mortgagor—Balance not paid to mortgagor—Right of mortgagee to sue for redemption.*—Plaintiff was a mortgagee. The mortgage-deed provided that the mortgagee was to discharge the prior incumbrances on the property and pay the balance of the consideration money to the mortgagor. The mortgagee did not pay the balance to the mortgagor as agreed. He now instituted a suit for redemption of one of the mortgages. *Held*, that the mortgagor was not a necessary party to the suit. *Held* also that the plaintiff was under his mortgage entitled to redeem the prior mortgages. There was at all events consideration for the mortgage deed to the extent of the undertaking there given to redeem the prior mortgages. The fact that the mortgagee did not pay the balance of the mortgage money did not prevent him from maintaining a suit for redemption. **MANGAB THUPPAN v. KADIR KUTTI, 13 M.L.J. 1.**

(443)—*Mortgage—Subsequent sale—Right to contest sale.*—Where a mortgagor sold away the mortgaged properties to the plaintiff, the consideration for the sale being the mortgage-debts on the property, cash and other unsecured debts, *held* that the defendant mortgagees could not contest the validity of the sale in a suit brought by the vendee for redeeming the mortgage according to his sale-deed. **BUTA AND TABA v. KHUSHAL SINGH, 101 P.R. 1891.**

(444)—*Joint Hindu family—Mortgage of ancestral property by father—Agreement between father and mortgagee for enjoyment of property in satisfaction of debt—Decree passed on agreement under s. 44 of the Relief Act, not binding on sons—Right of sons to redeem.*—The mortgage sought to be redeemed in this suit had been executed in 1888 in favour of the defendant by the plaintiff B and his late undivided father F. The brothers of B were subsequently made parties plaintiffs to the suit. The defendant pleaded (*inter alia*) that F had in 1890 come to an agreement with the defendant before a conciliator whereby it was arranged that

Mortgage—continued.**—9.—Redemption—continued.**

the mortgagee was to enjoy the allowance of the *mokasa* mortgage up to a certain period in full satisfaction of the mortgage-debt. The agreement came to under s. 43 of the Dekkhan Agriculturists' Relief Act, 1879, was filed in Court under s. 44 of the same Act and thereupon took effect as a decree. Neither B nor his brothers were parties to such proceedings. The lower Courts, however, *held* that the mortgage having become merged in the decree the plaintiff was bound by it and was not therefore entitled to redeem. *Held* that, by the agreement set up by the defendant, plaintiff's father was in effect giving up the right to redeem the mortgage before its fixed period ceased, as well as the right to the surplus profits that might remain with the mortgagee over and above the mortgage amount. Such an agreement by a Hindu father could not bind his sons in respect of ancestral property and consequently the decree against the father based upon such agreement was not binding upon them inasmuch as they were no parties to the suit in which it was passed. The fetter upon redemption imposed by the proceedings of 1890 upon the father of the plaintiffs was not binding upon them as co-parceners and they were therefore entitled to redeem. **BALA v. BALAJI, 22 B. 825. [R., 16 C.P.L.R. 19, 26 B. 163=9 Bom. L.R. 647.]**

(445)—*Suit to redeem—Claim for additional advance—Evidence.*—Where A sued to recover certain lands on the re-payment of Rs. 1,200, the mortgage debt, and B urged that A must also re-pay him Rs. 1,141, additional advance and Rs. 6,515, interest, and the three lower Courts decided in A's favour. *Held* that there was no evidence to show that B advanced the additional sum claimed by him. **RAJAH FURZUND ALI KHAN v. ABDUL RAZAK, 8 M.J. 181.**

(446)—*Suit for redemption and for surplus profits—Account—Suit filed in Munsif's Court—Amount decreed after taking account for a sum exceeding Rs. 1,000—Jurisdiction—Limitation to recover surplus profits—Limitation Act (IX of 1871), sch. I, art. 105—Limitation Act (XV of 1877), sch. II, art. 105.*—Plaintiffs sued for redemption of a mortgage executed in 1854 and prayed that an account be taken of the income received from the mortgaged property and a decree given them for any surplus profits which might be found due to them. The Munsif found that Rs. 9,701-7-2 surplus profits were due to the plaintiffs and decreed this amount in their favour. *Held*, that the Munsif had jurisdiction to pass the decree. (16 A. 286, 33 A. 97, 7 A.L.J. 963, 7 Ind. Cas. 385, F.) *Held*, further, that the plaintiffs were entitled to only so much of the surplus profits as were not barred under the Limitation Act, 1971. **SUDARSHAN DAS v. RAM PRASHAD, 10 Ind. Cas. 402.**

(447)—*Mortgage—Redemption—Decree not fixing time for payment—Decree kept alive—Limitation Act (XV of 1877), sch. II, art. 179.—A*

Mortgage—continued.**—9.—Redemption—continued.**

decree for redemption obtained by a mortgagor contained no clause as to the time for payment of the mortgage-debt or foreclosure in default of payment. Several darkhasts were presented by the mortgagor from time to time and thus the decree was kept alive. In the twelfth year of his decree, the mortgagor again presented an application for execution and paid the mortgage-debt into Court. The mortgagee contended that the decree for redemption was barred by limitation. *Held* that the mortgagor could execute it inasmuch as the decree was kept alive by him by the several darkhasts. **NARAYAN GOVIND v. ANANDARAM KOJIRAM, 16 B. 480.** (7 B. 467, 13 B. 597, *Disappr.*) [*F.*, 23 B. 592=1 Bom. L.R. 31; *Appr.*, 30 M. 28, 34 B. 189=12 Bom. L.R. 13; *D.*, 5 C.L.J. 289.]

(448)—*Redemption of zur-i-peshgee leases—Limitation.*—A *zur-i peshgee* lease is nothing but a simple mortgage, and though a lease like this in form may be for so many years, it may at any time be cancelled on the advance being proved to have been discharged with interest from the usufruct, or on the money having been paid in cash; and a person who has purchased the proprietary rights of a *zur-i-peshgeedar* is not debarred from suing to redeem, because he, or others through whom he claims, did not sue for an account or for possession within 12 years of the expiry of the term, or of the time of discharge of the debt by the usufruct. **PULTUN SINGH v. RESHAL SINGH, 1 W.R. 7.** [*F.*, 2 Agra 122.]

(449)—*Mortgage—Deposit in Court—Protest against validity of mortgage—Tender, if valid—Notice—Interest.*—A mortgagor deposited the full amount of the mortgage-money into Court accompanied by a protest against the validity of the mortgage itself. He expressed also his intention to sue for its cancelment. *Held* that the protest or perhaps threat of the mortgagor, to the effect that he should take legal measures for procuring the cancelment of the mortgage, imposed no condition upon the acceptance of the money; nor did it render the tender invalid. Where a deposit is once made, even though the Court-fees have not been paid, the mortgagor's equity of redemption is saved, quite irrespective of whether the mortgagee had received notice of the deposit or not. But if the mortgagee's delay in taking the money out of Court is due to the negligence of the mortgagor in not doing his best towards ensuring prompt notice of the deposit being given to the mortgagee, the latter may be entitled, on the equity of Regulation XVII of 1806, to hold the deed against the accruing interest. **HETHAN SINGH v. NURKOO SINGH, 3 W.R. 184.**

(450)—*Mortgage—Reg. XVII of 1806, s. 8—Foreclosure—Right of redemption.*—The plaintiffs sued to redeem certain properties which they had mortgaged to the two defendants, on the ground that the defendants had, after mortgage, held possession of such properties and had, from the usufruct of those properties, not

Mortgage—continued.**—9.—Redemption—continued.**

only repaid themselves the amount with interest due upon the mortgage, but had also received something over and above. It was found that the defendants, thinking that the mortgagors had not paid the money within the prescribed period, without waiting to foreclose the mortgage, had brought a suit and obtained a decree and taken possession of the mortgage share. The mortgage was found to be a conditional sale. *Held* that the mortgagors were entitled to redeem the property as the mortgagees took possession before the final foreclosure, and could do so on payment of the money advanced, whether that payment was made in cash or out of the usufruct of the property mortgaged. **ISHAN CHUDER BANERJEE v. JUGGUT CHUNDER DOSS, 13 W.R. 44.**

(451)—*Mortgage—Default in payment of interest—Provision for entry by mortgagee—Equitable relief.*—Where a mortgage-deed provided that, on non-payment of interest regularly, the mortgagee has the right to enter into property and dispossess the mortgagor, *held* that, in case a default was made, the Court was competent to grant equitable relief to the mortgagor if he could pay the interest due with interest thereon. In the present case, the Court granted the mortgagor three months time for the payment. **SITARAM DANDEKAR v. GANESH GOKHLE, 6 B.H.C. A.C. 121.**

(452)—*Mortgage—Purchase of equity of redemption—Right of purchaser to redeem—Tender—Costs.*—A purchaser of the right of redemption of a mortgagor has full right to sue for redemption without offering the mortgage-money out of Court to the mortgagee. The tender of the mortgage money to the mortgagee before he sued would only affect his right to recover costs. **DINONATH BUTOBYAL v. WOMACHURN ROY, 3 W.R. 128.**

(453)—*Mortgage—Lease to mortgage—Sale of equity of redemption—Right of purchaser to redeem—Validity of lease as against purchaser.*—A purchaser of the equity of redemption brought a suit to redeem the mortgage. The mortgagee disputed the plaintiff's right to recover possession, in the event of his redeeming the mortgage, of the mortgaged lands, on the ground that the lands had already been granted to him by the original mortgagor on perpetual lease. It appeared that the plaintiff had on a former occasion contended that the lease was a forgery and fraudulent. *Held* that the plaintiff was not bound by the lease, although a long period had elapsed since it was granted, and as the mortgagee was then entitled to possession under his mortgage, no acquiescence in the lease could be inferred from the mere fact of the mortgagee having remained in possession, there being no allegation that the rent was ever paid to the plaintiff. **SUBRAO MANGESHAYA v. MANJAPA SHETTI, 16 B. 705.**

(454)—*Decree for account with power to redeem.*—Case where the purchaser at an execution sale was held entitled to a decree for an

Mortgage—continued.**—9.—Redemption—continued.**

account with power to defendants to redeem within six months, plaintiff foreclosing in default. **JAMES MACKILLICAN v. KALEE DOSS ROY, 25 W.R. 436.**

(455)—*Reg. I of 1798, s. 2—Reg. XVII of 1806—Mortgage—Mortgagee in possession—Right of redemption—Deposit of principal only.*—Where the plaintiff-mortgagee stated that he had been in possession of the property in dispute under a mortgage, that he had received rents and paid some outgoings (the Government revenue) and that, in this way, he had left in his hand a sum of Rs. 41 odd and there was thus matter of account as to the profits of the mortgaged property between him and the mortgagor, *held* that the case was one falling within the second of the two classes of cases mentioned in s. 2, Reg. I of 1798, and that, consequently, a deposit of the principal sum only, without interest, would be sufficient to preserve the borrower's right of redemption, if the deposit be made according to the Regulation within the period stipulated in the mortgage-deed, and, therefore, according to Reg. XVII of 1806, within such extended period as would expire upon final foreclosure. It was an immaterial question in this matter how long the mortgagee had been in possession of the land. **ABDULLA KHAN v. UPENDRA CHANDRA, 6 B.L.R. App. 53=14 W.R. 278.**

(456)—*Resumed maafee estate—Settlement of—Previous mortgagee—Adverse possession.*—The settlement with a person who was previously mortgagee, after resumption of the maafee, does not by itself convert his holding under the settlement into an adverse holding, and does not destroy the mortgagor's right to redeem the property. **MUSST. OOMRAO BEGUM v. MUSST. NIZAM-OO-NISSA, 1 Agra 224.**

(457)—*Reg. XVII of 1806, s. 7—Reg. I of 1798, s. 2—Mortgage debt—Deposit—Conditional sale.*—Under s. 7, Reg. XVII of 1806, if a mortgagee has obtained possession at any time before the final foreclosure of the mortgage, the mortgagor's payment or established tender of the principal sum due under the mortgage-debt, saves his equity of redemption. The section applies where the mortgagee has obtained a decree for possession and *wasilat*, whether the same is executed or not. **SAKRIMAN DICHUT v. DHARAM NATH TEWARI, 3 B.L.R.A.C. 141.**

(458)—*Lease by usufructuary mortgage—Redemption—Right of mortgagor.*—In Upper Burma, a lease by a usufructuary mortgagee is determined by redemption. Apart from custom, the mortgagee or his tenant has no just ground of complaint. The contingency of redemption is one that he must reckon with and may provide against. The mortgagor is entitled to immediate possession and therefore to compensation in the event of obstruction. **NGA NYAN GYI v. NGA KYAW NYA, U.B.R. 1910, 2nd Qr., 14. (U.B.R. 1904—1906, II, Civ. Pro. 26, U.B.R. 1897—1901, II, 414, R.).**

Mortgage—continued.**—9.—Redemption—continued.**

(459)—*Right of subsequent incumbrancer to redeem prior mortgagee.*—Subsequent incumbrancers may redeem the first mortgagee, though the mortgagor is foreclosed by a decree; and the account taken in the suit in which such decree was obtained will not bind the subsequent incumbrancers. **RAGHOBIA SAKHARAM v. MADHO RAO BAPUJI, 15 C.P.L.R. 26.**

(460)—*Mortgage—Surety—Assignment of mortgage to surety—Right of redemption of mortgagor.*—Certain property was mortgaged with a condition that, if it be not redeemed within a certain time, the mortgage should be converted into a sale; a third person also stood as surety for the same, agreeing to pay the mortgage money and to take the mortgaged property if it were not redeemed by the mortgagor within the time fixed. On default of the mortgagor, the surety paid the amount and took possession of the land and got it transferred to his name in the Revenue books: *Held* that the mortgagor was entitled to redeem the property from the hands of the surety, because the surety having paid the money to the mortgagee in his character as surety, cannot be regarded as holding the land absolutely as purchaser. **GORAKI KANOJI v. NATHU APPAJI, 1 B.H.C. 135.**

(461)—*Agreement—Account stated—Mortgage—Redemption—Consideration.*—Plaintiff sued to recover possession of a certain house upon an agreement executed by the defendant which provided that, in the event of defendant going to live with any man, or in the event of her death, the house should become the plaintiff's property. The consideration for the agreement was stated to be Rs. 550, being the money expended by the plaintiff for taking care of the defendant during her minority, of giving instructions in dancing and singing, and of paying for certain debts due by the defendant. *Held* that the agreement, being for a consideration which was not illegal, was in the nature of an account stated, and of a mortgage of the house to the plaintiff to secure the amount found due. *Held*, further, that plaintiff was entitled to possession if the defendant did not pay Rs. 550 and interest thereon within a period of 6 months from the date of decree. **HUSEN BEG BAI'S HEIRS v. AKUBAI, 2 B.H.C. 337. [R., 9 B.H.C. 69.]**

(462)—*Mortgage—Assignment—Redemption—Rent—Civil and Revenue Courts, jurisdiction of.*—This was an action brought in a Revenue Court by the assignee of a mortgagee against the said mortgagee and the original mortgagor, to recover the rent of the mortgaged land, which the mortgagee had agreed to pay to the assignee, when he made the assignment. Subsequent to the assignment, the mortgagor had been put into possession of the land by the mortgagee, on the payment of the mortgage debt. *Held* that no action for rent could be brought in a Revenue Court by the assignee against the mortgagor, as the relation of landlord and tenant never existed between them.

Mortgage—continued.**—9.—Redemption—continued.**

nor against the mortgagee's representatives, after they ceased to be in occupation of the land. The proper course for the plaintiff was to institute a suit in the *Adawlut* Courts, to enforce any rights which he may possess, under the assignment, against any of the defendants. **BHAU B. GHOLAP v. GOPAL KUMAJI, 2 B.H. C. 183.**

(463)—*Mortgage—Redemption—Plea of right under absolute sale—Contemporaneous ikrarnamah—Transaction conditional and not absolute sale—Right to redeem.*—Where, in a suit for redemption of a mortgage, the mortgagee pleaded an absolute sale by virtue of a registered sale-deed, and the mortgagors proved by certain *ikrarnamahs* of contemporaneous dates that the transaction set up was a conditional mortgage and not an absolute sale, the mortgagor was entitled to redeem the mortgage, if it was shown that the mortgage-debt had been paid by the usufruct. **RAI ASAPAL SINGH v. SHEODURSUN SINGH, 3 Agra 205.**

(464)—*Mortgage—Zuripeshgi lease for 20 years—Redemption.*—Where a contract of *zuripeshgi* lease, which is in all its essentials a mortgage, only stipulates that the mortgagee may hold the land instead of his money for twenty years and that, if at the expiration of that period, the amount due is not paid off, he may proceed according to law, and there is no stipulation that the mortgagor shall not repay the mortgage-debt at any time before the twenty years are out, the mortgagor or the purchaser of the equity of redemption will be at liberty to re-pay the amount and to re-enter on the mortgaged premises even before the expiry of the stipulated period of twenty years. **DINDAYAL SHAHA v. GANESH MAHATUN, 6 B.L.R. 563, Note=12 W.R. 528, Note. [D., 6 B.L.R. 566=12 W.R. 527, 6 B.L.R. 562.]**

(465)—*Mortgage—Suit for redemption—Admission of mortgage—Written statement of Collector as representing Court of Wards—Acknowledgment—Limitation Act, XV of 1877, s. 19.*—In a suit for redemption of mortgage, proof of the mortgage was contained in a written statement of the Collector in a former suit against a representative of the mortgagee under the Court of Wards, the original document creating the mortgage having been lost. *Held* that the written statement of the Collector, not having been shown to have been filed under any mistake or misapprehension, was admissible in evidence not only to prove the mortgage but as an acknowledgment giving a fresh start of limitation to the plaintiffs under s. 19 of the Limitation Act. **KAMLA KUAR v. HAR SAHAI, A.W.N. 1888, 187. [R., 30 A. 422, F.B., =5 A.L.J. 375=A.W.N. 1908, 175=4 M.L.T. 49, 20 M.L.J. 808=6 Ind. Cas. 407.]**

(466)—*Cause of action—Suit for redemption of mortgage—Mortgage sued upon proved except as to plaintiffs' allegation in respect of its date.*—Where certain plaintiffs came into Court suing

Mortgage—continued.**—9.—Redemption—continued.**

to redeem an oral mortgage made some considerable time before suit, and it was found that they had proved their mortgage, with this exception that they gave a wrong date as the date of the making of the mortgage, it was *held* that it could not properly be said that the plaintiffs had established a different cause of action from that upon which they came into Court, so as to disentitle them to relief. **RAM KISHEN DAS v. BALWANT, A.W.N. 1899, 132. (18 A. 403, D.)**

(467)—*Mortgage—Redemption—Auction-purchaser—No notice of mortgage—Specific Relief Act (I of 1877), s. 27.*—Plaintiff, a tenant at fixed rates, usufructually mortgaged his land to a certain person, promising to pay the mortgage-money in the month of Jaith of any year. The rent payable by the mortgagee fell into arrear, and the holding was put up for sale in execution of a decree for arrears of rent, and it was purchased by the defendant. The plaintiff tendered the mortgage-money to the defendant in accordance with the conditions of redemption but he refused to accept. The Court of first instance dismissed his suit for redemption, with reference to s. 27 (b) of the Specific Relief Act on the ground that the defendant was a *bona fide* purchaser for value without notice of the mortgage. On appeal, the Court affirmed the decision holding that the plaintiff was bound to have given notice of his right in respect of the land at the time of auction-sale. On appeal to the High Court, *held* that cl. (b) of s. 27 of the Specific Relief Act was not applicable to the case and that the plaintiff was not bound to notify the mortgage to the defendant at the time of the auction-sale. *Held*, further, that the plaintiff could not be made for that omission to lose his right of redemption. **SAMPAT v. BANARSI DAS, A.W.N. 1883, 159.**

(468)—*Walikar inam lands—Service, failure to perform—Mortgagor failing to perform the service—Mortgagee required by Government to pay full assessment—Mortgagor's right to redeem.*—The plaintiff mortgaged *Walikar inam* lands to defendant who was to enjoy the profits in lieu of payment of interest. The plaintiff was relieved from the payment of assessment over the lands in consideration of his performing the service of *Walikar*. In the famine of 1876, the plaintiff left the village and as the service was not performed by him, the Government appointed some one else to perform the service and demanded from the defendant payment of the full assessment of the lands. This the defendant paid and continued in possession paying it since then. In 1895, the plaintiff brought a suit to redeem the mortgage: *Held*, that the Government merely demanded the payment of assessment in lieu of the performance of service, that there was no change of title and that the plaintiff consequently had the right to redeem. **BHIMA v. RAGHAVENDRACHARYA, 2 Bom. L.R. 211=24 B. 482.**

(469)—*Suit for—Decrees of the Settlement Court—Nature of such decrees—Settlement*

Mortgage—continued.**—9.—Redemption—continued.**

Courts, Procedure of.—The plaintiff alleged that, since 1252 Fasli or 1840 A.D., the defendants and their ancestors had possession of his zamindari share in lieu of Rs. 751-8-0 mortgage-money, the property being redeemable on payment of Rs. 50 on the principal as interest or Rs. 1,126-8-0 in all; and that under a judgment of the Settlement Court, dated the 15th February 1869, between the plaintiff's father and the defendant's ancestor, it was settled that redemption would take place on payment of the aforesaid amount. The defence was, that as the decree of the 15th February, 1869, was not executed, no fresh suit would lie. *Held*, that whatever be the wording of the decree, like all similar decrees of the Settlement Court, it was, in its nature, merely declaratory of the rights of the parties, and was no bar whatever to a subsequent suit. *Held*, further, that it would be contrary to justice, equity and good conscience to apply the technical rules now prevailing in the Civil Court to the state of facts which existed 30 or 40 years ago, and to Courts specially created in order that they might be free from such technicalities, and which were in fact free from such technicalities. **BHAGWAN BAKSH V. CHANDI DAT, 1 O.C. 289.** (S.C. 238 & 256, D.) [R., 8 O.C. 361, 9 O.C. 301; D., 6 O.C. 239.]

(470)—*Mortgage—Rights and liabilities of stranger redeeming mortgaged property—Subsequent suit by lawful heir of mortgagor—Amount spent by the stranger on funeral ceremonies and liquidation of debts of the mortgagor—Separate suit—Limitation Act XV of 1877, art. 118 of 2nd schedule.*—*Held*, that, a person, who, believing himself to be a representative of a mortgagor, redeems the mortgaged property, becomes virtually an assignee of the mortgagee; and in a redemption suit subsequently brought by the *de jure* heir of the mortgagor, he cannot successfully plead that he has lien on the said property for the amounts spent by him on funeral ceremonies of the mortgagor and his wife and liquidation of their debts, and that he can retain possession of the property redeemed until those amounts are paid to him. But he can maintain a separate suit for recovering the money thus spent by him from estate of the mortgagor. **MEHR SINGH V. JHANDA SINGH, 81 P.W.R. 1908.** (25 A. 66, 15 C. 682, 21 C. 142, 8 W.R. 115, D)

(471)—*Practice—Transfer of Judge—Propriety of re-opening questions already decided—Decree, interpretation of—Accounting.*—When a Judge gives his decision on some of the questions involved in a case leaving the remaining questions to be determined at a subsequent date, the Judge who succeeds him in the meanwhile does not act properly, though not illegally, in passing judgment contrary to the decision given by his predecessor, especially in a case when judgment is open to appeal. It is only when there is an obvious and patent error in the earlier decision that a successor should re-open a question in an appealable case. A

Mortgage—continued.**—9.—Redemption—continued.**

mortgagee obtained a decree that he was entitled to recover the mortgage-money from the mortgagee and other property of the mortgagor and the latter was also made personally liable for a part of the sum decreed. The mortgaged property was in possession of the mortgagee under the terms of the mortgage for profits to be realized in lieu of interest. The mortgagor brought a suit for redemption and claimed deduction for the profits realized by the mortgagee from the amount adjudged against him by the decree. *Held*, that the claim was valid under the terms of the decree. Under the peculiar circumstances of the case it was ordered that on the mortgagor's failure to redeem within the fixed period he would not be able to redeem in execution of the decree passed in the case. **CHUNI LAL V. MIAN GHULAM FARID KHAN, 41 P.L.R. 1908=42 P.W.R. 1908.** (134 P.R. 1894, R.)

(472)—*Redemption, suit for, by father dismissed—Second suit by sons—Only sons' share redeemable—Hindu Law.*—A suit for redemption brought by the father of the plaintiffs was dismissed. Some time after, the sons brought this suit for redemption of the whole property, the mortgage having been satisfied from the usufruct. *Held*, that the plaintiffs were entitled to redeem their shares only, and not the share of their father. **SUNDAR LAL V. CHITTAR LAL, 4 A.L.J. 17=29 A. 215=A.W.N. 1907, 25.** [R., 7 A.L.J. 945.]

(473)—*Redemption—Accretion—Civ. Pro. Code (Act XIV of 1882), s. 43.*—When the usufructuary mortgagee of a property, during the continuance of his mortgage, took a conditional mortgage of the holding of a tenant, and, after the expiry of his own mortgage, foreclosed the tenant, his mortgagor is entitled to treat the holding as an accretion and recover possession, upon payment of what is due on the usufructuary mortgage and the mortgage by way of conditional sale. A plaintiff is entitled, notwithstanding s. 43, Civ. Pro. Code (1882), to maintain different suits in respect of different parcels of land, for which there are different causes of action, although he sets up an alternative claim common to all the different suits. **MUSST. KETKI V. DINABANDHU PATNAIK, 10 C.L.J. 83=3 Ind. Cas. 395.**

(474)—*Heritable but not transferable estate, whether it gives a right to redeem—Transfer of Property Act, s. 91, cls. (a) and (b)—Confiscation of soil in Oudh after Mutiny, effect of, on mortgages.*—Where a Talukdar as such made a mortgage of certain lands in a *mahal* in 1852, and subsequently thereto the predecessors-in-title of the plaintiff obtained at the regular settlement a decree based upon a compromise, conferring on them a heritable but not a transferable estate in the *mahal*, *held* that the decree having created a permanent heritable interest and not a mere cultivating tenancy, it was an interest of the kind referred to in s. 91, cls. (a) and (b) of Act IV of 1882, which entitled

Mortgage—continued.**—9.—Redemption—continued.**

the plaintiff to redeem the mortgage. *Held*, further, that, the mortgagee as such having remained in possession of the mortgaged lands, the confiscation of the soil of Oudh which followed the Mutiny of 1857 did not affect the rights of the mortgagor or the mortgagee. **LOTAN v. PATAN DIN, 12 O.C. 271=3 Ind. Cas. 869.** (5 C.W.N. 83, 4 A.L.J. 703, 19 M. 151, R.)

(475)—*Right of prior mortgagee to redeem a puisne mortgage—Foreclosure in favour of a prior mortgagee, effect of, when puisne mortgagee no party—Mortgagee, puisne, right of, to redeem a prior mortgage when property already foreclosed by the prior mortgagee.*—A second mortgage, made during the pendency of a contentious proceeding between a mortgagor and a prior mortgagee, cannot be allowed to affect the right of foreclosure, conferred upon the prior mortgagee, where the mortgagor failed to redeem the property. Where a property had been foreclosed by the first mortgagee in a suit to which the second mortgagee was not a party. *Held*, that the first mortgagee was entitled to redeem the second mortgage. (28 B. 153, F.) The holder of the second mortgage cannot however redeem the first mortgage. **KEDAR NATH v. SAYYAD HAFIZ ALI, 10 O.C. 356.** [R., 13 O.C. 50.]

(476)—*Redemption, right of—Mortgage—Purchases by prior and puisne mortgagees—Accounting—Tenants settled on the land by prior mortgagee, right of.*—Where the prior mortgagee purchased the property mortgaged to him in a suit in which the puisne mortgagee was not made a party and the latter also purchased the same property subsequently in a suit in which the prior mortgagee was not made a party. *Held*, that each party would be entitled to redeem the other; but the preferable right to redeem was with the puisne mortgagee. The puisne mortgagee is bound to pay the mortgage-money with interest at the rate specified in the mortgage to the prior mortgagee and any amount paid by the prior mortgagee in possession for the protection of the property or for redeeming any prior mortgage with interest as also the costs of the suit and appeal as in an ordinary redemption suit. An account was to be taken of the amounts realised from the property by the prior mortgagee as mortgagee in possession from the date of the possession taken by him (prior mortgagee). If on taking accounts any balance be found in favour of the puisne mortgagee, the prior mortgagee will be bound to pay the said amount to him; but if otherwise, then the usual decree in redemption suit will be passed. The tenants settled by the prior mortgagee on the land are entitled to remain on the land until it be found in any subsequent suit or suits that they are liable to ejectment under the Bengal Tenancy Act or any other Act that may be in force. **KEDAR PROSANTA LAHIRI v. GIRINDRA PROSAD SUKUL, 8 C. L. J. 173.**

Mortgage—continued.**—9.—Redemption—continued.**

(477)—*Usufructuary mortgage of an ijara lease for a term—Mortgaged lands in possession of occupancy-tenants—Eviction of tenants for arrears of rent—Purchase of the holding by mortgagee—Assignment by mortgagee of lands thus acquired, whether binding on mortgagor—'Accretions or accessions' to property—Whether mortgagee is trustee to mortgagor in respect of such accretions—Duties of mortgagee—Transfer of Property Act (IV of 1882), ss. 63, 108—Trusts Act (II of 1882), s. 90.*—Plaintiffs, the *ijaradars* of suit village, mortgaged their *ijara* right to first defendant by way of *kshaya bhogyam* (usufructuary mortgage), for a term. During the subsistence of the mortgage, the mortgagee brought to sale items Nos. 1 to 22 which were in the possession of tenants, for arrears of rent under the provisions of the Rent Recovery Act, ejected the tenants therefrom and obtained possession of the properties. Subsequently the first defendant mortgagee, assigned these items as well as item 23—a portion of a forest—to his undivided son, and caused *pattahs* to be registered in the latter's name. The plaintiffs, on redeeming the mortgage, were put in possession of all the lands except the said items. They then filed the suit, alleging that the lands acquired from tenants under process of the Rent Recovery Act were held by the mortgagee in trust for them, and were liable to be delivered to them at redemption. The mortgagee urged that they were not 'accessions' or 'accretions' but became his separate property. *Held*, (1) that the mortgagee was not entitled to include the lands acquired from tenants in his *patta* or to make any disposition of the mortgaged property in his own favour and of such a kind as to give rise to a possible conflict between his interest and his duty, (it being found on the facts that the assignment to the son was *benami*); (2) that, in respect of these properties, the mortgagee occupied the position of trustee to the mortgagors, and was bound to deliver them to the mortgagors at redemption. **C. VENCATACHARIAR v. SRINIVASA AIYANGAR, 4 Ind. Cas. 357.**

(478)—*Prior and puisne incumbrances—Merger of charges—Redemption, terms of—Mortgagee tenant bound to account.* A first mortgagee, who purchases the mortgaged property from the mortgagor, may set up his prior security as a shield against a subsequent incumbrancer. (10 C. 1035, 29 C. 154, F.) When a mortgagee undertakes to collect rent from the tenants of the property comprised in his security and to apply them in satisfaction of his dues, if he himself is one of the tenants he must, when accounts are taken, allow credit for the rents payable by him, although, if, at that time, a suit were brought for the recovery of the rent, it might be held to be barred by limitation. (5 C. 333, F.) A puisne incumbrancer, who has not been made a party to a suit by a prior mortgagee, retains his right of redemption, but he must exercise such right only upon the footing that the mortgage relied upon by the prior in-

Mortgage—continued.—9.—Redemption—*continued*.

cumbrancer is subsisting and entitles him to all dues including interest, thereunder. **RAM NATH MUKHOPADHYA v. BRAHMAMOYI DEBYA**, 1 C.L.J. 531. (18 C. 164=17 I.A. 201; 21 C. 366=21 I.A. 1, R.)

(479)—*Interest—Charge—Redemption—Zar-i-raham*.—In interpreting usufructuary mortgages for purposes of redemption, the interest and redemption clauses have to be separately considered on their own merits as two distinct covenants. Where a mortgage was redeemable according to its terms on payment of *Zar-i-raham* (mortgage-money). *Held*, that the mortgagor was entitled to recover possession on payment of principal only. **BHAG MAL v. TALE**, 6 P.L.R. 1907=44 P.W.R. 1907. (57 P.R. 1888, 8 P.R. 1890, 147 P.R. 1890, F.B., 73 P.R. 1892, 77 P.R. 1898, 114 P.R. 1901=175 P.L.R. 1901, 92 P.R. 1905=50 P.L.R. 1906, R.)

(480)—*Mortgage—Suit for redemption by heir of mortgagor—Frame of suit*.—When the heir of the original mortgagor sued the defendant for redemption of an alleged mortgage with possession, effected for Rs. 49, and offered to pay whatever sum might be found to be due to the mortgagee as such, and the defendant denied the mortgage and the suit was dismissed on the ground that the plaintiff had failed to prove specifically that the defendant held as mortgagee for Rs. 49 only. *Held*, that the dismissal was wrong, and that it should have been decided whether the property was held on mortgage by the defendant from the plaintiff, and, if so, what sum must be paid in to redeem it. **MANSUKH v. BHAGAT RAM**, 152 P.L.R. 1903.

(481)—*Purchase by prior mortgagee of mortgagor's rights in the subject-matter of the prior mortgage—Suit for redemption by puisne mortgagee*. *Held*, that the purchase by a prior mortgagee of the mortgagor's rights in the subject-matter of the prior mortgage did not extinguish that mortgage and did not prevent a puisne mortgagee, from suing for redemption of the prior mortgage. **RAM NIDH MISR v. ISHAR DAYAL MISR**, A.W.N. 1906, 190.

(482)—*Mortgage suit by second mortgagee making first mortgagee party—Right of first mortgagee to pay off mortgage debt*.—There is nothing in the law to prevent a first mortgagee, who is made a party to the suit by the second mortgagee on his mortgage, from claiming his right to pay off the second mortgage and so save from sale the property which stands as security for his mortgage debt. **BHOJOHARI MAITI v. GAJENDRA NARAIN MAITI**, 5 Ind. Cas. 142=37 C. 282=14 C.W.N. 672.

(483)—*Sub-mortgage—Sub-mortgagees impleaded—No specific prayer to redeem sub-mortgage*. The plaintiffs had purchased the equity of redemption of all the mortgaged property, part of which had been sub-mortgaged. *Held* that, having made the sub-mortgagees parties,

Mortgage—continued.—9.—Redemption—*continued*.

they were entitled to redeem the whole mortgage although they might not have specifically sought to redeem the sub-mortgage; that the proper course was to ascertain what sum was due to the sub-mortgagees and to direct payment of that amount to the sub-mortgagees out of the amount payable for redemption of the whole mortgage. **RAJA SETH GOKUL DAS v. DEBI PERSHAD**, A.W.N. 1906, 162=3 A.L.J. 548=28 A. 638. (15 B. 692, *Appr.*)

(484)—*Mortgage—Construction—Satisfaction of the principal money out of surplus profits*.—The terms of mortgage-deed were that the mortgagee should realize the rents from the tenants of the land, should appropriate Rs. 7-8-0 to himself, and pay the balance of the rent amounting to one rupee to the mortgagor every year, and, on payment of the entire mortgage-money, the mortgagor would be entitled to redeem. The mortgagee did not pay the balance of Re. 1 to the mortgagor. *Held*, that, at the time of redemption, the mortgagor was entitled to deduction from the mortgage-money of Re. 1 a year. **SAYID AMIR HUSAIN v. MUSAMMAT IMTIAZ FATIMA**, 6 Ind. Cas. 503. (6 A. 303, F.)

(485)—*Court-sale at the instance of sub-mortgagee—Failure to describe property as mortgage interest—Effect—Suit by owner of equity of redemption to redeem—Whether equity of redemption subsists*.—A, the purchaser of certain property from the original mortgagor, sued B to redeem the property. B was a sub-mortgagee, who brought a suit on his sub-mortgage and bought the property in a Court-sale held in execution of the decree. The decree in B's suit failed to describe the property as mortgage interest, and the vagueness in the description was retained in the sale proclamation and the sale certificate. B contended that he became the absolute owner of the property and that A was not entitled to redeem. *Held*, that the decree passed in B's suit must be construed as one against the mortgage interest (a); that the sale certificate ought to be read as comprising only the mortgage interest (b); and that A was entitled to redeem. **ANA PATTAR v. SWAMI-NATHA PATTAR KARIAKAR**, 7 M.L.T. 191=5 Ind. Cas. 935. (29 M. 84, 22 A. 442, 22 W. R. 408, 27 B. 334, R.)

(486)—*Mortgage—Sale of equity of redemption—Discharge of prior mortgage—Right of puisne mortgagee*.—M purchased the equity of redemption in the property which was under a mortgage with R. There was also a prior mortgage on the same property which M redeemed. On a suit for sale being brought on the basis of R's mortgage, *held*, that it must be taken to have been intended to keep the first mortgage alive for his benefit and R could not sell the property without redeeming the first mortgage. **MAHARAJ alias MAHUA v. RAMJI LAL**, 7 A.L.J. 15=5 Ind. Cas. 177. (A.W.N. 1907, 85, D.; 10 C. 1035, A.W.N. 1896, 128, F.)

Mortgage—continued.**—9.—Redemption—continued.**

(487)—*Decree in favour of mortgagee based on compromise under which he was to lose interest on certain contingency—Right of mortgagee to claim interest at redemption—Mortgagee's right to be recouped the expenses on repairs and improvements—Merger—Construction of decree.*—One G, a mortgagee obtained a decree on the 6th January, 1896, against the mortgagor K based on a compromise, under which G was to lose interest on the mortgage-debt on his not paying a certain amount to K, by a certain date. K sued G for redemption, afterwards alleging that as G had not performed his part under the decree he was not entitled to any interest. G denied this and claimed *inter alia* certain additional sums as spent by him on repairs and improvements. The Divisional Court held that the mortgage had merged in the decree of the 6th January 1896, and that therefore the mortgagee was entitled to no more than his mortgage money. On appeal to the Chief Court: *Held* (1) that the decree did not operate as a merger and that it did not take away the mortgagee's right to be recouped for expenses alleged to have been incurred by him on repairs and improvements of the mortgaged premises. (2) That the decree must be construed with reference to the judgment and to the written *sulenamah* on which that judgment is based, and that on their true construction the mortgagee G must be held to have made the required offer within the period allowed, and that it was K, and not G who failed to carry out the terms of the compromise and that G was consequently entitled to the interest claimed on the mortgage. Case remanded as being decided on a preliminary point. **GAI MAL V. SRI RAM, 164 P. W. R. 1909.**

(488)—*Transfer of Property Act (IV of 1882), s. 91—Redemption—Mortgage of fixed rate tenancy by tenant—Death of tenant heirless—Right of zamindar to redeem—Escheat to Crown—Agra Tenancy Act (II of 1901, Local), ss. 5, 18, 20, 57.*—A fixed rate tenancy is but a limited interest which cannot be the subject of escheat to the Crown. Such a tenancy is carved out of the landholder's interest in the land to which it relates, and a fixed rate tenant has no absolute interest in it. If the tenancy comes to an end it necessarily goes back to the estate, which it was carved out of, and lapses to the landholder. Where a fixed rate tenant, therefore, who had made a usufructuary mortgage of the tenancy, died without leaving heirs, and the zamindars offered to redeem the mortgage after his death, *held* that the plaintiffs were clearly entitled to redeem the mortgage made by the tenant. *Query*, if they were not entitled to possession of the holding without redemption. **TULSHI RAM V. GURDIAL SINGH, 7 A.L.J. 1011, F.B. = 7 Ind. Cas. 231. (30 A. 488, overruled.)**

(489)—*Mortgagor and mortgagee—Mortgagee's duty to account and to restore the property in its entirety—Mortgagees' duty to identify the property mortgaged—Redemption suit—Denial of mortgage—Burden of proof.*—When a mortgagor

Mortgage—continued.**—9.—Redemption—continued.**

seeks to redeem, the mortgagee who has been in possession under the mortgage is, except under special circumstances, bound to account for and to restore the property in its entirety and he cannot be heard to say he does not know what has happened to a portion of the property mortgaged. It is the duty of the mortgagee or those who have held as his assignees to identify fully the property mortgaged and if he or they fail to do that, they come within the principle of *Wake v. Conyers*, namely, that, "the Court, in cases relating to confusion of boundaries, proceeds upon the same principle as it does where an agent, or bailiff, or any other person, who is under an obligation, express or implied, to keep his own property separate from the property of another, mixes them together, for under such circumstances he will have the *onus* thrown on him of distinguishing his own property, and, if he is unable to do so, the other person will be entitled to the whole property." In suits to redeem, where the defendant denies the mortgage very slight *prima facie* proof that a mortgage had been originally made will be sufficient to shift the entire burden of proof on the defendant. **RAMCHANDRA V. MUKUND, 3 Bom. L. R. 152.**

(490)—*Mortgage—Redemption of first mortgage when first mortgagee purchased equity of redemption—Second mortgagee bringing property to sale without offering to redeem first mortgage.*—The first mortgagee bought the equity of redemption of the property mortgaged to him. Subsequently when the plaintiff, a transferee of the second mortgagee, applied for mutation of names in his favour, the first mortgagee objected that his mortgage should be redeemed first. *Held*, that the rights of the first mortgagee did not merge into those of the mortgagor by purchase of the equity of redemption and that he was entitled to have his mortgage redeemed. *Held*, that the second mortgagee is not bound to offer to redeem the first mortgage before bringing the property to sale. **NAJJU KHAN V. RAM BALI, 7 O.C. 330. (13 A. 432, Diss.; 1 O.C. 105, R.)**

(491)—*Decree for sale to which puisne mortgagee was not made party—Purchaser at sale in execution of such decree—Puisne mortgagee's right to redeem property in the hands of such purchaser—Redemption from purchaser, amount payable on.*—The same property was mortgaged under two mortgages in favour of different persons. The prior mortgagee obtained a decree for sale, to which the puisne mortgagee was not made a party, and in execution thereof, the property was purchased by the plaintiff. Subsequently, the puisne mortgagee also obtained a decree for sale without making the prior mortgagee a party, and, in execution thereof, purchased it himself. The defendants, who were the successors-in-title of the puisne mortgagee, forcibly dispossessed the plaintiff. *Held*, that the plaintiff was entitled to a decree for possession, subject to the defendant's right to

Mortgage—continued.**—9.—Redemption—continued.**

redeem. *Held*, further, that the amount payable for redemption of the property is not the price paid by the plaintiff, but the amount which was proportionately due on the prior mortgage on account of the property in dispute. **JAWAHIR SINGH v. RAJENDRA BAHADUR SINGH**, 12 O. C. 133 (B.) = 2 Ind. Cas. 836. (33 C. 590, 24 A. 185, 19 A. 527, 26 A. 185, R.) [R., 13 O.C. 50.]

(492 & 493) — *Mortgagor demanding greater sum than has been advanced—Equity—Compound interest—Court—Discretion—Practice.*—The principles of justice, equity and good conscience do not of necessity disentitle a mortgagee from insisting on his security for a greater sum than what has been actually advanced: in each case the question must be asked whether there has or has not been a hard and unfair bargain on the borrower, but when that is not established against the mortgagee, then the right to redeem still remains, though it is redeeming not on payment of the sum advanced, but of the sum which the parties agreed it was worth the mortgagor's while to pay in order to get a smaller advance when he was in want of money. The Courts do not lean towards compound interest, they do not award it in the absence of stipulation, but where there is a clear agreement for its payment, it is in the absence of disentiing circumstances allowed. **HARI LAHU v. RAMJI PANDU**, 6 Bom. L.R. 307 = 28 B. 371.

(494) — *Mortgage—Equitable transferee—Rights of third party paying off the mortgage debt to the mortgagee—Lien on the mortgaged property—Redemption—Money should be paid to the equitable transferee—Contract Act, s. 85—Transfer of ownership of moveable property when sold along with immoveable.*—Where a third party pays off a mortgage debt to the mortgagee with the knowledge of the mortgagor, although he does not take a valid assignment of the mortgage, he becomes in effect an equitable transferee of the mortgage and is entitled to look to the mortgaged property for his money, and in a suit for redemption of the mortgage, the money should be ordered to be paid not to the original mortgagee but to the equitable transferee. S. 85 of the Contract Act covers all agreements for the sale of property part of which is moveable and part immoveable and cannot be read as if it were worded "for the sale of connected moveable and immoveable property." **MAUNG PAW v. MAUNG SAN U**, 12 Ind. Cas. 805.

(495) — *Redemption—Admission of redemption by mortgagee in mutation proceedings.*—Where a mortgagee appears before a competent Revenue Officer, who knows him personally, and is also recognized by a Lambardar, and admits that the mortgage in his favour has been redeemed under a private arrangement made between him and the mortgagor, and an entry to that effect has been made in the Mutation Register which is also supported by other evidence and

Mortgage—continued.**—9.—Redemption—continued.**

circumstances: *Held*, that it is a good proof of redemption and bars the mortgagee from enforcing the mortgage. **DIWAN CHAND v. KHUSHAL SINGH**, 94 P.W.R. 1911 = 11 Ind. Cas. 410.

(496) — *Effect of foreclosure-decree obtained against Hindu father on son's right of redemption.*—Suit for redemption. The defendant-mortgagee had previously obtained a decree for foreclosure and obtained possession of the mortgaged property. Plaintiff (mortgagor's son) had not been made a party to the previous suit. *Held*, the plaintiff had not, by the foreclosure decree against his father, lost his right to redeem. It might be that the son could not dispute the mortgage, but this does not preclude him from redeeming the mortgage. **BALAJI v. TULSIRAM**, 2 N. L. R. 90. (28 C. 517, F.; 4 M. 1, R.) [R., 5 N.L. R. 103.]

(497) — *Transfer of Property Act (IV of 1882), s. 99—Equity of redemption purchased by mortgagee—Sale voidable not void—Mortgagor, if may redeem without setting aside sale—Mortgagee, Trustee for mortgagor—Indemnity, right of mortgagee to, and to credit for amount paid for purchase.*—It is a well established principle that a purchase by the mortgagee of the equity of redemption constitutes him a trustee for the mortgagor, and that he does not (unless there has been a release of the equity of redemption or other circumstance which in law would bar his right to redeem) acquire an irredeemable title. (32 C. 296, 9 C. W. N. 201, R.) The right to redeem which, according to this principle, would still subsist in the mortgagor, has not been affected by the decision of the Full Bench in *Ashutosh Sikdar v. Behari Lal*, (35 C. 61, 11 C. W. N. 1011, R.) where it was held that a sale in contravention of the terms of s. 99 of the Transfer of Property Act is not a nullity, but an irregular sale liable to be avoided merely on proof that the terms of the section have been contravened. The mortgagor is under no necessity to have the sale set aside first, in order to be entitled to redeem the property. He may sue for redemption within the period of limitation allowed by law, but, in such a case, the mortgagor would have to pay to the mortgagee the amount given credit for by the latter in respect of the sale, and the mortgagee would further be entitled to be reimbursed and to add to the mortgage-debt the amount which he has expended for the protection and preservation of the property. **PANCHAM LAL CHOWDHURY v. KISHUN PERSHAD MISSER**, 14 C.W.N. 579 = 6 Ind. Cas. 47 = 12 C. L. J. 574. (22 M. 347, R.)

(498) — *Redemption, suit for—Estoppel—Interest on usufructuary mortgage—Unconscionable bargain—Construction of mortgage-deed—Usufructuary mortgage.*—In 1838, one A mortgaged his estate to F. In 1866 or 1867, the appellants and other representatives of A sued B the representative of F for redemption. The

Mortgage—continued.

—9.—Redemption—continued.

appellants compromised, and withdrew from the suit so far as it concerned their one-third share of the estate, and, in consideration of a further advance of Rs. 500 and Rs. 3,019-10-11 found to be their share of the former mortgage-debt, executed a mortgage in favour of B on the 14th January, 1867. The terms of the mortgage were (1) that the mortgage would be redeemable after 30 years in the month of Jeth on payment of the principal and interest at the rate of 2 per cent; (2) that the mortgagee would receive and retain the profits of the mortgaged property; (3) that the mortgagors at the time of redemption would pay to the mortgagee *takavi* advances and other arrears which would then be due. The appellants sued the respondents, the representatives of B, for redemption of the mortgage of the 14th January 1867. In their plaint, the appellants stated that, under the mortgage, it was stipulated wrongfully that the mortgagee should receive 2 per cent. per mensem in addition to the profits of the property, and that respondents were not entitled to both. The respondents pleaded that the appellants had no interest in the property in suit as the former mortgage had become irredeemable when the mortgage of the 14th January 1867 was executed, and Rs. 75,000 were due on the mortgage on account of principal, interest, arrears of *takavi*, etc. *Held* that B having admitted that the mortgage of 1838 was redeemable, and by that admission having induced the appellants to withdraw their suit, the respondents, as his representatives, were estopped from denying that that mortgage was redeemable in 1867. *Held* further, that, under the terms of the contract made on the 14th January 1867, the appellants were not liable to pay anything more than 2 per cent. on the principal for the whole term of the mortgage. Had there been an agreement to pay interest at the rate of 2 per cent. per mensem, there would be no sufficient reasons for finding that such a bargain was unconscionable and should not be enforced. **CHAMPAT SINGH v. LAKHA SINGH, 5 O. C. 155, B.**

(499) — *Redemption, Suit for—Tender of amount due on mortgage, Absence of—Transfer of Property Act, s. 60—Mortgage.*—Where there is a real dispute as to the amount due and the mortgagor tenders what turns out to be an insufficient amount or makes no tender at all, his suit for redemption should not be dismissed on the ground that no tender was made. **BARMA BAKSH v. SURAJ SINGH, 5 O.C. 127. (R., 6 O.C. 223.)**

(500)—*Hindu widow, mortgage executed by, to pay off her husband's debt—Mortgage made by Hindu widow for benefit of her husband's estate—Commission deducted by mortgagee from mortgage money advanced by him—Possession in redemption, when mortgagor entitled to—Khali fasl of Jeth stipulation as to taking of possession by mortgagor after redemption, in—Costs in redemption suits—New plea taken by*

Mortgage—continued.

—9.—Redemption—continued.

plaintiff at time of argument.—On the 17th May 1881, the widow of one Ishri Singh mortgaged to the appellants certain lands belonging to her husband for ten thousand rupees at 12 per cent. per annum. There was a stipulation that if the interest were not paid, when due, it should be added to the principal and carry interest at the rate above mentioned. There was also a stipulation that if all the interests were not paid within three years the mortgagees should be entitled to the possession of the mortgaged property. Out of the mortgage money, the widow paid off nine thousand and nine hundred rupees to one B on account of her husband's debt, which carried interest at the rate of 15 per cent per annum, and Rs. 100 to the mortgagees by way of commission. The mortgagees obtained a decree for possession of the property on the 17th April, 1885, against the widow. In accordance with the terms of the mortgage, the decree provided that the mortgagor should be entitled to redeem in the *khali fasl* of Jeth on payment of the principal sum together with interest due thereon from the 17th May, 1881, to the date on which the mortgagee obtained possession which was the 22nd April 1885. Subsequently, the respondents as reversionary heirs of Ishri Singh sued the appellants for possession and redemption of the mortgaged property. The appellants claimed a certain sum on the mortgage, but subsequently they abandoned part of their claim. The issue relating to the mortgage ran, "Was the mortgage dated the 17th May, 1881, for consideration and for payment of Ishri Singh's debt?" In the course of the argument, the respondents were allowed to urge that, even if the issue were found in the affirmative, the mortgage was invalid, inasmuch as, there being no danger of the property being sold in satisfaction of Ishri Singh's debt due to B and no necessity for paying it, as B was taking the profits in lieu of interest it was not beneficial to the estate. *Held* that the respondents should have been limited to the case which was made by their pleadings, and the issue as to the validity of the mortgage, their case being that no consideration passed for the mortgage, and it was not made to pay off Ishri Singh's debt, and that the mortgage was therefore invalid, and that they should have been allowed to make at the last stage of the suit the further new case that the mortgage was invalid as it was not necessary or for the benefit of the estate. *Held*, further, that the mortgage was one which a prudent owner might make in order to benefit the estate, and that it was therefore a valid mortgage. *Held*, therefore that the appellants were entitled to be paid compound interest for the period between the date of the mortgage and the date on which they obtained possession in accordance with the conditions of the mortgage. *Held*, further, that the amount of Rs. 100 taken by the appellants by way of commission did not benefit the estate, and they were not entitled to claim it from the respondents. *Held*, further,

Mortgage—continued.—9.—**Redemption**—continued.

that on payment of mortgage money within the six months' time fixed by the Court the mortgage would be redeemed, and the respondents would be entitled to possession, any stipulation as to their taking possession in the *Khali fasl* of Jeth notwithstanding. *Held*, further that in suits for redemption unless there are special reasons to the contrary the parties should pay and be paid costs in proportion to their success and failure as regards the amount alleged to be due on the mortgage. **KALKA SINGH v. SHEORAJ SINGH**, 4 O.C. 347.

(501)—*Purchase of mortgagor's equity of redemption—Further mortgage by mortgagor subsequent to purchase, if binding on purchaser.*—A mortgagor, who has sold away his equity of redemption in the mortgaged property could not, by creating subsequent to such sale any further charge or mortgage, impose any additional burden on the vendees so as to derogate from their rights under the purchase and to render them liable to pay such further debt also before exercising their right to redeem. By their purchase, the vendees had acquired a title which, under the provisions of s. 91 of the Transfer of Property Act, gave them a right to redeem the whole of the mortgaged property by paying off the mortgage in existence at the time of their purchase, and in that way to acquire full proprietary possession of the portion of it as to which they had acquired the equity of redemption. **BHAGWAN DAS v. SHAM DAS**, 23 A. 429 = A.W.N. 1901, 121. (4 A. 85, D.)

(502)—*Usufructuary mortgage—Lease on same day by mortgagee in favour of mortgagor—Rent in lieu of interest—Effect of lease—Construction of mortgage-deed—Disposition by third party—Acquiescence—Settlement proceedings of 1858 and 1864.*—Where, on the same day on which a usufructuary mortgage-deed is executed, the mortgagee executes a lease under which the mortgagor becomes a tenant of the mortgagee and is to pay rent in lieu of interest, the mortgagee takes the chance of the rent being greater or less than the interest reserved in the mortgage bond, and so the mortgagor will be enabled to redeem on payment of the principal sum only. [R., 6 Bom. L.R. 630.] Where a mortgagor agreed in the mortgage instrument which was executed before the annexation of Oudh by the British, to pay interest at the rate of 2 per cent. on the mortgage money until possession of the mortgaged property was delivered to the mortgagee; and the mortgagee, having been placed in possession of the property, was subsequently dispossessed by a stranger claiming under a settlement from the King of Oudh, and the mortgagee acquiesced in such dispossession, but was once again put in possession of a part only of mortgaged property at the settlement proceedings of 1858 and 1864 which followed the annexation; *held* that this did not constitute a failure on the part of the mortgagor to secure to the mortgagee possession of the mortgaged property, which entitled the mortgagee to claim interest in lieu of the rents

Mortgage—continued.—9.—**Redemption**—continued.

and profits for the property of which he was dispossessed, as the mortgagee had acquiesced in the dispossession, and as the decisions of Settlement Courts in 1858 and 1864 were final as to the ownership of the mortgaged property. **PARTAB BAHADUR SINGH v. GAJADHAR BAKHSH SINGH**, 24 A. 521 P.C. = 29 I. A. 148 = 7 C.W.N. 97 = 4 Bom. L.R. 845 = 8 Sar. 310. [F., 27 A. 313 = A.W.N. 1904, 273 = 1 A.L.J. 715; R., 31 A. 325 = 6 A.L.J. 247 = 2 Ind. Cas. 221; D., 11 C.W.N. 732 = 6 C.L.J. 74.]

(503)—*Usufructuary mortgage—Lease of mortgaged property to mortgagor—Rent being made charge on property—Acquiescence of mortgagee in the loss of portion of mortgaged security—Suit for redemption—Claim for inclusion of arrears of rent and recoupment of loss for diminution of security, validity of.*—Certain villages were usufructuarily mortgaged, to the defendants for five years. The day after the execution of the usufructuary mortgage the mortgagor executed a lease deed for four years in favour of the mortgagee and agreed to pay a fixed rent annually, making the rent a charge upon the property. The terms of the mortgage and the lease-deed were not coincident. At the date of execution of the mortgage, one of the mortgaged villages was the subject of a suit for pre-emption, which was ultimately successful and the pre-emptor obtained possession of the same. No steps were taken by the mortgagees to obtain an equivalent of that village; they remained satisfied with the rest of the security. A suit for redemption was brought by the representatives of the mortgagor. It was contended by the defendants (1) that the plaintiffs should be compelled to pay off the rent due by them as a condition precedent to redemption and (2) that they should recoup the loss incurred by the defendants on account of the deprivation of the village, the subject of the suit for pre-emption. *Held*, that the mortgage and the lease-deed were separate and independent transactions and that, as there was nothing to show that the mortgage should not be redeemed unless the charge created by the lease was also paid off, the defendants were not entitled to claim the amount due to them under the lease, (16 A. 295, R.) and that the defendants were disentitled to claim anything for the loss of the village, as they had acquiesced in the loss of that security and remained content with the other villages in their possession. **KHUDA BAKHSH v. ALIM-UN-NISSA**, 27 A. 313 = A.W.N. 1904, 273 = 1 A.L.J. 715. (29 I. A. 148 = 24 A. 521, R.) [F., 31 A. 325 = 6 A.L.J. 247 = 2 Ind. Cas. 221; D., 6 C.L.J. 74 = 11 C.W.N. 732]

(504)—*Mortgagor and mortgagee—Redemption, suit for—Possession of mortgagee adverse, when Equity of redemption—Purchase by mortgagee benamee, effect of—Sale in execution, when void and when irregular.*—As between mortgagor and mortgagee, neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty

Mortgage—continued.

—9.—Redemption—continued.

years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, will be a bar or defence to a suit for redemption, if the parties are otherwise entitled to redeem. A mortgagee, who purchases, the equity of redemption *benamiee* in the name of another, cannot set up his possession as adverse to the right of the mortgagor. The view that a mortgagee should not acquire the equity of redemption, directly or indirectly by purchase at a Court-sale, except by a suit brought on the mortgage, on account taken and time specially allowed by redemption, is based on a misapplication of a sound principle of equity. The true principle is that a mortgagee cannot by obtaining a money decree for the mortgage-debt, and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and with the other safeguards usual in a suit on a mortgage. Where a mortgagee purchases, at a Court-sale, the equity of redemption without a suit brought on the mortgage, such sale is not a nullity for want of jurisdiction, but only irregular in procedure. Sale in execution of a decree cannot be treated as void or be avoided on the ground of any mere irregularities of procedure in obtaining the decree or in the execution thereof. But a Court has no jurisdiction to sell the property of persons, who are not parties to the proceeding or properly represented on the record. As against such persons, the decree and sale would be a nullity and might be disregarded without any proceeding to set it aside. (Marsh 647, *F.*) Where a Judge accepted, without a question and without applying his mind to the matter, a statement that a particular person is the representative of a deceased person, passed decree against such representative and, in execution of that decree, sold the property of the deceased, such sale is without jurisdiction and null and void, it not being a case of erroneous decision. *KHAIRAJ MAL v. DIAM*, 9 C.W.N. 201, P.C. = 2 A.L.J. 71 = 7 Bom. L.R. 1 = 1 C.L.J. 584 = 32 C. 296 = 32 I. A. 23 = 8 Sar. 734. (5 C.W.N. 10 = 27 I. A. 216, P.C., *D.*) [*F.*, 29 A. 640 = 4 A.L.J. 521 = A.W.N. 1907, 221, 4 A.L.J. 787 = A.W.N. 1908, 1 = 3 M.L.T. 132, 28 A. 137 = A.W.N. 1905, 229 = 2 A.L.J. 615, 11 C.W.N. 1078 = 6 C.L.J. 719; *R.*, 27 A. 517 = A.W.N. 1905, 80 = 2 A.L.J. 210, 2 A.L.J. 356 = A.W.N. 1905, 152, 8 O.C. 327, 35 C. 61 = 11 C.W.N. 1011 = 6 C.L.J. 320, 90 P.L.R. 1908 = 65 P.R. 1908 = 113 P.W.R. 1908, 33 M. 6 = 6 M.L.T. 269 = 19 M.L.J. 671, 8 O.C. 409, 9 C.W.N. 956 = 2 C.L.J. 384, 34 C. 241 = 5 C.L.J. 385, 30 B. 477 = 8 Bom. L.R. 268, 34 C. 811 = 5 C.L.J. 696 = 11 C.W.N. 756, 17 M.L.J. 179, 7 C.L.J. 251, 2 S.L.R. 76, 3 S.L.R. 17; *Expl.*, 7 Bom. L.R. 816; *Diss.*, 30 M. 362 = 17 M.L.J. 325.]

(505)—*Prior mortgagee purchasing equity of redemption in Court auction in execution of simple money decree—His right to redeem subsequent mortgagee—Transfer of Property Act,*

Mortgage—continued.

—9.—Redemption—continued.

s. 99.—A certain person mortgaged the suit property to the father of the appellant and subsequently mortgaged the same to the respondent. The appellant, subsequently, purchased the property in execution of a simple money decree of his. The respondent puisne-encumbrancer brought the present suit for sale upon his mortgage and offered to redeem the prior mortgage, alleging that the Court-sale in execution of the simple money decree was illegal. The appellant defended the suit, and stated that he was entitled to redeem the subsequent encumbrancer and offered to redeem him. The lower Appellate Court gave the plaintiff a decree for sale, holding that the appellant, the prior mortgagee had no right of redeeming the subsequent mortgagee. *Held* that the appellant, the prior encumbrancer, who had purchased the equity of redemption in execution of his simple money decree, was entitled to redeem the respondent, the subsequent mortgagee whose incumbrance was created prior to the purchase. *Held*, also, that, although the sale of the appellant was in direct contravention of the provisions of s. 99, Transfer of Property Act, the sale was final, as the mortgagor took no objection to the sale, and that neither the mortgagor nor the puisne encumbrancer could dispute the title which the prior mortgagee obtained by the purchase. *MANGALI PRASAD v. PATI RAM*, 1 A.L.J. 360. (18 A. 325, *F.*) [*R.*, 6 C.L.J. 320 = 11 C.W.N. 1011 = 35 C. 61, *F.B.*]

(506)—*Right of purchaser at prior mortgage sale to redeem purchaser at subsequent mortgage sale.*—Where the plaintiff purchased certain properties at two sales in execution of two mortgage decrees obtained by him and the defendant purchased a portion of the same properties before either of the sales at which the plaintiff purchased, and before the date of the plaintiff's second decree, and the defendant was not a party to the plaintiff's two suits, nor was the plaintiff a party to the defendant's suit, it was *held*:—(a) the defendant purchased the equity of redemption in the property covered by his decree. (b) The plaintiff purchased the mortgagee's rights and the equity of redemption in the remainder of the property not covered by the defendant's decree. (c) The defendant was entitled to redeem the plaintiff by paying off the proportionate amount of the plaintiff's mortgages due on the property purchased by him. (d) If the defendant failed to pay as aforesaid, the plaintiff would be entitled to pay him off by paying into Court the amount paid by the defendant for the property. *SHEO PERSHAD SINGH v. BABU TILAK SINGH*, 5 C.W.N. 232.

(507)—*Absentee owner's land mortgaged by person in possession for his own benefit—Suit by owner for possession of mortgaged land—Mortgage not binding on owner.*—Where a person in possession of the land of an absentee owner mortgaged it for his own benefit and the owner claimed the land, *held* that the

Mortgage—continued.**—9.—Redemption—continued.**

mortgage was no bar to his suit and that he could recover the land without redeeming the mortgage. *HIRA SINGH v. JOWALA SINGH*, 187 P.R. 1888.

(508)—*Mortgagor — Right of redemption—Effect of laches—Duty of mortgagees to furnish accounts.*—This was an action to redeem from mortgage and recover possession of a field alleged to have been mortgaged to the defendant. In the mortgage which was effected in 1844, there was a stipulation that if the mortgagor failed to pay a moiety of the mortgage-money within three years, or wholly to redeem within five years, the property mortgaged should be considered as sold to the mortgagee. Possession of the mortgaged property remained with the mortgagor for three years, at the end of which it passed to the hands of the mortgagee, who then, according to the law of mortgage as recognised at the time, became the absolute owner. Subsequently to 1847, the property changed hands. The absolute right was sold in 1855, and then, on two occasions in 1862, and the representative of the latter purchaser of 1862 was the defendant in the present suit. This case was held by the High Court to differ from ordinary redemption cases in this, that there was here absolute delivery of possession to the mortgagee by the mortgagor, who, when he gave up that possession, fully knew that, as the law was then understood, he thereby lost all right to the property, and, subsequently, though fully aware that the field was sold over and over again, he stood by in silence, and so led purchasers to believe that they were purchasing an unincumbered estate. Under the above peculiar circumstances of the case, the mortgagee was held not liable to be called upon to furnish accounts of the rents and profits on the one hand and of the amount of the mortgage on the other. *RAM SHET BACHA SHET v. PANDHARI NATH*, 8 B.H.C.A.C. 236. [F., 14 B. 78; R., 9 B.H.C. 69, 1 M. 1, P.C. = 2 I.A. 241.]

(509)—*Land taken by mortgagee in exchange for mortgaged land—Right of mortgagor to redeem—Forest Act (VII of 1878), s. 10 (d).*—Certain lands had been mortgaged by the plaintiff to the deceased brother of their present holder H. The Forest Department wanted to acquire the lands of which H admitted he was only the mortgagee. It was arranged between H and the Forest Department that he should allow the assessment to fall into arrears, upon which Government would forfeit the holding, and that then H should receive another plot in exchange. The present suit was by the mortgagor's heir to redeem the land so acquired in exchange. Reversing the decree of the special Judge and restoring that of the Subordinate Judge, the High Court held that by non-payment of the assessment, the whole building became liable to forfeiture, and such forfeiture extinguished the rights of the mortgagor who

Mortgage—continued.**—9.—Redemption—continued.**

could no longer maintain his equity of redemption against Government in whom the land became vested. H was, however, a trustee for the mortgagor of the latter's equity of redemption which he had lost out of his hands by his own fraud. He obtained the plot now sought to be redeemed as the compensation or price of the lands previously mortgaged and as the rights of the parties in the latter lands were thereby transferred to the former, he obtained the former only to hold it just as he held the latter, viz., as mortgagee for the plaintiff and his heirs who were therefore entitled to redeem the said land taken in exchange. *BABAJI v. MAGNIRAM*, 21 B. 396.

(510)—*Mortgage with possession—Mortgagee bound to pay Government revenue—Sale for arrears of revenue—Purchase by mortgagee—Right of mortgagor to redeem not affected.*—The general rule that a Government sale for arrears of revenue gives a title against all the world is subject to the exception that a person cannot take advantage of his own wrong. So, where certain property was mortgaged with possession and the mortgagee was under the mortgage to pay the Government-revenue, and owing to his default the land was sold for arrears of revenue and he himself purchased it, held that the right of the mortgagor to redeem the mortgage and to recover the land was not affected. *KALAPPA v. SHIVAYA*, 20 B. 492.

(511)—*Mortgage bond and instalment bond executed on same date—Redemption of mortgage made conditional on payment of both debts—Instalment bond-debt becoming barred by limitation—Effect on mortgage-debt—Condition, if affected.*—Where the plaintiff executed a mortgage-deed and an instalment bond on the same date to the defendant, the former deed containing a stipulation to the effect that the plaintiff should not redeem the property without also paying the amount due under the other bond, and the defendant, having obtained a decree on this latter bond made several attempts to execute it but failed, his last application for execution being dismissed as barred by limitation, held, in a suit by the plaintiff for redemption, that the right of redemption was made conditional on whatever was due on the instalment bond being paid, a condition which remained none the less unsatisfied, as long as such sum remained "unpaid"—although there might be no longer a bond debt in contemplation of law still in existence owing to a decree having been passed on the bond and although that decree had become barred. *SUNDAR MALHAR PATEL v. BAPUJI SHRIDHER*, 18 B. 755. [R., 22 B. 520, 28 B. 349 = 6 Bom. L.R. 313, 8 O.C. 132, 11 Bom. L.R. 318.]

(512)—*Mortgage to firm—Subsequent mortgage to one member of firm for a personal loan—Stipulation to pay later debt before prior debt—Suit for redemption of prior mortgage only—Maintainability.*—The suit land belonged to one N, who mortgaged the same under a mortgage-deed dated 13-7-1877 to the defendants 1, 2, 3

Mortgage—continued.**—9.—Redemption—continued.**

and 4 who traded as a firm. He gave a second mortgage on the same property to the second defendant only for a loan advanced by him personally, the mortgage-deed containing a stipulation to the effect that the debt due thereunder must be paid off before the prior mortgage-debt. The plaintiff, as purchaser of the equity of redemption from the heirs of the mortgagor, brought this suit for redemption of the prior mortgage only against the defendants. The latter contended that the plaintiff could not redeem the earlier mortgage without redeeming the subsequent one. *Held* that the plaintiff was entitled to a decree for redemption. The later mortgage-debt in the second defendant's favour being a personal one, the firm, as such, had no equity to insist on its being paid before redemption of the earlier mortgage, whatever rights the second defendant himself might have to insist on it. The present suit being one against the firm and the second defendant being a party thereto (not in his individual capacity but as a member of the firm), he could not, in this suit for redemption of the earlier mortgage, resist the plaintiff's right to redeem for any reason based on the stipulations contained in the later mortgage-deed executed to himself alone in his individual capacity. **CHHOTALAL GOVINDRAM v. MATHUR KEVALRAM, 18 B. 591.**

(513) — *Adverse possession — Payment of revenue by mortgagee—Possession obtained by mortgagee—Land Revenue Code, Bombay (Act V of 1879), ss. 56, 57, 153.*—Plaintiff executed a mortgage-deed in favour of the defendant in 1870. The latter obtained a decree on it in 1876 but did not execute it. In 1876, the mortgaged property was about to be sold for arrears of assessment. The defendant paid the arrears and prevented the sale. Thereupon he was put in possession of the property by the *Mamlatdar*. Since then he continued to be in possession and pay the assessment. Now, the plaintiff sued him for redemption and the defendant pleaded adverse possession. *Held* that the plaintiff was entitled to redeem. There was nothing in the *Mamlatdar*'s report on the defendant's possession to show that the land was declared to be forfeited by the Collector, as contemplated by ss. 56, 57 and 153 of the Land Revenue Code. All that could be gathered from it was that the defendant prevented proceedings under s. 56 by himself paying the arrears. That could not make the defendant's possession adverse or affect the original relationship of mortgagor and mortgagee between the plaintiff and himself, which remained still in existence after the decree of 1876, subject only to the mortgagee's right under the decree to sell within three years from the date thereof. **DASHARATHA v. NYAHALCHAND, 16 B. 134.** [*F.*, 90 P.L.R. 1908=65 P.R. 1908=113 P.W.R. 1908; *R.*, 21 B. 381, 20 B. 747, 2 N.L.R. 92.]

(514)—*Mortgage—Decree establishing proprietary right—Subsequent decree declaring right*

Mortgage—continued.**—9.—Redemption—continued.**

in another to which proprietor not a party—Effect of such decree on proprietor's right to redeem mortgage.—The plaint lands were originally the janmam property of the first defendant's family, by whom they were sold to the plaintiff. After her purchase, the plaintiff established her proprietary right to them as against the first defendant's family and a mortgagee thereof with possession. Subsequently, the first defendant himself sued this otti mortgagee and obtained a decree against him in a suit to which the plaintiff was not a party, since which time the second defendant who had obtained a transfer of the rights of the first defendant held possession. The present suit by the plaintiff was for redemption of otti mortgage and was brought more than twelve years after the decree in favour of the first defendant. *Held* that the relation of things created by the decree in favour of the plaintiff as against the first defendant and the otti mortgagee in possession could not terminate by mere lapse of time. Unless the plaintiff was aware or might, by ordinary diligence, have been aware of the suit by the first defendant, the claim of the plaintiff was not barred, though twelve years may have elapsed from the date of the decree in the latter suit to the institution of the present suit. **PUDIYAKOVILAGALLA v. ALLUNANNALATTA KADINNI, 1 M.H.C. 146.**

(515)—*Suit for redemption — Decree on a different mortgage set up by defendant, propriety of.*—In this suit for redemption, the defendant, in his written statement, admitted that he held as mortgagee, but alleged that he did so under a previous mortgage different from the one sued on by the plaintiff. Reversing the decree passed by the Court of first instance in favour of the plaintiff, as on the mortgage admitted by the defendant, the lower appellate Court dismissed the suit on the ground that the plaintiff, having failed to establish the mortgage relied on by him, should not be given a decree based on a different mortgage and a state of facts inconsistent with the case set up in his plaint. The High Court held that the decree made by the Court of first instance did not in any way proceed upon a cause of action different from that made in the plaint. There was no contravention of the rule that a plaintiff ought not to be allowed to alter his case "so as to convert a suit of one character into a suit of another and inconsistent character." The cause of action remained the same, namely, the right of a mortgagor to redeem from a mortgagee. **LAKSHMAN BHISAJI SIRSEKAR v. HARI DINKAR, 4 B. 584.** [*Diss.*, 18 A. 408 = 16 A.W.N. 132; *Appr.*, 27 B. 271; *R.*, 17 B. 365, L.B.R. 1893—1900, 73, 3 O.C. 173.]

(516)—*Suit for redemption — Defendants denying mortgage sued on but producing another—Court's power to pass decree according to term of mortgage admitted.*—In a suit for redemption, where the plaintiff produces a mortgage the genuineness of which is denied by

*Mortgage—continued.***—9.—Redemption—continued.**

the defendant, and the defendant produces a mortgage from the plaintiff's ancestors, to the defendant's ancestors, the Court is justified in making a decree for the restoration of the lands according to the terms of the mortgage produced by the defendant. *KUNHI KUTTI NAIR v. KUTTY MARACCAR*, 4 M.H.C. 359. [F., 8 M. 415, 19 M. 160; R., 7 M. 226, 18 M. 462.]

(517)—*Suit to redeem by purchaser in execution—Absence of certificate of title—Production of certificate at hearing.*—In this case, the lower appellate Court dismissed the suit for redemption brought by the plaintiff, on the ground that the certificate of sale from which he derived his title was not in existence when the suit was brought and that, consequently, the plaintiff had not then a complete title, but the High Court remanded the case for the usual decree for redemption being passed in favour of the plaintiff. The plaintiff and his assignors had successively purchased and paid for the equity of redemption, although the certificate of sale was not issued until after the suit had begun, and there is no reason why, if a party (whose title may, to some extent, be imperfect) sues for redemption and is able to prove a perfect title at the hearing of his cause, he should not be given a decree for redemption. *KRISHNAJI RAOJI GODBOLE v. GANESH BAPUJI PATVARDHAN*, 6 B. 139. [R., 12 B. 589, 10 B. 453, 17 B. 375, 15 C.P.L.R. 175.]

(518)—*Right of puisne incumbrancer to redeem.*—Any puisne incumbrancer or purchaser from the mortgagor prior to the date of the mortgagee's decree who was not a party to the action in which the mortgagee's decree was obtained, would have the right to redeem the property which the mortgagor would have had, had it not been for the decree. *GAJADHAR v. MUL CHAND*, 10 A. 520 = A.W.N. 1888, 210. (9 A. 125, F.; 1 A. 240, A.W.N. 1886, 70, 4 A. 518, 8 A. 324, R.) [R., 20 B. 390; D., 9 A. W.N. 91; F., 13 A. 315.]

(519)—*Usufructuary mortgage—Second mortgage of same property—Suit for redemption of first mortgage—Subsequent suit by second mortgagee against prior incumbrancer—Act VIII of 1859, s. 2.*—A second incumbrancer, can maintain a suit to redeem a prior mortgage (Agra F. B., 7, F.). It is competent to a mortgagor to execute a second mortgage to redeem a prior one, and there is nothing to prevent the second mortgagee from enforcing his mortgage, as long as his doing so is not in defeasance of the rights of the first mortgage. A former suit, which had been instituted by the mortgagors against the first mortgagee, and in which the second mortgagees were not parties, is no bar to a subsequent suit for redemption by the second mortgagees against the prior incumbrancers. *SHEOPAL v. DEEN DYAL*, 5 N.W.P. 145.

(520)—*Usufructuary mortgage—Time for redemption fixed in instrument—Effect.*—K executed an usufructuary mortgage of certain land

*Mortgage—continued.***—9.—Redemption—continued.**

for a term of 22 years to D, for the consideration stated in a written instrument of mortgage dated 21st January 1863. The deed of mortgage contained a stipulation that possession should be given to K upon his paying the principal and interest due to D within two months from the date of the execution. Held that K was entitled to redeem although the amount of principal and interest had not been paid or tendered within two months. *B. DORAPPA v. K. MALLIKARJUNUDU*, 3 M.H.C. 363. [R., 2 M. 314, 16 M. 486, 11 C.P.L.R. 103.]

(521)—*Stipulation as to mortgage becoming sale on failure to pay in time—Redemption.*—A mortgagor stipulated by an instrument in writing that, if he failed to repay the sum lent on mortgage within three years, the property mortgaged was to be held on absolute sale. Held that the mortgagor was entitled to redeem although the amount lent had not been repaid within the three years. *NALLANA GAUNDAN v. PALANI GAUNDAN*, 2 M.H.C. 420. [F., 3 B.H.C. 11; R., 3 M.H.C. 363, 7 M.H.C. 6, 9 B.H.C. 69, 7 M.H.C. 395, 3 M. 26, 4 M. 179, L.B.R. 1872—1892, 549, 1 M. 1, P.C.]

(522)—*Conditional sale clause in mortgage deed, effect of, on mortgage.*—In 1884, the plaintiffs sued to redeem a mortgage made by their father in 1854, stipulating that the mortgaged land was to be considered as sold if the mortgage money was not paid within five years. The mortgagee had brought a suit in 1866, to recover certain sums due by the plaintiff's father on the above and certain other mortgages and account was taken therein on the basis that the land had become the mortgagee's property and decree passed for the balance due on the other mortgages. The lower Courts held that the present claim for redemption was too stale for admission, the conditional sale having been made prior to 1864, but the High Court decided that the rule in *Ramji v. Chinto* was in force in the Presidency of Bombay with regard to mortgages containing clauses of conditional sale, whether executed before or after 1864. The lower Courts were also wrong in having held that the mortgage had merged in the decree passed against the mortgagor in the suit of 1866. That suit had been brought to recover a different mortgage-debt and the question of the subsistence of the present mortgage, though mentioned therein, was not directly and substantially in issue at that time. Nor could it be contended that the plaintiffs were prevented from redeeming the property merely because, up to 1866 the understanding of the parties was that the mortgage had been converted into a sale and that the property had passed to the defendants by purchase. Mere admissions of such an understanding, even when made in depositions and pleadings, have been held not to operate as estoppel or prevent

Mortgage—continued.**—9.—Redemption—continued.**

the mortgagor from redeeming his property. **ABDUL RAHIM v. MADHAVRAV APAJI, 14 B. 78.** [Appr., 27 B. 297=9 Bom. L.R. 140]

(523)—*Transfer of Property Act (IV of 1882), s. 93—Foreclosing of redemption.*—The effect of non-payment under a former decree, and consequent dismissal of the suit, has not the effect of foreclosing the mortgagor for all time from redeeming the property. **MUHAMMAD SAMI-UD-DIN KHAN v. MANNU LAL, 11 A. 386 = A.W.N. 1889, 136.** (N.W.P. 1871, 52, D.; 4 A. 481, R.) [R., 21 A. 251, 24 A. 44, F.B.=21 A.W.N. 194, U.B.R. 1897—1901, Vol. II, 582.]

(524)—*Usufructuary mortgage followed by sale—Revival of mortgage by cancelment of sale—Attachment in execution of decree—Claim to attached property—Effect of order under s. 246, Civ.Pro. Code, 1859—Annual payments due from the mortgagee—Mortgagor's claim for deduction.*—When a sale, made to a mortgagee in possession, is cancelled, the mortgage is revived, and the possession of the property becomes one under the mortgage. Where, in such a case, after the cancelment of the sale at the suit of his sons, the vendor, a Hindu father, sued the mortgagee for possession of the property on the ground of such cancelment, and his suit was dismissed, on the ground that he could not be allowed to retain the purchase-money and eject the mortgagee-purchaser, and that he was also estopped from setting up the invalidity of his own sale; and the property, which thus continued to be in possession of the mortgagee, was attached in execution of a decree, held by a third party, against the mortgagor and his sons; and the mortgagee objected on the ground that the judgment-debtors had no saleable interest in it, and his objections were overruled under s. 246 of the Civ. Pro. Code, and the property was sold to the decree-holder; held, in a suit by the decree-holder as purchaser of the equity, for redemption of the mortgage, that he was entitled to such relief, and that the mortgagee, not having prosecuted, by means of a suit, his disallowed claim, could not urge, in this suit, the plea of *res judicata*, or his claim for a lien for his purchase-money, or any other plea to the effect that he was anything more than a mortgagee. Where the mortgagee has undertaken to make certain annual payments to the mortgagor, the latter or the purchaser of the equity of redemption is entitled to a deduction, from the amount due to the mortgagee, of such annual payments not made by him. **BASANT RAI v. KANAUI LAL, 2 A. 455 = 4 Ind. Jur. 583.**

(525)—*Purchase by mortgagee of subordinate tenures in respect of mortgaged property—Effect of sale of equity of redemption—Acquisition by mortgagor and mortgagee.*—Where the usufructuary mortgagee of a zemindari purchased with his own funds certain subordinate birt tenures, that had existed in respect of it, and merged them in the taluk instead of keeping them alive as distinct sub-tenures, the mortgagor was held entitled to redeem, in the pecu-

Mortgage—continued.**—9.—Redemption—continued.**

liar circumstances of the case, the subordinate tenures also, on payment to the mortgagee of the mortgage-amount, plus the sums expended by him in purchasing the sub-tenures. [R., 1 C.W.N. 174, 14 C.P.L.R. 169, 33 C. 1212, 8 O.C. 121, 11 O.C. 183, 12 O.C. 97, 3 S.L.R. 17.] The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee, exercising the power, a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent encumbrancers, and ultimately for the mortgagor. The estate, if purchased by a stranger, passes into his hands free from all the encumbrances. [F., 18 B. 684, 24 M. 96, 5 C.L.J. 95=11 C.W.N. 284; R., 10 B. 49, 27 M. 428=12 M.L.J. 390, 7 O.C. 307, 33 C. 92=9 C.W.N. 989, 33 C. 915=3 C.L.J. 629=10 C.W.N. 747, 3 S.L.R. 17.] *Semle*—Generally, most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of the security; and similarly, any acquisitions by the mortgagee are accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption. [R., 25 A. 46=22 A.W.N. 176.] *Semle*—Every purchase by a mortgagee, of a sub-tenure existing at the date of the mortgage, cannot be taken to have been made for the benefit of the mortgagor so as to enhance the value of mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption on equitable terms. **RAJA KISHEN DATT RAM v. RAJA MUMTAZ ALIKHAN, 5 C. 198 = 5 C.L.R. 213=6 I.A. 145, P.C.=4 Sar. 17.** [R., 5 C.P.L.R. 105.]

(526)—*Mortgagor and mortgagee—Stipulation in mortgage-deed to sell premises to mortgagee, not binding on mortgagor.*—It is the policy of the law that the right of redemption in a mortgagor shall not be fettered or clogged in any manner or to any extent by an agreement between mortgagor and mortgagee, saving such transactions between the parties as would operate as an extinguishment of the right. Consequently, a clause in a mortgage-deed providing that the mortgagor should sell the mortgaged property to the mortgagee, in default of payment of the mortgage money on the due date, is not binding on the mortgagor, the effect of such a stipulation being practically to deprive the mortgagor of his right to redeem after the expiry of the term. **KANARAN v. KUTTOOLY, 21 M. 110=8 M.L.J. 62.** [R., 24 M. 449, 154 P.L.R. 1901=39 P.R. 1907=119 P.L.R. 1907, 127 P.L.R. 1908=54 P.W.R. 1908.]

(527)—*Transfer of Property Act (IV of 1882), ss. 60, 99—Persons holding mortgage decree, effect of purchase of equity of redemption by, at sale in execution of third party's decree.*—When a mortgagee buys the equity of redemption at a Court auction in execution of a personal decree for money obtained by a third person against the mortgagor, even though there be no fraud or collusion between him and the

*Mortgage—continued.**—9.—Redemption—continued.*

third party, the mortgagee cannot by reason of such purchase, be regarded as having freed himself from his liability to be redeemed. In such a case as well as in the case when the personal decree in execution of which he purchases is a decree obtained by himself, he must be equally looked upon as availing himself of his position as mortgagee to obtain an undue advantage over the mortgagor or otherwise to be acting *mala fide* in the eye of the law (whether there be actual fraud or collusion or not), and in contravention of the principle underlying s. 99 of the Transfer of Property Act. *ERUSAPPA MUDALIAR v. COMMERCIAL AND LAND MORTGAGE BANK LIMITED*, 23 M. 377 = 10 M.L.J. 91. (22 B. 624, 22 M. 347, R.). [Diss., 12 M.L.J. 390, 3 S.L.R. 17; Not F., 27 M. 428; Disappr., 24 M. 96; R., 7 O.C. 307, 8 O.C. 327, 30 M. 313 = 2 M.L.T. 181 = 17 M.L.T. 163, 35 C. 61 = 11 C.W.N. 1011 = 6 C.L.J. 320.]

(528)—*Transfer of Property Act, s. 99—Mortgage of annuity—Sale of mortgaged property by mortgagee in execution of money-decree—Validity.*—A Hindu father had mortgaged an annuity belonging to the family. In execution of a money-decree, the mortgagee attached, brought to sale and himself purchased the annuity. The judgment-debtor's son, who was born after the decree and before the sale, sued to set aside the sale or to have it declared that the sale did not affect his share in the annuity. *Held*, that although a sale in contravention of s. 99 of the Transfer of Property Act is not absolutely void for all purposes, it is void against all persons who are not parties to the suit in which the decree for money was obtained. In the present case, the sale did not affect the share of the plaintiff in the annuity, and the plaintiff was entitled to a decree for the redemption of his share. *MUTHURAMAN CHETTY v. ETTAPPASAMI*, 22 M. 372 = 9 M.L.J. 113. [F., 2 P.R. 1907 = 157 P.L.R. 1906; D., 29 M. 421 = 15 M. L.J. 445.]

(529)—*Transfer of Property Act (IV of 1882), ss. 91, 95—Decree in previous suit by mortgagor—Purchaser of equity of redemption, whether can sue to redeem subsequently.*—Where a mortgagor obtained a decree declaring the amount due under the mortgage and ordering that on payment by him of the sum found due on taking accounts, the mortgagee should give up possession and the present plaintiff, as purchaser of seven-eighths of the equity of redemption subsequently brought the present suit to redeem on payment of the mortgage-money, on the contention that the previous decree obtained by the mortgagor precluded this suit, it was *held* that such decree did not of itself operate to foreclose the right of redemption or alter the previously existing relation of mortgagor and mortgagee so as to preclude a second suit praying for redemption on payment of such sum as may then be found due, and it was therefore competent to the

*Mortgage—continued.**—9.—Redemption—continued.*

plaintiff to sue to redeem the entire mortgage on impleading as defendant the owner of the one-eighth portion of the equity of redemption not purchased by him. *NAINAPPA CHETTY v. CHIDAMBARAM CHETTI*, 21 M. 18. [Overruled, 25 M. 300, F.B.; R., 24 A. 44 = 21 A.W. N. 194, F.B., 100 P.R., 1905 = 16 P.L.R. 1906, 93 P.R. 1908 = 164 P.L.R. 1908 = 123 P.W.R. 1908; D., 21 A. 251.]

(530)—*Prior and puisne mortgagees—Prior mortgagee purchasing property in execution of his own mortgage decree—Puisne mortgagee entitled to be redeemed—Registration Act (III of 1877), s. 50.*—An unregistered mortgage was executed in 1895 in favour of C. In 1902, another mortgage was executed over the same property in favour of R. The second mortgage was a registered one and the mortgagee had no notice of the first. The second mortgagee had, therefore, a priority over the first. The second mortgagee brought a suit for sale of the property, without making the first mortgagee a party to it, and bought the property himself. In the sale proclamation, the mortgage of C was notified. Subsequently the puisne (i.e., 1st), mortgagee, Charni, brought a suit for sale of the property: *Held*, that, as subsequent mortgagee, he could bring the equity of redemption to sale, subject to the rights of the prior mortgagee. (29 A. 385, R.) A prior mortgagee, by making a purchase at a sale in execution of his own decree to which the puisne mortgagee is no party, becomes possessed of the equity of redemption belonging to his mortgagor, subject to the rights of the puisne mortgagee. (10 A. 520, R.) The prior mortgagee by making such purchase stands in the shoes of the mortgagor, and can redeem the puisne mortgagee. *CHARNI v. RAJ BAHADUR*, 2 Ind. Cas. 495. (22 C. 33, 28 B. 153, R.)

(531)—*Mortgage with possession—Second mortgage under an unregistered deed—Delivery of property—Stipulation postponing redemption till payment of the additional advance, not binding on purchaser—Registration Act, s. 49—Transfer of Property Act, s. 59, cl. (2).*—Property subject to a possessory mortgage was again mortgaged by an unregistered deed to secure a fresh advance. The second mortgage provided that the property should not be redeemed except upon payment of the additional advance. *Held*, that, there being nothing in the transaction which could be regarded as delivery of the property, the deed should have been registered. *Held* further, that a purchaser of the property subject to the mortgage was not bound by the stipulation postponing redemption till payment of the additional advance. *Held*, also, that the stipulation could not be enforced because the subsequent deed being inadmissible in evidence under s. 49 of the Registration Act could not be used to fetter the equity of redemption. *SADA SHEO v. MAHABIR PRASAD*, 11 O.C. 248. (4 A. 85, 9 B. 233, 18 M. 368, 12 B. 231, R.)

Mortgage—continued.**—9.—Redemption—continued.**

(532)—*Mortgage in consideration of prior mortgages—Non-registration—Decree to redeem prior mortgages.*—In a suit for redemption, it was found that the mortgage-deed, which was executed in consideration of two prior mortgages, was not registered and so could not be proved. The plaintiff was held to be entitled to redeem the two previous mortgages, if they were found to be genuine and valid. **ARUMUGAM PILLAI v. PERIASAMI, 19 M. 160. (18 M. 462, R.)**

(533)—*Punjab Civil Code, s. 17, para 2—One of several joint mortgagors, right of, to redeem his own share only of the mortgaged property.*—According to the law and the rulings prevailing in the Regulation Provinces, one or more of several common mortgagors can come forward and redeem the whole property mortgaged and hold the shares of his co-sharers as well as his own, till they recoup him for their shares; but, the mortgage debt being indivisible, the mortgagee is entitled to say to each of the joint-mortgagors that he shall not redeem a part of the property on payment of a proportionate part of the debt, because the whole and every part of the land is mortgaged for the whole debt. Para 12, s. 17, of the Punjab Civil Code, however lays down a different rule, and grants one of several joint-mortgagors the right to redeem only his own share. **RULLIA RAM v. ENAYAT SHAH, 95 P. R. 1869. [R., 31 P.R. 1870]**

(534)—*Mortgage of land—Improvement by mortgagee without mortgagor's consent—Suit for redemption—Compensation.*—It would be very inequitable to allow a mortgagee so to improve the property mortgaged to him that the owner is unable to pay for the improvements and so unable to re-occupy his land by redeeming the mortgage. A mortgagee built a house in the land mortgaged to him, without any objection from, but also without the consent of the mortgagor. *Held* that the mortgagor could redeem the property, but that he must also pay the mortgagee a fair and reasonable sum for the house he permitted him to build, or to the building of which he made no objection at the proper time. **GANSHAM v. BUDHA, 119 P. R. 1876.**

(535)—*Part-sharer of mortgagor's interests, suit for redemption by—Maintainability.*—A part sharer in the inheritance left by a mortgagor cannot sue to redeem his share of the property under the mortgage. *Obiter.*—The dismissal of a suit for redemption of part of a mortgage would not bar a suit for redemption of the whole. **MAHMUD KHAN v. BHAI BALKISHEN, 76 P. R. 1878.**

(536)—*Suit for redemption—Compensation for improvements made by mortgagee—Compensation in excess of Tahsildar's powers—Suit to be dismissed with leave to bring fresh suit in proper Court.*—In this suit for redemption, defendant pleaded that, having obtained the land in mortgage he had since effected improvements at

Mortgage—continued.**—9.—Redemption—continued.**

large expense. The Tahsildar refused to consider defendant's plea regarding improvements and gave plaintiffs a decree for redemption and possession. *Held*, that the question of compensation raised should have been made an issue in the case, but that the suit itself was beyond the jurisdiction of the Tahsildar's Court as the amount of compensation claimed was beyond his powers. The Tahsildar ought to have dismissed the suit leaving plaintiff to bring a suit in the proper Court. **BUDHA v. MUHAMMAD KHAN, 20 P.R. 1879. [R., 82 P.R. 1888, 1 P.R. 1887; D., 63 P.R. 1887.]**

(537)—*Mortgage—Redemption—Acknowledgment by one of several mortgagees, effect of—Limitation Acts XIV of 1859, IX of 1871, and XV of 1877.*—A right to sue barred under the earlier Limitation Act XIV of 1859 is not revived by the later Act IX of 1871 which came into operation on 1st April, 1873. A mortgage which had been executed 69 years before date of suit, 5th February 1878, was acknowledged in 1857 by one of the mortgagees. A suit for redemption having been instituted, the question was whether that acknowledgment saved the right to redeem, and this depended on whether the suit was governed by the new law, or by the former law as enacted in Act IX of 1871, or Act XIV of 1859. *Held* that, if the period prescribed by the old law had expired when Act XV of 1877 was passed, the old law was still applicable though the suit was instituted subsequent to the 1st October 1877, and that, as under Act IX of 1871 as well as under Act XIV of 1859, an acknowledgment only served to revive the mortgagor's right of redemption when it has been made in writing by the mortgagee or some person claiming under him, the alleged acknowledgment not having been signed by the mortgagees in person or by those claiming under them, the suit was barred 9 years before suit and the claim was extinct when Act XV of 1877 was passed. **HAKIM DEVI DYAL v. PRAB DYAL, 85 P. R. 1880. [Appr., 157 P.R. 1888; Appl., 39 P.R. 1901=53 P.L.R. 1901; R., 62 P.R. 1900.]**

(538)—*Mortgage and sale of land belonging to minor—Suit for redemption by minor after attaining majority—Burden of proof.*—Land which had descended to a minor from his deceased father was first mortgaged to defendant and then sold to him outright by the minor's mother and grandmother who professed to act as his guardians during his minority. *Held*, in a suit by him to redeem the land, that the burden of proof lay upon the purchaser to show that he had acquired a valid title as against the minor by the purchase from persons affecting to act as guardians. **BURA v. AMIR BUKSH, 117 P.R. 1880.**

(539)—*Mortgage for fixed period of 150 years—Right of the representative of mortgagor to redeem before the expiry of the term—Clog on the equity of redemption.*—In a suit for redemption in which the deed of mortgage contained

Mortgage—continued.**—9.—Redemption—continued.**

the words "*tarikhi imroza se miadi 150 sal rahn kardi*" and, "*bad inqiza miad mukarra jub zar-i-rahm 16,00 ada kiua to fak karakar kabiz wa dakhil loonga*"; *Held*, that the fixation of the period was of the essence of the contract and the right to redeem did not mature before the expiry of the term fixed in the deed. **ABDULLA v. SAADULLA KHAN**, 227 P.L.R. 1912=13 P.W.R. 1912, N.W. (F.B.), =15 Ind. Cas. 917.

(540)—*Mortgage—Redemption—Value for purposes of appeal—Interest two per cent. compound—Zamindar and money-lender—Undue influence—Mortgagee not taking possession at once—Punjab Courts Act (XVIII of 1884) as amended by the Punjab Act (I of 1912), s. 40 (b).*—For the purposes of s. 40 (b) of the Punjab Courts Act (XVIII of 1884) as amended, the value of a suit for redemption is the sum found by the first Court to be payable to the mortgagee, and the fact that the lower appellate Court has reduced that sum is immaterial. (23 P.R. 1909=37 P.W.R. 1909, F.) In the absence of any previous dealings between a Zamindar and a money lender, no question of undue influence can arise. Consequently two per cent. compound interest payable under the terms of a mortgage-deed of landed property cannot be reduced on the ground of the former being under the undue influence of the latter. Where mesne profits after payment of revenue are to go towards compound interest, and the mortgagor fails to give possession, the mortgagee is entitled to his full compound interest as agreed. But where the mortgagee neglects to execute the decree for possession, he should get only simple interest at the agreed rate. In this case Rs. 241 were added to a principal of Rs. 100 in about 13 years. **BIRJ RAJ v. TIRKHA**, 100 P.W.R. 1912=130 P.L.R. 1912=16 Ind. Cas. 119. (23 P. R. 1909=37 P.W.R. 1909, F.)

(541)—*Court fee—Redemption suit—Decree on payment of a certain sum—Appeal for setting aside whole decree—Stamp-duty payable—Jurisdiction—Forum of appeal—Divisional Court—Decree for redemption on payment of a sum below five thousand—Appellate decree on payment of a sum exceeding five thousand—Jurisdiction of Civil or Revenue Court—Mortgagee effecting improvements under tenancy before mortgage—Plea raised by mortgagee for compensation in redemption suit—Decree.—Held*, that, where, in an appeal against a decree for redemption on payment of a certain sum, the whole decree is sought to be set aside, the memorandum of appeal should bear *ad valorem* Court-fee on the amount, on payment of which redemption is decreed. (44 P.R. 1888, 5 P.R. 1911=9 Ind. Cas. 676=59 P.W.R. 1911, F.) A suit for redemption was filed in the Court of a Subordinate Judge, having civil jurisdiction without pecuniary limits. The plaintiff prayed for redemption on payment of Rs. 400. The Subordinate Judge gave a decree for redemption on payment of Rs. 3,770. From this decree, both sides appealed to the Divisional Court, which decreed

Mortgage—continued.**—9.—Redemption—continued.**

redemption on payment of Rs. 14,000. *Held*, further, that the Divisional Judge had jurisdiction to entertain the appeal when first presented and to pass a decree for redemption on payment of a sum exceeding five thousand rupees. (106 P.R. 1895, F.; 16 P.R. 1908=13 P.W.R. 1907, D.) A mortgaged certain land to B. B was already in possession of the land as a tenant and had made considerable improvements during the period of his tenancy. When A sued for redemption, B pleaded that he could not be ousted before he was awarded compensation for the improvements effected during the term of his tenancy. There was no clause in the mortgage-deed providing for payment of compensation to the mortgagee in the form of value of the improvements before redemption. *Held*, that the Civil Court had no jurisdiction to entertain the plea of B as regards his rights in respect of the improvements effected under the conditions of B's tenancy. The mortgagor was entitled to redeem what was mortgaged and to be put in the same position as regards the mortgagee *qua* the mortgage as he was at the time when he had entered into the mortgage. If the mortgagee had any rights under the conditions of his tenancy and could claim to retain possession as a tenant until paid full compensation for the trees, he could plead that, when the mortgagor sought possession through the agency of the Revenue Courts, or, if he had any claim which he could affirmatively urge before a Revenue Court, he could sue in the Revenue Court. **DYAL SINGH v. RAM RAKHA**, 122 P.W.R. 1912=54 P.R. 1912=14 Ind. Cas. 78. (76 P.R. 1909=11 P.W.R. 1909=3 Ind. Cas. 498, R.; 93 P.R. 1886, 169 P.R. 1888, 91 P.R. 1889, 63 P.R. 189, 40 P.R. 1892, 101 P.R. 1900, 58 P.R. 1902, 24 P.R. 1906, 46 P.R. 1906=94 P.L.R. 1906, 19 P.R. 1908 (F.B.)=38 P.W.R. 1908, 69 P.R. 1908=125 P.W.R. 1908, 23 C. 536, 38 A. 639=12 Ind. Cas. 464, D.)

(542)—*Transfer of Property Act, s. 76 (i)—Person entitled to a share in equity of redemption—Right to such share in dispute—Claim of apportionment of the mortgage amount to the extent of his share—Tender of his share of mortgage amount—Refusal by mortgagee—Latter not bound to pay mesne profits under s. 76 (i)—Right under s. 76 (i) when can be claimed.*—Where the plaintiff claiming to be entitled to four-fifths share in the property sought to be redeemed tendered four-fifths of the mortgage amount to the mortgagee, which the latter refused to accept on the ground that the plaintiff was not entitled to demand apportionment of the mortgage amount in respect of his share and to ask for partition and redemption in the same suit, and where there was dispute as to the share to which the plaintiff was entitled. *Held*, that under the circumstances, the plaintiff was not entitled to claim mesne profits in respect of his share from the date of tender up to the date when he was put into possession of his share. The provisions of the Transfer of Property Act do not in terms refer to a case where

Mortgage—continued.**—9.—Redemption—continued.**

the mortgagor claims to split up the mortgage in consequence of the mortgagee having become the owner of the equity of redemption, or to a case where there are disputes between the parties as to the subsisting interest of the mortgagor in the equity of redemption, so as to compel the mortgagee to take upon himself the task of deciding such disputes rightly for himself at the risk of losing interest on money due to him and becoming accountable for mesne profits. (5 E. and B. 639, R.) A statutory right of the character mentioned in s. 76 (i) of the Transfer of Property Act should not be extended where there are disputes between the parties of the kind that existed in this case, so as to throw an undue amount of responsibility on the mortgagee. **VENKATARAMA IYER v. RANGASAWMI AIYANGAR**, 23 M.L.J. 588 = M.W.N. 1912, 1175.

(543)—*Redemption suit—Limitation—Mortgagee alleging transaction to be sale—Mortgagor contending fraud and asserting mortgage—Donees from mortgagee—Limitation Act (IX of 1908), sch. I, arts. 91, 134, 142, 148—Evidence Act (I of 1872), s. 92.*—A suit for redemption against donees from the mortgagee is not governed by art. 134 of the Limitation Act, as this article does not apply to persons who are not transferees for valuable consideration. In a suit for redemption of mortgage, the mortgagee pleaded that the property had been sold to him by a registered sale-deed and not mortgaged. The contention on behalf of the plaintiff was that, though the deed was executed by him, it was a fraudulent one, inasmuch as he had been induced to sign it by a false representation that it was a mortgage deed. *Held*, that the suit was governed by art. 148 of the Limitation Act and that the plaintiff was entitled to prove the fraud and the fact that the transaction was a mortgage. *Held*, further, that art. 91 or art. 142 of the Limitation Act was inapplicable to the case. **NGA PAW v. NGA LU GALE**, 13 Ind. Cas. 376.

(544)—*Contract—Unconscionable bargain—Mortgage fixing 58 years for redemption.*—*Held*, that a covenant in a mortgage-deed fixing 58 years for the mortgagor to redeem the mortgaged property was not, in the absence of fraud or duress, hard and unconscionable. **RAM PRASAD v. JAGRUP**, 10 A.L.J. 157 = 15 Ind. Cas. 880.

(545)—*Redemption before expiry of term of mortgage.*—The property in dispute was mortgaged to defendants by way of conditional sale for Rs. 599-15-0 for ten years, but all but Rs. 50-15-0 were left with mortgagees for payment to prior incumbrancers. The mortgagee did not pay up the prior incumbrancers, and the plaintiffs, the vendees from mortgagors, sued for redemption of the mortgage before the expiry of ten years. *Held* that, on equitable grounds, the defendants not having performed what was a most reasonable part of the contract, the plaintiffs should be allowed to redeem

Mortgage—continued.**—9.—Redemption—continued.**

before the expiry of the ten years stipulated for. **CHHATKU RAI v. BALDEO SHUKUL**, 10 A.L.J. 330 = 34 A. 659.

(546)—*Prior suit for foreclosure against father, a minor—Son not made party—Notice under s. 8, Reg. XVII of 1806 served on guardian of the father—Minor son—Representation of latter by father's guardian—Sufficiency—Subsequent suit for redemption by son—Maintainability—Hindu Law—Managing member, a minor—Guardian of—Power to represent other minor members of the family.*—A brought a suit for redemption against B and others on the ground that he was not a party to a former foreclosure suit brought against his father N and others, although the mortgagees of whom the present defendants, viz., B and others, are the legal representatives, were fully aware of the fact of A's existence and his interest in the family property. In the prior suit which was governed by Regulation XVII of 1806, the notice required by s. 8 of that Regulation was served upon the plaintiff's father, who was then a minor, through his mother, M, who acted as guardian. *Held* that A's suit for redemption must fail and that his interests in the former suit were sufficiently represented by his grandmother M. If the person who would naturally be the manager of the family is incapacitated by minority from acting as manager, and the other members are incapacitated by still greater minority the person who is the guardian of the minor who would naturally be the manager takes the place of that manager as regards the other minors and fully represents them. **BAJI RAO v. GULABSINGH**, N. L.R. 136. (2 C.P.L.R. 221, R.)

(547)—*Suit by prior mortgagee for redemption—Puisne mortgagee not impleaded therein—Subsequent suit by puisne mortgagee for redemption—Amount payable by latter.*—The puisne mortgagee cannot treat the prior mortgagee as a mortgagee for one purpose and as a decree-holder for another. So where a prior mortgagee obtained a decree for sale in a suit on the prior mortgage, without impleading the puisne mortgagee, and the puisne mortgagee subsequently seeks to redeem the prior mortgage, he must pay the prior mortgagee interest at the mortgage-rate and not at the decree rate. **PON-NAMBALA CHETTI v. MUTHUSAMI PILLAI**, 23 M.L.J. 284 = M.W.N. 1912, 1119. (18 C. 164, 31 M. 258, F.; 39 C. 527, P.C., Cons.).

(548)—*Redemption suit—Oral sale—Consideration—Adverse possession—Prescriptive title—Sale or exchange—Registered document—Indispensability.*—Where, in a suit for redemption of one of two items of mortgaged property, it is alleged in defence that an oral arrangement had extinguished the mortgage, by the plaintiffs obtaining full ownership, free from mortgage, of the other item and that the transaction is one not covered by the Transfer of Property Act. *Held per Miller, J.*—The transaction amounts to a transfer of ownership in immoveable property. It is to be deemed in exchange

Mortgage—continued.**—9.—Redemption—continued.**

if not a sale. A registered instrument is necessary to evidence it. It is not a compromise amounting merely to acknowledgment or adjustment of existing rights. Suit not barred by limitation. *Sadasiva Iyer, J.*—The Transfer of Property Act exhaustively deals with all known kinds of transfer of immoveable property. Conveyances are either sale, exchange or gift. They require registered instruments to evidence them. Price paid means not only money but includes cases of vendor's claim for price being satisfied by his acceptance of what is tantamount to payment. In cases of compromise where only existing rights are recognised, registered writing is unnecessary. Title by prescription cannot arise by mere assertion of possession as owner under an invalid sale. Art. 144 of the Limitation Act cannot be invoked in favour of the mortgagee if the mortgagor is not barred by art. 148 from redeeming. S. 92 of the Evidence Act does not preclude oral evidence of payment in extinguishment of mortgage rights, but not for proving an invalid oral conveyance of the equity of redemption by virtue of such payment. *ARIYAPUTHIRA PADAYACHI v. MUTHUKUMARASAMY PADAYACHI, M.W.N. 1912, 854=23 M.L.J. 339=15 Ind. Cas. 343=12 M.L.T. 425. (13 M.L.J. 500, Not F.)*

(549)—*Practice — Redemption-decree under appeal by mortgagee — Deposit of decretal amount by mortgagor—Duty of mortgagee to withdraw under protest—Responsibility of mortgagee for loss of right in deposit by lapse of time although amount of decree increased by Appellate Court—Ex parte judgment, slip in order founded on, responsibility.*—In a suit for redemption, the Court of the Judicial Commissioner in India passed a decree entitling the mortgagees to recover a certain sum on account of principal and interest, from which decree the mortgagees appealed to the Privy Council who increased the amount. Pending the appeal the mortgagors had deposited the amount of the decree of the Judicial Commissioner which however the mortgagees did not withdraw, as they might have done without prejudice to their pending appeal either by arrangement or with the sanction of the Court in India or the sanction of the Board which would have been given as a matter of course. *Held*, that, if the amount deposited has lapsed to Government under the Rules owing to the same not having been withdrawn in time, the mortgagees must give credit for the amount. A person who obtains an *ex parte* judgment is responsible for any slip in the order founded on the judgment. *CHAMPAT SINGH v. JANGU SINGH, 16 C.W.N. 793, P. C.=12 M. L. T. 482=M.W.N. 1912, 1150=10 A.L.J. 379=23 M.L.J. 738=14 Bom. L. R. 1223=17 C.L.J. 1=16 Ind. Cas. 830.*

(550)—*Mortgage—Deshgat Inam lands—Forfeiture of the Inam by Government—Mortgagee in possession paying assessment to Government—Suit by mortgagors to redeem—Effect of forfeiture—Conversion of service tenure into one*

Mortgage—continued.**—9.—Redemption—continued.**

liable to pay assessment—Mortgagee cannot deny mortgagor's title to redeem.—The plaintiffs' ancestor executed in 1855 a usufructuary mortgage of certain lands which were their Deshbat Inam, to the defendant's ancestor. In 1856, the Inam lands were made Khalsa and the order was communicated to the mortgagee who was in possession. The mortgagee, however, after the forfeiture, continued in possession and went on paying assessment in respect of the lands to Government. In 1901, the plaintiffs sued to redeem the mortgage. The defendant resisted the claim on the ground that the order of forfeiture deprived the plaintiffs of all right to the lands and that the title thereafter became vested in the defendant by reason of the fact that he was allowed by Government to continue in possession and pay the assessment:—*Held*, (1) that the order of forfeiture had not the legal effect of depriving the plaintiffs, who were the Desais, of all right and title to the lands; and that the resumption had merely the effect of converting the land from a service tenure into land liable to pay assessment to Government; (1 B.H.C. 22, 9 B. 419; *F.*); (2) that the defendant who came into possession of the property as mortgagee of the plaintiffs could not turn round after the order of forfeiture and take the benefit of it and challenge the validity of the mortgage, in virtue of which his title to the land as mortgagee had begun. *GURBASAPPA v. RANGO, 14 Bom. L. R. 563=16 Ind. Cas. 348.*

(551)—*Suit for redemption by mortgagor—Further advances taken by other co-owners of the mortgaged property, without mortgagor's consent—Right of mortgagor to redeem for his original amount borrowed—Pleadings—Burden of proof—Admission of defendant if relied upon should be taken as a whole.*—A sued B for redemption of a piece of land which he said had descended to him from an ancestor. He claimed to redeem it for Rs. 246. B admitted the mortgage, but alleged that the original mortgage-money was Rs. 270. He further alleged that further advances had been taken by various persons who were heirs of the mortgagor and that the total mortgage-money amounted to Rs. 820 which B had agreed to reduce to Rs. 770. The first Court dismissed the suit on the ground that A should have sued for partition. The lower Appellate Court held that this was wrong and remanded the case for a finding as to the amount of mortgage-money. The first Court placed the burden of proof upon B and held that he had not discharged it and, therefore, found that the amount was Rs. 246, the sum for which A claimed redemption. In second appeal it was contended that the burden of proving the amount of mortgage was wrongly placed on the defendant-appellant. *Held* (1) that, before B could be called upon to prove the amount of mortgage-money, A must prove something and that he had established nothing. (U. B. R. 1892—1896, Vol. II, 350, *D.*); (2) that the ordinary rule

Mortgage—continued.**—9.—Redemption—continued.**

must be applied and that, as A could not succeed without relying on B's admission, that admission must be taken as a whole and that it must be held that the original mortgage-money was Rs. 270; (3) that, as regards some of the further advances, as the person, to whom they were made, had no interest in the land at all, A was not bound by such advances; (4) that, as the other advances were made by documents which were unstamped and unregistered, and were not produced, they could not be proved, and that, therefore, they did not affect the land; (5) that, therefore, A was entitled to redeem the land for Rs. 270. If a mortgagee gives an advance to a person other than the mortgagor without the latter's consent, the mortgagor is nevertheless entitled to redeem the mortgaged property for the sum for which he mortgaged it, and the mortgagee then retains a charge on the interest of the person to whom he made the subsequent advance. **NGA SHWE PA V. MI YON, 14 Ind. Cas. 815.**

(552)—*Old mortgage—Subsequent agreement subjecting the right of redemption to certain conditions—Suit for redemption of mortgage in the absence of breach of compromise, maintainability of.*—This was a suit for redemption of a mortgage executed by the plaintiffs' ancestor in 1846 in favour of the predecessor in title of the defendants. There were certain proceedings *inter partes* during the first regular settlement in the course of which certain *razinamahs* were entered into between the parties under which the representatives of the mortgagor agreed to subject their right of redemption to certain conditions. The *razinamahs* were filed in the Settlement Court which passed a decree subject to the conditions set forth in the *razinamahs*. *Held*, that there was nothing in law to prevent the parties to a mortgage from coming to any arrangement afterwards qualifying the right to redeem. *Held, further*, that, as it was not alleged that there was any breach of the covenants contained in the deed of compromise, the suit for redemption was rightly dismissed. **SHANKER DIN V. MUNSHI GOKUL PRASAD, 15 O.C. 285.**

(553)—*Mortgagee's right to pre-empt sale of equity of redemption becoming time-barred—Suit for redemption—Pre-emption as a defence.*—In 1897, A mortgaged his estate to B, a co-sharer. Subsequently in 1906, A sold his equity of redemption to C. B allowed his rights to pre-empt the sale of 1906 to become time-barred. C then sued B for redemption of the mortgage: *Held*, that, under the circumstances, C was entitled to redeem the mortgage of 1897 and that B could not plead in defence that he had a right of pre-emption. **WAJID ALI V. SAFQAT HUSAIN, 16 Ind. Cas. 219.**

(554)—*Accounts—Mortgagee obstructing and prolonging litigation to keep property in possession—Interest, disallowance of, for period during which defendant prosecuted appeals to higher Courts unsuccessfully—Liability of defendants*

Mortgage—continued.**—9.—Redemption—continued.**

to account for rents and profits received during the period—Expenses of management, necessarily incurred—Costs of taking accounts and striking balance against redemption money—Costs of special leave application.—Where a suit for redemption of a mortgage in respect of property, of which the mortgagee took and kept possession from 11th February 1864, was commenced on 30th May, 1888, and a preliminary decree for accounts, &c., was passed by the Subordinate Judge on 29th June, 1889, and the decree, subject to certain modifications in favour of the plaintiffs, was affirmed by the High Court on 10th September, 1890, and the decree of the High Court was affirmed by the Privy Council on 27th July, 1895; and the plaintiffs having applied in the meanwhile for the taking of accounts in pursuance of the decree of the High Court, the same was taken and a final decree for redemption was passed by the Subordinate Judge on the 29th July, 1902, declaring that a sum of Rs. 3,31,162-0-11 was due, from the plaintiffs, to the defendant, at that date, and decreeing that, on payment into Court, within six months from that date, of the said sum with interest at 12 per cent. per annum, on the sum of Rs. 2,86,886 from the 29th July, 1902, to the date of payment into Court within such six months, the plaintiffs should have a reconveyance, free of incumbrances, of the property under mortgage, &c., and the plaintiffs appealed to the High Court and the defendants also filed cross objections, but both were dismissed by that Court, and upon appeal and cross-appeal by both parties to the Privy Council, the decree of the Subordinate Judge of 29th July, 1902, was maintained by the Board's judgment, dated the 13th June, 1912, but the Privy Council found that, in the action, the defendants had been obstructive and oppressive and they had unduly and intentionally prolonged the litigation to their own advantage and to the serious detriment of the plaintiffs: *Held* by the Privy Council, that no further sum as interest beyond the interest on the sum of Rs. 2,86,886 decreed by the Subordinate Judge for the period from 29th July, 1902, to the 28th January, 1903, should be allowed to the defendants in the accounts which the High Court was directed to take of the rents and profits which the defendants had received since 29th July, 1902, and it was ordered that the expenses of taking such account and all procedure incident thereto and to the striking of the balance upon payment of which redemption might be made, was to be borne by the defendants, that allowance should be made in taking the accounts for money, if any, necessarily spent by the defendants after the 29th July, 1902, in the proper management and preservation of the mortgaged property, but no interest should be allowed on the money so spent, but that simple interest should be allowed to the plaintiffs on the balance or excess of each year's receipts over expenditure at a rate to be fixed by the High Court, and that the sum of money found to be due to the

Mortgage—continued.

—9.—Redemption—continued

plaintiffs should be deducted by the High Court from the amount which would have been payable by the plaintiffs into Court on the 28th January, 1903, if payment had been made under the decree of the Subordinate Judge of 29th July, 1902, and that the plaintiffs should be allowed to redeem on payment by them into the High Court within a time to be fixed by that Court of the balance to be ascertained in the manner indicated. In the appeal and cross-appeal, the respective parties were directed to bear their own costs, except those in connection with the application for special leave to cross-appeal, which, in accordance with the order granting such leave, was to be paid by the cross-appellants. *GANGA BAHU DEBI v. APURBA KRISHNA ROY*, 17 C.W.N. 25, P.C.

(555)—*Mortgage—Suit by puisne mortgagee to redeem prior mortgage—Decree in prior mortgagee's suit reducing rate of interest—Puisne mortgagee not party to such suit—Whether he can claim benefit of interest.*—A puisne mortgagee suing to redeem prior mortgage is not entitled to get the benefit of a reduction in the contract rate of interest from the date of the prior mortgagee's decree obtained in a suit to which the former was not a party. *AWATMAL v. GOKALSINGH*, 6 S.L.R. 227. (31 M. 258, 18 C. 164, 11 C.W.N. 403, R.)

(556)—*Prior suit for redemption—Second suit—Res judicata—Bar—Time for redemption—Power of Appellate Court to fix.*—One redemption suit operates as *res judicata* to bar a second redemption suit (25 M. 300, 28 A. 1, P.C., 21 A. 251, 7 B. 377, 20 B. 467, R.). The fact that a redemption decree does not extinguish the equity of redemption, which subsists until an order for sale is made on an application by the mortgagee, does not prevent the remedy by way of a second redemption suit becoming barred by the operation of *res judicata* (25 M. 300, 28 A. 1, P.C., 21 A. 251, 7 B. 377, 20 B. 467, R.). If the period fixed for redemption had not been indicated by a date, but were expressed as a specified period of time, that time would have to be counted from the appellate decree, because the Appellate Court draws up the decree of the lower Court and gives it existence as if made on the day upon which it was thus adopted (11 B. 172, R.). The mere fact that the first Court fixed a date makes no difference to the principle, and the Appellate Court, when making its own decree, is at liberty to fix a fresh date for redemption with reference to the date of its own decree. *BIKHOMAL v. RAJALMAL*, 6 S.L.R. 140.

Suit for redemption of mortgage—Declaratory decree—Status of parties—Mortgagee acknowledging mortgagor's title to redeem—Limitation—See ACKNOWLEDGMENT, A.W.N. 1885, 194.

See BEN. ACT VI OF 1871, s. 20, A.W.N. 1887, 262.

See BOM. ACT III OF 1874, s. 10, 21 B. 55.

Mortgage—continued.

—9.—Redemption—continued.

Mortgagee let into possession under decree—Liability to account—Redemption—See BOM. ACT XVII OF 1879, s. 2, 13 Bom. L.R. 30.

See BOM. ACT XVII OF 1879, ss. 3 (z), 53, 73, Ch. II, 23 B. 321.

Mortgagor holding property under a rent note—Decree for arrears of rent due—Subsequent suit by mortgagor to redeem—Mortgagee found to have overpaid himself—Right of mortgagor—See BOM. ACT XVII OF 1879, s. 12, 12 Bom. L.R. 137=34 B. 260=5 Ind. Cas. 864.

See BOM. ACT XVII OF 1879, ss. 13 (b) and (d), 15, 19 B. 553.

See PUN. ACT XVIII OF 1884, s. 39, 63 P. R. 1891.

Redemption suit—Valuation—Cost of repairs—Additional lien—See PUN. ACT XVIII OF 1884, s. 40 (1), 197 P.L.R. 1908.

Conversion of, into a mortgage under s. 6 (1) (a) of Pun. Act XIII of 1900—See PUN. ACT XIII OF 1900, ss. 6, 9, 88 P.R. 1909=67 P.L.R. 1910=137 P.W.R. 1909=3 Ind. Cas. 619.

Usufructuary mortgage by occupancy tenant—Expiry of tenancy—Final adjudication that mortgage was binding on zemindar—Suit for redemption by zemindar—See U. P. ACT XII OF 1881, s. 8, A.W.N. 1887, 283.

Notice of attornment to tenants—Registration—Evidence—See ATTORNMENT, 19 B. 36.

Decree giving benamidar an opportunity to redeem—Benamidar failed to redeem—Beneficial owner could not maintain a separate suit to redeem—See BENAMI TRANSACTION—GENERAL, 4 A.L.J. 689=A.W.N. 1907, 272=30 A. 30.

See BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE, 122 P.R. 1882.

Suit for account and redemption of mortgage, whether maintainable by assignee of equity of redemption—Assignment of such equity, not bad as champertous—See CHAMPERTY, 14 B. 72.

Failure of suit for redemption—Second suit in ejectment—*Res judicata*—Redemption decree in ejectment suit—Practice—See CIV. PRO. CODE, 1908, s. 11, Expl. 4, 13 Bom. L.R. 895=35 B. 507.

Suit for possession of proprietary holding without mentioning shamilat—Mortgage created by decree—Execution of decree barred—Subsequent suit for possession of the same land by way of redemption—Adverse possession—Construction of decree—Bar to recovering shamilat—*Res judicata*—See CIV. PRO. CODE, 1908, s. 11, O. II, r. 2, 4 Ind. Cas. 410=30 P.W.R. 1909.

Applicability of s. 244, Civ. Pro. Code, 1882—See CIV. PRO. CODE, 1908, s. 47, 7 A.L.J. 264=5 Ind. Cas. 496=32 A. 321.

Mortgage—continued.**—9.—Redemption—continued.**

Purchaser under a decree of puisne mortgagee obtaining possession of mortgaged property—Subsequent purchase under decree on the first mortgage—Suit for possession or for redemption by subsequent purchaser—See CIV. PRO. CODE, 1908, s. 47, 1 S.L.R. 172.

See CIV. PRO. CODE, 1903, s. 47, 12 B.H.C. 163, 22 M. 372=9 M.L.J. 113.

See CIV. PRO. CODE, 1903, s. 50, O. XXI, rr. 22, 90, 21 B. 424, F.B.

See CIV. PRO. CODE, 1908, s. 115, A.W.N. 1882, 32.

Execution of appellate decree—Restitution—Mesne profits—See CIV. PRO. CODE, 1908, s. 144 (1), 4 Ind. Cas. 376=7 A.L.J. 1=32 A. 79.

See CIV. PRO. CODE, 1908, s. 144 (1), 9 O. C. 254.

Claim for possession—Transformation into one for redemption—See CIV. PRO. CODE, 1908, O. VI, r. 17, 167 P.W.R. 1911.

Suit for redemption dismissed for default—Fresh suit for the same barred—See CIV. PRO. CODE, 1908, O. IX, rr. 8, 9, 43 P.R. 1907=169 P.L.R. 1908.

See CIV. PRO. CODE, 1908, O. IX, r. 9, 10 B. 28.

Suit for redemption—Proceedings under Reg. XVII of 1806 or Act IV of 1882, necessary to extinguish title of mortgagor—Effect of expunging the name of mortgagor—Adverse possession by mortgagee—See CIV. PRO. CODE, 1908, O. XXI, rr. 23, 25, 9 Ind. Cas. 431.

See CIV. PRO. CODE, 1908, O. XXIII, r. 1, U.B.R. 1897—1901, Vol. II, 286.

Foreclosure decree—Extension of time for redemption—See CIV. PRO. CODE, 1908, O. XXXIV, rr. 2, 5, 9 Ind. Cas. 771.

Redemption, suit for—Court-fee, how to be computed—Court Fees Act, ss. 16 and 7, cl. (9)—See CIV. PRO. CODE, 1903, O. XLI, r. 22, 2 O.C. 87.

Compromise decree whereby one of the parties was to redeem a house under mortgage—Mortgagee not a party to the suit—Enforcement of redemption—See COMPROMISE—COMPROMISE OF SUITS IN CIV. PRO. CODE, 2 Ind. Cas. 430.

Decree for redemption—Deposit of mortgage-money within fixed time—Construction—Limitation—See COMPUTATION OF TIME, A.W.N. 1888, 80.

Mortgage—Collateral covenant not fettering right of redemption—Validity—See CONTRACT ACT, 1872, s. 16, 3 S.L.R. 130=4 Ind. Cas. 610.

Co-sharers, mortgage of entire property owned by—Suit for redemption brought by one co-sharer, necessary parties to—See CO-SHARERS, SUIT BY CO-SHARERS, 9 B. 128.

Mortgage—continued.**—9.—Redemption—continued.**

Refusal of costs to plaintiff—See COSTS—SPECIAL CASES, 13 C.P.L.R. 74.

See COSTS—SPECIAL CASES, 3 M.H.C. 279.

Foreclosure suit—Plaintiff ordered to discharge prior mortgage—Validity of mortgage challenged in appeal—*Ad valorem* fee—See COURT FEES ACT, 1870, ss. 5, 7, cl. 9, 6 A.L.J. 155=31 A. 265=1 Ind. Cas. 1000.

Redemption suit against mortgagee in possession—Arrears of rent to be deducted—Court-fee—See COURT FEES ACT, 1870, ss. 6, 7, (IX), 17, 19 M. 16.

Decree of redemption of mortgage conditional on payment of certain sum—Appeal by mortgagor—Court-fee on memo of appeal—See COURT FEES ACT, 1870, s. 7 (9), 13 A. 94=A. W.N. 1890, 231.

Suit for—Appeal as regards portion of amount decreed payable for—Valuation of appeal—Court-fee—See COURT FEES ACT, 1870, s. 7, cl. 9, 2 A.L.J. 105=A. W.N. 1905, 40=27 A. 447.

Suit for redemption—Deeds of further charge pleaded by mortgagee, but denied by plaintiff—Court-fee payable on appeal—See COURT FEES ACT, 1870, s. 7, cl. 9, 12 O.C. 130 (B)=2 Ind. Cas. 600.

Court-fee in a suit to redeem property subject to more than one deed of mortgage, how to be computed—See COURT FEES ACT, 1870, ss. 7 (9), 17, 7 O.C. 152.

Redemption decree—Appeal against Court-fee on appeal memo.—See COURT FEES ACT, 1870, s. 7, cl. 9 and sch. I, art. 1, 6 M.L.T. 245=20 M.L.J. 120=3 Ind. Cas. 459.

Redemption suit—Court-fee payable on appeal—See COURT FEES ACT, 1870, sch. I, art. 1, 46 P.L.R. 1911=5 P.R. 1911=59 P.W.R. 1911=9 Ind. Cas. 676.

See COURT FEES ACT, 1870, sch. II, art. 17, 7 N.W.P. 343.

Mortgage of ancestral land—Land yielding little profit—Sale of equity of redemption to pay off mortgage—See CUSTOMS—PUNJAB—ALIENATION, 47 P.L.R. 1912=31 P.W.R. 1912.

Suit—Sub-mortgagees impleaded as parties—Accounts between mortgagee and sub-mortgagee *inter se* to be taken—Form of judgment—Practice—See DECREE—DECREE, FORM OF, 15 B. 692.

Suit in ejectment—Court's power to pass decree for redemption—See DECREE—DECREE, FORM OF, 20 B. 196.

Decrees for—of mortgages in the Punjab—should be without any time limit for payment—See DECREE—DECREE, FORM OF, 100 P.R. 1905=16 P.L.R. 1906.

See DECREE—DECREE, FORM OF, 1 A. 524, 1 A. 344.

Mortgage—continued.**—9.—Redemption—continued.**

See EJECTMENT, SUIT FOR, 9 M. 208.

See ESTOPPEL—MISCELLANEOUS, 13 M. I.A. 585, 99 P.R. 1895.

Suit for redemption—Previous decree for foreclosure, evidence of—Secondary evidence—Evidence Act I of 1872, s. 63—See EVIDENCE—SECONDARY EVIDENCE, 7 B. 139.

Mortgage-deed — Counterpart executed by mortgagee—Registered copy of mortgage-deed—Secondary evidence — See EVIDENCE—SECONDARY EVIDENCE, 9 M.L.J. 300.

See EVIDENCE—SECONDARY EVIDENCE, 3 B.H.C. A.C. 160.

Redemption suit—Registered mortgage-deed not to be varied except by a registered instrument—See EVIDENCE ACT, 1872, s. 92, 5 A.L.J. 717=31 A. 13=A.W.N. 1908, 264=1 Ind. Cas. 558.

Suit for redemption by vendor as on mortgage—Evidence to show that the sale was a mortgage—See EVIDENCE ACT, 1872, s. 92, 25 M. 7=11 M.L.J. 370.

Suit for redemption—See EVIDENCE ACT, 1872, ss. 102, 110, U.B.R. 1897—1901, Vol. II, 409, U.B.R. 1897—1901, Vol. II, 412.

See EVIDENCE ACT, 1872, s. 108, 42 P.R. 1892.

See EVIDENCE ACT, 1872, s. 110, 11 A. 438, U.B.R. 1897—1901, Vol. II, 418.

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 13 B. 106.

Mortgage of joint family property executed by father alone—Decree for foreclosure—Sons not made parties—Right of sons to redeem—See HINDU LAW—ALIENATION, A.W.N. 1908, 106=5 A.L.J. 267=30 A. 256.

Mortgage of ancestral property by father or grandfather prior to son's birth—Son's right to redemption—See HINDU LAW—ALIENATION, 11 C.W.N. 462=34 C. 372.

See HINDU LAW—ALIENATION, 6 O.C. 101.

Mortgage by uncle in favor of nephew—Onus of receipt of consideration—Consideration paid in part—Redemption—Interest—See HINDU LAW—INHERITANCE, 123 P.W.R. 1911.

Decree for sale against Hindu father—Sons not made parties—Right of sons to sue or redemption—See HINDU LAW—JOINT FAMILY, 2 A.L.J. 647=A.W.N. 1905, 248=28 A. 182.

See HINDU LAW—JOINT FAMILY, 11 B.H. C. 283, 10 B. 21.

Property held in mortgage, assignment of, as maintenance to widow of family—Money paid into Court on redemption—Right of the widow—See HINDU LAW—MAINTENANCE, 21 B. 747.

Mortgage—continued.**—9.—Redemption—continued.**

See HINDU LAW—MAINTENANCE, 18 A. 253=A.W.N. 1896, 41.

See HINDU LAW—USURY, 18 B. 227.

Minor son, when bound by decree against mother alone—Sale of equity of redemption under decree—Right of son to redeem—See HINDU LAW—WIDOW, 9 B. 429.

Redemption of decree-holder by subsequent mortgagee—Accounts — Previous mortgage-decree—Rate of interest allowed by decree—See INTEREST—SPECIAL CASES, 31 C. 322, P.C.=31 I.A. 57=8 C.W.N. 609.

See INTEREST—SPECIAL CASES, 8 P.R. 1890, 28 P.R. 1892, 67 P.R. 1893, 95 P.R. 1902, 14 W.R., P.C., 17=13 M.I.A. 404.

See JURISDICTION—SUITS FOR LAND, 1 Ind. Jur., N.S., 319.

See JURISDICTION OF CIVIL COURTS, 17 B. 681.

Holding under mortgage—Surrender—Landlord's right to redeem—See LANDLORD AND TENANT—GENERAL, 10 Ind. Cas. 307.

Market value of the subject-matter of suit for redemption—See LEGAL PRACTITIONERS—PLEADER—REMUNERATION, 6 O.C. 130.

Suit to redeem after confiscation of mortgagee's interest—See LIMITATION—LAW OF LIMITATION, 3 Agra 139.

Joint mortgage—Acknowledgment by one of two mortgagees—Effect—See LIMITATION ACT, 1908, s. 19, 9 A.L.J. 386.

Acknowledgment by mortgagee of mortgagor's right to redeem to be good for saving limitation need not be addressed to mortgagor specifically—See LIMITATION ACT, 1908, s. 19, A.W.N. 1908, 226.

See LIMITATION ACT, 1903, s. 19, 20 P.R. 1887, 59 P.R. 1901.

Redemption of mortgage—Acknowledgment by one co-mortgagee, whether saves limitation—See LIMITATION ACT, 1903, s. 19, art. 148, 18 A. 458=A.W.N. 1896, 147.

Suit for redemption of mortgage—Limitation—Acknowledgment of mortgagor's title—See LIMITATION ACT, 1908, s. 19, art. 148, A.W.N. 1885, 211.

See LIMITATION ACT, 1903, s. 28, art. 144, A.W.N. 1883, 178.

Suit for redemption—Sale of equity of redemption to mortgagees—Mortgagee cannot set up adverse possession as owner—See LIMITATION ACT, 1908, arts. 44, 142, 14 B. 279.

Suit for money—Bond containing covenant to pay money at time of redemption of earlier mortgage—Limitation—See LIMITATION ACT, 1908, arts. 65 to 68, 116, 8 A.L.J. 233=9 Ind. Cas. 482.

See LIMITATION ACT, 1908, art. 132, 17 P.R. 1888.

Mortgage—continued.

—9.—Redemption—continued.

Suit by puisne mortgagee purchaser to redeem prior mortgagee purchaser—Limitation—See LIMITATION ACT, 1908, arts. 132, 134, 148, 14 C.W.N. 439=5 Ind. Cas. 877.

Person redeeming mortgage at mortgagor's request—Lien on mortgaged property—Lienor's possession—Adverse possession by lienor—See LIMITATION ACT, 1908, arts. 132, 144, 13 Bom. L.R. 867.

Bona fide purchaser from mortgagee, redemption from—Ostensible owner—Suit to redeem brought more than twelve years after sale—See LIMITATION ACT, 1908, art. 134, 9 O.C. 373.

Redemption by one mortgagor—Nature of possession—Limitation against co-mortgagors—See LIMITATION ACT, 1908, art. 134, 7 A.L.J. 95=5 Ind. Cas. 123=32 A. 160.

Transfer by mortgagee to third person—Mortgagor and his descendants not taking steps to protect their interest—Redemption—Limitation—See LIMITATION ACT, 1908, art. 134, 93 P.W.R. 1910=7 Ind. Cas. 708.

Transfer by mortgagee—Rights of transferee—See LIMITATION ACT, 1908, art. 134, 13 Bom. L.R. 1057.

Case between mortgagees—Right to redeem prior mortgage—Principles applicable—See LIMITATION ACT, 1908, art. 135, 143 P.L.R. 1911.

Suit by a purchaser of equity of redemption for possession of mortgaged property—Value for purposes of appeal—See LIMITATION ACT, 1908, art. 136, 130 P.R. 1906=100 P.L.R. 1907.

See LIMITATION ACT, 1908, art. 136, A.W.N. 1893, 67.

Adverse possession by mortgagee, what does not amount to—Redemption—Abridgment of period—See LIMITATION ACT, 1908, art. 142, 11 Ind. Cas. 853.

See LIMITATION ACT, 1908, art. 142, 7 O.C. 259.

Mortgage with possession—Redemption by trespasser—Mortgagor's right—See LIMITATION ACT, 1908, arts. 142, 144, 148, U.B.R. 1906, 4th Qr., Limitation, 9.

See LIMITATION ACT, 1908, arts. 143, 148, 7 N.W.P. 53.

See LIMITATION ACT, 1908, arts. 144, 148, U.B.R. 1892—1896, Vol. II, 516.

See LIS PENDENS, 102 P.R. 1888.

See MAHOMEDAN LAW—DEBTS, 20 B. 338.

Shia Law—Childless widow—No saleable right—Equity of redemption—Adverse possession—Purchase by mortgagee at execution sale—Right of mortgagor's heirs—See MAHOMEDAN LAW—INHERITANCE, 11 M.L.T. 316=M.W.N. 1912, 417=9 A.L.J. 450.

Mortgage—continued.

—9.—Redemption—continued.

See MAHOMEDAN LAW—WAKF, 4 B.L.R. A.C. 86=12 W.R. 498.

Malabar Law—Suit by one uralan for redemption without consulting other uralan—Co-uralan made defendant—Maintainability of suit—See MALABAR LAW—MORTGAGE, 24 M. 296.

See MALABAR LAW—MORTGAGE, 16 M. 328.

Joint mortgagors—Right of each to redeem whole estate—Suit for redemption, parties to—See PARTIES TO SUITS—GENERAL, 10 B. 648.

See PARTIES TO SUITS—GENERAL, 1 Agra 36, 3 Agra 144, 9 M.L.J. 49.

See PAUPER SUITS, 7 A.L.J. 1191=8 Ind. Cas. 484.

See POSSESSION—ADVERSE POSSESSION, 6 C.W.N. 601.

Adverse possession—Co-sharers—Redemption of mortgage by one co-sharer—No exclusive title—See POSSESSION—NATURE OF POSSESSION, 16 B. 191=P.J. 1891, 123.

Property sold subject to mortgage—Redemption by vendee—Pre-emptor cannot claim to pre-empt equity of redemption only—See PRE-EMPTION—GENERAL, 74 P.W.R. 1912.

See PRE-EMPTION—RIGHT TO PRE-EMPT, 3 O.C. 213.

Meaning of "redeemed"—Suit for redemption of mortgage and profits valued at less than Rs. 1,000—Decree for over Rs. 1,000—Jurisdiction—See BEN. REG. XV OF 1793, s. 10, 7 A.L.J. 963=7 Ind. Cas. 385.

See BEN. REG. XXXIV OF 1803, ss. 9, 10, 8 A. 402=A.W.N. 1886, 139.

See BEN. REG. XVII OF 1806, ss. 7, 8, 57 P.L.R. 1901=21 P.R. 1901.

Mortgage by conditional sale prior to 1882—Right of redemption, when lost—See BEN. REG. XVII OF 1806, s. 8, 4 A.L.J. 717=A.W.N. 1907, 266.

See MAD. REG. XXXIV OF 1802, 4 M. 113.

Mortgagor and mortgagee—Court sale to first mortgagee, extinction of right of redemption of second mortgagee on—Relief sought in the alternative—See RELIEF, 16 M. 121=2 M.L.J. 291.

See RELINQUISHMENT OF PORTION OF CLAIM, 13 B. 326.

Dismissal of suit for redemption—Second suit for redemption of another mortgage of the same properties—Suit not barred—See RES. JUDICATA—ADJUDICATIONS, 8 A.L.J. 47=9 Ind. Cas. 53.

Whether it is open to the mortgagor who has brought a suit for redemption and obtained a

Mortgage—continued.**—9.—Redemption—continued.**

decree to bring a second suit for redemption—*See RES JUDICATA—ADJUDICATIONS*, 164 P. L.R. 1908, F.B. = 93 P.R. 1908 = 133 P.W.R. 1908.

Prior and puisne mortgage—Sale of mortgaged property—Redemption by vendee of prior mortgage—Suit for sale by puisne mortgagee—Dismissal of suit on the ground that previous mortgage not offered to redeem—Second suit for redemption of prior mortgage and sale—*Res judicata*—*See RES JUDICATA—CAUSE OF ACTION*, 10 O.C. 145.

Dismissal of suit for redemption, plaintiffs having no *locus standi*—Suggestion in judgment that plaintiffs might sue again in certain events—Subsequent suit—*See RES JUDICATA—CAUSE OF ACTION*, 84 P.R. 1880.

Suit for possession—Subsequent suit to redeem—*See RES JUDICATA—CAUSE OF ACTION*, 15 C. 800 = 15 I.A. 106, P.C.

Suit for redemption decreed—Subsequent suit for recovery of amount not taken into account—*See RES JUDICATA, MATTERS IN ISSUE*, 4 A.L.J. 763 = A.W.N. 1907, 281 = 30 A. 36.

Suit by mortgagee against mortgagor—Decree for possession—Subsequent suit for redemption—*See RES JUDICATA—MATTERS IN ISSUE*, 14 B. 327.

Decree for redemption of mortgage—No provision for foreclosure or payment within fixed time—Mortgagee subsequently suing for sale of mortgaged property—*Res judicata*—Civ. Pro. Code, 1882, s. 13, Expl. II—Limitation—*See RES JUDICATA—MATTERS IN ISSUE*, 18 B. 567.

See RES JUDICATA—MATTERS IN ISSUE, 86 P.R. 1877.

Suit by one member of a joint Hindu family—Second suit by other members—*See RES JUDICATA—PARTIES*, 3 A.L.J. 644 = A.W.N. 1906, 242 = 29 A. 1.

Suit to redeem by alleged karnavan—Subsequent suit for redemption by junior members—*Res judicata*—*See RES JUDICATA—PARTIES*, 8 Ind. Cas. 129 = 8 M.L.T. 445.

"Adimayavana," meaning of—*See RES JUDICATA—MISCELLANEOUS*, 30 M. 203.

See RES JUDICATA—MISCELLANEOUS, 26 A. 61, F.B. = A.W.N. 1903, 196.

Suit for redemption, valuation of, for purposes of jurisdiction—*See REVIEW—PRACTICE AND PROCEDURE*, 11 B. 591.

See REVISION—GENERAL, 3 A. 576.

Failure to redeem—Co-mortgagees acquiring occupancy rights—Tenancy in common—*See RIGHT OF OCCUPANCY—GENERAL*, 46 P.W. R. 1907.

Occupancy holding—Transfer before Agra Tenancy Act—Rights of mortgagee—*See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT*, 7 A. L.J. 755 = 6 Ind. Cas. 837 = 32 A. 628.

Mortgage—continued.**—9.—Redemption—concluded.**

Conditional sale—Redemption—Re-purchase—Vendee in possession—Price paid—Sale-deed unregistered—Admission—Suit for possession—Burden of proof—*See SALE—GENERAL*, 9 Ind. Cas. 770.

Conversion of suit for possession on ejectment into one for redemption, validity of—*See SHE-BAIT*, 5 O.L.J. 527.

See SPECIFIC RELIEF ACT, 1877, s. 42, A.W.N. 1884, 78, 9 M.L.J. 165.

Value of a suit for redemption, not market-value, but amount of mortgage-money. *See SUITS VALUATION ACT*, 1887, s. 8, 5 A.L.J. 713 = A.W.N. 1908, 296 = 31 A. 44 = 1 Ind. Cas. 703.

Valuation of suit for redemption—*See SUITS VALUATION ACT*, 1887, s. 11, 214 P. L.R. 1910.

See TRANSFER OF PROPERTY ACT, 1882, ss. 6 (a), 85, 91 (a), (b), U.B.R. 1892—1896, Vol. II, 581.

Lease granted by mortgagee in possession—Redemption of mortgage—Effect on lease—*See TRANSFER OF PROPERTY ACT*, 1882, ss. 111, 117, 14 O.C. 204.

Defendant, a Kanom demisee from plaintiff's father as trustee, not estopped from denying plaintiff's title to redeem, on the ground that he was not trustee at date of suit—*See TRUST*, M.W.N. 1912, 445.

Persons holding under invalid mortgage—Suit against them as trespassers—Suit treated as one for redemption—*See UNDUE INFLUENCE*, 123 P.W.R. 1909.

Appeal from redemption suit, valuation for purposes of Court fees—*See VALUATION OF APPEALS*, 16 M. 326.

Suit for redemption—Denial of mortgage—Valuation of suit—Dekhan Agriculturists' Relief Act XVII of 1879, Chap. II, s. 3—Applicability—Jurisdiction—Appeal—*See VALUATION OF SUITS*, 13 B. 489.

Suit for redemption of mortgage—Valuation for purposes of jurisdiction—*See VALUATION OF SUITS*, 2 A. 778, 14 C.P.L.R. 154.

See VALUATION OF SUITS, 5 A. 822 = A.W. N. 1881, 85, 82 P.R. 1882, 44 P.R. 1888, P. L.R. 1900, p. 362.

See VENDOR AND PURCHASER—CONSIDERATION, 10 B.H.C. 491.

Suit by prior mortgagee—Subsequent mortgagee and alienee of equity of redemption not impleaded—Redemption—*See VENDOR AND PURCHASER—PURCHASE OF MORTGAGED PROPERTY*, 4 B. 83.

Sale—Counter-agreement for redemption—Mortgage—Condition against alienation—*See VENDOR AND PURCHASER—MISCELLANEOUS*, 3 A. 369, F.B.

Mortgage—continued.**—10.—Sale of mortgaged property.**

See TRANSFER OF PROPERTY ACT 1882, ss. 58—101.

(1)—*Suit on hypothecation-bond—Proof of debt—Sale of property.*—No Court of equity ought to direct the hypothecated property to be sold, and its proceeds applied to the satisfaction of a debt, without first taking care to ascertain that the debt is due. It is not enough that it should be stated in the security bond itself to be due. It is quite open to the defendant to dispute such a statement, if the facts are such as to justify his doing so, and ask the Court to inquire what is equitably due from him to the plaintiff on the bond before it orders the mortgaged property to be sold. *AMRITH NATH JHA v. DHUNPUT SINGH BAHADOOR*, 20 W. R. 253.

(2)—*Ss. 70, 82, Tr. P. Act, 1882—Accession to mortgaged property, incorporated with original subject of security—Sale-proceeds, distribution of.*—Where an accession to mortgaged property takes place, it becomes incorporated in the original subject of the security as though it had been in existence at the time when the original security was given. A mortgagor, after executing two simultaneous mortgages in respect of certain property, erected some more buildings on it and subsequently executed several mortgage-deeds in respect of that property. A suit having been brought by one of the subsequent mortgagees it was held (a) that so far as the first two mortgagees were concerned, the newly erected buildings should be considered as accession to the original mortgaged-property and, (b) that the sale-proceeds of all the properties being insufficient to pay off all the mortgagees, the mortgagees were respectively entitled only to such surpluses after payment of the first two mortgages as might be attributable to the property subject to their respective mortgages. *KRISHNA GOPAL SADHARI v. MILLER*, 29 C. 803.

(3)—*Sale of hypothecated property by one other than hypothecatee—Fresh suit.*—Hypothecation of property in bonds on which a decree in favour of a party so secured is passed, gives such party a right to the application of the hypothecated property, or its sale proceeds, to the satisfaction of his claim decreed in his favour, although he could not, after the sale of the property in execution of another's decree, have caused it to be re-sold in satisfaction of his own, without bringing a fresh suit and obtaining a decree for that purpose. *GAJHA-DUR PERSHAD v. DAIBER PERSHAD*, 1 N.W. P. 27.

(4)—*Mortgage—Purchase by prior mortgagee in execution of decree on his mortgage—Suit by subsequent mortgagee for declaration of his right to bring same property to sale.*—Where the prior mortgagee had purchased the mortgaged property in execution of a decree on his mortgage, a subsequent mortgagee, who later on obtained a decree on his mortgage, cannot

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

maintain a suit against the former for a declaration of his right to bring the same property to sale in execution of his decree. *DHURMLALL ROY v. DUSRUTH SINGH*, 22 W.R. 322.

(5)—*Mortgage-sale.*—When property is sold under a decree obtained on a mortgage-bond, the purchaser does not purchase merely the rights and interests of the debtor, but the right which the mortgagee brings to sale by virtue of the decree. *PRAHLAD MISSER v. UDIT NARAYAN SINGH*, 1 B.L.R. A.C. 197=10 W. R. 291. [*F.*, 14 W.R. 233; *R.*, 4 M. 73 F.B., 12 W.R. 522.]

(6)—*Mortgagee not applying for possession at end of time allowed—Sale by mortgagor of property to others—Objection by mortgagee useless.*—A mortgagee by neglecting to take possession of the mortgaged property at the expiration of the time of grace, but choosing to remain in the position of a mortgagee and to give the mortgagor time to raise the money and pay his debt, cannot complain if the mortgagor availed himself of this permission and sold the property to other parties ready to pay off the mortgage-debt. *BABOO RAM ROOP SINGH v. LALLA THAKOOR PERSHAD*, 24 W. R. 429.

(7)—*Bona-fide sale—Purchaser—Locus standi.*—The rights of a purchaser in a bona-fide sale deprive his vendor of his locus standi in a case between purchaser and third party relating to the property. *MUSSAMUT FUZEELUT-UN-NISSA v. SREENATH RAI*, 25 W.R. 535.

(8)—*Reg. XVII of 1806, s. 8—Purchaser of rights and interests of mortgagor.*—A purchaser of the rights and interests of a mortgagor is a "legal representative" of the mortgagor within s. 8 of Reg. XVII of 1806, and a notice of application for foreclosure must be served upon him. *GOLAM DUSTAGEER KHAN v. JUGGUR SINGH*, 1 B. L. R., S. N., 3 (a)=10 W. R. 86.

(9)—*Mortgage bond—Right of mortgagee, nature of—Suit on mortgage bond—jurisdiction.*—The right which accrues to a lender of money under a mortgage-bond which provides that the amount borrowed thereunder should be repaid on a specified date, is to have his mortgage lien on the land declared and the property sold in satisfaction of his debt, and, if the proceeds be insufficient to satisfy the debt, to proceed against the debtor for any balance of the claim. A suit on such a bond as the above is not cognizable by the Small Cause Court, because the Court could not give to the plaintiff such a decree as the one mentioned or the remedy which alone he is entitled to. *LLOYD'S BANK v. RINCHIDIN*, 14 W. R. 214.

(10)—*Bond debt, decree on—Execution—Mortgaged and other property of judgment-debtor—Sale.*—A decree obtained on a mortgage bond may be satisfied by sale of the mortgaged property and, if that be insufficient, also by sale of

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

any other property belonging to the judgment-debtor. *LALLA MITTERJEET SINGH v. R. W. SCOTT*, 17 W.R. 62. [R., and D., 6 C. 711=8 C.L.R. 189.]

(11)—*Mortgage—Instalment bond—Default—Sale—Surplus—Lien.*—A mortgagee of an instalment mortgage bond who brings to sale the entire mortgaged property on one of the instalments becoming due, does not lose all lien over the surplus proceeds. *RAM KANT CHOWDHRY v. BRINDABUN CHUNDER DOSS*, 16 W.R. 246.

(12)—*Bond giving separate lien on each of several pledged mouzahs—Right of obligee to elect any mouzah for sale—Sale of portion of property mortgaged—Obligee entitled to purchase a portion.*—The plaintiff's bond, in this case, gave him a separate lien on each and all of the mouzahs charged with the debt. Although he might undoubtedly have made the representatives of all defendants, and have recovered his dues by the sale of all, one after the other, unless his debt had been sooner extinguished, yet, the terms of the bond were at the same time held to leave him free to elect which of the mouzahs he thought most likely to satisfy his claim. It was also contended in this case that the mere fact of the plaintiff having bought three of the mouzahs pledged to him and broken up his lien on the others, and had changed the mortgage into a simple unsecured debt, but it was held that there was nothing to prevent the plaintiff from purchasing any of the mouzahs pledged to him, and he bought them at the risk of lessening his own security; nor was there any law preventing a transaction of such a nature between a mortgagor and a mortgagee. *MUSSAMUT HOOLAS KOOREE v. MUSSAMUT BIBEE SUFEEHAN*, 8 W.R. 379. [R., 4 C. 72=2 C.L.R. 580.]

(13)—*Mortgage—Equity of redemption—Purchase by mortgagee—Trustee.*—Where a creditor lent money under an agreement and afterwards took a mortgage from the debtor and then sued and obtained a money decree on the original agreement and attached and purchased the mortgaged property in execution of this money decree, he became a trustee for the mortgagor and was liable to be redeemed in a suit brought four years after the sale. A mortgagee cannot, properly, in execution of a simple decree for money, the re-payment of which is secured by mortgage, attach and sell the mortgagor's equity of redemption in the property mortgaged; but if he does so, and purchases it himself, he becomes a trustee for the mortgagor, against whom he cannot acquire an irredeemable title. *S. M. KAMINIDEBI v. RAMLOCHAN SIKKAR*, 5 B. L. R. 450. [Diss., 30 M. 362=17 M. L. J. 325; F., 3 C. L. R. 237, 1 Ind. Cas. 952=3 S. L. R. 17; R., 23 W. R. 338, 4 C. 817, 5 C. 265=4 C. L. R. 358, 16 C. 682, P. C.=16 I. A. 107, 18 M. 153, 22 B. 624, 7 O. C. 307, 35 C. 61, F. B.=11 C. W. N. 1011=6 C. L. J. 320, 6 Ind. Cas. 47.]

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

(14)—*Power of sale—Purchaser from the mortgagee—Practice.*—A mortgagee in exercising his power of sale is not (except as to the balance of the purchase money) a trustee for the mortgagor even if the mortgage is in the form of a trust for sale. A mortgagee having a power of sale, provided he acts *bona fide* and takes reasonable precautions to obtain a proper price, has a perfect right to realize his security by sale in such manner as he thinks most conducive to his own benefit. A mortgagee may sell under special conditions even of a stringent character if not unreasonably depreciatory. A depreciatory condition is one which tends to deter persons from bidding or to deter those who do bid from bidding up to so high a figure, and a condition which has that tendency has it because it tends to cripple the rights of a purchaser and to put a fetter on him. The question is whether the condition would tend to the detriment of mortgagor or of an absolute owner or be prudent in an absolute owner. If it would be prudent in an absolute owner it is not imprudent as affecting a mortgagee. Under a power of sale, although a purchaser is relieved from all obligation to make inquiries, yet if circumstances which put in question the propriety of the sale or brought to his knowledge and he purchases with that knowledge he becomes a party to the transaction which is impeached. A proviso relieving a purchaser under a power from inquiring as to the regularity of a sale does not protect the purchaser who knows of an irregularity which cannot have been waived. The mortgagee must sell as if he were a prudent man. He is, however, not at liberty to look after his own interests alone and it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor. *CHHABILDAS v. DAYAL*, 5 Bom. L.R. 247 O.C.J., modified on appeal, 6 Bom. L.R. 557; confirmed by Privy Council at 9 Bom. L.R. 1062=31 B. 566=4 A.L.J. 750=11 C.W.N. 1109=6 C.L.J. 674=17 M.L.J. 465, P.C.

(15)—*Mortgage in English form—Mortgagor in possession—Mortgagor wilfully making default—Sale for arrears of revenue—Purchase by mortgagor benami—Criminal misappropriation.*—Where a mortgage is in an English form in which the property is, in point of law, in the mortgagee, if the mortgagor in possession, who is entrusted by the mortgagee with the dominion over the mortgaged property, wilfully defaults and causes the property to be sold at a Revenue sale for the purpose of defrauding the mortgagee and purchases it *benami*, he is liable to be punished for criminal misappropriation under s. 405 of the I.P.C. *RAM MANICK SHAHA v. BRINDABUN CHUNDER POTDAR*, 5 W.R. 230.

(16)—*Mortgage decree—Execution of money decree—Sale proceeds—Lien—Election.*—A mortgage decree-holder objected to the sale of the mortgaged property in execution of a money

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

decree without reserving his rights. Consequently the sale was held subject to the mortgage. Then the mortgage decree-holder claimed a lien on the surplus sale-proceeds left after satisfying the money decree. *Held* that he, having satisfied his mortgage-lien, and procured the sale of his debtor's estate subject to that lien, was bound to recoup himself from the mortgaged property and could not get any part of the sale-proceeds, unless it were shown that the mortgaged land had not produced enough to satisfy his claim. **KALEE DASS GHOSE v. LALL MOHUN GHOSE, 16 W.R. 306.**

(17)—*Sale of property subject to mortgage—Mortgagee not entitled to surplus sale proceeds.*—A mortgagee of property which has been sold subject to his mortgage is not entitled to have the surplus proceeds paid out to him in satisfaction of the decree which he had obtained upon his mortgage and upon which he had issued execution. **MIRZA FUTEH ALI v. MR. A. A. GREGORY, 6 W.R. Mis., 13.** [Appr., 14 W.R. 209; Expl., 8 W.R. 301; R., 8 W.R. 291, 16 W.R. 306.]

(18)—*Successive mortgages of same property—Sale in execution of money decrees obtained by mortgagees—Rights of purchasers.*—Where property which was mortgaged first to A, and then to B, was first sold in execution of a money decree obtained by B for his debt, and subsequently, A also having obtained a money decree caused the rights and interests of the mortgagor to be again sold. *Held*, that the purchaser under the second sale did not get the estate, but only his judgment-debtor's right, title and interest, which had become extinct by reason of the first sale, and that he could not sue for possession of the property itself. **DURPO NARAIN MAHATAH v. NULEETAH SOONDUREE DOSS, 11 W.R. 332.**

(19)—*Civ. Pro. Code, Act VIII of 1859, s. 259—Mortgage decree—Sale of mortgaged property—Nature of interest sold.*—Where, in execution of a mortgage decree, the mortgage property is sold, what is sold is the entire interest of the debtor in the property as it stood at the time of the mortgage. The purchaser takes the property subject to such incumbrances as existed at the time of the mortgage, and he is not bound to discharge subsequent mortgages or charges on the property. The subsequent incumbrancers would, however, be entitled to share in the surplus proceeds of the sale. In applying s. 259 of Act VIII of 1859 to cases of this description, the words "the right, title and interest of the defendant in the property sold" meant the right, title and interest which the decree ordered to be sold, i.e., the right, title and interest which the judgment-debtor had in the property at the time of the mortgage. **KASANDAS LALDAS v. PRANJIVAN ASHRAM, 7 B.H.C. A.C. 146.** [Appr., 5 B. 2, 5, 16 B. 486, 20 B. 158; R., 11 B.H.C. 139, 5 B. 8, 8 B. 481, 10 B. 224, 20 B. 399, 22 B. 945, 28 B. 153 = 5 Bom. L.R. 892.]

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

(20)—*Mortgagee taking possession under money decree—Rights of puisne mortgagee.*—A mortgagee obtained a money decree upon a deed of mortgage hypothecating lands for the payment of money due and bought the mortgaged property in execution of the money decree and entered satisfaction of the decree. Subsequent to this, a puisne encumbrancer under a usufructuary mortgage created before the money decree brought a suit against him for recovery of possession and obtained a decree. *Held*, that the prior mortgagee could not maintain a suit to recognize his lien under the mortgage bond. **KASIMANNISSA BIBI v. HURANNISSA BIBI, 7 B.L.R. App. 8 = 15 W.R. 195.** (4 B. L. R. App. 35, F.)

(21)—*Mortgage—Mortgagee electing to take money decree—Prior conveyance by mortgagor—Subsequent suit for declaring mortgaged property liable.*—Where a mortgagee having the option to take either a decree binding on the property or a simple decree for money, chose the latter and in execution himself became the purchaser and got possession, entering up at the same time satisfaction of his decree, and was afterwards ejected on a suit by a party claiming to hold the mortgaged property on a prior conveyance, from the judgment-debtor, he could not then bring a suit to have the mortgaged property declared liable or saddle it with the money due on his decree at the expense of an innocent third party. **KUSEEMOONNISSA BIBEE v. HUROONNISSA BIBEE, 15 W.R. 195.** [Diss., 23 W.R. 460]

(22)—*Money-decree, property hypothecated for debt sold in execution of—Rights of purchaser.*—In this case, admittedly, the defendant had purchased the property in execution of a decree obtained by a person for a debt due under a bond hypothecating for the said debt the property itself, before the hypothecation of the same to the plaintiff under his deed. Plaintiff urged that there being no order in the decree to enforce the lien on the property, defendant had purchased only in execution of a decree for money, and so had purchased only the rights of the debtor as existing at the time of the sale, before which time there was the hypothecation to the plaintiff, and therefore defendant did not purchase any rights as existing in the debtor before the execution of the first bond. The High Court however held that when property hypothecated is held by the debtor and is sold in execution of a money-decree (passed under a bond hypothecating it, without any additional order in the decree for enforcing the lien on the property, the purchaser at the sale is not in such a case competent to plead his previous lien with a view to obtain the property, when a holder of a subsequent bond seeks to enforce his lien decreed against the property. The purchaser in such a case not only stood in the shoes of the debtor, but had purchased all rights in the property as hypothecated by the debtor when the first hypothecation was made and thus

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

also acquired the rights of the decree-holder. *SHEO PROSUN SINGH v. BROJOO SAHOO*, 7 W.R. 232. [R., 11 W.R. 332, 12 W.R. 260, 19 W.R. 83, 23 W.R. 187, 24 W.R. 94.]

(23)—*Decree—Simple money decree—Purchase by decree holders—Possession—Rights of parties.*—The plaintiffs respondents obtained a decree for sale and an order absolute under a mortgage executed by one R. H. H. C., a son of R. H. on the sole ground that he had not been impleaded by the mortgagees, obtained a decree, dated the 6th July, 1898, declaring that his share in the family property was not liable to sale. Notwithstanding the latter decree, the plaintiffs sold the entire mortgaged property and themselves purchasing, obtained possession. Next J. K., the holder of a simple money decree against R. H. and H. C. brought to sale a six-pie share together with the equity of redemption of certain land in one of the mortgaged villages and purchased himself. J. K. then sued the plaintiffs for possession, obtained a decree on the 17th December, 1903, subject to any rights which the plaintiffs in the present case might have over the property, and in execution of his decree, was given possession of the six-pie share. *Held*, that although the plaintiffs' purchase in respect of the property, covered by J. K.'s decree must be treated as a nullity, their general rights as mortgagees were safe-guarded by the terms of that decree, and s. 73 of the Code of Civil Procedure could not bar the plaintiffs' right to bring the present suit. *Held*, also, that the fact that the plaintiffs had purchased a portion of the mortgaged property did not limit them to a right to sue for a proportionate part only of the mortgage-debt. *JAGAL KISHORE SAHU v. HARBANS CHAUDHRI*, A.W.N. 1906, 208 = 3 A.L.J. 791 = 28 A. 700. (22 A. 284, D.)

(24)—*Mortgage — Money-decree—Execution.*—Where the decree in a suit to recover money under a mortgage-bond simply directs the payment of so much money, this is not a decree for the sale of the mortgaged property; and where the property has been alienated by a *bona fide* conveyance for value received, a decree binding the property cannot be obtained without making the new holder a party to the suit, or showing that he took with notice of the claim, and that the vendor had bound himself not to alienate. *SOOBUNS SINGH v. ISHUR DUTT MISSER*, 21 W.R. 150.

(25)—*Mortgage—Sale of mortgaged property in execution of decree for money—Mortgages executed before Transfer of Property Act, —Transfer of Property Act, s. 2, cl. (c), ss. 67 and 99.*—The appellant, to whom three separate and distinct shares in a village had been mortgaged by three separate deeds, obtained a decree for money on a claim not arising under any of the mortgages, and attached the mortgaged property. The question was whether he was

Mortgage—continued.**—10 —Sale of mortgaged property—contd.**

entitled to bring such property to sale in execution of the decree for money. The mortgages were severally made at different dates before the Transfer of Property Act came into force. It was contended that under s. 2, cl. (c) of the Act, s. 99 was not applicable where the mortgage was made before the Act came into force. The decree was passed after the Act came into force. *Held*, that s. 99, Transfer of Property Act, disentitled the appellant to bring the property to sale, otherwise than by instituting a suit under s. 67; and that s. 2, cl. (c) did not bar the application of the provisions of s. 99 to the case.—On the contention that s. 99 was not applicable, because the relation of mortgagor and mortgagee had ceased to exist, as the mortgagee had sub-mortgaged the property and a decree for sale had been made against him on the sub-mortgage, *held*, that the mortgage did not cease to exist and s. 99 was applicable. It was further contended that the mortgages were purely usufructuary mortgages, that the mortgagee had no right to sell under the Transfer of Property Act, and that s. 99 was only applicable, where, at the time of attachment, the mortgagee could institute a suit under s. 67 and could do so at once. There was no evidence that mortgages were purely usufructuary. *Held*, that, even if the suit required by s. 99, were one on the mortgages and even if such suit, did not lie under s. 67, the mortgagee could not bring the property to sale, but could only proceed in a certain way before he could sell the property, and that if he could not proceed in that way, he could not sell, as s. 99 did not make any exception. *RAMPARSHAD v. RAM PARSHAD SINGH*, 4 O.C. 231.

(26)—*Mortgagee, Purchase by, of half-share of mortgaged property subject to entire mortgage-debt—Equity of redemption, Purchase of, by mortgagee at sale in execution of money-decree —Mortgagor, Suit for possession by.*—In August 1866, the respondents made a usufructuary mortgage of an entire village to the appellant and another co-mortgagee to secure the payment of Rs. 3,000. In August, 1874, the respondents borrowed Rs. 4,500, from the mortgagees, the payment of which was secured by a further charge on the mortgaged property. In 1881, the appellant obtained a money-decree against the respondents and caused an undivided half-share of the village to be attached and put up for sale in execution of this decree. The share was sold subject to the entire mortgage-debt of Rs. 7,000 and the equity of redemption was purchased by the appellant, who, sometime after, paid his co-mortgagee what was due to him on the mortgages and obtained possession of the entire village. The respondents sued the appellant for possession of the remaining eight-annas share on the allegation that the mortgage-money had been satisfied by the sale of the moiety sold. *Held*, that the purchase by the appellant of a half-share of the mortgaged property subject to the

Mortgage—continued.**—10.—Sale of mortgaged property — contd.**

entire mortgage-debt satisfied the entire mortgage-debt; it having been paid to the appellant, he had got all he had a right to; and that the respondents were entitled to recover possession of the other half share without being called upon to pay anything. *AMIR HASSAN KHAN v. CHAUDHARI HADI HASAN*, 4 O.C. 341. [Rel. on, 10 O.C. 280.]

(27) — *Purchaser of equity of redemption at sale in execution of money-decree, neither certificate of sale nor possession obtained by—Sale in execution of decree on prior mortgage, priority of rights of purchaser under.*—Plaintiffs' predecessor-in-title purchased the interest of the judgment-debtor in the property in dispute at a sale in execution of a decree on a simple debt. Decrees were subsequently obtained on the prior mortgages thereon. The purchaser of the equity of redemption had not either got possession or obtained a certificate of sale at the time when the sale under the mortgage decree took place. On the inchoate title of the plaintiffs, neither the mortgagee nor the purchaser had any notice. Had the plaintiffs got into possession or obtained a certificate of sale and registered it, there would have been notice sufficient to put all persons interested on enquiry as to the rights of the plaintiffs. The purchase here having been made without notice of the plaintiffs' equitable title, the purchaser under the mortgage-decree acquired a right as good as the plaintiffs and, fortified by possession, his title became a complete one. *NANJUNDEPA AND GURULINGAPA v. HEMAPA*, 9 B. 10 [R., 17 B. 375, 2 Bom. L.R. 32.]

(28) — *Suit on mortgage—Prayer for sale of mortgaged property and for "any other relief to which plaintiff may be entitled"—Subsequent application for money-decree—No inconsistency in granting subsequent prayer.*—A mortgage deed contained the usual covenant for payment besides the covenant securing the property, and the mortgagee brought a suit on the mortgage praying for sale of the mortgaged property and also that "any other relief which the plaintiff may be entitled to may be granted, because the mortgaged property is at present under *kham* management." The suit was heard out and had proceeded up to judgment and decree, when the plaintiff by a fresh application withdrew his prayer for the sale and asked for a simple money decree. Held that the Court was competent to grant the money decree asked for, because when the mortgage covenants were entered into, both parties contemplated the possibility of a simple money decree, and because the decree for sale pre-supposes and gives specific time for payment of the money. Held, further, as to the contention that it would be allowing the plaintiff to alter his suit for sale into a suit of another and inconsistent character, that it was not so, because, looking to the words in which the relief was couched, it was clear that the plaintiff all along asked for a simple money decree, if for any reason the

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

decree against the property mortgaged were to prove ineffectual. *SUKHDEO PRASAD v. LACHMAN SINGH*, 24 A. 456 = A.W.N. 1902, 114. [R., 2 L.B.R. 4.]

(29) — *Mortgage—Money-decree—Declaration of lien.*—Where plaintiffs have not, in the decree in execution of which a property is sold, obtained from the Court a declaration of their rights as mortgagees, the plea that they have a lien on the property discloses no sufficient defence. *KASIMUNNISSA BIBI v. HURANNISA BIBI*, 2 B.L.R. App. 6 = 10 W.R. 468. [F., 10 C. 567; R., 15 W.R. 195.]

(30 & 31) — *Property burdened with debt, sale of, in execution of money decree—Right of purchaser subject to lien.*—Defendant obtained a simple money decree and took out execution upon the property in suit, as he might have done upon any other property in the possession of his judgment-debtor. At the time of the sale, the property was admittedly burthened with a debt due to the plaintiff. Held that the defendant should be taken to have bought subject to that lien and to be entitled to retain possession only on paying off the plaintiff's claim under it. *SOONEY RAM MARWAREE v. BYJNATH KOOR*, 10 W. R. 88. (1 W. R. 315, F. B., F.)

(32) — *Bengali mortgage—Plaint—Suit for money-decree on mortgage.*—An application was made for leave to file a suit brought to recover the sum of Rs. 2,300 on a Bengali deed of mortgage containing a provision that "if I should fail, within the term of six months, to pay off the whole of your money with interest, in that case you will have recourse to law, and by sale of the said huts recover with interest the whole of your money. Should the whole of your money be not thereby realized, in that case you will get it by the sale of whatever other property I may have elsewhere. Should even then all the money be not realized, I shall in that case be held responsible for the remainder,—that is to say, I shall myself pay. If I should make any objection thereto it shall be false and inadmissible." The plaintiff prayed for a money-decree. *Phear, J.*, refused to admit the plaint. *SRIMATI UMA SUNDARI DAS v. UMACHARAN SADKHAN*, 6 B.L.R. App., 117.

(33) — *Act IV of 1862—Bank of Bengal—Loans on security of landed property—Deposit of title-deeds, with written authority to sell—Equitable lien.*—The prohibition by s. 30, Act IV of 1862, of the Bank of Bengal entering into loan transaction on the security of immoveable property, does not necessarily include a prohibition against taking such security as a protection against loss in respect of a debt due. A written authority given to the Bank by a debtor to sell his immoveable property, of which the title-deeds are in deposit with the Bank, and to apply the proceeds towards payment of liabilities, creates an equitable lien upon that property even if the circumstances

Mortgage—continued.

—10.—Sale of mortgaged property—*contd.*
under which the deposit was originally made rendered the transaction *ultra vires* of the Bank. **IBRAHIM AZIM v. W. D. CRUICKSHANK, 7 B.L.R. 653 = 16 W.R. 203.**

(34)—Mortgage—Fraud—Priority—Lien.—Where the defendant advances a sum of money upon a simple mortgage, the plaintiffs fraudulently concealing the fact that they have themselves made a prior advance on the same property, the effect is to make the defendant first mortgagee, his purchase of the property at an execution sale, after notice of the plaintiff's mortgage, not affecting his rights as mortgagee. **BHARAT LAL BHAGAT v. GOPALSARAN LAL BHAGAT, 3 B. L. R. A. C. 1 = 11 W. R. 286.**

(35)—Mortgage of revenues of village executed by a firm—Suit by partner against co-partners for his share of assets—Attachment against estate in execution—Suit by mortgagee for removal of attachment.—The question in this case related merely to the construction of a mortgage-deed by which the revenues of a village were mortgaged by a firm in which the respondent was a partner. By the mortgage-deed it was stipulated that the holders of the mortgage shall station a *mehta* or clerk of their own in the said village for the purpose of making the collections; so long as the property remained in mortgage, the *mehta* was to receive his salary from the mortgagors. The instrument was executed on account of the partnership of which the respondent was member, so that though he had not himself executed it, he was cognizant afterwards of its execution, and was bound by its contents so as to be considered as being a mortgagor. This respondent, having obtained a decree against his co-partners for his share of the assets of the firm, got attachment to issue against the estate in execution of his decree. Thereon, the mortgagee instituted the present suit for the removal of such attachment. Their Lordships were of opinion that, on the facts in evidence, actual possession should be deemed to have been taken by virtue of the mortgage and that the transaction was valid up to the time of the notice of the respondent's claim, because, until the attachment was executed there was no notice to the mortgagee of any adverse claim on the part of the respondent. But, when the attachment was placed on the village, the mortgagee had notice of the adverse claim so that if, after that time, he permitted the mortgagor to receive any portion of the profits of that estate, then he ought, with respect to the monies so received, to be postponed to the respondent who was to be regarded as a second incumbrancer, only from after his having proceeded to enforce his claim by attachment and not before. **JUGJEEWUN DAS KEEKA SHAH v. RAM DAS BRIJBOOKUN DAS, 6 W.R.P.C. 10 = 2 M.I.A. 487. [Appl., 12 C. 389, 26 M. 662; R., 19 M. 471; D., 7 Ind. Cas. 108 = 8 M. L. T. 253.]**

(36)—Mortgaged properties situate in different districts—Mortgage decree by court in one district—Effect—Property in the possession of

Mortgage—continued.

—10.—Sale of mortgaged property—*contd.*

third party—Suit to enforce mortgage lien.—A mortgage-decree, against properties situate in different districts, upon a suit instituted in the Court of one district, without the sanction of the High Court, though it could not be enforced against the property in the other district, would, however, have the effect of changing the original bond-debt into a judgment-debt for the mortgage money and interest. Though the mortgagee could not enforce his lien against the property in the other district under the decree, he would be at liberty to establish his lien for the mortgage-debt and interest in a suit against a third person who had purchased the property. **BOLAKEE LALL v. THAKOO PERTAM SINGH, 5 C. 928 = 6 C.L.R. 370. (14 B.L.R. 425 = 19 W.R. 255, 14 B.L.R. 408, 3 C. 363, R.)**

(37)—Conveyance of mortgaged property to mortgagee avoided by attachment and sale under another decree—Title of mortgagee to mortgage-*lien* upon property.—Where the private purchase by the mortgagee of the mortgaged property became void as against the purchaser in execution of the same property, by reason of the property having been under attachment at the time of the conveyance, *held*, the mortgagee-purchaser was entitled to fall back upon the lien created by the mortgage. **GOPAL SAHOO v. GUNGA PERSHAD SAHOO, 8 C. 530. (5 C. L. R. 29, F.) [R., 10 C. 567.]**

(38)—Sale of property under mortgage decree—Prior sale under money-decree—Suit for possession.—A person, though he may have purchased the lien of the mortgagee, is not entitled to recover possession of the property, as against a person, who was no party to that decree and is a *bona fide* purchaser for value, without bringing a suit to enforce the lien. **BIR CHUNDER MANIKYA v. MAHOMED AFSAROO-DEEN, 10 C. 299 [R., 10 B. 88, L.B.R. 1893-1900, 14; D., 12 C. 299.]**

(39)—Sale—Hypothecation by vendor before sale—Suit on hypothecation, decree, and sale—Subsequent suit by vendee—Mortgagee's claim, still subsisting.—A in 1862 bought a house belonging to B which was already hypothecated to C. In 1863, C sued B in the Small Cause Court for the debt on account of which the hypothecation had been made and got a judgment. He then had the house attached and put up to auction, bought the right, title and interest of the judgment-debtor in the premises, and entered and continued in possession. In a suit brought by A to recover possession by right of his purchase in 1862, *held* that as B had no interest whatever in the property at the date of the purchase, C's purchase was not a purchase from the debtor in part satisfaction of his debt, C's claim still existed, and he could pursue his remedy either against the person or upon the property; and that, as he was in possession, he had a right to demand the liquidation of the debt due to him before submitting to be turned out, and also that the obligation of B gave C a two-fold cause of action and

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

a two-fold remedy, one against the person and the other against the thing. *MUNI REDDI v. VENKATA REDDI*, 3 M.H.C. 241.

(40)—*Mortgage—Purchase of mortgaged property by one of two joint-mortgagees, effect of, on the debt under the joint-mortgage—Guarantee for personal default of the obligors—Extent of surety's liability.*—One Z and his son I executed a bond, in favour of B and H, hypothecating 6½ out of the 10 biswas of their village. On the same date, the 3rd of May 1872, one S executed a surety-bond guaranteeing Z's payment of the above loan and charging as security certain rights in property belonging to S. In December 1872, Z made another bond (No. 2) in favour of B, the plaintiff-appellant, in which he hypothecated the above-mentioned 10 biswas of his village. In execution of a decree obtained by B on bond No. 2, he brought to sale and purchased, on 20th July, 1877, the 10 biswas which he sold subsequently in 1883 to M, defendant-respondent. The questions which arose in this appeal related to the 6½ biswas, previously hypothecated to B and H, out of the 10 biswas in the hands of M, B's vendee, and, to the right of the plaintiffs to enforce the surety-bond given by S, against the property charged thereunder. The effect of B's Court-purchase of the 10 biswas on 20th July 1877, on the joint-bond of the 3rd May 1872, was as effectually to extinguish the joint-encumbrance thereon, as if H, his co-obligee, had been associated with him in buying it. On B's sale to M, he therefore passed to her a clean title free of all encumbrance under the bond of the 3rd of May 1872, and it was competent to M to assert such title as a complete answer to the present suit in regard to the said 6½ biswas. As to the question of the liability of the heirs of S, to suffer the 10 biswas charged under the surety-bond to be brought to sale, the obligation of the surety under his bond being confined to the personal default of Z, and the present plaintiff not praying for any personal decree against Z, the heirs of S had been wrongly impleaded in the present suit by B and H, seeking only to enforce the hypothecation of their joint-bond against the property hypothecated therein. *BHUP SINGH v. ZAIN-UL ABDIN*, 9 A. 205 = A.W.N. 1886, 279.

(41)—*Mortgage suit by first mortgagee—Second mortgagee, no party—Decree and sale—Subsequent suit by second mortgagee—Remedies.*—Where property mortgaged to two persons is sold in execution of a decree obtained by the first mortgagee in a suit on his mortgage to which the second mortgagee is not a party, the second mortgagee has, subsequently, only a right to redeem, and cannot, without redeeming the first mortgage, bring the property to sale in satisfaction of his subsequent charge. *DURGA CHURN MUKHOPADHYA v. CHANDRA NATH GUPTA CHOWDRY*, 4 C.W.N. 541. [Overruled, 30 C. 599, F.B.]

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

(42)—*Payment of prior mortgage by conditional sale—Decree for sale obtained by intermediate simple mortgagee—Foreclosure of conditional sale—Intermediate mortgagee cannot sell without paying first mortgage.*—A zamindar made two mortgages in favour of P, of his zamindari property. Some time afterwards he mortgaged a portion of the property in favour of another Z, the defendant. Subsequently, he made a conditional sale of the property to R, the plaintiff, to pay off the mortgages in favour of P. Then again he mortgaged the same portion of the property to Z for another amount. Z sued on his mortgages and obtaining a decree brought to sale the portion of the property mortgaged to him. Meanwhile, R had taken the necessary proceedings to foreclose his deed of conditional sale. In a suit by R for a declaration that the defendant Z was not entitled to bring to sale the property mortgaged to him, it was held that, by the conditional sale which became absolute, the plaintiff acquired all the rights that subsisted under the two mortgages and was entitled to press those securities in his aid as prior incumbrances to that of the defendant, for the purpose of stopping him bringing the property to sale in execution of his decree, unless he recouped the plaintiff for the amount which he (plaintiff) found to satisfy and discharge these incumbrances; held also that the only right which the defendant had was upon the strength of the decree obtained in reference to his first mortgage, because he could have no right whatever under the instrument of second mortgage in his favour. Therefore, the defendant should only be permitted to bring the property to sale under his decree in respect of the first mortgage to him, when he has satisfied and discharged the two mortgage-bonds held by the plaintiff. *ZALIM GIR v. RAM CHARAN SINGH*, 10 A. 629 = A.W.N. 1888, 247. [F., 17 M. 309; R., 13 A. 432, 1 O.C. 107.]

(43)—*Property of insolvent subject to mortgage—Purchase of property at sale by receiver—Mortgagee's rights when and how far affected—Civ. Pro. Code, 1882, ss. 353, 356.*—S. 356 of the Civ. Pro. Code of 1882, contemplating payment of debts secured by mortgage out of the proceeds of the conversion of the insolvent's property in priority to the general creditors, must be read with s. 354 of the Civ. Pro. Code, and must therefore be understood as referring to those cases in which the mortgaged premises have been sold after coming to an understanding with the mortgagee, such mortgaged property not being saleable by the receiver without the consent of the mortgagee or paying him off. What vests in the receiver in such a case is merely the equity of redemption which is the only interest the insolvent has in the mortgaged property, and that alone the receiver is competent to convert into money. A purchaser from the receiver, under such circumstances, gets only the equity of redemption, and is therefore entitled only to claim to redeem the

Mortgage—continued.— 10.—Sale of mortgaged property—*contd.*

lands comprised in the mortgage. **SHRIDHAR NARAYAN v. KRISHNAJI VITHOJI**, 12 B. 272.

(44)—*Transfer of Property Act* (IV of 1882), s. 67—*Assignment of mortgage right by a heir of mortgagee—Right of purchaser to sue for sale of whole or part of mortgaged property.*—Where, on the death of a sole mortgagee leaving several heirs, one of such heirs conveyed the mortgage interest to another person, a suit by the purchaser for sale of the entire mortgaged property or a portion of it in respect of his own share was not maintainable, in the absence of the other persons interested in the mortgage being joined in the suit. **PARSOTAM SARAN v. MULU**, 9 A. 68, F.B. (1 A. 297, 10 W.R. 476, 19 W.R. 315, R.) [R., 3 O.C. 8.]

(45)—*Mortgage—Redemption of prior mortgage by puisne mortgagee—Sale decreed on certain terms—Attachment of future interest—S. 266, Civ. Pro. Code—Increase of judgment debtor's interest after attachment—Lis pendens—Parties to suit.*—On a claim by a puisne mortgagee to redeem prior encumbrances and, in the alternative, for a decree authorising a sale of the property mortgaged, the sale was decreed, with application of the purchase money to pay encumbrances in their due order; and with redemption by the plaintiff of a prior mortgagee, who was to have an option to redeem. Previous to the mortgage, a fraction of the interest in the property (such interest being purchased by the plaintiff, at a judicial sale) had been the subject of a settlement by a Mahomedan on his second wife with the condition that, if he should have no child by her, it should go to his two sons by another wife. On his death, the second wife having no child, *held*, that the two sons had taken a definite interest, and that such interest was not a mere expectancy or other merely contingent or possible right or interest, but an interest capable of being attached and sold under s. 266, Civ. Pro. Code. [F., 22 C. 33, 143 P.L.R. 1905, 32 B. 172=9 Bom. L. R. 1152; R., 13 A. 432, F.B., 17 B. 503, 1 O. C. 109, 6 Bom. L.R. 625, 5 C.L.J. 315=11 C. W.N. 403, 9 Bom. L.R. 295, 30 C. 599 F.B.] A judicial sale of property, purporting to be of all the interests of the judgment-debtor, carries with it any enlargement thereof, that might have occurred after the attachment and before the sale. Although, at any time before the actual sale of the mortgaged property, the mortgagor himself and any body to whom he may have transferred the property can come in and redeem the property by paying the debt and, after the sale, the mortgagor's transferee, if not a party to the proceedings, can do the same thing, yet if the transfer took place *pendente lite*, the transferee must take his interest subject to the incidents of the suit; and one of these is that a purchaser under the decree will get a good title against all persons whom the suit binds. Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between a prior mortgagee and

Mortgage—continued.— 10.—Sale of mortgaged property—*contd.*

the mortgagor, to which they are never made parties. **UMES CHUNDER SIRCAR v. ZAHUR FATIMA**, 18 C. 164, (P.C.)=17 I.A. 201=5 Sar. 507. [R., 30 C. 599, P.C., 1 O.C. 53, 28 B. 153=5 Bom. L.R. 892, 31 C. 737, 1 C.L.J. 531, 8 C.L.J. 478=13 C.W.N. 281, 4 N.L.R. 168; D., 2 C.L.J. 202.]

(46)—*Default in payment of assessment by mortgagee in possession—Purchase, under conveyance from mortgagor, by defendant paying arrears of assessment—Rights of purchaser—Mortgagee merely lying by, not estopped from claiming to recover—Mortgagee's suit for foreclosure.*—On the plaintiffs, the registered mortgagees in possession of the land in question, having ceased to cultivate the land during certain years and declined to pay assessment for those years, the defendant, who paid the arrears of such assessment to the Mamlatdar, became the registered occupant of the land taking a conveyance of it from the mortgagor and cultivated it without any objection by the plaintiffs with regard to their interest in it, until the present suit was filed. The lower appellate Court decided that the purchaser-defendant had acquired a title to the land free from all incumbrances, and in any case, the plaintiffs were estopped from setting up their title, but the High Court reversed its decision holding that the purchaser could only acquire the mortgagor's interest by the conveyance. Even if the mortgagor had been in actual possession, the registration of the mortgage would have been noticed, to the purchaser, of the mortgagee's title. Also, the plaintiffs were not subject to any estoppel. They were under no obligation to see that outsiders were not led to believe that they as mortgagees were no more interested in the land and it was not suggested that they stood by whilst the negotiation with the mortgagor was going on, and, by so doing, led the purchaser to suppose that they were not interested in the land. **CHINTAMAN RAMCHANDRA v. DAREPPA**, 14 B. 506. [Disappr., 7 C.W.N. 11; D., 134 P.L.R. 1904.]

(47)—*Two mortgages of same property to same person—Decree on both but each by different Court—Purchase by mortgage decree-holder in sale under one decree.*—A obtained two decrees of different Courts on separate bonds mortgaging the same property, and purchased the property himself in execution of one of his decrees. The surplus of the sale proceeds was distributed by the Court among other persons holding money-decrees against the judgment-debtor. It was *held* that the decree-holder could not, afterwards, execute the second decree against the judgment-debtor's property not included in the hypothecation. **BALLAM DAS v. AMAR RAJ**, 12 A 537=A.W.N. 1890, 90. (11 B. 12, 3 A.W.N. 61, 5 A.W.N. 210, R.) [R., 20 A. 23, 24 M. 96; D., 18 A. 31, 19 A. 196=17 A. W.N. 18.]

(48)—*Transfer of Property Act, IV of 1882, s. 55—Civ. Pro. Code, 1882, s. 43 (=O. II, r. 2,*

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

new Code)—*Holder of two independent mortgages on same property—Decree for sale obtainable on each of them.*—There is nothing in the Civ. Pro. Code or in the Transfer of Property Act which prevents a holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit. S. 43, Civ. Pro. Code, has no application to such a case. *Held* that s. 43, Civ. Pro. Code, and s. 85, Transfer of Property Act, did not preclude a mortgagee (who had obtained a decree for sale of the mortgaged property in a suit brought by him, against the mortgagor only, on a mortgage bond executed in his favour in 1878), from instituting a second suit on a bond mortgaging the same property in 1882 in favour of a third party, who had assigned the mortgage to the plaintiff in 1883 before he instituted the former suit on the mortgage bond of 1878. In this case, no objection was taken by the mortgagor to the maintainability of the first suit, and in fact, no allusion whatever was made in that suit to the existence of the second mortgage; and a decree for sale was passed under s. 88, Transfer of Property Act. But the mortgagor resisted the second suit, pleading s. 43, Civ. Pro. Code, and s. 85, Transfer of Property Act, as a bar to the same, but the plea was disallowed. **SUNDAR SINGH v. BHOLU**, 20 A. 322, F.B. = A.W.N. 1898, 58. [Diss., 30 M. 353 = 17 M.L.J. 301 = 2 M.L.T. 330; F., 3 Ind. Cas. 175; R., 25 M. 108 = 11 M.L.J. 373, 7 O.C. 152, 3 A.L.J. 238 = A.W.N. 1906, 112; D., 26 A. 14.]

(49)—*Mortgage—Purchase by mortgagee of part of mortgaged property in execution of money-decree—Liability of mortgagee to account for full value of portion bought.*—Where a mortgagee purchases a portion of the mortgaged property which is sold subject to his mortgage, such purchase may have in certain cases the effect of discharging the whole of the mortgage-debt, but it cannot be taken to have that effect in every case, however insignificant the portion purchased may be, and whatever value may have been paid for it. For, where of two properties mortgaged to secure re-payment of one debt, one happens to be of very small value and the other of large value, and the value of the smaller property is less than the amount of the mortgage, the purchase of that property by the mortgagee cannot be held to satisfy the mortgage in full. Where, on the other hand, the portion of the mortgaged property purchased by the mortgagee is of a value higher than the amount of the mortgage, and the difference between that value and the price paid by the mortgagee is equal to or exceeds the amount of the mortgage, such purchase by the mortgagee has the effect of fully discharging the mortgage. In every case, therefore, of a mortgagee who has thus previously purchased, when he has to bring the mortgaged property to sale in execution of his mortgage-decree, he is bound to bring into account the full value of the portion

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

of such property formerly purchased by him. **CHUNNA LAL v. ANANDI LAL**, 19 A. 196 = A.W.N. 1897, 18. (A.W.N. 1895, 1, F.; A.W.N. 1883, 61, 12 A. 537, R.) [Not F., 26 B. 88 = 3 Bom. L.R. 628, 12 C.W.N. 745 = 8 C.L.J. 92; Cons., 22 A. 284 = 20 A.W.N. 69; R., 20 A. 23; 24 M. 96.]

(50)—*Mortgagee, general right of, to keep mortgage unsplit—Purchase of portion of mortgaged property by mortgagee—Splitting up of mortgage and rateable distribution of mortgage-debt.*—The general rule is that a mortgagee has a right to insist that his security shall not be split up. In the following cases, however, there can be no objection to splitting the mortgage and rateably distributing the mortgage-debt:—(1) When the mortgagee himself does not press his right to insist on keeping the security entire. (2) Where the original contract itself recites that the mortgagors join together in mortgaging their separate shares. (3) Where the mortgagee has himself split up the security as by having brought a portion of the mortgaged estate, in which case he could properly be held to be estopped from seeking to throw the whole burden on the part of the property still mortgaged with him. So, when a mortgagee acquires the interest of some of the mortgagors by purchase, he can sue for partition only after the redemption of the entire security has been effected. Before urging the title acquired by him by reason of the purchase, he must surrender or restore the mortgage-security. **NARAYAN v. GANPAT**, 21 B. 619

(51)—*Transfer of Property Act, s. 101—Mortgage in renewal of prior mortgage—Right of mortgagee to priority over subsequent mortgages.*—A mortgagor does not lose his right to priority over subsequent mortgages by accepting another mortgage in renewal of his first deed. **ALAN-GARAN CHETTI v. LAKSHMANAN CHETTI**, 20 M. 274 = 7 M.L.J. 87. [R., 12 C.P.L.R. 70.]

(52)—*Mortgage—Sale by mortgagor of part of mortgaged property—Effect.*—The right of a mortgagee to bring any portion of the mortgaged property to sale is not curtailed by the mortgagor, subsequently to the mortgage, selling a portion of the mortgaged property to a third person. **BHIKHARI DAS v. DALIP SINGH**, 17 A. 434 = A.W.N. 1895, 83. (11 C. 258, 5 M. 387, 9 A. 690, R.) [Appr., 31 M. 419, F.B. = 3 M.L.T. 287 = 18 M.L.J. 229; R., 29 M. 217.]

(53)—*Right of mortgagee purchasing equity of redemption—Transfer of Property Act (IV of 1882)—S. 85—Right of sale of mortgaged property—Suit to bring mortgaged property to sale—Necessary parties—Prior and subsequent incumbrancers.*—A and B, the joint owners of certain property, jointly gave two mortgages to X—one in 1882 and another in 1884. Then A alone mortgaged a portion to Y, and B alone mortgaged another portion to X, and lastly A mortgaged a portion to Z. In 1885, A and B jointly sold the whole property to X, and with the proceeds of that sale, X's three mortgages

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

were paid off. In 1887, Y sued to bring the property mortgaged to him to sale, and for cancelment of the deed of sale to X. *Held*, that X, not having exhibited any intention of fore-going his rights under the first two mortgages, was entitled to use them as a shield against the claim of Y. (11 I.A. 126=10 C. 1035, 3 A. 682, 6 B. 404, 6 B. 651, 7 M.H.C. 229, 7 A. 568, 7 A. 577, 8 M. 246, R.) [R., 13 A. 581, 12 C.P.L.R. 70, A.W.N. 1907, 85=4 A.L.J. 349.] The provisions of the section are mandatory. A mortgagee has no right to bring mortgaged property to sale under his mortgage, without redeeming the prior mortgagee, if any, or affording the subsequent mortgagee, if any, an opportunity to redeem, *i.e.*, a second mortgagee is not entitled to have the property sold subject to the prior mortgage. Consequently in a suit by a mortgagee for sale on his mortgage, the other mortgagees whether prior or subsequent, are necessary parties. *MATADIN KASODHAN v. KAZIM HUSAIN*, 13 A. 432, F.B. (17 W.R. 480, 1 A. 210, 8 C. 79, 4 A. 196, A.W.N. 1882, 59, 4 A. 518, 10 A. 629, 17 I.A. 201=18 C. 164, R.; 8 A. 105, D.; 4 M. 213, 8 M. 246, R.; 7 A. 568, 7 A. 577, Diss.) [Diss., 1 O.C. 53; *Not F.*, 1 O.C. 105, 7 O.C. 330; *F.*, 18 A. 83, 22 B. 701; *R.*, 18 A. 109, 17 A. 537, 23 C. 795, 19 A. 379, 19 A. 543, 20 A. 110, F.B., 11 C.P.L.R. 75, 12 C.P.L.R. 86, 25 M. 108=11 M.L.J. 373, 14 C.P.L.R. 177, 24 A. 549, 1 L.B.R. 210, 1 C.L.J. 337, 30 B. 156=7 Bom. L.R. 811, 1 S.L.R. 68, 10 O.C. 145, A.W.N. 1907, 286=4 A.L.J. 765, 132 P.W.R. 1908=64 P.R. 1908, 31 A. 352=6 A.L.J. 427; D., 22 A. 377, 23 A. 25.]

(54)—*Prior usufructuary mortgage — Suit for sale on subsequent simple mortgage when maintainable.*—A decree for sale under the Transfer of Property Act, cannot be a decree for the sale of the mere equity of redemption, but must be a decree ordering the sale of the mortgaged property itself. So, the holders of a subsequent simple mortgage cannot institute a suit for sale under their mortgage until a prior usufructuary mortgage over the same property has become capable of redemption. Such a suit brought before the time when the plaintiffs, the subsequent mortgagees, could ask for redemption of the prior usufructuary mortgage would be liable to dismissal as having been prematurely brought. *AKHARA PANCHAITI v. SUBA LAL*, 18 A. 83. (3 A. 432, *Expl. & F.*) [R., 11 C.P.L.R. 75, 1 O.C. 53, 105.]

(55)—*Transfer of Property Act (IV of 1882), s. 101—Payment of first mortgage by last mortgagee—Last mortgagee entitled to priority over intermediate mortgagees.*—On the footing of a mortgage made in 1882 for the purpose of paying off a prior mortgage, of 12th February, 1877, which had itself been executed for discharging another earlier mortgage of 1876, plaintiff claimed priority over the mortgage to the defendant dated 10th February 1877. Plaintiff was held entitled to priority over the defendant to the extent to which the mortgage-money of

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

the mortgage of 1882 went to discharge that of 1876. *SEETHARAMA v. VENKATAKRISHNA*, 16 M. 94. [R., 20 M. 274, 12 C.P.L.R. 70, 2 C.L.J. 202.]

(56)—*Mortgagee or pledgee purchasing mortgaged property—Trustee—Leave to bid—Rights of mortgagee-decree-holder under the Code—Mortgagee whether trustee for mortgagor.*—Neither the mortgagee, whether he claims under an ordinary power or under trust for sale, nor his trustee, can buy the mortgaged property, unless, when the sale is made by the Court, he has obtained leave to bid, and if the mortgagee be a trustee he will not have leave to bid where the *cestui que trust* objects, unless attempts to sell to others have failed and the same rule applies to a pledgee. The reason of this prohibitory rule is that it would be improper to place a person in a situation in which his interest as intending purchaser might conflict with his duty to secure the highest price for the property to be sold. But a hard and fast rule that the mortgagee can never become the purchaser is not only unnecessary but would be inexpedient, even in the interests of the mortgagor. [*Expl.*, 18 M. 153.] The decree-holder under the Civ. Pro. Code, can only buy with the leave of the Court and when the mortgagee-decree-holder has bought the mortgaged property with such leave, there is no reason or authority for holding that he takes the property in trust for the mortgagor. A mortgagee in such a position can therefore take out further execution for any balance of the decretal amount that may be left after deducting the price for which the mortgaged property was sold, and is not bound to credit the judgment-debtor with the real value of the property to be ascertained by the Court. *SHEONATH DOSS v. JANKI PROSAD SINGH*, 16 C. 132. [*F.*, 18 A. 31=15 A.W.N. 144; R., 19 C. 4, 24 M. 96, 10 C.W.N. 209=3 C.L.J. 240, 4 C.L.J. 246.]

(57)—*S. 294, Civ. Pro. Code (Act XIV of 1882)—Purchase by mortgagee-decree-holder under his own decree—Bound to give credit to the mortgagor only to the actual amount of his bid.*—A mortgagee-decree-holder, purchasing the mortgaged property at Court auction, having obtained permission to bid under s. 294, Civ. Pro. Code, is in the same position as an independent purchaser, and is only bound to give credit to the mortgagor for the amount of his bid. *GUNGA PERSHAD v. JAWAHIR SINGH*, 19 C. 4. [R., 3 S.L.R. 17, 18 A. 31=15 A.W.N. 144, 24 M. 96, 4 C.L.J. 246; D., 18 M. 153.]

(58)—*Lien on land, suit to enforce—Mortgaged premises—Sale.*—A suit is maintainable for the enforcement of a lien on land which has been mortgaged. The land as it stood at the time of mortgage free from subsequent incumbrances may be sold, though a decree for money due on the mortgage has been obtained, and the right, title and interest of the mortgagor

Mortgage—continued.—10.—Sale of mortgaged property—*contd.*

thereto has under such decree been once sold. **BISWANATH MUKHOPADHYA v. GOSAIN DAS BARA MADAK, 3 B.L.R. App. 140.** [*F.*, 19 W.R. 255; *R.*, 2 M. 108; *Expl.*, 4 B.L.R. O.C. 83.]

(59)—*Sale—Purchase subject to lien—Suit for lien amount—Proper form of suit.*—A suit will not lie against the purchaser of property subject to a lien, to recover from him personally the amount of the lien, but the lien is not lost by the sale and a suit may be brought against the purchaser with the object of obtaining a decree for the realisation of the lien by the sale of the hypothecated property. **JUGERNATH v. ILAHI, 3 N.W.P. 207.**

(60)—*Mortgage—Agreement to place mortgagee in possession on default in payment within limited time—Right of mortgagee to sue for mortgage money.*—A mortgagor covenanted as follows:—"If I fail to pay the (mortgage) amount, then I will put you in possession of the land (mortgaged for the debt) and you may enjoy it; and, when I have the means, I will redeem the land and pay the debt with interest and take back the bond." *Held* that the mortgagee was entitled to enforce the obligation for payment of the mortgage money of which the defendant had made default in payment within the time named. He was not bound to sue for possession of the land. **ANNASWAMI v. NARRANAIYAN, 1 M.H.C. 114.**

(61)—*Prior encumbrancer—Subsequent encumbrancer—Postponement—Gross negligence.*—A prior encumbrancer would not be postponed to a subsequent encumbrancer unless he has been guilty of gross negligence amounting to fraud in its qualified legal sense. **MUTHA v. SAMI, 8 M. 200.** [*R.*, 12 M. 424.]

(62)—*Mortgagee electing to take money decree—Execution sale—Mortgagee, purchase by—Rights.*—When a creditor who holds a bond whereby property is mortgaged, elects to take a money-decree, and in execution thereof brings the mortgaged property to sale, he by that sale transfers to the purchaser the benefit of his own lien and also the right of redemption of his debtor, transfers in a word everything that either mortgagor or mortgagee could convey. When, therefore, the decree-holder is himself the auction-purchaser and buys at the execution sale the rights and interests of his debtor, he obtains the right to have his lien on the mortgaged land satisfied. **ARUTH SOAR v. JUGGUNNATH MOHAPATTUR, 23 W.R. 460.** (23 W.R. 186, 15 W.R. 195, *R.*) [*R.*, 3 C. 363.]

(63)—*Mortgage deed—Money decree—Sale of mortgaged property in execution of decree—Ticcadar no party to suit—Ticca rights not transferred.*—In execution of a money decree obtained on a mortgage deed, a mortgagee attached and brought to sale the mortgaged property: *held* that he transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor; but what passed to the buyer would not include ticca rights, if the ticcadar

Mortgage—continued.—10.—Sale of mortgaged property—*contd.*

was not made a party to the suit on the bond. **BYJNATH SINGH v. GOBURDHUN LALL MOHASOHREE, 24 W.R. 210.** (23 W.R. 187, F.B., *R.*) [*F.*, 6 C. 317.]

(64)—*Lien on mortgaged property—Form of decree.*—A mortgagee, by way of simple mortgage, cannot assert his lien on the property mortgaged as against a subsequent mortgagee by way of conditional sale who had foreclosed, if the decree passed in favour of the former on his mortgage-bond does not provide for its satisfaction from the sale of the mortgaged property. **RAM CHUNDER MISSER v. KALLY PROSONNO SINGH, 2 Hay 625.**

(65)—*Possessory suit—Mortgage deed—Money decree—Proof—Remand.*—Where a suit for possession of property was resisted by the defendant in possession on the ground that he claimed to be entitled to retain possession as purchaser under a sale in execution of a decree, against the vendor of the plaintiff's vendor on bonds which pledged the property, although the mortgage was not declared in the decree. *Held* that if the defendant in possession could prove that, by the bonds on which the money decree was given under which he bought, this property was mortgaged as security for the debts covered by them, he will be entitled to remain in possession as against the plaintiff. **RAM KANT ROY v. RAJ KISHORE DEB, 24 W.R. 94.** (17 W.R. 232, 23 W.R. 190, F.B., *F.*) [*Expl.*, 7 C. 677; *D.*, 6 C.L.J. 609.]

(66)—*Mortgages—Priority—Sale in execution, by first mortgagee—Foreclosure by second mortgagee.*—Certain properties were pledged to R as security for the rents of another property. There was a failure to pay the rents. R got a decree for the sale of the secured properties. In the meanwhile the same properties had been mortgaged in favour of U. The money due on this second mortgage to U not having been paid, notice of foreclosure was issued and U was about to take up possession when R sold the property in execution of his decree and it was purchased by B. U now sued to set aside the sale. *Held* that the sale could not be set aside. R had legal priority over U's mortgage and B therefore as purchaser has the lien which ought to be maintained. B's purchase was not in execution of a mere money-decree. **J. BECKWITH v. UMESH CHUNDER ROY, 3 W.R. 110.** [*F.*, 7 W.R. 232; *D.*, 10 W.R. 88.]

(67)—*Zuripeshgi lease—Possession abandoned—Money decree—Lien.*—Where a *zuripeshgee-dar* abandons his right to possession under his lease, and institutes a suit to recover the sum that he has advanced and obtains a decree in that suit, and allows that decree to be so framed as to give him no specific remedy against the property leased to him, his lien must be held to have terminated. **GOUREE SINGH v. FUZL HOSSEIN, 15 W.R. 313.**

(68)—*Mortgage—Money decree—Suit for declaration of right to sell mortgaged property.*

Mortgage—continued.**—10—Sale of mortgaged property—contd.**

—A suit can be brought for the declaration of a person's right to have mortgaged property put up for sale, notwithstanding a money-decree has already been obtained upon the mortgage-bond, and notwithstanding that that property has passed into other hands. *RADHA GOBIND SURMAH v. SYUD UMBER ALI*, 15 W.R. 27. [R., 22 W.R. 308.]

(69)—*Money advanced on deed of conditional sale—Suit for refund of money—Money-decree—Rights of decree-holder—Lien.*—M who had advanced certain moneys to A on a deed of conditional sale, *bye-bil-wufa*, not being able to get possession of the mortgaged property sued A for the return of his money. A having died *pendente lite*, M obtained a decree for money against A's personal representatives, and in execution purchased the property which formed the subject of mortgage. He then brought the present suit to set aside two mukurruree leases granted subsequent to the date of his mortgage by A's legal representatives. Held that M's decree, which was a simple money decree, would merely enable the decree-holder to follow the assets of the debtor into the hands of his heirs, as they existed at the time, but could not give a lien or charge on the land which once formed the subject of the *bye-bil-wufa*, and that the decree-holder had no title to insist on the lands being delivered to him free of incumbrances, merely because when the debt was contracted the property forming those assets was unburthened. *MIRZA AKBUR ALI v. MUSSAMUT AMEERONISSA*, 11 W.R. 225.

(70)—*Hypothecation—Simple money decree—Regular suit against purchaser in execution of decree on another mortgage.*—Plaintiff, a hypothecatee, purchased, at a sale in execution of a simple money decree obtained by him on the hypothecation bond, the rights and interests of his judgment-debtor in the property hypothecated. Defendant was the holder of a subsequent mortgage on the same property, who had, in execution of the decree obtained by him on the said mortgage, brought the property to sale and purchased it himself. Plaintiff brought the present suit to set aside the order passed in the summary department rejecting his objections to the sale of the property at the instance of the defendant. Held that the suit should be dismissed. The plaintiff had obtained only a money decree and was not entitled to follow the property hypothecated under his bond except by regular suit against the party in possession of the property. Plaintiff had purchased the rights and interests of his judgment-debtor subject to the rights of the mortgagee (defendant), and as such had the mortgagor's equity of redemption. So, if he satisfied the defendant's mortgage, he could obtain the properties unincumbered. Not having done so, his suit to set aside the purchase of the defendant should be dismissed. *ACHUMBIT THAKOOR v. CHOONEE LALL CHOWDHRY*, 10 W.R. 27. [Rel. on, 11 W.R. 149.]

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

(71)—*Simple mortgagee obtaining mere money decree—Attachment and sale of property in execution—Previous bona fide purchaser not prejudiced.*—The rights of a bona fide purchaser of property for valuable consideration cannot be prejudiced by the sale, in execution of a money-decree obtained by the holder of a simple mortgage, without any declaration that the money due formed a charge on the estate in question. The simple mortgagee possessing only a decree without any declaration as to the liability of the mortgaged property for the debt, is in the position of a mere ordinary judgment-creditor and is entitled only to seize the rights and interests of the debtor such as they are at the time of the judgment. Any lien he may yet possess over the property, he must enforce by a separate suit against those in possession of it. *BINDABUN CHUNDER SHAHA v. JANE BIBE*, 6 W.R. 312. [F., 11 W.R. 149.]

(72)—*Suit on bond with mortgage clause—Money decree—Execution.*—Where the bond upon which the suit was brought contained a mortgage clause, but the decree was altogether silent about it and an ordinary decree for money was passed against the judgment-debtor, the decree cannot be executed against any property which no longer belongs to the judgment-debtor. *GOLUCK MONEE DEBIA v. RAM SOONDUR CHUCKERBUTTY*, 9 W.R. 82. [F., 10 W.R. 468, 15 W.R. 27.]

(73)—*Civ. Pro. Code, Act VIII of 1859, s. 270—Decree under s. 53 of Act XX of 1866 on specially registered bond—Attachment and sale in execution—Prior attachment at instance of another decree-holder—Right of latter to receive sale proceeds.*—Plaintiff had obtained a mortgage of certain property by a specially registered bond and got a decree under s. 53 of Act XX of 1866. In execution of that decree, he attached the mortgaged property and had it sold. Prior to this attachment, the defendant, another decree-holder of the same judgment-debtor, had attached the same property; the Court acting under s. 270 of Act VIII of 1859 directed that the sale proceeds be paid over to the defendant by right of his prior attachment. Hence the present suit by the plaintiff to recover those sale proceeds from the hand of the defendant. Held, that the rule in s. 270 was a mere rule of procedure for the guidance of the Court in determining questions between rival decree-holders, and was never intended to alter or limit the rights to which a party might have become entitled by virtue of a contract independently of the provisions of the Code. Held, also, that the sale at the instance of the plaintiff conveyed away the entire interest of the judgment-debtor in the property. Consequently the plaintiff had nothing to fall back upon except the sale proceeds which represented the property. Plaintiff was therefore entitled to the sale-proceeds in preference to the defendant. *RAJ CHUNDER SHAHA v. HUR MOHAN ROY*, 22 W.R. 98. [D., 10 C. 567.]

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

(74)—*Money-decree passed on a simple mortgage bond—Right of purchaser of decree.*—The purchaser of a simple money-decree passed on a simple mortgage bond does not acquire a lien upon the property mortgaged. *GANPAT RAI v. SARUPI*, 1 A. 446. [D., 78 P.R. 1905 = 135 P.L.R. 1905.]

(75)—*Mortgage—Sale—Prior auction-sale of mortgaged property in execution of money decree by mortgagee—Right of purchaser.—Registration Act—Summary procedure—Decree—Notice.*—In execution of a money-decree obtained by the plaintiff, certain property which was subject to a mortgage in his own favour, was brought to sale and purchased by the defendant. The plaintiff now sued on his mortgage and sought to sell the property. It was not urged by the defendant that the plaintiff had committed a fraud upon him. *Held* that the plaintiff was entitled to insist upon his prior hypothecation right. A decree passed under the summary procedure prescribed by the Registration Act can only be a decree for money and not for the enforcement of a lien. *JUGGUN NATH v. KOMAL SINGH*, 3 N.W.P. 123.

(76)—*Execution of decree—Amount not given in decree included—Sale-proceeds insufficient—Validity of proceedings—Prior and subsequent encumbrances on properties—Decrees—Sale—Possession—Priority.*—Where, in the proceedings in execution taken by a decree-holder, he refers to his *kistbundee* as well as his decree, and includes in the amount to be levied what was not given by the decree, *held* that, though such inclusion was irregular and improper, the proceedings were not void, where the sale proceeds were not sufficient to cover the decree, and that the sale held in the execution proceedings was not invalid. Where, in execution of a decree obtained on a prior encumbrance, A purchases the mortgaged property, and B in execution of another decree obtained on a subsequent encumbrance purchases the same property and enters into possession, *held* that B could not retain possession as against A, who became owner of the property and *prima facie* entitled to possession, his purchase being at the instance of a prior encumbrancer. *BABU KAMESSUR PERSHAD v. DOWLAT RAM*, 19 W.R. 83. [R., 10 C. 567.]

(77)—*Owner in possession of estate—Purchase from owner for valuable consideration—Previous unregistered mortgage not binding on purchaser.*—In this suit the lower Appellate Court had given a decree to the plaintiff, a purchaser for valuable consideration of an estate from the former owner who was in possession of it. It had rejected the claim of a mortgagee under a simple mortgage of the same estate at a prior date. It was contended on special appeal that the mortgage was a prior lien on the estate and that the plaintiff's purchase was subject to the mortgage but the High Court refused to interfere. The mortgage was not registered, and the owner of the estate

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

remained in possession of it. The purchaser consequently had no means of obtaining notice of the mortgage. If the mortgagee had not taken the proper legal steps to give notice of his mortgage by registering it, he has only himself to blame, if his interests were jeopardized by other parties dealing with the owner of the estate mortgaged (who was in possession of it) as if no such mortgage existed. *SHAMA CHURN MOOKERJEE v. NOBIN CHUNDER MOOKERJEE*, 4 W.R. 67.

(78)—*Money-decree by mortgagee—Property with mortgagor and with mortgagor's alienee—Mortgagee's lien, enforcement of—Summary decree by mortgagee—Alienation by mortgagor—Suit against alienee.*—A mortgagee, with a summary decree under the Registration Act (XX of 1866), whose effect is the same as that of a money-decree in an ordinary mortgage-suit, would not acquire a greater right by reason of the mortgagor's alienation, the purchaser not taking the property subject to a greater burden than the debtor himself; the lien is enforceable against the property, by execution, when it is in the hands of the mortgagor, and by suit in the other case. Where execution of a summary decree under s. 53 of the Registration Act of 1866 by a mortgagee has become barred, he has no better right to proceed by separate suit against the mortgaged property in the hands of a purchaser from the mortgagor, the right not at all being more extensive against the alienee than against the mortgagor. *Quære.*—Whether, if the suit stated above had lain, a suit by one only of two mortgagees for a portion of the debt due on the mortgage, would be maintainable. *CALLY NATH BUNDOPADHYA v. KOONJO BEHARY SHAHA*, 9 C. 651. (14 B.L.R. 408 = 23 W.R. 187, 7 C. 714 = 9 C.L.R. 353, R.)

(79)—*Charge against immoveable property—Subsequent lease—Auction purchaser's rights.*—When the holder of a simple mortgage bond, obtains only a money decree on the bond, in execution of which the property hypothecated in the bond is attached, brought to sale and purchased by him, and the debt is completely discharged, he cannot afterwards sue to enforce his lien on the collateral security for his debt, which no longer exists. *Semble*: Even if the debt had not been fully satisfied, he could enforce the lien so as to avoid a lease granted subsequent to the bond. *BALWANT SINGH v. GOKARAN PRASAD*, 1 A. 433. (1 A. 240, F.)

(80)—*Farming lease as security for loan—Suit on bond—Decree—Execution—Effect.*—Where a party, who had obtained a farming lease as security for a loan, obtained a decree in a suit on the bond executed by the lessor, and, in execution thereof, realized the whole of the amount due to him, *held*, that the decree obtained by the judgment-creditor substituted another means of recovery for the one previously given to him; and, if he chose to recover the amount due to him under the decree,

Mortgage—continued.—10.—Sale of mortgaged property—*contd.*

which, in the place of his farming lease, gave him power to sell the property leased to him, he could not retain his former status as well. **ISSUR CHUNDER SEIN v. KENARAM GHOSE, 14 W.R. 463.**

(81)—*Prior and subsequent mortgage on the same property—Sale under money-decree—Rights of purchaser and subsequent mortgagee—Notice.*—Where, in execution of a money-decree obtained by him after notice of a subsequent mortgagee's lien over the mortgaged property, a prior mortgagee sells the rights and interests of the mortgagor in the mortgaged property, which are purchased by a third person, what the purchaser acquires by his purchase is only the equity of redemption of the mortgagor. The purchase has not the effect of extinguishing the subsequent mortgage. The purchaser may redeem the subsequent mortgage and become the absolute owner of the property. **DEO CHAND SAHOO v. TEELUCK SINGH, 14 W. R. 238.**

(82)—*Mortgage—Possession, suit for, by purchaser at sale in execution of decree on mortgage, against holder of Mokurrari of subsequent date.*—At a sale in 1871, in execution of a decree upon a mortgage, dated 3rd May, 1867, A purchased the mortgaged lands, the existence of a Mokurrari granted in 1863 having been notified at the sale. Held that a suit by A against the Mokurraridars for possession would not lie, the existence of the mortgage being no bar to the creation of a subsequent incumbrance carrying with it the right of possession. **KOKIL SINGH v. DULI CHAND, 5 C.L.R. 243.** (23 W. R. F. B. 187, 12 W. R. 522, 9 W. R. F. B. 171, 1 W. R. F. B. 315, discussed.) [F., 21 C. 116.]

(83)—*Mortgage—Execution—Sale—Parties.*—In 1868, A, the Mokurruridar of a mouzah, mortgaged 8 annas of the mokurruri to B and gave him a dur-mokurruri lease of the remaining 2 annas. In 1870, he again mortgaged the whole 10 annas to C, and, in 1875, sold a 1 anna share of the mokurruri to the predecessor in title of the defendants. In 1877, B obtained a decree on his mortgage and, in execution thereof, sold 6 annas of the property, and the plaintiff became the purchaser. In 1877, subsequent to the above sale, C obtained a decree on his mortgage and, in execution thereof, sold the remaining 4 annas of the mokurruri to the plaintiff. 2 annas of the 10 annas share mortgaged to C being subject to the dur-mokurruri lease to B, the plaintiff brought a suit for the rent of the remaining 8 annas, and in that suit the defendants, who were no parties to any of the previous suits, intervened on the ground that the plaintiff was not entitled to the 1 anna share which had been purchased by their predecessor in title in 1875. Held that the plaintiff was not entitled as against the defendants to the 1 anna share, but that, if the lower Court on remand should find the plaintiff to be in possession of such share, then, a decree for rent should be passed in the plaintiff's favour

Mortgage—continued.—10.—Sale of mortgaged property—*contd.*

leaving the defendants to take any steps. **MADHU SINGH v. ACHRAJ SINGH, 9 C. L. R. 369.** (1 A. 240, F. B. Disappr.; 4 B. 57, 14 B. L.R. 408 = 23 W.R. 187, F.)

(84)—*Mortgage—Sale of mortgaged property in execution of money-decree obtained by mortgagee, effect of, on mortgagee's lien.*—The mere taking of a money-decree for the mortgage-debt does not extinguish the mortgagee's lien, but, when he proceeds to execute such money-decree upon the mortgaged property, a sale of it in such execution has the effect of passing the entire interest of himself and the mortgagor together. Whenever a mortgagee proceeds to sell, whether under a decree for sale or under a simple money-decree, what he really seeks is to obtain satisfaction out of his security,—in fact, to enforce his lien. So, it cannot be said that when such proceeding by the mortgagee is in execution of a money-decree only, he still retains his lien for enforcement, *qua* mortgagee, by a second sale of the same property in respect of the debt which might be left undischarged. **NARSIDAS JITRAM v. G. JOGLEKAR, 4 B. 57.** (14 B.L.R. 408, 1 C. 337 = 7 M.H.C. 229, F.; 1 A. 240, Diss.) [Not F., 29 C. 537; F., 10 C. 567; R., 5 B. 614, 9 C.L.R. 369, 7 O.C. 314; D., 8 C. 517, L.B.R. 1893—1900, 14.]

(85)—*Execution—Money decree obtained by mortgagee—Ordinary money decree—Difference*—Where a mortgagee is entitled to a personal decree against the mortgagor or his heir or representative, and takes a mere money decree against him upon the mortgage without any direction that the amount of the decree should be recovered by sale or otherwise from the mortgaged property, the mortgagee nevertheless would have the right to attach and sell that property under the money decree, and such sale would transfer to the purchaser the interest both of the mortgagor and of the mortgagee in the same manner as if the sale had been made under an express direction in the decree. (14 B.L.R. 408, p. 421 F.B., 4 B. 57, R.) Even though the officer of the Court may merely mention the right, title and interest of the mortgagor, as what is sold, the interest of the mortgagee who has promoted the sale passes by way of estoppel, although the mortgagee executes no conveyance to the purchaser. (1 B. 314, R.) The only difference, which can be made in execution between a money decree upon a mortgage and a money decree not upon a mortgage, is that, where the mortgaged lands are attached under the former, the sale of them is deferred until six months, or some other reasonable period expires in order to give to the mortgagor the opportunity of redeeming, which would be afforded to him in a suit for foreclosure or redemption. **HARI v. LAKSHMAN, 5 B. 614.** [R., 12 B. 678, 18 B. 444.]

(86)—*Execution—sale of mortgaged property—Sale freed from mortgagee's lien.*—Where mortgaged property is brought to sale in execution

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

of a mortgage-decree, the property cannot be sold reserving the mortgagee's rights over it, the very object of the sale being to satisfy such rights; and the mortgagee is precisely in the same position, as far as his own interest is concerned, even if the mortgaged property is sold under a simple money-decree. In either case, the mortgagee sells it freed from his lien. [R., 32 C. 891=9 C.W.N. 728=1 C.L.J. 371.] If, at the time of the sale of the mortgaged property, the mortgagor has no interest in the property, the execution-purchaser takes nothing by the sale. *RAMANATH DASS v. BOLORAM PHOOKUN*, 7 C. 677=9 C.L.R. 233. (14 B.L.R. 408, 22 W.R. 338, 24 W.R. 94, 1 A. 240, 3 C. 363, 7 C. 714, *Disc. & Expl.*) [Cons., 10 A. 520=8 A.W.N. 210]

(87)—*Purchase by mortgagee under money-decree—Enforcement of lien against prior purchaser.*—A mortgagee, becoming himself the purchaser of the mortgaged property at an execution sale under a money-decree which he elects to take, may sue to enforce his lien against a purchaser of the right, title and interest of the same debtor in the same property, at a prior execution sale under a prior money-decree. *JONMENJOY MULLICK v. DOSSMONEY DOSSEE*, 7 C. 714=9 C.L.R. 353 F.B. (3 C. 363, *Overruled.*) [R., 9 C. 651, 10 C. 567, 14 C. 464; D., L.B.R. 1893—1900, 14, 33 C. 849.]

(88)—*Mortgagee with money-decree—Suit for enforcement of lien on mortgaged property.*—A mortgagee of specific property, with a money-decree against the mortgagor, can sue to have his lien against the particular property established as against an execution purchaser of the property with notice of the mortgage. *RAJ KISHORE SHAHA v. BHADOO NOSHOO*, 7 C. 78. [D., 33 C. 849; R., 10 C. 567.]

(89)—*Mortgagee's lien—Equity of redemption sale of, by mortgagee, effect of.*—Lien of mortgagee on sale of right, title and interest of mortgagor. A mortgagee is not entitled, by means of a money-decree obtained against the mortgagor, to sell the equity of redemption, thus depriving the mortgagor of his right of redemption. *BHUGGOBUTTY DASSEE v. SHAMACHURN BOSE*, 1 C. 337. [F., 4 B. 57; D., 23 B. 119; R., 22 B. 624, 7 O.C. 314, 8 O. C. 327, 27 A. 517=2 A.L.J. 210=A.W.N. 1905, 80, 35 C. 61 F.B.=6 C.L.J. 320=11 C.W.N. 1011, F.B.] (See 5 B.L.R. 460 (Note). [On appeal, 10 B.L.R. 60 (note), 4 B.L.R. O.C. 83, 5 B.L.R. 450 and 10 B.L.R. 57.]

(90)—*Civ. Pro. Code, 1882, s. 43—Mortgage to secure payment of rent—Revenue Court decree for arrears of rent allowed to become time-barred—Right of lessor to enforce mortgage.*—Where, to secure due payment of rent, a lessee gave security by way of mortgage, and the lessor, after partial satisfaction, allowed a decree obtained by him in the Revenue Court for the arrears of rent to become barred by limitation, the lessor was not precluded from bringing a

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

suit to recover the balance due by enforcement of the mortgage security. *CHUNNI LAL v. BANASPAT SINGH*, 9 A. 23. [R., 103 P.R. 1893.]

(91)—*Mortgage—Decree of prior mortgage—Auction purchaser—Resistance by subsequent mortgagee with possession—Sale of "right, title and interest of mortgagor"—What passes by such sale.*—The same property was subject to two mortgages, duly executed and registered in favour of two different persons, the prior being without possession and the latter with possession. The prior mortgagee obtained a decree for sale on his mortgage in a suit against the minor son of the mortgagor, who was represented by his mother as his guardian, although she did not obtain a certificate of administration under the Minor's Act, XX of 1864. The property was sold in auction, and the purchaser having been resisted, in his attempt to take possession of the property, purchased by the widow and heiress of the deceased second mortgagee, brought the present suit for possession. *Held*, that the auction-purchaser was entitled to possession, as his position was the same as that of the prior mortgagee before the sale, and as he therefore had a superior title to that of the defendant who claimed under a subsequent mortgage. The question whether, under the circumstances of the case, the minor son or the widow of the second mortgagee could sue the plaintiff (auction-purchaser) to redeem the mortgage was left undetermined. Although it is not the practice of the Mofussil Courts to require a mortgagee who sues for and obtains a sale of the mortgaged premises, formally to convey to the purchaser, and the latter must be contented with a certificate of sale to him of the right, title and interest of the mortgagor, yet in fact, the interest of the mortgagee, who causes the sale to be made, is held to pass to the purchaser, and that mortgagee is completely estopped from disputing that such is the effect of the sale. *KHIVRAJ JUSRUP v. LINGAYA*, 5 B. 2. (7 B.H.C. 146, A.C.J., R.) [R., 5 B. 5, 11 B.H.C. 139, 5 B. 8, 22 B. 686, 22 B. 945; D., 23 B. 290.]

(92)—*Prior registered mortgage—Subsequent lease with possession—Right of lessee—Sale under mortgage decree—Effect.*—Where there was a prior registered mortgage on the property, held that a subsequent lessee of the same property, although the lease was registered and possession given thereunder, took only what the mortgagor had to give him, viz., a lease subject to the registered mortgage. Where a decree is obtained upon his mortgage by a mortgagee, and the mortgaged property is sold under the decree for paying off the mortgagee, the interest of the latter as well as that of the mortgagor passes to the purchaser. The mortgagee is completely estopped from disputing that such is the effect of the sale so far as his interest is concerned, although the officer of the Court may only have described the sale as one of the right,

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

title and interest of the mortgagor. It is not the practice in the Mofussil to require the mortgagee to convey to the purchaser. The transfer takes place by way of estoppel. *SHESHGIRI SHANBHOG v. SALVADOR VAS*, 5 B. 5. [R., 11 B.H.C. 139, 5 B. 8, 22 B. 686, 945; D., 20 B. 290.]

(93)—*Mortgage decree—Execution sale of right, title and interest of mortgagor or his heir, what passes at—Non-joinder—Effect.*—The usual mode in the Mofussil Civil Courts, of selling in suits on mortgages "the right, title and interest" of the mortgagor or his heirs, is not correct, if the right, title and interest so sold are deemed to be only his right, title and interest at the time of the sale. In fact the intention of the Court is to pass to the purchaser the right, title and interests of both the mortgagor and mortgagee; and therefore, "the right, title and interest" of the mortgagor, as it stood when he was making the mortgage (and not as it stood at the time of the Court sale), is what passes under the certificate of sale to the purchaser. [R., 5 B. 614, 10 A. 520=8 A.W.N. 210, 16 B. 486, 17 M. 247.] On the death of the mortgagor, the mortgagee instituted a suit on the mortgage against the widow of the mortgagor, without impleading his minor children as parties. A decree for sale was passed, and the property was sold thereunder. The purchaser at auction sale was resisted in taking possession of the properties, on the ground that his purchase did not include the share of the children, they not having been made parties to the suit. The purchaser sued to obtain possession of the entire property. *Held*, that, although the sale was not impeachable in other respects, it was defective in that the children of the mortgagor were not impleaded as parties to the suit, and that these children, therefore, were entitled to any relief which they would have obtained if they had been made parties to that suit, viz., the right of redeeming the property by paying off the mortgage. *SHAIK ABDULLA SAIBA v. HAJI ABDULLA*, 5 B. 8. [R., 6 B. 515, 28 B. 153; D., 19 B. 680.]

(94)—*Suit for foreclosure—Alienation by mortgagee pending suit—Mortgagor's right to redeem not affected.*—An alienation of the mortgaged property by the mortgagee during the pendency of the suit for foreclosure brought by him cannot affect the mortgagor's right to redeem which the foreclosure suit in its ultimate issue might leave open and affirm to him. *SEEDER NAZEER ALI KHAN BAHADUR v. RAJAH OJODHYA RAM KHAN*, 8 W. R. 399.

(95)—*Land subsequently sold, liability of, for a debt for which it was previously hypothecated.*—Land subsequently sold stands as a security for a debt for which it was previously hypothecated. *SADAGOPA CHARİYAR v. RUTHNA MUDALI*, 5 M.H.C. 457. [R., 10 M. 509, F.B., 13 A. 28.]

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

(96)—*Undertaking by debtor not to alienate property until satisfaction of debt—Lien of creditor, priority of.*—The defendants Nos. 4 to 8, the Dutts, were indebted to the defendants Nos. 9 to 12, the Roys, in a large sum of money. By a razeenamah and a safeenamah filed by the parties, the Dutts bound themselves not to transfer by gift or sale or otherwise alienate a certain zemindaree until the debt due to the Roys had been satisfied. Some years after the razeenamah, the Dutts granted a putnee of two mouzahs in the zemindaree to defendants Nos. 1 to 3, the Seins. Plaintiffs claimed as purchasers of the rights of the Dutts, debtors in the suit above compromised. On going to take possession, plaintiffs found the Seins in possession of their putnee and consequently brought the present suit to cancel the same and to obtain *khas* possession of the mouzahs. On this state of things, the High Court agreed with the Principal Sudder Ameen who had held that the plaintiffs had no right to enforce the terms of the razeenamah, and to set aside the putnee created after the above deed, that the putnee was created long before their purchase and that they acquired the rights of the debtors, and not those of the creditors. *MESSRS. ERSKINE AND CO. v. DHUN KISHEN SEIN*, 8 W.R. 291. [F., 10 W.R. 88; R., 10 W. R. 151, 13 W.R. 82.]

(97)—*Prayer in plaint for realisation of mortgage—Judgment granting plaintiff's claim—Absence of express order for sale—Sale in execution of decree, effect of.*—The plaint in this case asked for the realisation of the mortgage, and, although the judgment did not in terms order sale of the mortgaged property, it directed that the plaintiff's claim should be granted; and the High Court held that in such a case the sale following in execution of the decree would pass to the plaintiff the actual property mortgaged. *MUSST. SOUJHAREE COOMAR v. RAMESHUR PANDA*, 4 W.R. 32. [R., 21 W.R. 150; D., 8 W.R. 291.]

(98)—*Rival incumbrances claiming possession under their decrees—Priority—Second incumbrance, force of.*—A suit by a prior mortgagee, decree-holder and auction-purchaser against a subsequent incumbrancer, decree-holder and auction-purchaser for possession of his judgment-debtor's property, for cancellation of the sale to the subsequent auction-purchaser and for confirmation of his own prior purchase was based on this latter fact and on the priority of mortgage lien, though the first incumbrancer had taken a second security from the debtor, after the latter's failure to re-pay him his loan, for the total amount of the principal and interest due to him under the first security. *Held* that the plaintiff on purchasing at the sale in execution took subject to the defendant's later security to this extent, that the defendant by paying off the prior debt might establish his own security: *Held* also that the question whether the plaintiff's first security

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

was extinguished by his taking a second security, covering the original debt and the accumulated interest depended on the intention of the parties, which was clearly shown by the original bond having remained in the possession of the creditor. **GOPEE BHUNDHOO SHANTRA MOHAPATTUR v. KALEE PUDO BANERJEE**, 23 W.R. 338. (5 B.L.R. O.C., 460, 450, 83, *Appt.* [Expl., 4 C. 817; *Cons.*, 25 W.R. 513, 5 C.L.R. 243, 7 C. 677; *D.*, 7 C. W.N. 11; *R.*, 6 B. 404, 20 B. 390.]

(99)—*Two mortgages of same property—Merger when takes place—Intention of parties—Effect of not impleading subsequent incumbrancer in suit on previous mortgage.*—Where there are two mortgages of the same property to the same person on different dates, the later comprising the earlier one, it depends upon the intention of the parties whether or not the earlier security has become merged or extinguished in the later one. In the present case, there was a simple mortgage in 1870, and subsequently in 1873, there was a mortgage with possession of the same land to the same person. The earlier mortgage was not given up to the mortgagor, nor was it cancelled at the time, but remained with the mortgagee. *Held* that there was nothing to show that there was any intention to forego the benefit of the security created by the prior mortgage. And when the mortgagee obtained a decree on his later mortgage of 1873, and had the property sold in auction, the purchaser was held to take the property free from all incumbrances even from the date of the earlier mortgage. [*R.*, 16 B. 486, 1 O. C. 107, 5 C.L.J. 527; *D.*, 13 B. 348, 30 M. 500 = 17 M.L.J. 431, 13 A. 432, F.B.] Where a subsequent incumbrancer is not made a party to a suit on a previous mortgage, he does not lose his right of redemption, even after the property has passed into the hands of the auction purchaser. **DULLABHDAS DEVCHAND v. LAKSHMANDAS SARUPCHAND**, 10 B. 88. [*R.*, 13 A. 432, 20 B. 158.]

(100)—*Suit upon mortgage—Decree—Suit for redemption based on decree—Not maintainable—Act XXIII of 1861, s. 11—Second appeal—Suit cannot be changed in.*—A suit was brought in 1825 by the mortgagee against the mortgagor on his mortgage of 1806; and a decree was passed in 1825 to the effect that an account having been taken of what was due on the mortgage, the mortgagor might at any time make a tender of the amount due, with the interest up to that time, and require that the land should be restored to him. No action seems to have been taken upon this decree, until its execution became time-barred. However, in 1877, the plaintiff as the representative of the original mortgagor brought the present suit claiming to redeem the mortgage, and basing his cause of action on the above said decree as regulating the rights of the parties from the time when it was made. *Held* that the decree of 1826 must be regarded as a decree and not as a mortgage, and that under Act

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

XXIII of 1861, s. 11, which provides that questions arising between the parties to the suit and relating to the execution of the decree must be determined by order of the Court executing the decree, and not by a separate suit, the plaintiff ought, if he wished to redeem the property, to have applied to the Court to execute the decree by putting him into possession after paying the money due on the mortgage; and that, inasmuch as the time limited by law for the execution of the decree had long since elapsed, there was no cause of action existing, and the suit was barred. [*R.*, 19 B. 140, 19 M. 40, F.B., 19 A. 202, 21 A.W.N. 194, 25 M. 300, F.B., 8 O.C. 261, 10 C.L.J. 115 = 1 Ind. Cas. 71; *D.*, 14 B. 327, 21 M. 18, 24 A. 44.] *Held*, further, that the plaintiff not having sought by his plaint to redeem the mortgage or alleged that there had been acknowledgment, could not in second appeal fall back on a right to redeem such mortgage, although the latter might be within limitation—as that would be to make a case different from the one tried and decided in the Courts below. Accordingly, the suit was held to be properly dismissed. **HARI RAVJI CHIPLUNKER v. SHAPURJI HORMASJI SHET**, 10 B. 461, P.C. = 13 I.A. 66 = 4 Sar. 719.

(101)—*Payment of first mortgage by third mortgagee in ignorance of second—Registration—Notice—Presumption of intention to keep alive first mortgage.*—Where, in ignorance of a second mortgage represented by a registered decree, the third mortgagee of property pays off the first mortgage, but without taking an assignment, he will be entitled to a first charge on the property in respect of the amount paid by him; and even if registration be held to be notice, he will still be presumed to have intended to keep the first mortgage alive, in accordance with the ruling of the Privy Council in 11 I.A. 126. **GANGADHARA v. SIVARAMA**, 8 M. 246. (11 I.A. 126, *R.*) [*F.*, 15 M. 268; *Appt.*, 22 C. 33; *R.*, 13 A. 432, F.B.; *D.*, 18 B. 86.]

(102)—*Purchase of equity of redemption by prior mortgagee—Intention of retaining benefit of prior mortgage, nature of evidence necessary for.*—The purchase of the equity of redemption by a mortgagee does not necessarily prevent the mortgagee from falling back upon his mortgage in a contest between himself and a puisne mortgagee. The question in such cases is whether the prior mortgagee and purchaser intended to retain the benefit of his charge, and this question may be decided in the affirmative if he has declared his intention by express words or necessary implication, that the mortgage shall continue to subsist, or if such continuance would be for his benefit. Generally, slight evidence will suffice to establish such intention. The circumstance that the mortgage-deed remained with the purchaser could be regarded as evidence that he intended to retain the bene-

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

fits of his mortgage. *SHANTAPA v. BALAPA*, 6 B. 561. [F., 13 A. 432; R., 1 O.C. 105.]

(103)—*Discharge of prior mortgage—Presumption as to keeping it alive.*—The presumption, generally speaking, in the absence of any evidence to the contrary, is that a person, whose money goes to satisfy a prior mortgage, intends to keep alive for his benefit that prior mortgage; and a covenant in a mortgage-deed that the mortgagor will redeem the mortgage bond of a third person and deliver it to the mortgagee to his satisfaction, is an indication on the part of the mortgagee to keep alive that security in his favour. *AMAR CHANDRA KUNDU v. ROY GOLOKE CHANDRA CHOU-DHRY*, 4 C.W.N. 769. [R., 29 C. 25.]

(104)—*Payment of prior mortgage—Presumption of keeping it alive—Intention.*—A purchaser or mortgagee of the equity of redemption, who pays off a first incumbrance, is entitled, as against intermediate incumbrances, to stand in the place of incumbrancers paid off, even if no intention to keep it alive is expressed. *RUPABAI v. ADIMULAM*, 11 M. 345. (11 I.A. 126, F.) [F., 16 M. 94, 20 M. 274, 12 C.P.L.R. 70.]

(105)—*Attachment of mortgaged property—Equity of redemption, purchase of—Payment to prior mortgagee pending attachment—Code (XIV of 1982), s. 276—Presumption to keep alive the prior lien.*—Where certain property subject to a mortgage was attached in execution of a money decree and purchased by D in Court auction and pending the attachment, the mortgagor created a subsequent mortgage of the same property for paying off the prior mortgage-debt in favour of plaintiff who discharged the prior mortgage the day after his mortgage, held, that, on the day of the attachment of the property, nothing more could be attached than the equity of redemption belonging to the mortgagor, and under s. 276, Civ. Pro. Code, the subsequent discharge by the mortgagor could not enlarge the subject of the attachment, as D purchased only the equity of redemption in the property. The mere fact that the mortgagor pays the money to the prior encumbrancer for his own benefit, namely, with the object of getting a reduction in the amount of the debt, cannot be taken as an indication of an intention on the part of the subsequent mortgagee not to keep alive the prior security for his benefit. *DINO BANDHU SHAW CHOWDHURY v. NISTARANI DAS*, 3 C.W.N. 153. (10 C. 1035, Relied on.) [Rel. on., 29 C. 25; R., 8 C.W.N. 690.]

(106)—*Execution of decree—Sale of property subject to mortgage—Subsequent mortgage—Payment of first mortgagee—Second mortgagee taking possession—Suit for possession by purchaser of equity of redemption—Keeping alive of first mortgage—Rights of second mortgagee.*—T mortgaged the suit property to G in 1885. In execution of a money decree which he obtained against T, the plaintiff brought

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

the mortgaged property to sale and purchased it in 1886. In 1888, T gave a second mortgage on the suit property (along with some other property) to the defendant and paid off G. The defendant thereupon took possession of the property in dispute. The plaintiff, as purchaser of the equity of redemption, went to take possession, when he was obstructed by the defendant. The present suit was thereupon instituted by the plaintiff to recover possession of the suit property. The defendant contended *inter alia* that, as he had satisfied G's mortgage lien, which was prior in date to plaintiff's purchase and had been put in possession and as the plaintiff was aware of that fact, the plaintiff must redeem him before claiming possession. Held that the defendant could have no defence to the plaintiff's suit for possession, as his mortgage in 1888 was subsequent to plaintiff's purchase at auction sale in 1886 of the equity of redemption, unless, at the time when G's mortgage was paid off, there had been a formal assignment thereof to the defendant, in token of the same having been kept alive in his favour. In this case there was nothing to show that there was any intention to keep G's mortgage alive for the benefit of the defendant. Held also that the plaintiff should give credit to the defendant for the sum paid by him in wiping off the mortgage of G, because in this case, plaintiff sought to recover property which, but for defendant's payment to G, would have been burdened with G's mortgage, and as the defendant, at the time he advanced money to T to pay off that mortgage, did not know that T was not the owner of the equity of redemption. Held, further, that, as the mortgage to the defendant comprised other properties besides the one in suit, the plaintiff should recover possession on payment to the defendant of a proportionate part of G's mortgage-debt having regard to the value of the suit property and that of the other mortgaged properties. *LOMBA GOMAJI v. VISHVANATH AMRIT TILVANKAR*, 18 B. 86. [R., 18 B. 348, 21 B. 567; Expl., 36 C. 193=5 C.L.J. 611.]

(107)—*Purchase of part of mortgaged property—Suit by purchaser for possession—Decree for possession on payment of whole mortgage debt—Apportionment of debt whether could be first claimed in second appeal.*—Suit for possession of lands purchased by plaintiff from defendants Nos. 1 and 2. Both the Courts below passed decree in plaintiff's favour subject to his paying the entire debt due under a mortgage decree that had been obtained by defendant No. 3 on a mortgage of the suit lands with others by the first two defendants to third defendant's father. In second appeal, plaintiff contended that, as the mortgage in question covered other properties than those purchased by him, the whole of its debt should not be made payable out of the lands he had purchased, and it was held that, although, if the plaintiff had prayed for it in the Courts below, he might have been entitled to the apportionment of the mortgage-debt,

Mortgage—continued.**—10—Sale of mortgaged property—contd.**

the matter not having been mooted in the Courts below nor suggested itself to either of the Judges, and the appellant being entitled to his proper remedy of a suit for contribution, it was not competent to the High Court to pass a decree as prayed for on second appeal, thus allowing the sum to be paid to be ascertained in execution. *YADAO BABAJI v. AMBO*, 21 B. 567.

(108)—*Mortgage—Mortgaged property, purchase of, by first mortgagee—Priority.*—If the first mortgagee purchases the property mortgaged after a second mortgage is created upon it, he does not thereby lose the benefit of his first mortgage, if the money due under the first mortgage be set off against the consideration of the sale. *BISSEN DOSS SINGH v. SHEO PROSAD SINGH*, 5 C.L.R. 29.

(109)—*First and second mortgages—Rights of their assignees.*—A sub-mortgagee of the rights and interests of the first mortgagee, who has purchased the same in execution of a decree obtained against the first mortgagee, is entitled to possession of the property as against the assignee of the interests of the second mortgagee. *SAHAI PANDEY v. SHAM NARAIN*, 2 A. 142.

(110)—*First and second mortgages—Purchase of mortgaged property by first mortgagee.*—Where a first mortgagee of certain property purchases it subsequent to a second mortgage on the same property, the second mortgagee cannot bring such property to sale without satisfying the first mortgage. The fact that the first mortgagee has purchased the property will not extinguish his mortgage, which must be held to subsist for his benefit after the purchase. *HAR PRASAD v. BHAGWAN DAS*, 4 A. 196 = A.W.N. 1882, 13. (3 A. 682, F.) [Cons., 22 C. 33; R., 13 A. 432, F.B., 1 O.C. 105.]

(111)—*Purchase of mortgage property by mortgagee—Whether security continues after purchase—Purchase of portion of mortgage property by mortgagee—Liability of remaining portion for whole debt.*—The question whether a mortgagee who has become a purchaser of his security, thereby extinguishes his security or keeps it alive, depends upon the express or implied intention of the parties; and when it is manifestly for the interest of the person in whom both the mortgage and the equity of redemption have united, to keep the security alive, an intention, so to keep it, will be presumed in the absence of circumstances negating such a presumption. [F., 4 A. 196, 2 A. W.N. 59, 4 A. 518; Appr., 13 A. 432, F.B.; Cons., 22 C. 33; R., 20 B. 390.] A mortgagee who purchases a portion of his security may throw the whole burden of his mortgage-debt on the remaining portions of the property. *GAYA PRASAD v. SALIK PEASAD*, *GAYA PRASAD v. GAYA PRASAD*, 3 A. 682 = A.W.N. 1881, 53. [D., 13 B. 45.]

(112)—*Condition against alienation—First and second mortgages—Purchase by mortgagee*

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

of mortgaged property—Extinguishment of lien.—An alienation, in contravention of a covenant in a mortgage-deed not to alienate the mortgaged property so long as the mortgage is subsisting, is not absolutely void, but only voidable so far as it goes to defeat the mortgagee's right under the mortgage; saving the mortgagee's right, such a covenant does not bind the property so as to prevent the acquisition of a valid title by the transferee. (1 A. 126, 1 A. 610, 2 A. 826, *Observed*.) The purchase by a mortgagee of the mortgaged property does not extinguish the mortgage, when it is the manifest intention of the mortgagee to keep alive the mortgage, or when it is for his benefit to do so. *ALI HASAN v. DHIRJA*, 4 A. 518 = A.W.N. 1882, 118. (3 A. 682, 7 M.H.C. 229, F.)

(113)—*Mortgage—First and second mortgages—Payment of first mortgage by purchaser of equity of redemption—Whether first mortgage extinguished—Right of second mortgagee to bring property to sale.*—When the purchaser of the equity of redemption pays off a prior mortgage, such mortgage is not extinguished; the purchaser acquires an equitable right to its benefits, which could be used against a subsequent mortgagee. (10 C. 1035 = 11 I. A. 126, F.) *Per Oldfield, J.* (*Mahmood, J.*, dissenting). Where, under the above circumstances, a subsequent mortgagee seeks to bring the property to sale, the prior mortgage is a good defence to the purchaser against such claim. (10 C. 1035 = 11 I. A. 126, F.) *Per Mahmood, J.* The ruling of the Privy Council in 10 C. 1035 explained. The purchaser in the above case did not acquire any right greater than those which the first mortgagee possessed. And the security of the intermediate incumbrancer, being a valid one, could be enforced against him as he held the equity of redemption. It could be enforced against him even without paying off the prior mortgage, provided such enforcement did not interfere with the rights under it. *SIRBADHI RAI v. RAGHUNATH PRASAD*, 7 A. 568 = A.W.N. 1886, 25. (3 A. 682, 7 M.H.C. 229, 6 B. 404, R.) [D., 8 A. 105; Appr., 13 A. 432, F.B.; R., 7 A. 577, 29 A. 385, F.B. = 4 A.L.J. 273 = A.W.N. 1907, 97 = 2 M.L.T. 248.]

(114)—*Priority—Registered and unregistered mortgages—Rights of purchaser paying off prior mortgage—Rights of postponed mortgagee—Registration Act, 1877, s. 50.*—A person purchased, in execution of a decree, property subject to two mortgages—an earlier unregistered one optionally registrable under the Registration Act of 1871, and a later registered one optionally registrable under the Act of 1877—and paid off the later mortgage. In a suit by the holder of the earlier mortgage to bring the property to sale on his mortgage: *Held by Oldfield, J.*, that the purchaser, having paid off the amount due under the registered mortgage, became entitled to the benefits of it which must be presumed to be kept alive, and therefore, to priority over the unregistered

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

mortgage (with reference to the provisions of s. 50 of the Registration Act of 1877), and he has thus a good defence to the suit. (10 C. 1035=11 I.A. 126, *Appl.*; 2 A. 851, *R.*). *Held* by Mahmood, J., that, with reference to the circumstances of this case, "unregistered" in s. 50 of the Act of 1877 must be construed as meaning unregistered under the Act of 1871, and that, accordingly the later registered mortgage had priority over the earlier unregistered mortgage. But the purchaser who had acquired such priority by paying off the amount due under the registered mortgage, was in no better possession than the assignee of such mortgage, and could not, in virtue of it, claim to defeat the unregistered mortgage altogether. There was, therefore, nothing to prevent the sale of the property in enforcement of the plaintiff's mortgage subject to the right of priority acquired by the purchaser. **JANKI PRASAD v. SRI MATRA MAUTANGUI DEBIA, 7 A. 577=A.W.N. 1885, 115.** (2 A. 851, 4 A. 227, 7 A. 568, 10 C. 1035, *R.*) [*D.*, 8 A. 105; *Appr.*, 13 A. 432, *F.B.*; *R.*, 7 A. 577, 29 A. 385, *F.B.*=4 A.L.J. 273=A.W.N. 1907, 97=2 M.L.T. 248.]

(115)—*Mortgage—Priority—Right of second mortgagee to bring property to sale subject to first mortgage.*—A certain property was subject to two successive mortgages. A subsequent purchaser of the equity of redemption paid off the first mortgage which related to a portion of the property. In a suit on the second mortgage by the second mortgagee who sought to bring the whole property to sale, the portion subject to the first mortgage was exempted on the ground that the purchaser of the equity of redemption who had paid off the first mortgage had priority. The *Full Bench* modified this decree by adding "that the interest of the plaintiff in such portion as second mortgagee only to be sold." *Per Oldfield, J.*—The second mortgagee could not bring the whole property to sale so as to oust the first mortgagee and get rid of the mortgage without satisfying it. *Per Straight, J.*—A purchaser in execution of the decree on the second mortgage will have no further right than to take the property subject to the charge of the first mortgagee, and whatever other rights he may have under his mortgage. **RAGHUNATH PRASAD v. JURAWAN RAI, 8 A. 105, F.B.=A.W.N. 1886, 25.** (*On Letters Patent appeal from*, 7 A. 569.) [*Appr.*, 22 C. 33; *Expl.*, 12 A. 548; *R.*, 16 M. 121, 29 A. 385, *F.B.*=A.W.N. 1907, 97=4 A.L.J. 273=2 M.L.T. 248; *D.*, 13 A. 432, *F.B.*]

(116)—*Mortgage—Sale of equity of redemption—Sale of mortgaged property in execution of decree obtained by mortgagee.*—At a sale under a decree for sale by a mortgagee, the right, title and interest of the mortgagor which is sold is that which the mortgagor has at the date of the mortgage, and the rights and interests of the mortgagee. (5 B. 8, 10 B. 224, 1 A. 245, 6 B. 538, 7 C. 677, *R.*) Accordingly the attachment and sale, after the mortgage of the property under a money-decree, does

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

not affect the purchaser under the mortgage-decree. **GAJADHAR v. MUL CHAND, 10 A. 520=A.W.N. 1888, 210.** [*R.*, 20 B. 390; *D.*, 9 A.W.N. 91.]

(117)—*Sale in execution of mortgage decree—Extinguishment of mortgage lien before confirmation—Civ. Pro. Code, s. 316—Revenue sale—Purchase before confirmation of sale in execution of mortgage decree—Rights of purchaser—S. 54, Act XI of 1859—S. 73, Transfer of Property Act—Mortgagor's right to redeem—Right of redemption of—Auction purchaser at Revenue sale—Mortgagee purchaser's right on failure to redeem.*—Where a decree is obtained on a mortgage of a share in a revenue paying estate, and the mortgagee himself purchases the property in execution of the decree, the mortgage debt is not extinguished, nor is the mortgage merged in the decree on the execution sale, but, under s. 316 of the Code, the mortgagee's rights are kept alive until the property vests in him by virtue of the granting of the sale certificate, and his lien is fully preserved between the date of the sale and the date of the confirmation. [*F.*, 24 A. 475=22 A.W.N. 145; *Cons.*, 17 B. 375; *R.*, 9 C.L.J. 96=13 C.W.N. 226.] Where a person purchases such mortgaged property in a revenue sale, which takes place between the sale in execution of the mortgage decree and the confirmation thereof, his purchase will be governed by s. 54, Act XI of 1859, and he acquires the property subject to all incumbrances including the mortgage lien mentioned above. [*Rel. on.*, 11 C.W.N. 828; *R.*, 27 B. 334, 7 C.L.J. 1, 9 C.L.J. 96=13 C.W.N. 226.] S. 73 of the Act does not, under such circumstances, deprive a mortgagee of his lien over the property and confine him to proceeding against the surplus proceeds derived from the revenue sale. [*Expl.*, 3 C.L.J. 52; *R.*, 24 C. 746, 9 C.W.N. 117.] The mortgagor has a right to redeem the mortgaged property between the date of the sale in execution of the mortgage-decree and the confirmation of such sale, upon payment of principal and interest and costs to the mortgagee-purchaser; and the auction purchaser at the revenue-sale mentioned above who has only purchased the equity of redemption in the mortgaged property, has an equal right to redeem between those two dates. And where the auction-purchaser does not avail himself of such right to redeem, the property becomes absolutely vested in the mortgagee-purchaser from the date of confirmation of the sale, and he is entitled to sue for possession as against the mortgagor and the subsequent purchaser at the revenue sale. **PREM CHAND PAL v. PURNIMADASI, 15 C. 546.** [*Commented on*, 24 C. 682.]

(118)—*Sale by mortgagor of portion of mortgaged property—Decree on mortgage satisfied in part by second mortgage—Sale, by second mortgagee—Title of purchaser as against previous purchaser of portion.*—One X executed a mortgage of his house to Y on 4-10-1864. On

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

25-6-1868, he sold one-half of the house to the defendant who obtained possession. On 24-9-1868, Y sued X on his mortgage and obtained a decree. Having made certain payments towards the decretal debt, X passed an instalment bond to Y in 1875, for the balance due under the decree, and executed a new mortgage of the house as security, which was registered. Satisfaction of the decree was entered up and certified. A suit was brought on the second mortgage in 1882 and a decree obtained. In execution, the house was sold in 1883 to plaintiff who sued the defendant to recover possession of one-half of the house. *Held*, rejecting the claim, that plaintiff's purchase in 1883 did not give him a title paramount to that of the defendant. All rights under the mortgage of 1864 had become merged in the decree obtained on the mortgage. Satisfaction of the decree was certified to the Court and entered up, when the second mortgage was passed. The fact that the debt secured by the second mortgage was the balance of the old debt was insufficient to justify the inference that it was intended to keep the decree alive. Consequently, no rights existed under the old mortgage which the plaintiff could put forward as against the defendant. **RAM KRISHNA SADA-SHIV v. CHOTHMAL, 13 B. 348.**

(119)—*Mortgage—Sale of mortgaged property—Purchase by a mortgagor at a judicial sale of interest under a second mortgage—Rights against mortgagor of purchaser at a sale in execution of the consent-decree on the first mortgage.*—Decrees having been obtained on two mortgages of the same property created at different times (the terms of the first decree giving effect to a compromise between the mortgagor and the first mortgagee), sale in execution followed, but before the sale under the decree on the first mortgage was effected, the sale under the decree on the second took place, the possession remaining with the purchaser at the first sale acting *benami* for the mortgagor. In a suit for possession brought by the plaintiff, a purchaser at the subsequent sale under the decree on the first mortgage. *Held*, (a) that the judgment of the High Court incorrectly treated the plaintiff as mortgagee, refusing him a charge for the full amount of his purchase-money, (b) that it would be contrary to equity to allow the mortgagor to set up any right to possession as acquired by his purchase, and (c) that the plaintiff, as against him, was entitled to a decree for possession as purchaser. **LUTF ALIKHAN v. FUTTEH BAHADUR, 17 C. 23, P.C. = 16 I.A. 129 = 5 Sar. 364. [R., 23 C. 397, 5 C.L.J. 95 = 11 C.W.N. 284, 5 C.L.J. 315 = 11 C.W.N. 403.]**

(120)—*Transfer of Property Act (IV of 1882), s. 85—Transferees of purchaser from mortgagor, necessary parties to suit by mortgagee—Right of redemption of transferees not impleaded.*—Where one of the three items of property mortgaged was sold by the mortgagor but the proceeds were not applied towards the mortgage

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

and after such purchaser had transferred his rights over to certain others, the mortgagee brought his suit, impleading the mortgagor, and the purchaser but not the transferees from the latter, and obtained a decree for a certain sum, the above transferees, not having been made parties to the suit, were held entitled to redeem from the purchaser in execution of the decree in the suit, on payment not of the price paid by such purchaser at the Court-sale, but of the amount found by the decree of the Court to be the proportion of the mortgage-debt chargeable in respect of the property. **SIVATHI ODAYAN v. RAMASUBBAYYAR, 21 M. 64 = 8 M. L.J. 21. [Rel. on, 33 C. 590 = 10 C.W.N. 592; R., 4 C.W.N. 297, 11 C.W.N. 403 = 5 C.L.J. 315.]**

(121)—*Mortgage of entire joint property—Subsequent mortgage of a share thereof—Partition of joint property—Sales in execution of decrees on both mortgages—Right of purchasers.*—An entire joint property was first mortgaged to one person, and later on, an undefined portion of it was mortgaged to another by one branch of the joint family. In a family partition that took place subsequently, the share of the mortgagors under the second mortgage became ascertained. Both the mortgagees sued upon their respective mortgages and obtained decrees for sale. Neither of them made the other mortgagee a party to his suit. The second mortgagee, in execution of his decree, purchased the property which fell to the share of his mortgagors, and obtained possession of the plaint property through Court. The prior mortgagee executed his decree later on and purchased the right and interest of his mortgagors. Notwithstanding the obstruction of the second mortgagee-purchaser, the plaint property was ordered to be delivered to the first mortgagee-purchaser. Hence the suit for setting aside the above order and for an injunction restraining the defendant from taking possession. Both the lower Courts treated the suit as one for redemption. *Held*, that the suit could not be treated as one for redemption. The plaintiff having purchased and got into possession of the plaint land prior to the sale to the defendant, at the date of the latter sale there remained in the mortgagors no right or interest in the plaint land that could be sold. The defendant, as purchaser of the right and interest of the mortgagors, acquired no fresh right in the suit land over and above that already possessed by him as mortgagee. The plaintiff was, therefore, entitled to the declaration and injunction asked for in the plaint. **RAMANADHAN CHETTI v. ALKONDA PILLAI, 18 M. 500 = 5 M.L.J. 197. [R., 32 C. 891 = 9 C.W.N. 728 = 1 C.L.J. 371.]**

(122)—*Registration Act (III of 1877), s. 50—Sale in execution of decree on prior unregistered mortgage of 1862—Right of purchaser as against subsequent mortgagee with possession of 1867.*—The contest in this case was between the purchaser in execution of a decree on a prior

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

unregistered *san-mortgage* of 1862, and the defendant in possession under a subsequent registered mortgage of 1883, a renewal of the one effected in 1867. *Held* that (1) the purchaser stood in the place of the prior mortgagee; (2) that he had a right to recover possession; (3) that the subsequent mortgagee could not compel him to redeem his own mortgage; but (4) that the defendant had a right, in case he had not been made a party to the suit on the prior mortgage, to pay off the prior incumbrance if he desired to retain possession. **DESAI LALLUBHAI SETHABHAI v. MUNDAS KUBERDAS**, 20 B. 390. [*F.*, 23 A. 1, 25, 26 M. 537, 5 Bom. L.R. 892=28 B. 153, 31 C. 737, 1 S.L.R. 172.]

(123)—*Prior mortgagee—Purchaser—Shield against subsequent incumbrancers.*—A prior mortgagee having purchased may still use his mortgage as a shield against subsequent incumbrancers. **RAMU NAIKAN v. SUBBARAYA MUDALI**, 7 M.H.C. 229. [*Diss.*, 1 A. 240; *Doubled*, 4 M. 213, 6 M. 174; *F.*, 4 B. 57, 4 A. 518; *R.*, 6 B. 404, *F.B.*, 10 C. 1035, *P.C.*, 13 A. 432, *F.B.*; *D.*, 1 A. 236.]

(124)—*Sale subject to two mortgages—Prior mortgage paid off but not kept outstanding—Liability of purchaser.*—Where property subject to two mortgages is purchased, and with the purchase money the first mortgage is paid off, but the purchaser takes no steps to keep it outstanding, he is not entitled to priority of the first mortgage, as against the second mortgagee. **KRISHNA v. NARAYANA**, 7 M. 127.

(125)—*Mortgage—Subsequent collusive sale—Validity of sale under mortgage.*—Case where it was held that defendant, who was a *bona fide* purchaser for value, without notice, was entitled to hold a certain property bought by him in a sale in execution of a valid mortgage decree as against the plaintiff upon whom the mortgagor committed a fraud by selling to him, as unincumbered, the mortgaged property and that the mortgage-deed, though unregistered was valid against the latter conveyance which was registered, because the former did not require to be registered. **MAHOMED ASHRUF v. KUREEMOODDEEN**, 24 W.R. 468.

(126)—*Prior mortgagee, purchase of equity of redemption by, when operates as merger—Intention to keep prior mortgage alive—Evidence.*—It has been held that, generally speaking, a purchaser of an equity of redemption with notice of subsequent incumbrances, stands in the same situation, as regards such subsequent incumbrances, as if he had been himself the mortgagor, and he can neither set up, against such subsequent incumbrances, a prior mortgage of his own, nor consequently, a mortgage which he or the mortgagor may have got in. The position, however, of the purchaser of the owner's remaining interest and of a first incumbrance, of the position of a first incumbrancer buying the remnant of ownership, where there have been several successive mortgages, is quite

Mortgage—continued.**—10.—Sale of mortgaged property—contd**

distinguishable from that of the owner himself, on account of the absence, in the purchaser's case, of any general personal obligation which can be fixed upon the whole property so as to override his own mortgage right in it. This distinction has led to the doctrine that, though the original owner cannot set up a prior incumbrance got in by him against a *puisne* charge, yet, a purchaser, whose money is expended partly or wholly in discharging an incumbrance may, at his option, set up such incumbrance as still subsisting for his own benefit as against the *puisne* incumbrances. If an incumbrancer buying, intends to retain the benefit of his charge, he must be allowed to retain it. Generally, he will intend to retain it, and slight evidence will, therefore, suffice to establish such intention which may be indicated even otherwise than by express words. **MULCHAND KUBER v. LALLU TRIKAM**, 6 B. 404, *F.B.* [*F.*, 6 B. 561; *R.*, 3 C.P.L.R. 82, 13 A. 432, *F.B.*, 22 C. 33, 14 C.P.L.R. 177.]

(127)—*Number of mortgages on same property.*—Case where the High Court laid down the *modus operandi* when there was a succession of mortgages on the same property and the order of execution against them. **MUSST. WOSEEUN v. BABOO BYJNATH SINGH**, 25 W.R. 171.

(128)—*Mortgage in Guzerat—Rights of prior and puisne mortgagee—Possession—Registration—Effect—Purchaser of equity of redemption with notice of subsequent encumbrance.*—The rule of Hindu law that a mortgage with possession takes precedence of a mortgage of prior date, but unaccompanied by possession, has not been held applicable to Guzerat. The defendants, *puisne* mortgagees in possession, having had notice of plaintiff's prior mortgage, could not claim the benefit of the above rule in Guzerat. [*F.*, 8 B. 168; *R.*, 12 B.H.C. 241, 2 B. 299=P.J. 1880, 57, 6 B. 168, 6 B. 193.] Registration could not of itself alter a rule of Hindu law, except so far as such effect may be given to it by statute; and registration secures the same object which the Hindu law wished to secure by requiring possession, *viz.*, notice to subsequent incumbrancers of the existence of a prior incumbrance. [*F.*, 8 B. 168; *R.*, 12 B.H.C. 241, 2 B. 299=P.J. 1880, 57, 6 B. 168, 6 B. 193.] A purchaser of an equity of redemption with notice of subsequent incumbrances stands in the same situation, as regards such subsequent incumbrances, as if he had been himself the mortgagor; he can neither set up against such subsequent incumbrances a prior mortgage of his own, nor, consequently, a mortgage which he or the mortgagor may have got in. **ITCHARAM DAYRAM v. RIJI JAGA**, 11 B.H.C. 41. [*R.*, 10 C. 1035=11 I. A. 126, *P.C.*; *Cons.*, 6 B. 404; *D.*, 1 B. 314.]

(129)—*Dekkhan mortgage—Possession not given—Sale with notice of mortgage—Liability of purchaser to pay mortgage-debt.*—A mortgage in the Dekkhan was not given possession. Th

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

mortgagee thereupon sued for and obtained a decree for possession. Subsequently, the plaintiff purchased the mortgaged premises with notice of the mortgage and sued to recover possession from the mortgagee, who had obtained possession in execution of his decree. *Held*, that, as the plaintiff had, before his purchase, knowledge of the mortgage, he could not recover possession freed from the debt, but took the property subject to the mortgage. **GOPAL YADAVRAV KESKAR v. KRISHNAPPA bin MAHADAPPA, 7 B.H.C. A.C. 60.** [R., 11 B.H.C. 41, 4 B. 126, F.B., 6 B. 168; D., 2 B. 299.]

(130)—*Prior and subsequent mortgagees—Possession of title-deeds—Purchaser for value without notice—Priority.*—The mere possession of the title-deeds by a second mortgagee, though a purchaser for value without notice, will not give him priority. There must be some act or default of the first mortgagee to have this effect. **SOMASUNDARA TAMBIRAN v. SAKKARAI PATTAN, 4 M.H.C. 369.** [F., 15 M. 268; R., 8 M. 200, 51 M. 7 = 17 M.L.J. 499 = 3 M.L.T. 87.]

(131)—*Mortgage by persons having no title—Subsequent acquirement of title—Award authorising mortgagee to sell property, effect of presentation of in Court—Attachment and sale by money decree-holder.*—*Lis pendens—Priority.*—Where the mortgagors who had no title to the property at the time of the mortgage subsequently acquired title thereto by purchases and, on reference to arbitration by the mortgagors and the mortgagee, an award was passed empowering the latter to sell the property in satisfaction of his debt, and after the presentation of the award in Court, a holder of a decree for money against the mortgagors attached the property and brought it to sale; in a suit by the mortgagee against the auction-purchaser it was held that the defendant, the purchaser under the money-decree, could not defeat the plaintiff's right as mortgagee to sell the property in satisfaction of his debt. The presentation, in Court, of the award obtained by the plaintiff, was equivalent to the presentation of a plaint for the specific performance of the contract of mortgage; and the proceedings consequent thereon constituted a *lis pendens* during which a mere money decree-holder could not, by any proceedings which he might take, defeat the object of the plaintiff's application in Court to file the award. **PRANJIVAN GOVARDHANDAS v. BAJU, 4 B. 34.** [R., 9 M. 130, 1 O.C. 280.]

(132)—*Sale in execution of previous mortgage decree—Suit by purchaser against subsequent mortgagee with notice of sale—Application for possession, rejection of, on resistance by prior mortgagee—Failure to bring suit within one year effect of.*—Subsequently to the judicial sale of the property of the mortgagors in this case in favour of the first plaintiff, A, and a sale of the same by him to plaintiffs Nos. 2 and 3, the

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

property was mortgaged by the said mortgagors to M. defendant No. 2, who had full notice of the above Court-sale to plaintiff, No. 1. An application for possession made by the purchasers under s. 269 of Act VIII of 1859 had been rejected on resistance by N, a prior mortgagee in possession. In this suit for possession of the property brought by A and his vendees, it was contended on behalf of M. that N, the alleged prior mortgagee, having defeated the attempt of A to obtain possession of the property and A not having brought an action of ejectment within one year, M might have assumed that A had lost all title to the property, but it was *held* that there was nothing to prevent A from bringing a suit against N for redemption. The order passed against him rejecting his application for possession could not and did not affect that right; and if M supposed otherwise, he must take the consequence of his mistake in law. Plaintiffs, therefore, were entitled to a decree for recovery of the property sued for by them. **APAJI BHIVRAV RAYRIKUR v. KAVJI, 6 B. 64.** [F., 3 S.L.R. 133.]

(133)—*Prior san-mortgage—Purchaser of property for value without notice—Suit by mortgagee—Purchaser not impleaded in suit on mortgage, right of, to redeem.*—In this suit against the defendant to establish the plaintiff's right, under his *san-mortgage*, to attach and sell the mortgaged house, the defendant's plea, that he had purchased for valuable consideration and without notice of the plaintiff's *san-mortgage*, was held not to avail him to defeat that mortgage, in the face of the established usage in Guzarat in favour of *san-mortgages*. But the defendant, having by his purchase become entitled at least to the equity of redemption in the house, ought to have been made a party to the original suit on the mortgage, and, not having been so impleaded, was held not to be bound by the decree in that suit, and to be entitled to a reasonable time to redeem the house from the plaintiff's mortgage. **NARAN PURSHOTAM v. DOLATRAM VIRCHAND, 6 B. 538, F.B.** [F., 20 B. 390; R., 10 A. 520 = 8 A.W.N. 210, 13 A. 28 = 10 A.W.N. 216.]

(134)—*Mortgage—Registration—Notice—Sale of mortgaged property in execution of money-decree—Omission to state mortgage in proclamation of sale—Purchaser without notice—Right of mortgagee to enforce mortgage against property in hands of purchaser—Estoppel whether arises.*—In the Bombay Presidency, it is settled law that registration of a mortgage-deed is notice to all subsequent purchasers, except in cases of a fraudulent concealment by the mortgagee (3 B.L.R. 407, 6 B. 165, *ibid.*, 168, 8 B. 168, P.J. 1883, 83, 12 B. 678, R.). A mere omission without fraud on the part of the mortgagee to give notice of the mortgage will not affect this doctrine of notice by registration. In the present case, a registered mortgagee brought the mortgaged property to

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

sale under a money-decree obtained in some matter other than the mortgage, and it was purchased by a person without any knowledge of the mortgage. The mortgage lien was not announced in the proclamation of sale as required by s. 287 of the Civ. Pro. Code, 1882. The mortgagee subsequently sued against the mortgagor and the auction purchaser, to recover the mortgage-debt by sale of the mortgaged property. *Held*, that the registration of the mortgage was notice to subsequent purchasers; that there was a mere omission and not a fraudulent concealment on the part of the mortgagee to mention the mortgage lien in the proclamation of sale; and that the property was, therefore, liable under the mortgage, and the auction purchaser was bound by it. [*R.*, 22 B. 686, 134 P.L.R. 1904, 1 S.L.R. 44, 11 O.C. 206.] Nor does the omission of the plaintiff to declare his incumbrance in the proclamation of sale create an estoppel (9 B. 86 at p. 92, 6 B. 193 at p. 206, *R.*). An estoppel would have arisen only if the decree in execution of which the previous Court-sale occurred had been obtained on the mortgage (5 B. 2, *Ibid.*, 5, *R.*). But in the present case, the previous sale was in connection with a decree independent of the mortgage now sued on. **DHONDO BALKRISHNA KANITKAR v. RAOJI**, 20 B. 290. [*R.*, 1 S.L.R. 44, 11 O.C. 206.]

(135)—*Mortgage — Sale — Mortgage-decree, vendee being no party—Suit by vendee for confirmation of possession and declaration of title.*—Where a person mortgaged his properties to two persons and then sold the same to another, and the mortgagees, who were aware of the purchase, brought a suit on the mortgage without making the vendee a party, and got a decree and purchased the property themselves in execution of that decree, *held* in a suit by the original vendee for confirmation of possession and declaration of title, that as the vendee was not made a party to the mortgage-suit, the mortgage decree was not binding upon him, but the vendee only acquired by his purchase a right to redeem the mortgage and was entitled only to such a decree and not to the decree prayed for. **PROTAP CHANDRA MANDAL v. ISHAN CHANDRA CHOWDHRY**, 4 C.W.N. 266.

(136)—*Mortgage-suit—Purchaser of equity of redemption not party to suit—Suit for possession by purchaser, whether maintainable.*—Where the purchaser of mortgaged property from the mortgagor was not made a party to a subsequent suit on the mortgage, and the auction purchaser in execution of the mortgage-decree ejected him, *held*, that the purchaser of the equity of redemption was not bound by the mortgage-decree and that he could maintain a suit for recovery of possession of the mortgaged property. **GRISH CHUNDER MONDUL v. ISWAR CHUNDER RAI**, 4 C.W.N. 452.

(137)—*Mortgage of property — Mortgagee's rights unaffected by mortgagor's subsequent*

Mortgage—continued.**— 10.—Sale of mortgaged property—contd.**

grant—Execution sale of mortgaged property, interest passing at—Purchase of mortgaged property from mortgagor's grantee—Priority of purchaser in execution of mortgagee's decree.

—A mortgagor cannot, by a subsequent grant, derogate from the rights of his mortgagee to be paid his principal, interest and costs out of the property pledged; the proper, and indeed the only, mode for the mortgagee, to realise his money under an ordinary Bengalee bond pledging the land, is to get a decree for it and to bring the mortgaged property to sale by process of execution. (23 W.R. 338, 5 B.L.R. 450, *R.*) Where a mortgagee puts up mortgaged property to sale in execution of a decree, "he sells the entire interest that he and the mortgagor could jointly sell," and not merely the right and interest of the mortgagor, as they stood at the time of the sale. (23 W.R. 187 = 14 B.L.R. 408 F.B., *Appl.*). Where mortgaged property was leased to one and granted to another and was subsequently purchased, in execution of the mortgage-decree, by the lessee's transferee, it was held, in a suit by such auction purchaser against the vendee from the mortgagor's grantee, that the former was entitled to priority, in respect of the property, over the latter, and that he was not liable to pay rent to the latter. **MUTHORA NATH PAL v. CHUNDERMONEY DABIA**, 4 C. 817. [*Diss.*, 5 M. 184.]

(138)—*Suit on mortgage—Puisne mortgage not made party—Effect of decree.*—To render a decree for foreclosure or sale effectual, the mortgagee must make subsequent purchasers or incumbrancers parties to the suit, at least if he have notice of them, or if circumstances exist which should have put him on inquiry as to the claim by them of an interest in the mortgaged property, and where they are not made parties they are entitled to redeem the first mortgage. **VENKATA V. KANNAM**, 5 M. 184. (4 C. 817, *R.*; 2 B. 663, *Diss.*) [*F.*, 26 M. 484; *Appr.*, 23 A. 1; *R.*, 10 B. 88, 17 M. 17, 20 B. 390, 10 M.L.J. 347; *D.*, 24 M. 171.]

(139)—*Two mortgages of same property—Sale in execution of decree by first mortgagee—Second mortgagee not made party to suit by first mortgagee—Decree awardable to subsequent mortgagee.*—When mortgaged property is brought to sale under a decree upon a first mortgage, the purchaser takes it free from all subsequent incumbrances; but a subsequent mortgagee, if he was not made a party to the suit in which the decree was obtained, is still as he was before, entitled to redeem the property if he so wishes. The fact that the plaintiff was himself the purchaser at the execution sale, cannot affect the estate which passed by the sale. **MOHAN MANOR v. TOGU UKA**, 10 B. 224. [*R.*, 10 A. 520 = 8 A.W.N. 210, 13 A. 315, 13 A. 432, 16 B. 486, 20 B. 158, 20 B. 390, 22 B. 945, 1 O. C. 107, 23 A. 1, 23 A. 25, 26 M. 537, 28 B. 153.]

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

(140)—*Mortgage—Suit by mortgagee for possession—Sale of mortgaged property by mortgagor—Pre-emption—Adverse possession—Purchaser for value without notice—Limitation Act, 1877, sch. II, No. 144.*—Under a mortgage of the year 1869, the mortgagee was entitled to immediate possession, but by arrangements between the parties, the mortgagor was allowed to remain in possession, the right of the mortgagee to claim possession being kept alive. The property was sold by the mortgagor in the same year. A suit for pre-emption was brought in respect of such sale and decreed; and the plaintiff pre-emptor sold it in 1871. The mortgagee sued the purchaser for possession in 1883. The purchaser pleaded adverse possession for more than twelve years. *Held* that the position of a person who purchases property by asserting a right of pre-emption is not analogous to that of an auction-purchaser in execution of a decree. He merely takes the place of the original purchaser, and enters into the same contract of sale with the vendor that the purchaser was making. There is privity between him and the vendor, and he comes in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor. (14 M.L.A. 101 = 8 B.L.R. 122, D.) And in the absence of evidence that the purchaser had been by fraud kept out of all knowledge of the mortgage, his not having notice of it otherwise would not affect his liability; for the principle on which Courts of Equity in England refuse to interfere against *bona fide* purchasers for a valuable consideration, when clothed with the legal title, has no application to Courts in British India. *DURGA PRASAD v. SHAMBHU NATH*, 8 A. 86 = A.W.N. 1886, 11. [Diss., 141 P.R. 1907 = 93 P.W.R. 1907 = 57 P.L.R. 1908; R., 13 A. 28, 12 O.C. 45.]

(141)—*Mortgage-decree on mortgage—Sale in execution—Conveyance of property—Second mortgage—Sale of equity of redemption.*—Where a mortgagee sues upon his mortgage bond, the Court should pass a decree for satisfaction of the claim from out of the property mortgaged and not from the right, title and interest, which remained in the mortgagor. A sale in execution of a decree under the mortgage passed all the interest which passed by the mortgage to the mortgagee and any interest which remained in the mortgagor. Where there has been a second mortgage, all that passes under that is the interest that remained in the mortgagor after the first mortgage had been made, *i.e.*, the equity of redemption. In a suit brought on the second mortgage, the mortgagee will only be entitled to a decree for sale of the equity of redemption, unless the first mortgagee has been made a party to the suit and his mortgage has been declared invalid as against the second mortgagee. *DOOLAL CHUNDER DEB v. GOLUCK MONEE DEBIA*, 22 W.R. 360.

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

(142)—*First and second mortgages—Suit for sale of mortgaged property—Parties to suit—Decree.*—Where there were two mortgages of the same property to different persons on different dates, and the second mortgagee brought a suit on his mortgage without impleading the former mortgagee, and purchased the property in execution of the decree therein, and the first mortgagee who had also sued on his mortgage and obtained a decree for sale, brought the present suit against the previous auction-purchaser for a declaration that the property might be sold, *held* that the plaintiff's suit should be allowed, but that the decree should be passed reserving a right to the defendant, *i.e.*, the previous purchaser under the second mortgage, of redeeming the first mortgage within a certain fixed time. *KANHAIYA LAL v. BANSIDHAR*, A.W.N. 1884, 136. [Appl., 13 A. 288, F.B. = 11 A.W.N. 63; R., 8 A. 23 = 5 A.W.N. 310, 7 A. 888 = 6 A.W.N. 95.]

(143)—*Suit by prior mortgagee—Second incumbrancer not made party—Decree—Auction purchaser.*—Where a prior mortgagee brings a suit on his mortgage without making a second incumbrancer a party to the suit and a decree is passed therein, the latter is not bound by the decree. While the purchaser in execution of that decree must be treated as if he had bought privately the interests of the mortgagor and the first mortgagee, when the second mortgagee sues on his mortgage against the auction-purchaser, a decree should be made in the form in which it would have been made if the second incumbrancer and the purchaser had both been parties to the original suit. The position of the second incumbrancer should not be worse than it would have been if there had been no previous suit. Therefore it is open to him to question the account taken between the first mortgagee and the mortgagor, and he is not concluded as to the value of the property by the sale which has followed upon the decree. On the other hand, he cannot be in a better position, and therefore, before he can enforce his mortgage right against the property, he must still pay off the amount secured by the first mortgage, whether or not that amount exceeds the purchase-money. That would clearly be so, where the mortgagee himself is the purchaser, and it cannot be otherwise when the property is purchased by a stranger. The purchaser is supposed to take the interests in the property which the mortgagor and the mortgagee together could convey, and therefore, although money may still remain due to the mortgagee, no interest in the property is retained by him. *NAGAMMAL v. VENKATAGIRI AIYAR*, 8 M.L.J. 298. (19 A. 532, R.)

(144)—*Mortgage—Second mortgagee's right to sell mortgaged-property after it is sold by the first mortgagee in execution of decree in suit to which second mortgagee, not a party.*—A second mortgagee is entitled to a sale of the property secured by his mortgage, subject to the rights

Mortgage—continued.—10.—Sale of mortgaged property—*contd.*

of the first mortgagee, even after the property has been sold in execution of a decree on the first mortgage to which the second mortgagee was not a party. *DEBENDRA NARAIN ROY v. RAMTARAN BANERJEE*, 30 C. 599, F.B.=7 C. W.N. 766. (4 C.W.N. 541, *Overruled.*) [*Cons.*, 28 B. 153=5 Bom. L.R. 892; R., 31 C. 737, 1 C.L.J. 531, 29 A. 385, F.B.=4 A.L.J. 273=A. W. N. 1907, 97, 7 C.L.J. 1, 8 C.L.J. 478=13 C.W.N. 281; D., 31 M. 425=18 M.L.J. 298, 3 M.L.T. 397.]

(145)—*Decree for sale of mortgaged property—Subsequent lease by mortgagor—Execution of decree—Purchase by decree-holder—Suit for dispossession of lessee—Lis pendens—Transfer of Property Act, s. 52.*—The respondents obtained a decree for sale of mortgaged property upon their mortgage. Subsequent to the decree, the mortgagor leased the mortgaged property in favour of the defendant appellant. In execution of the decree, the mortgaged property was sold and purchased by the respondents themselves. The suit was for dispossession of the lessee, defendant. The defendant pleaded that the lease was fair and binding on the plaintiff, having regard to the fact, that there was no active prosecution of plaintiff's suit for a number of years so as to entitle him to the benefit of s. 52 of the Transfer of Property Act. *Held*, that the plaintiff is entitled to a decree. It is unnecessary for the plaintiff to call in aid the provisions of s. 52 of the Transfer of Property Act, because in no event can the lessee, who derives his title from the mortgagor, acquire an interest in the leased property prejudicial to the rights of the mortgagees who become the auction purchasers of the property. A mortgagor, ordinarily, cannot, without the concurrence of his mortgagee, execute a lease which would be binding upon the mortgagee. He may execute a lease which may be binding upon himself, and so long as the mortgagee does not interfere with the possession of the lessee, so long may the lessee enjoy the benefits of that lease. *WAZIR ALI v. MOTI CHAND*, 2 A.L.J. 294.

(146)—*Mortgage—Condition against alienation—Purchase of equity of redemption—Extinguishment of security—Lis pendens.*—Where land mortgaged first to one person with a condition against alienation is again mortgaged to another person, and afterwards sold to the first mortgagee pending a suit against the mortgagor on the second mortgage, the second mortgagee's right, under his mortgage, cannot, be affected by the sale to the first mortgagee *pendente lite*, but neither can such purchaser deprive the first mortgagee of the rights he may otherwise have, by virtue of his prior mortgage and the condition against alienation. The purchase of the equity of redemption by the mortgagee does not necessarily extinguish the original security, when it is manifestly intended to keep it alive. *LACHMIN NARAIN v. KOTESHAR NATH*, 2 A. 826. [*Expl.*, 4 A. 518.]

Mortgage—continued.—10.—Sale of mortgaged property—*contd.*

(147)—*Recital in mortgage-deed—Effect thereof on purchaser.*—Where a mortgaged property has been sold, a recital contained in the mortgage-deed will bind the purchaser also. *BURKUR RAM KISHEN SINGH v. LALJI RAM, PHULJI AND ANANT RAM*, 13 C.P.L.R. 1. (6 C. 268, 17 A. 428, F.) [R., 13 C.P.L.R. 69.]

(148)—*Mortgage—Sale of property subject to mortgage—Proclamation of sale, Recital of mortgage in—Civ. Pro. Code, s. 295.*—The defendant No. 2 mortgaged a share of a village to the plaintiff for a certain sum of money. He subsequently mortgaged certain land, being part of that share, to the defendant No. 1. The first mortgagee brought a suit against the mortgagor and the second mortgagee for the sale of the mortgaged share and obtained a decree. The share was sold in execution of the decree and was purchased by the plaintiff, i.e., the first mortgagee. The proclamation of sale specified that the property was liable to the second mortgagee's mortgage. The plaintiff as purchaser of the share brought the present suit for possession of the land mortgaged to the second mortgagee. The latter pleaded that the plaintiff purchased the land subject to his mortgage and was bound to pay that mortgage. *Held* that, before it can be said that the purchaser of immoveable property at a sale in execution of a decree has purchased it subject to a mortgage i.e., has purchased only the equity of redemption, it must be quite clear that the Court sold him the property subject to the mortgage. *GANGA DIN v. CHET*, 6 O.C. 76.

(149)—*Prior mortgagee accepting payment at second mortgagee's foreclosure—Effect.*—If the first of two mortgagees accepts from auction-purchaser at execution-sale, made at foreclosure of mortgage of the other, any money in satisfaction of his prior lien, it is incompetent to any person claiming under him to proceed against the property again. *JANKEE PERSHAD v. BABOO AJOODHYA DOSS*, 25 W. R. 251.

(150)—*Arrears of Government revenue—Sale—Prior registered mortgage.*—Sale for arrears of revenue of property which, after its hypothecation to Government as security (along with other property) had been mortgaged (the registration of the mortgage having been effected prior to that of the security). *Held* that though the purchaser took the property subject to the prior registered mortgage, yet the mode in which the property had been dealt with by the mortgagor entitled the purchaser to require that the other property should be first applied in satisfaction of the mortgage-debt. *TOOLSEE RAM v. MUNNO LALL*, 1 W.R. 353. [R., 7 A. 711=A.W.N. 1885, 191.]

(151)—*Mortgage—Subsequent bill of sale—Registration of bill of sale—Priority.*—A bill of sale to a plaintiff was neither executed nor registered until after a suit had been instituted to enforce a prior mortgage. The plaintiff who purchased at such a time was held to be

Mortgage—continued.**—10. — Sale of mortgaged property—contd.**

entitled to take nothing as against the mortgagee or as against the defendant claiming under him under a decree which directs the sale of the property in satisfaction of the mortgage, even though the deed of sale be registered, and the mortgage not registered. **PULUCK DHAREE ROY v. MOHABEER SINGH, 23 W.R. 382.**

(152)—*Mortgage—Lien—Vendor and purchaser.*—Where it was proved that the plaintiff in a later suit had previously obtained a decree against his defendant's vendors on the footing of an alleged mortgage, in which alleged mortgage were hypothecated all the properties of the defendant's vendor, for the very debt the plaintiff sought in such later suit to enforce as a mortgage against the defendant's land, though by his conduct, he treated his security as a mere bond, in which his debtor had undertaken to give a general lien over his property, *held* that the plaintiff could not interfere with the possession of the defendant, obtained by purchase for valuable consideration. **RAM DYAL BANERJEE v. RAMKULPO MOOKERJEE, W.R. 1864, 325. [F., 14 W.R. 209.]**

(153)—*Rights of bona fide mortgagees and vendees.*—*Bona fide* purchasers and mortgagees are not to be defeated by any number of earlier obligations in the hands of third parties, who were never in possession of the lands in question. **RAMESSUR BHOMICK v. POORAN CHAND GOLACHA, W.R. 1864, 225.**

(154)—*Condition for sale without Court's intention—Sale in pursuance thereof—Effect.*—*Held*, that, generally speaking, in a simple mortgage, a power of private sale is invalid, but that, if a sale is held in professed exercise of such a power, it is not to be impeached, but the mortgagor may sue for damages, if he can show that he was damnified. Where the sale has been held and mortgagor has had seven months' notice, he cannot in justice recover possession from a *bona fide* purchaser for value. **MI NAN MYA v. NGA HMI, U.B.R. 1909, 1st Quarter, Mortgage 5. (U.B.R. 1907, Mortgage 1, Expl.; 3 W.R. 157, 30 M. 61, D.)**

(155)—*Mortgage—Prior simple and subsequent usufructuary, mortgages over same property—Sale by mortgagee under his simple mortgage—Rights of mortgagee as against auction purchaser.*—One K.M. held a simple mortgage over certain land and a subsequent usufructuary mortgage comprising the same land. He brought a suit for sale on the simple mortgage and had the mortgaged property sold, notifying his lien under the usufructuary mortgage. The mortgaged property was purchased by one H.S. who, being refused possession, sued the mortgagor and the mortgagee for recovery of possession of the property purchased by him. *Held* that H.S. was entitled to possession and that K.M. if under the circumstances he had any remedy at all, had no more than a right to

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

redeem the plaintiff as a purchaser under the decree on the first mortgage. **HARNAM SINGH v. BISHAN SINGH, A.W.N. 1894, 136.**

(156)—*Sale of property mortgaged, objector claiming to prevent, liability of, to pay decree amount due by mortgagor.*—Where the claim of an objector has been disallowed but he wishes to save the mortgaged property from sale, he would be bound to pay whatever the mortgagor was liable to pay under the decree. **KISHEN KISHORE GHOSE v. SREEMUTTY GAETREE DEBIA, 7 W.R. 493.**

(157)—*Two properties mortgaged—One sold to satisfy a prior claim—Second property alone liable.*—Where two properties are mortgaged under a second mortgage and one of them is swallowed up by a first mortgage, the whole burden of the second mortgage falls entirely on the remaining property, the owner of which has no right of contribution against the owner of the property sold to satisfy, the first mortgage. **BOHRA THAKUR DAS v. THE COLLECTOR OF ALIGARH, 3 A.L.J. 439 = A.W.N. 1906, 150 = 28 A. 593. (24 M. 96, F.) [R., 3 A.L.J. 441 = A.W.N. 1906, 161, 29 A. 233 = A.W.N. 1907, 31 = 4 A.L.J. 66, 11 C.L.J. 639; Affirmed, 12 C.L.J. 272, P.C.]**

(158)—*Transfer of Property Act, s. 82—Part of property sold to satisfy earlier mortgage—Subsequent mortgagee party—Contribution.*—When property subject to a second mortgage is sold in execution of a decree obtained on a first mortgage in a suit to which the second mortgagee was a party, the purchaser, whether he be a decree-holder himself or an outsider, takes the property free of all claims under the second mortgage. One B mortgaged his property to plaintiff. He and his brothers again mortgaged their respective shares to M. S then mortgaged his share to plaintiff. Plaintiff obtained a decree on his first mortgage, to which M was a party being interested in redeeming B's share, sold the property and himself purchased it. The plaintiff then redeemed M's mortgage and brought a suit on his third mortgage claiming the whole amount against S's share. *Held*, that B's share, having been entirely swallowed up by the prior incumbrance, no right of contribution in respect of the second mortgage can be enforced against that property and the whole burden of the second mortgage must fall on the property of S. **BALDEO PRASAD v. SHEO DIAL, 3 A.L.J. 441 = A.W.N. 1906, 161.**

(159)—*Mortgage—Joint mortgagees—Sale and purchase by one of the co-mortgagees separately under another decree of part of mortgaged property—Effect of such sale in lieu of other co-mortgagees.*—Where one of several co-mortgagees brought to sale and himself purchased under a separate decree a portion of the property jointly mortgaged to himself and others, notice of the joint mortgagees' lien having been proclaimed at the sale: *Held*, that

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

whatever effect such separate sale and purchase might have on the lien of that particular mortgagee under the joint mortgage, it could not affect the lien of the other joint mortgagees. **KARAN SINGH v. LACHMI NARAIN, A.W.N. 1892, 101.**

(160)—*Mortgage for a term of years—Mortgagor having no title over portion of the property mortgaged—Mortgagee's right of sale—Transfer of Property Act (IV of 1882).*—When a person mortgages some property to another to secure payment of a certain debt after a term of years, and it turns out that the mortgagor has no ownership over a portion of the property mortgaged, the mortgagee is at liberty to bring the remainder of the property to sale notwithstanding that the term fixed has not expired. **VENKATRAO v. MAHABLESHWAR, 3 Bom. L.R. 876 = 26 B. 241.**

(161)—*Selling under power of sale—Depreciatory condition—Auction—Conditions of sale—Transfer of Property Act (IV of 1882), s. 69—Principal and Agent—Knowledge of the agent—Silence.*—A mortgagee in selling the mortgaged property under a power of sale, contained in the mortgage-deed, covenanted with the purchaser that "the purchaser shall accept such title as the vendors can give and shall not require the vendors to enter into any other covenant except a covenant that they have not incumbered and shall not raise any question or objection to the title and shall be held bound to accept such title as the vendors possess." *Held*, that this condition had a depreciatory tendency. A mortgagee exercising the power of sale is, both in honour and in law, under an obligation to sell the mortgaged property under such conditions as an owner would reasonably use in the sale of his own property. The conditions of sale at an auction should not be merely written, and read over at the time of sale; but they should be circulated in the auction room and widely distributed among the bidders before the sale. The power to sell under special conditions, though it may give in certain circumstances a mortgagee a wider discretion than he would otherwise possess, does not entitle him needlessly to use depreciatory conditions, while the protection afforded to a purchaser, by a clause which entitles a mortgagee to sell subject to any special or other stipulations, exempting the purchaser from any liability to enquire into the necessity, expediency, propriety or regularity of the sale, is qualified by the condition that he must not have purchased with notice. **CHABILDAS v. DAYAL MOWJI, 6 Bom. L.R. 557, C. A., confirmed by Privy Council at 9 Bom. L. R. 1062.**

(162)—*Sale—Power of sale for interest in arrears.*—Where a mortgagee rightly exercises his power of sale for arrears of interest the mortgagor, if he wishes to stay the sale, must pay up all the interest which is due up to the date of payment, and that if he tenders a smaller

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

sum the mortgagee is justified in refusing to accept it. **DOOLABHDAS v. CHHABILDAS, 1 Bom. L.R. 273.**

(163)—*Purchaser in execution of decree on prior mortgage when sale takes place after sale on subsequent mortgage—Mortgaged property sold twice in execution of decrees on prior and subsequent mortgages—Prior and subsequent mortgages—Transfer of Property Act, s. 85—Possession, Suit for.*—A purchaser at a sale held in execution of a decree for sale on a first mortgage made by a person in possession of the property, the decree having been obtained in a suit brought in strict accordance with s. 85, Transfer of Property Act, is entitled to possession as against a purchaser at an earlier sale held in execution of a decree for sale obtained in a suit brought on a second mortgage in defiance of the rule laid down in that section. **FAYAZ HOSSEIN KHAN v. PRAG NARAIN, 7 O.C. 243.**

(164)—*Failure of consideration for mortgage—No sale under mortgage.*—Where a mortgage-bond failed for want of consideration therefor, the mortgaged property cannot be brought to sale under the mortgage. **R.B. BALAPRASAD v. BIDUR RAM, 4 C.P.L.R. 120. [D., 1 N.L.R. 146.]**

(165)—*Sale of mortgaged property—Remedy of mortgagee.*—Property subject to a mortgage can be sold and the mortgagee's remedy is to enforce his mortgage against the purchaser and he has no right to cancel the sale of the equity of redemption. **GUNESH v. NAGO RAO, 3 C.P.L.R. 156.**

(166)—*Sir land—Mortgagee entitled to bring to sale entire rights of proprietor—Right to bring those rights to sale.*—Where a mortgagee was entitled to bring to sale the entire rights, i. e., the possessory and the cultivating rights of the proprietor in a sir land, he could bring those rights to sale, though, by operation of law, the mortgagor would become the occupancy tenant of the sir land. **DIWAN ZALIMSINGH v. CHHADAMILAL, 11 C.P.L.R. 133. [Obs., 17 C.P.L.R. 33.]**

(167)—*Mortgagee not to bring mortgaged property to sale twice over in satisfaction of mortgage-debt.*—A mortgagee cannot sell the mortgaged property twice in satisfaction of his mortgage. He cannot sell it first for a portion of the mortgage debt and then a second time for the remainder. Once he has exercised his right of sale, he has parted with his right over the mortgaged property and the mortgage becomes extinguished. **BANOABI v. UTTAMCHAND LAKSHMICHAND, 1 C.P.L.R. 79. [R., 9 C.P. L.R. 30.]**

(168)—*Of tenant's holding—Decree for rent—Sale of the holding in execution—Purchase by landlord—Decree and sale fraudulent and collusive—Lien, how affected.*—A tenant, who had

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

mortgaged his holding to a third person, confessed judgment in a rent suit brought against him by the landlord and allowed the holding to be sold in execution of the decree. The landlord, himself, purchased the holding. A suit was brought by the mortgagee for a declaration that the decree and sale were fraudulently and collusively obtained and the mortgaged property was not free from the liability created by the mortgage in his favour. The Munsiff decreed for the plaintiff but the Subordinate Judge reversed the decree on the ground that, as against the landlord, there was no cause of action. On appeal, the High Court held, that if the decree and sale were *bona fide* the plaintiff would have had no cause of action against the landlord; if they were not *bona fide*, as in the present case, the mortgagee under the tenant would have the same right to proceed against the landlord as he would have against the tenant, his mortgagor. **RAM SARAN DAS v. RAM PERGASH DAS, 32 C. 283.**

(169)—*Sale of property on first mortgage—Purchase by decree-holder—Suit on second mortgage—One mortgagee the same as first—Sale of property for a second time.*—The property in dispute was mortgaged first to M, then to M and S and then to the appellant. M brought a suit for sale upon the first mortgage, obtained a decree, sold the property and purchased it himself. M and S then brought a suit upon the second mortgage and obtained a decree. To this suit the appellant was a party. *Held*, that M and S could again sell the property which was sold in execution of the decree on the first mortgage, inasmuch as M, by his purchase, did not become full owner, as the property was subject to two other mortgages. **MURLIDHAR v. SHER SINGH, 3 A.L.J. 238 = A.W.N. 1906, 112.**

(170)—*Purchase by—Of mortgaged property prior to sale in execution of his mortgage-decree.*—Where, prior to the sale in execution of his mortgage-decree, a mortgagee purchases the equity of redemption in the mortgaged property in the name of a benamidar, his subsequent purchase of the property at a sale held in execution of his mortgage-decree can pass no title to him. **CHUTTERPUT SINGH v. MAHARAJ BAHADOOR SINGH, 9 C.W.N. 225, P.C. = 32 C. 198 = 2 A.L.J. 190 = 32 I.A. 1. [D., 34 C. 427 = 4 C.L.J. 495 = 11 C.W.N. 1; R., 34 C. 999 = 11 C.W.N. 889 = 6 C.L.J. 410.]**

(171)—*Decree-holder allowed to purchase mortgaged property—Purchase by benamidar for decree-holder for lesser sum—Execution for balance.*—Where, upon an application for sale of certain property in pursuance of an order absolute for sale, the decree-holder obtains leave to purchase the property upon the undertaking to pay the full decretal amount for it, and the property is purchased *benami* for him, at a less sum, and the judgment debtor does not object at the time, *held*, upon the decree-holder applying for a personal decree

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

for the balance, that the judgment-debtor, having the remedy to get the sale set aside in due course of law, cannot object to the decree-holder executing his decree for the balance, although the purchase by the decree-holder was an abuse of the process of the Court. **DURGA v. BHAGWAN DAS, 1 A.L.J. 486. [R., 4 C.L.J. 247.]**

(172)—*Mortgage—Subsequent sale of portions in execution of simple money decree—Purchase of equity of redemption by mortgagee—His rights.*—The appellant obtained a mortgage of fifteen biswas in four villages which represented the entire interest of the mortgagors. Some years subsequent to this mortgage the defendant-respondent sold under a simple money decree which had been obtained by him against the mortgagees, a five Biswa share of each of the four villages and purchased those shares himself. Two years after, the plaintiff-appellant instituted a suit for the sale of the mortgaged property including also the defendant-respondent as a party to the suit. Before the date fixed for the sale of the property, the mortgagors conveyed the mortgaged property to the plaintiff-appellant, who certified to the Court the discharge of his debt under s. 258. But the defendant-respondent, being no party to the sale, objected to the mutation of names in respect of the five Biswas in each village which had been purchased by him. The objection being allowed by the Revenue authorities, the plaintiff appellant applied for execution for his one-third decree as against the five Biswas so remaining recorded in the name of the defendant-respondent, and his application being rejected on the ground that his decree had been satisfied, he instituted the present suit. *Held* that the representatives of the mortgagors were necessary parties to the suit, and that the plaintiff-appellant was entitled to contribution to the extent of one-third of his decree against the defendants-respondents, with interest upon one-third of the decree up to the date of payment. **SETH SHAPOORJEE v. ABDUL RAHIM, 1 A.L.J. 564.**

(173)—*Property of mortgagor sold under decree absolute on mortgage—Right of mortgagor to question validity of sale.*—A mortgagor, whose property has been sold under a decree absolute on the mortgage, may come in and question the validity of the sale, although his right to redeem may have been long since extinguished by the decree; and a person to whom he has transferred his interest may also do the same. **GOLAM AHAD CHOWDHURY v. JUDHISTER CHUNDER SHAHA, 30 C. 142 = 7 C.W.N. 305.**

(174)—*Negligence of purchaser to have property purchaser freed from mortgage—Liability of purchaser to pay mortgaged debt.*—A vendee sued to enforce the specific performance of a contract of sale. The vendor and the mortgagee of the property purchased were made defendants in a suit. A decree was passed

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

in favour of the vendee, directing him to pay the purchase-money (in which was included the mortgage amount) into Court to the credit of the mortgagor. The decree was wrong. It should have provided for the payment of the mortgage-money to the mortgagee first. Neither the vendee nor the mortgagee applied to the Court to set right the decree. On being asked by the mortgagee, the vendee paid the mortgage-money into Court to the credit of the mortgagor, and the money paid into Court was dissipated without the mortgage having been paid off. Thereupon the mortgagee sued both the mortgagor and vendee for the mortgage-money. The question was whether the vendee or the mortgagee was to be the loser. *Held*, that, the mortgagee having drawn the attention of the purchaser to the fact that his mortgage had not been paid, it was the interest of the purchaser before he parted irrecoverably with the purchase-money, to have seen the property freed from all liability for the mortgage debt. The purchaser having failed to take proper care, he was liable for the consequences. The mortgage money having become dissipated he was liable to pay it over again. There was no law or equity which relieved him from the responsibility. **KANDASAMI GRAMANI v. JAGATHAMBA AMMAL, 10 M.L.J. 353.**

(175) — *Mortgage — Decree against Hindu father only — Death of father before execution — Notice to sons — Consent of guardian — Petition to set aside sale.* — A mortgage decree was obtained against a Hindu father in a suit in which his minor sons were made parties. Before the decree could be executed, the father died. The decree-holder executed the decree against the judgment-debtor's sons after a guardian *ad litem* was appointed and the mortgaged property was sold in auction. The sons through their guardian put in a petition to set aside the sale on the ground that no order absolute was obtained and that no notice was given to them. In the petition, no objection was taken as to the want of consent of the guardian before he was appointed as such by an order of the Court. *Held* (1) that the action of the Court in making such order was merely irregular and did not vitiate the sale, especially where no objection on that score was taken in the Courts below and the same guardian applied on the minors' behalf to set aside the sale; and (2) that no notice was necessary to the father's representatives. The suit was against a father and sons forming a joint Hindu family and it was quite unnecessary to join the sons as representatives of the father on his death. **ODAYANASAMY TEVER v. ALAGAPPA CHETTY, 14 M.L.J. 342. (7 C.W.N. 774, R.)**

(176) — *Transfer of Property Act — Purchase by prior mortgagee in execution of decree under later mortgage — Validity of sale.* — Where, in execution of a mortgage decree, the prior mortgagee purchased the mortgaged property, the sale was not invalid. **KUTTAN NAYAR v. KRISHNAN MUSSAD, 12 M.L.J. 390.**

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

(177) — *Execution — Sale of mortgaged property — Sale pending insolvency application by mortgagor — Judgment-debtor — Declaration of insolvency subsequent to sale whether, affects sale* — *Civ. Pro. Code, 1882, ss. 344, 351.* — In this case, the sale of the mortgaged house in execution was set aside by the Subordinate Judge on the ground that the pendency of an insolvency application by the mortgagor judgment-debtor at the time of the sale rendered it illegal and void. The District Judge, on appeal, confirmed the order. *Held*, cancelling the order that set aside the sale, that the *Civ. Pro. Code*, does not provide that any consequences in derogation of the ordinary rights of judgment-creditors shall follow from a mere application by the judgment debtor under s. 344 of the Code. It is only when a receiver is appointed under s. 351, that the property of the insolvent vests in the receiver under the provisions of s. 354 and the rights of the creditors are interfered with, and such an order can under no circumstances have any retrospective effect. **ISHWAR LAKHMIDAT v. HARJIVAN RAMJI, 21 B. 681.**

(178) — *Civ. Pro. Code, 1882, ss. 310-A, 311 — Applicability to sales in execution of mortgage decrees.* — *Ss. 310-A. and 311, Civ. Pro. Code*, applied to sales of mortgaged property which had taken place in execution of mortgage decrees. **MALIKARJUNADU SETTI v. LINGAMURTI PANTULU, 25 M. 244, F.B. = 12 M.L.J. 279. (25 C. 703, Commented on; 19 A. 205, 25 B. 104, 22 M. 286, Appr.) [F., 31 C. 863 = 8 C.W.N. 684, 31 M. 354 = 18 M.L.J. 259 = 3 M.L.T. 281; R., 28 M. 473 = 15 M.L.J. 126, 2 N.L.R. 137, 7 C.L.J. 1, 5 M.L.T. 278.]**

(179) — *Mortgage — Suit to recover mortgage-debt by sale of mortgaged property — Property sold to realize — Municipal taxes — Personal claim — Limitation Act, 1877, arts. 97 and 116.* — This was a suit brought on the 7th August, 1896, by the mortgagee against the mortgagor, for recovery of the mortgage-debt by sale of the mortgaged property, and from the mortgagor personally, based on a registered mortgage deed, dated the 29th July, 1886, which provided that the debt was payable within two years. On the 15th August, 1890, the mortgaged property, then in possession of the mortgagee, was sold for non-payment of Municipal taxes and purchased by the son of the mortgagee. *Held*, that the plaintiff had no claim against the mortgaged property, which was sold for arrears of municipal taxes free from all incumbrances. *Held*, further, reversing the decisions of the Lower Courts, that, as regards the personal claim for the amount due on the mortgage, art. 97, Limitation Act, 1877, was applicable, and the plaintiffs had, under that article and art. 116, six years to bring their suit from the time when the mortgaged property was sold and they were dispossessed on the 7th November, 1890. **HARNARAIN DAS v. SARUP LAL, P.L.R. 1900, p. 201.**

(180) — *Suit for sale premature — Decree obtained in part on confession of judgment by some*

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

of the defendants—Second suit to recover balance of mortgage-debt, maintainability of—Cause of action, accrual of—Transfer of Property Act, s. 90—Civ. Pro. Code, s. 244, applicability of.—A usufructuary mortgage of a shop was made in favour of the plaintiff, with a dwelling house as a collateral security. In execution of a money-decree against the mortgagor, the house was sold and purchased by the defendants subject to the mortgage. Before the expiry of the term of the mortgage, the plaintiff brought a suit to recover the mortgage-debt by sale of both the shop and the dwelling-house. This suit was decreed against the representatives of the mortgagor, who confessed judgment, but it was dismissed as premature against the purchaser of the house. After the expiry of the mortgage, a second suit was brought by the plaintiff to recover the balance by sale of the dwelling-house. *Held*, that this second suit was not barred, the cause of action arising on the expiry of the term of the mortgage and on the proceeds of the sale of the shop proving insufficient for the satisfaction of the plaintiff's claim. It was not now open to the defendant purchaser to contend that the plaintiff's claim ought to have been included in the first suit, when he was allowed to defeat it on the ground that it was premature; and neither s. 90, of the Transfer of Property Act, nor s. 244, Civ. Pro. Code, was applicable to the present case. **GANGA RAM v. KANHAIYA LAL, 27 A. 254 = A.W.N. 1904, 236 = 1 A.L.J. 649**

(181)—*Sale by first mortgagee—Effect—Rights of puisne incumbrancers who were parties—Sale-proceeds, lien on—Withdrawal of money by third mortgagee—Suit to enforce lien by second mortgagee—Limitation—Limitation Act (XV of 1877), sch. II, art. 132—Civ. Pro. Code, ss. 244, 295—Transfer of Property Act (IV of 1882), s. 73.*—When property is sold under a decree obtained by a first mortgage in a suit, in which the puisne incumbrancers were parties, it passes into the hands of the purchaser discharged from all incumbrancers. But the rights of the puisne incumbrancers are not extinguished or discharged by the sale but transferred thereby to the surplus sale-proceeds. Where a second mortgagee, who had been made a party in a first mortgagee's suit, took no steps to enforce his lien on the surplus sale proceeds, but, subsequently, a third mortgagee, who had notice of the second mortgagee's claim brought a suit on his mortgage without making the second mortgagee a party and withdrew the surplus sale-proceeds in satisfaction of his mortgage:—That a suit brought on his mortgage by the second mortgagee wherein he seeks to enforce his lien on the surplus sale-proceeds in the hands of the third mortgagee is governed by art. 132 of sch. II of the Limitation Act and not by art. 120. **BERHAM DEO PRASAD v. TARA CHAND, 9 C.W.N. 989 = 33 C. 92. (5 C. W.N. 356, 27 C. 180, R.) [Appl., 38 P.L.R. 1909 = 37 P.R. 1909.]**

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

(182)—*Mortgage—Sale of mortgaged property suit by simple mortgagee—Transfer of Property Act, s. 67.*—By a mortgage deed executed on the 28th May, 1885, one-third share of a village was hypothecated as security for payment of a loan with interest at Rs. 12 per cent. per annum. The mortgagor agreed to pay interest out of the profits of the mortgaged property every six months and the mortgage was for a term of three years. There was a further agreement that, on default in payment, the mortgagee would obtain possession of the mortgaged property. The mortgagee's suit, in which he prayed for a decree for a sale of the property, was instituted on the 8th November, 1900, when a suit for possession under the terms of the mortgage deed had become barred. *Held*, that in view of the provisions of s. 67 of the Transfer of Property Act, as the mortgage was not an usufructuary one, the mortgagee had a right at any time after the 26th May, 1885, when the money became payable, to him to institute a suit for sale. **KUNAR BINDA BAKSH MINOR v. ABDUL SAMAD KHAN, 6 O.C. 151. [Not F, 6 O.C. 157.]**

(183)—*Mortgage—Execution of, decree mortgagee's right to put up for sale any portion of mortgaged property in.*—Where more than one property is subject to a mortgage-debt in execution of his decree on the mortgage the mortgagee is entitled to put up for sale whatever portion of the mortgaged property it is necessary to sell in order to realize the amount of the debt. **MUSSAMMAT CHANDO BIRI v. MUSSAMMAT BISMILLA KHANAM, 6 O.C. 197.**

(184)—*Application for re-sale of mortgaged property—Execution of decrees—Limitation.*—In a suit on a mortgage-bond, the order for sale was made absolute on the 3rd November, 1894. On the 23rd November, the decree-holder applied to have the property sold and in January, 1898, it was sold. In October, 1898, the sale was set aside and on the 19th April, 1901, the decree-holder, setting out the above facts, applied for re-sale of the property. The judgment-debtors contended that the application was barred by limitation. The first Court dismissed, and the Court of first appeal allowed, the application. *Held*, that the application of the 9th April, 1901, was not a fresh application but one, to revive the proceedings on the former application from the time when they became irregular. The result of the order setting aside the sale was not to dismiss the application for sale but to annul the proceedings in the former application after they became invalid. The order allowing the application of the 19th April, 1901, was therefore a proper order. **INAYAT ALI v. BHAYA GAYA PERSHAD, 6 O.C. 195.**

(185)—*Mortgage, Suit for recovery of money due on—Anomalous mortgage—Interest—Claim for recovery of, by sale of mortgaged property—Damages—Limitation Act, sch. II, art. 116.*

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

—The plaintiff sued the defendant for the recovery of certain sums of money as principal and interest alleged to be due upon a mortgage executed by the latter in favour of the former on December 11th, 1888. He claimed to be entitled to recover these sums by sale of the mortgaged property. *Held*, that, having regard to the terms of the deed, the mortgage was an anomalous mortgage, that the parties did not intend that the mortgagee should, in any event, be entitled to a decree for sale in respect of the interest, that he was entitled by way of damages to interest for six years previous to the suit under art. 116, Limitation Act, and that, under the circumstances, the interest awarded as damages could not be held to be a charge on the land. **RAM PARSHAD v. UMRAO, 7 O.C. 11.**

(186)—*Hypothecation of two items—Condition that if money should not be recovered from first item, second item might be proceeded against—Subsequent hypothecation of second item—Decree and execution sale of both properties at once in execution—Validity.*—A person hypothecated his property A to the defendant and by the bond it was agreed that if the money should not be recovered from A, the defendant might realize it from other property B. Subsequently the same person hypothecated his property B to the plaintiff. The plaintiff and the defendant respectively obtained decrees under their bonds and proceeded to sell. The defendant put up for sale and purchased properties A and B. The plaintiff, in execution of his decree, on the same day, also purchased property B. The plaintiff then brought the present suit to recover possession of the property so purchased by him on the ground that the defendant was not entitled under his deed to proceed at once against property A and against property B, but should, in the first instance, have proceeded against the former. *Held* that as the property A and the property B did not fetch a sufficient sum to satisfy the defendant's bond, it was immaterial whether the defendant should have proceeded first against A before having recourse to B, that the result showed that the sale of A would not have discharged the defendant's bond and that his lien would still have taken priority over that of the plaintiff, and that therefore the suit should be dismissed. **BHAWANI PRASAD v. NARAIN PRASAD, A.W. N. 1887, 192.**

(187)—*Two mortgage decrees on same property—Execution of decree on puisne encumbrance—Notification of prior incumbrance—Purchase of mortgaged property by mortgagee decree-holder—Extinguishment of first mortgage—Merger.*—Were the holder of two decrees enforcing simple mortgages of certain property, brought the mortgaged property to sale in execution of the decree which enforced the second mortgage and purchased it himself, notifying at the time of sale the lien he held under the

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

decree in respect of the prior encumbrance, *held* that the purchase, having been made subject to the prior encumbrance held by the purchaser himself, operated by the rule of merger to extinguish it, there being no intervening equities in the case. **KHWAJA BAKHSI v. IMAMAN, A.W.N. 1885, 210. [Appl., 12 A. 537; Cons., 20 A. 23.]**

(188)—*Mortgage decree—Sale of portion of mortgaged property in execution of another decree—Sale subject to mortgage—Right to execute mortgage decree by sale of other properties.*—A mortgage decree-holder purchased a portion of the mortgaged property in execution of another decree against the same judgment-debtor, the sale being made subject to his mortgage. Subsequently, he sought to execute his mortgage decree by sale of other mortgaged properties. *Held* that the purchase by the mortgage decree-holder of a portion of the mortgaged property subject to his mortgage, satisfied his mortgage-debt. **AHMAD WALI v. BAKAR HUSAIN, A.W. N. 1883, 61. [Overruled, 20 A. 23, F.B.= 17 A. W. N. 163; R., 12 A. 537, 19 A. 196.]**

(189)—*Suit for sale on a mortgage—Right of purchaser under decree prior to mortgage to use as a shield a lien created by compromise on which decree was based.*—On the 27th of September 1867, a mortgage was made by the predecessors in title of Hushiar Singh and Badbu in favour of Baldeo Bharti. In 1871, the mortgaged property was sold at an auction sale under a decree dated the 24th of September 1858. That decree was a money decree, but was passed on a compromise by which a certain sum, agreed between the parties to be due to the plaintiff on an account stated, was made payable by instalments, and the property in suit was hypothecated as security for the due payment of such instalments. The property was purchased by one Gurdayal Jati, who was the decree-holder. In a suit by the mortgagee of the mortgage of 1867 for sale, it was *held* that the representatives of the purchaser under the decree of 1858 were entitled to use the lien created by the compromise upon which that decree was based as a shield to the extent of the price, which Gur Dyal had paid for the property, but no further. **BALDEO BHARTI v. EUSHIAR SINGH, A.W. N. 1895, 45. [Appl., 22 A. 453; D., 19 A. 527.]**

(190)—*Mortgage—Prior and subsequent incumbrances—Rights of subsequent mortgagee who has paid off a first mortgage as against a purchaser at a sale under a decree on an intermediate mortgage.*—The plaintiff held a mortgage of 1887 over several villages, including the village of Chandanpur. The defendant was the purchaser of Chandanpur at a sale in execution of a decree for sale on two mortgages of 1886. Before suit was brought on the mortgages of 1886 the plaintiff had paid off the amount due on an earlier mortgage of 1883. The plaintiff was not, however, made a party to the suit on the mortgages of 1886, in execution of the decree in

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

which the defendant purchased. The plaintiff brought her suit on the mortgage of 1887, but in respect of Chandanpur sought only to recover from the defendant auction-purchaser of Chandanpur the amount due in respect of the mortgage of 1883, waiving her right to any relief directly dependent on the mortgage in suit. *Held*, that the defendant could not resist the sale of Chandanpur except by paying to the plaintiff the full amount due in respect of the mortgage of 1883; then only could he claim priority in respect to the mortgages of 1886, which were the basis of his title. **SITAL PRASAD v. TUFAIL FATMA, A.W.N. 1904, 285.**

(191)—*Mortgage—Usufructuary mortgage and hypothecation bond—Right of mortgagee to sale of property.*—Where, in a usufructuary mortgage-deed, it was stipulated that the mortgagor was to be left in possession on payment of a certain rent every year to the mortgagee; *Held*, that the terms of the mortgage must be understood to cover both cases of a usufructuary mortgage and those of an hypothecation charge and as such the mortgagee was entitled to bring the property to sale. **UMRAO BEGAM v. VALI-ULLAH, A.W.N. 1888, 171. [R., 21 A. 4.]**

(192)—*Mortgage—Dispossession—Sale of hypothecated property.*—Whenever a contract gives a pledge of property as security for money lent, there will always be a power of sale, unless a contrary intention is clearly expressed. Such is sometimes the case in usufructuary mortgages, when the mortgagee looks only to the usufruct for his principal and interest. Where the mortgagee was expressly empowered to recover the principal and interest on being dispossessed, either before or after the expiration of the term, *held*, that the mortgagee, on being dispossessed, was entitled to recover the debt by the sale of the hypothecated property, although the mortgage-deed did not in so many words provide that, in such a case, the money should be recovered from the property. **RAM BAKSH v. NOHAR PANDEY, A.W.N. 1881, 63.**

(193)—*Mortgage—Sale in execution of decree enforcing second mortgage—Concealment by prior mortgagee of his lien.*—Where the prior mortgagees of certain property were the sons of two brothers and the subsequent mortgagees of the same property were some of them, *held*, that the purchaser of the property in execution sale under the decree on the subsequent mortgage, in entire ignorance of the prior charge on the property, was protected, as, having regard to the relationship of the parties and the fact that the subsequent mortgagees were actually, though not in name, as much interested in the subsequent mortgage as in the prior mortgage, there was an obligation on them at the time of the sale to disclose the lien held by them under the prior mortgage. **LACHMI NARAIN v. HUSAIN KHAN, A.W.N. 1881, 91.**

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

(194)—*Mortgagor and mortgagee—Covenant not to alienate—Sale of mortgaged property in execution—Right of purchase.*—Where the rights and interests of a mortgagor were sold in execution of a decree declaring the mortgaged property liable for the mortgaged debt, it was held that a putneedar, who had obtained a pottah from the mortgagor subsequent to the mortgage and in violation of its conditions, had no right or title to hold possession against the purchaser. The purchaser in such a case buys the rights and interests of the judgment-debtor as they stood at the time of the execution of the mortgage, and not as they stood at the time of the sale. **BRAJARAJ KISORI DAS v. MOHAMMED SALEM, 1 B.L.R.A.C. 152 = 10 W.R. 151. (7 W.R. 67, F.; 8 W.R. 292, R.) [R., 23 W.R. 187.]**

(195)—*Mortgage—Power of sale by mortgagor—Mortgage to be treated as sale if money not repaid within fixed time—Attachment—Effect.*—A person mortgaged some property to the plaintiff with a stipulation that if the mortgage debt were not paid off within the prescribed time, the entire proprietary interest in the property was to pass to the plaintiff without further conveyance. It also provided that the mortgagor was competent, at the expiration of the time fixed, to sell the property and to apply the proceeds to the liquidation of the mortgage-debt; and that it was only on his failure to adopt this course that the proprietary right in the property was to pass to the plaintiff. Possession of the property continued with the mortgagor. In execution of a money-decree against him, some third person attached the mortgaged properties, and this was 23 days after the date fixed for payment of the mortgage-debt. The mortgagee then brought the present suit to raise the attachment on the ground that according to the stipulation in the mortgage the entire proprietary interest passed to himself on the failure of the mortgagor to pay the amount on the date fixed, and that the mortgagor had no interest in the property which could form the subject of attachment. *Held*, (i) that the stipulation in the mortgage to the effect that the mortgagor may, on the expiration of the time fixed, sell the property and pay the mortgage amount, implied that a reasonable time should be allowed to the mortgagor to dispose of the property. (ii) that the period of 23 days, which intervened in the present case between the date fixed for the payment and the date of attachment was not sufficient for the exercise of the power of sale, which remained with the mortgagor; (iii) that the mere fact that no sale was made within the interval cannot equitably be held to operate as a foreclosure; (iv) and that, therefore, at the time the attachment was made, the mortgagor had not lost the equity of redemption, and that, at the time the suit was brought, the plaintiff was at the most only a mortgagee, and not in a position to demand the removal of the attachment. **KONER MANOHAR v. NARO HARI DASPUTRE, 1 B.H. C. 167.**

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

(196)—*Execution of decree—Decree for sale on a mortgage—Decree subsequently modified in favour of a puisne incumbrancer in respect of a portion of property comprised in first mortgage—Application to execute original decree excluding property covered by puisne incumbrance.*—A first mortgagee obtained a decree under s. 88 of the Transfer of Property Act in a suit to which he made defendants several persons interested in the mortgaged property, including a certain puisne mortgagee of a portion of the property mortgaged to the plaintiff. This puisne mortgagee did not appear to defend the suit, but subsequently proceeded under s. 108 of the Code of Civil Procedure, and eventually obtained a certain modification of the decree in her favour. To these proceedings she only, and none of the other defendants to the suit, was a party. The decree-holder, the first mortgagee, made an application for execution, which, after amendment, amounted to an application for execution of the original decree exempting that portion of the property which was dealt with by the second and subsidiary decree. *Held*, that this was a good application, and that the original decree, with the exception thus made, was capable of execution. **MUNNA LAL v. RUKN-ALAM, A.W.N. 1900, 14. (25 C. 155, D.)**

(197)—*Sale of mortgaged property in execution of decree on puisne mortgage subject to prior incumbrances—Purchase by decree-holder—Prior incumbrances, declaration of invalidity of—Suit by judgment-debtor's representative to recover from auction-purchaser the amount due on the prior incumbrances—Equity of the claim.*—In execution of a decree obtained by a puisne mortgagee in a suit on his mortgage, to which the prior mortgagees were not parties, the mortgaged property was sold subject to two prior incumbrances, which, on the representation of the decree-holder in the sale-proclamation were said to be then existing on it, and purchased the property himself. After confirmation of sale, the two prior mortgages were declared to be invalid in suits on those mortgages. The present suit was brought by the representatives of the mortgagor to recover from the auction-purchaser the amounts due on the two mortgages. *Held*, by Stanley, C. J., and Blair, J. (Burkitt, J. dissenting) that what the decree-holder purchased was only the equity of redemption in the mortgaged property, and not the whole of the proprietary rights therein. (14 I.A. 77, 14 I. A. 84, 31 I.A. 1, R.) That the whole interest in the property, other than that of equity of redemption belonged to the estate of the judgment-debtor. That, the prior mortgages having been found to be invalid, the plaintiffs, as the rightful owner of the property, was, in equity, entitled to recover from the decree-holder-purchaser the amount of the principal and interest as was proportionate to the value of the property purchased by the decree-holder. *Per Stanley, C. J.*—That the plaintiff-appellant was entitled to a lien on the property in respect of the amount found due to

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

him. *Per Burkitt, J.—contra.*—That in this suit, which was framed as a suit for the recovery of unpaid purchase-money, no decree could be passed for the payment of the amounts due on the prior mortgages. That the words "purchase-money," used in the Civ. Pro. Code, import only the sum offered by the highest bidder and accepted by the Court conducting the sale and do not include the amount of any incumbrances existing on the property put up for sale. The execution Court, when selling immoveable property, does not guarantee that the incumbrances, notified in the sale-proclamation, are valid charges, or that they are the only charges on it; nor is there anything in the conduct of the auction purchaser which would estop her from denying the validity of the prior mortgagees. Consequently, the auction purchaser ought not to be deprived of the fruits of her bargain. **INAYAT SINGH v. IZZAT-UN-NISSA BEGAM, 27 A. 97, F.B. = A.W.N. 1904, 174 = 1 A.L.J. 435. [Reversed on appeal, 13 C.W.N. 1143; R., 10 O.C. 280; D., 2 C.L.J. 599, 28 A. 418 = A.W.N. 1906, 68 = 3 A.L.J. 200, A.W.N. 1907, 131 = 4 A.L.J. 434 = 29 A. 463.]**

(198)—*Decree exonerating defendants from personal liability—Sale of property not mortgaged, validity of.*—A decree based on a mortgage directed that, in default of the judgment-debtor's payment of the decree-amount within a specified date, the property mortgaged should be sold. It also directed that the defendant should not be personally liable. A question arose as to whether the decree prohibited the sale of property not mortgaged, the proceeds of the sale of the mortgaged property not proving sufficient to satisfy the decree. *Held*, that the provision in the decree that the judgment-creditor should not be entitled to proceed against the person of the judgment-debtor implied that the Court did not prohibit the sale of the property other than that mortgaged, should it be necessary to sell such property for the realisation of the decree-amount. **MUTHANA KONE v. KUMARASAMI PILLAI, 15 M.L.J. 6.**

(199)—*Power of sale in mortgage-deed, whether entitles mortgagee to sell out of Court—English law.*—Although, under the English Law, not only has the mortgagee power to sell, without the concurrence of the mortgagor, in cases where such power is expressly given by the mortgage-deed, but such power of sale has been made by statute incident to all mortgages, unless it be excluded or limited by the mortgage-deed, yet, there have been no decisions of the Courts in India on the subject of a mortgagee's power to sell, without the intervention of Court, in cases not governed by the English law. **KESHAVARAV K. JOSHI v. BHAVANJI BABAJI, 8 B.H.C. A.C. 142. [R., 2 B. 1, 2 B. 252, 14 C. 464, 14 B. 377, 20 B. 408, 2 S.L.R. 90.]**

(200)—*Mortgage-decree—Sale of mortgaged property—Subsequent mortgage and conveyance by judgment-debtor—Rights of mortgagee and*

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

subsequent vendee as against purchaser under decree.—Where certain property was pledged as security for a loan given by T after a decree had been passed in favour of R on a prior mortgage over the same property and the mortgaged property had been ordered to be sold, and the judgment-debtors subsequently to R's petition for a sale of the property, conveyed a moiety of the property to M, *held* that neither T nor M could acquire a new ownership under their mortgage or sale as against R. *Held* further that the proceedings of the lower Court upholding the objection of either T or M to the sale made in favour of R were invalid, and that the latter was entitled to a refund of any money which he had paid as consideration for his purchase. **SHAIKH EIDA v. RAM JUG PANDEY, 19 W.R. 289.**

(201) — *Assignment of gantee tenure by ganteedar — Agreement by assignee to pay zemindar rents and a yearly amount towards debts due to ganteedar—Mortgage of tenure by assignee — Sale by mortgagee—Liability of purchaser to pay rent and the annual sum.*—Defendant was a ganteedar on the plaintiff's zemindari and, as such, had to pay plaintiff an annual gantee *jumma* of Rs. 525. Plaintiff alleged that under an *ekrar* executed by one H to the defendant, H stipulated to pay a debt due by defendant to plaintiff by instalments of Rs. 100 per annum, and instituted the present suit for the arrears of the instalments for some years. The widow and sons of H who were defendants in the suit pleaded that the payment of the Rs. 100 per annum was a liability of additional rent to that extent and such liability could last only so long as the gantee remained that of the ganteedar, and that when the gantee itself passed from the assignor, the liability for the payment in question as additional rent passed to the assignee. It was argued that similarly the liability was to cease with any transfer of the gantee, and that the payment was to be made only out of rent-profits of the gantee as long as it was in the hands of the assignee either. *Held*, the mere statements that the sum was to be paid out of the profits cannot make that rent which in fact was money due irrespective of the current rent. The defendant's gantee was in fact taken in *mourose* by H on his agreeing to pay Rs. 525 and Rs. 100. No subsequent mortgage could get rid of his *mourose* or of the agreement, and the liability of H and his heirs would not cease with the transfer of the ganteedar's right by the creation of the mortgage and the foreclosure which followed. On the contrary the purchaser could only have bought the tenure subject to the liabilities of the *mouroseedar* and his heirs to fulfil the conditions of the *ekrarnamah* entered into by him. **MOHIMA CHUNDER GHOSE v. RAJA BURODA KANT ROY, 2 W.R. 121.**

(202)—*Two mortgages on same property—Sale of mortgaged property by first mortgagee—Right of redemption of second mortgagee.*—Where

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

there are two mortgages on the same property, and the first mortgagee having obtained a decree enforcing his lien on the security, brings the mortgaged property to sale, the second mortgagee, wishing to preserve his lien on the estate, must redeem the first mortgage. **RAM TAHUL ROY v. MUSSUMAT BELATTEE KOONWAR, 1 W.R. 19.**

(203)—*Pledged property, Sale of—Sale declared valid by decree of Court—Effect.*—Where property which had been previously pledged is sold and such sale is declared valid by a decree of Court, such a decree (so long as it is not set aside) disposes of questions of ownership in favour of the purchaser, though she may be the wife of the vendor. **BABOORAM PANDEH v. HUREE CHAND DOSS, 1 W.R. 64.**

(204)—*Mortgage—Foreclosure—Sale—Rights of mortgagee.*—In a suit by a mortgagee for possession after foreclosure, it was found that the plaintiff had, in good faith, advanced the mortgage-money for the purpose of discharging a debt contracted by the original owner, that his (plaintiff's) present mortgage-security was, either wholly or in part, a substitution for the original mortgage which was a valid one, and that the defendant mortgagor was no stranger but a nephew of the original owner, claiming under an apparently valid Will from the latter, producing a certificate from the Court entitling him, to collect the debts due to the deceased's estate and actually remaining in possession of the property. It was also found that the defendant-mortgagor, as one of the heirs of the original owner, was the owner of the mortgaged property. *Held* that the plaintiff had a valid title as mortgagee, and was entitled to sue for possession having foreclosed the mortgagee previously. *Held*, further, that a person who had purchased the rights and interests of the original owner and of the mortgagor (as his representative) in the property in question at an execution sale, held only subsequent to the foreclosure proceedings, was not entitled to withhold the property from the plaintiff, because at the time of sale, the judgment-debtor had no interest in the property sold. **MADHUB ANUND MOITRO v. GANESH PERSAD, 1 W.R. 91. [F., 17 W.R. 480.]**

(205)—*Execution of decree—Sale of portion of mortgaged property—Purchase of mortgage decree by auction purchaser—Right to execute decree—Equity.*—The auction purchaser under Act VII, B.C. of 1868, of a portion of the properties subject to a mortgage-decree purchased the mortgage-decree to protect the share that he had bought. *Held* that such transferee was entitled to execute the decree against the judgment-debtors; and also, in the event of their making default in paying the amount due under the decree, to proceed against the share of the mehal still in their hands; and, further, that if, by reason of its being necessary to sell the remaining share of the judgment-debtors, any equity should arise between them and the

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

transferee-decree-holder to have the decretal money distributed over the whole property mentioned by the decree, such equity must be asserted by an independent suit. The existence of such an equity is no bar to the execution of the decree. **NAFER CHUNDER MUNDUL v. BAIKANTO NATH ROY, 4 C.L.R. 156.** [Appl., 4 C.L.J. 573=34 C. 13.]

(206)—*Mortgage—Resumption by Government of portion of lands mortgaged, and subsequent sale to mortgagor—Equity—Waiver.*—Government having, under the Land Acquisition Act, taken possession of portion of a certain land which had been mortgaged by the owner, subsequently, while the mortgage was still in force, resold the portion taken to the mortgagor, who sold it to a third person *bona fide* for value. In a suit by the mortgagee (who had taken no steps to obtain any portion of the money paid by the Government for the land) praying for the sale under the mortgage of the land resumed by Government, *held* that the plaintiff as mortgagee had waived his rights under the mortgage and that the purchaser from the mortgagor had acquired a title free from the plaintiff's incumbrance. **RAM AWTAR SINGH v. TULSI RAM, 5 C.L.R. 227.** [R., 23 C. 397, 11 C.W.N. 284=5 C.L.J. 95.]

(207)—*Successive mortgages of same property—Sale under both mortgages—Priority—Redemption—Form of decree.*—A person created successive mortgages upon the same property first in the name of A and subsequently in the name of A's husband, B. Suits were instituted on both the mortgages and judgments were given in both the suits on the same day. The decree on the second mortgage was first executed, the property was brought to sale and plaintiff became the purchaser of the same at the Court-auction. Subsequently, the decree in the name of A was executed and B's son C became the auction-purchaser of the property. In a suit by the plaintiff against A, B and C without impleading the mortgagor as a party, to set aside the sale to the son C, to have himself declared the purchaser and to be entitled to redeem, it was found that B, the husband or father was merely using the names of the others and that the purchase under the second sale was by B himself, who had himself caused the first sale to take place, and then purchased under the second sale. *Held* that the sale to C could not stand against the purchaser under the first sale, that it must be set aside and that the plaintiff was entitled to redeem. In such a case, it is quite unnecessary and irrelevant to say in the decree whether it is, as a second mortgagee or as a purchaser that the plaintiff is entitled to redeem the first mortgage. **CHORAMUN SINGH v. MAHOMED ALI and AHMED KHAN v. CHORAMUN SINGH, 11 C.L.R. 1=9 I.A. 21, P.C.**

(208)—*Transfer of Property Act, ss. 58 (b), 100—Decree for sale of property on the bond—*

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

Subsequent sale of same property in execution of money decree against executant of bond—Bona fide purchaser for value without notice, right of.—A decree for sale of the property as on a simple mortgage was obtained on this bond, but before execution thereof, the property was attached and sold in auction under a money decree against the same judgment-debtor; *Held*, that the *bona fide* purchaser for value in the auction sale without notice of the bond and the decree thereon, could take only subject to the rights of the mortgage decree-holder, where the want of notice was not due to any fault of the latter. **KISHAN LALL v. GANGA RAM, 13 A. 28=A.W.N. 1890, 216.** (21 W.R. 148, 12 M.I. A. 366, R.)

(209)—*Sale of mortgaged property in execution of decree on second mortgage—Suit by first mortgagee for re-sale of property in execution of decree on his mortgage—Civ. Pro. Code, 1882, s. 295.*—Where property, the subject of two mortgages, is sold in execution of a decree on the second mortgage, the only remedy open to the first mortgagee, who has obtained a decree on his mortgage, is to sue for the re-sale of the property in execution of his decree; for, he could not have claimed a rateable distribution under s. 295, Civ. Pro. Code, as the first and second provisos to that section refer only to sales in execution of simple money decrees and the third proviso relates to subsequent, and not to prior, incumbrances. **JAGAT NARAIN RAI v. DHUNDHERY RAI, 5 A. 566=A.W.N. 1883, 150.** [D., 10 A. 35.]

(210)—*Leave to bid obtained by mortgagee decree-holder—Effect.*—Leave to bid puts an end to the disability of the mortgagee and puts him in the same position as any independent purchaser. **MAHABIR PERSHAD SINGH v. MACNAGHTEN, 16 C. 682=16 I.A. 107, P.C.=5 Sar. 345.** [F. 19 C. 4, 4 C.W.N. 474; R., 18 M. 153, 18 A. 31=15 A.W.N. 144, 23 M. 227=27 I.A. 17, P.C., 22 A. 284=A.W.N. 1900, 69, F.B., 26 B. 88=3 Bom.L.R. 628, 17 M.L.J. 325=30 M. 362.]

(211)—*Mortgage—Payment of prior mortgage merged in decree—Priority—Intention.*—Where a subsequent mortgagee advances money for discharging a prior mortgage on which a decree had been passed, he is entitled to priority in respect of that money in a suit by an intermediate mortgagee. It is sufficient for him to show that there was a prior encumbrance which it was for his benefit to keep alive. In such cases he would be presented to have intended to keep it alive. The fact that the mortgage had taken the form of a decree does not affect the question. **PURNAMAL CHUND v. VENKATA SUBBARAYALU, 20 M. 486=9 M.L.J. 198.** [F., 2 C.L.J. 202; R., 12 C.P.L.R. 70.]

Mortgage by occupancy tenant—Right of mortgagee to sue for sale of holding—See C.P. ACT XVII OF 1889, 10 C.P.L.R. 53.

Mortgage—continued.**—10.—Sale of mortgaged property—contd.**

Mortgage-debt attached in execution of decree against mortgagee—Mortgaged property not attached—Effect of Civ. Pro. Code, 1882, s. 274—See ATTACHMENT—GENERAL, 19 B. 121.

Application for attachment and sale of property under—Common error of Court—Claim to such property under s. 278, Civ. Pro. Code—See ATTACHMENT—SUBJECTS OF ATTACHMENT, 2 L.B.R. 138.

See CIV. PRO. CODE, 1908, O. XXI, rr. 10, 21, s. 48, O. XXI, r. 30, s. 73, sch. III, r. 2, 25 C. 580=2 C.W.N. 118.

See CIV. PRO. CODE, 1908, O. XXI, r. 53, 6 C.W.N. 5.

See CIV. PRO. CODE, 1908, O. XLI, r. 5, 30 C. 1060=7 C.W.N. 914.

Decree for sale on a—Right of a prior mortgagee to put forward a claim in execution-proceedings—See CIV. PRO. CODE, 1908, O. XLI, rr. 23, 25, A.W.N. 1905, 157=27 A. 700.

See DECREE—DECREE, FORM OF, 22 C. 100.

See IMMOVEABLE PROPERTY, 6 C.W.N. 5.

Power of High Court to order sale of mortgaged land beyond jurisdiction limits—See JURISDICTION—SUITS FOR LAND, 14 B. 353.

Conditional decree in a suit on a, puts an end to the suit—See LIMITATION ACT, 1908, arts. 176, 177, 11 C.W.N. 156.

Decree for sale on mortgage—Limitation—Execution—Objection to sale—Decree under s. 283, Civ. Pro. Code, declaring liability of property—See LIMITATION ACT, 1908, art. 181, 19 A. 71=A.W.N. 1896, 188.

See LIS PENDENS, 22 B. 939, 11 B.H.C. 139.

Suits on mortgages—Prior mortgagee not impleaded in *puisne* mortgagee's suit—Suit by prior mortgagee-purchaser for possession or for his being redeemed—Maintainability of such suit—See MORTGAGE—REDEMPTION, 9 C.W.N. 728=1 C.L.J. 371=32 C. 891.

See REGISTRATION ACT, 1908, s. 50, 8 B.H.C. A.C. 50, 9 B.H.C. 304, 12 B. 569.

Res judicata—Sale of mortgaged property in execution of decree—Objection to execution of decree taken after part of mortgaged property sold under decree—Order absolute—See RESJUDICATA—RESJUDICATA IN EXECUTION PROCEEDINGS, 5 O.C. 251.

See RIGHT OF SUIT—EXECUTION OF DECREE, 9 B. 35.

Mortgage-security interest passed in a sale of—See SALE—SALE IN EXECUTION OF DECREE—GENERAL, 7 Bom.L.R. 585=29 B. 435.

See SALE—SALE IN EXECUTION OF DECREE—GENERAL, 18 M. 153.

Mortgage—continued.**—10.—Sale of mortgaged property—concl.**

Sale of mortgage decree—Setting aside of sale—See SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 6 C.W.N. 5.

See SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 10 M.L.J. 205.

—11.—Subrogation.

(1)—Subrogation—English and Indian Law—Reversioner—Transfer of Property Act, ss. 85 and 91—Person interested in the property—Contract Act, s. 69—Charge under mortgage executed by the daughters during the lifetime of the widows.—A person, who pays of a mortgage-debt on the properties of the deceased male owner, cannot claim to be subrogated to the rights either of the daughters or of the original mortgagee whose debt he discharges. The scope of the rule of subrogation in India is much narrower than in England or America (5 C.L.J. 611, 33 C. 1133, *Disappr*; 22 B. 164, *D.*) Mere payment of a mortgage-debt by a stranger would not entitle him to the mortgagee's right, by subrogation (2 I.A. 131, *R.*) A reversioner cannot voluntarily claim to redeem a mortgage made by the last male holder or institute a suit for that purpose, though, when a suit is instituted by the mortgagee for sale, he has a sufficient interest in the property to entitle him to discharge the mortgage to prevent the loss of the property to which he would be entitled to succeed on the death of the widow. In the latter case the reversioner is entitled, under s. 69 of the Contract Act, to be reimbursed by the widow in respect of the money which the latter was bound by law to pay. The scope of s. 69 of the Contract Act and of ss. 85 and 91 of the Transfer of Property Act is not co-extensive. Where a mortgagor died leaving a widow and daughters, *held* that the daughters had sufficient interest in the land to entitle them to discharge the mortgage-debt, when the property was brought to sale in execution of the mortgage decree. By so discharging they obtained a charge over the land which they were entitled to assign or charge in favour of the plaintiff who enabled them to discharge the mortgage-debt. *NARAYANA KUTTI GOUNDAN v. PECHIAMMAL*, (1912) M.W.N. 353=11 M.L.T. 174.

(2)—Subrogation—Purchaser of equity of redemption—Interest—Profits of property.—The purchaser of an equity of redemption, upon paying off prior mortgages, is subrogated to the rights of the mortgagees paid off, the mortgages paid being considered part of the purchaser's title to the premises. Such a purchaser is entitled to claim interest on the foot of the mortgages discharged; but he cannot be allowed to retain the profits of the properties. It is only his mortgage-character which can support his claim for interest, and it is only the status of full owner that can justify the enjoyment of the profits by him. He cannot simultaneously enforce his rights in both capacities. A person cannot claim a subrogation

Mortgage—continued.**—11.—Subrogation—concluded.**

when he simply performs his own obligation or covenant. *SATNARAIN TEWARI v. CHOWDHURI SHEOBARAN SINGH*, 14 C.L.J. 500. (9 C. 96, 10 I.A. 62, 13 C.L.R. 221, 10 C. 1035, 11 I.A. 126, 33 A. 101, 7 A.L.J. 914, F.B., 2 C.L.J. 288, 5 C.L.J. 611=36 C. 193, *Expl.*)

(3)—*Subrogation—Attachment in execution of money decree—Private sale pending attachment—Payment by purchaser of prior mortgage—Intention to keep it alive as against auction purchaser—Presumption.*—Where some property was mortgaged and then attached in execution of a money decree, and while under attachment it was privately sold by the mortgagor to a third person, who paid off the mortgage, held that it must be presumed that he intended to keep the mortgage alive for his own protection, and that it could not have been his intention to clear the property from the incumbrance for the benefit of any person who might purchase the property at an auction sale to be held in pursuance of the attachment. *JAMIL-UN-NISSA v. PITAMBAR DAS*, 11 A.L.J. 127. (10 C. 1035, 29 C. 154, *F.*)

—12.—Tacking.

(1)—*Mortgage—Application of English law to this country.*—The principle of the English law of mortgage which enables a mortgagee to tack on, to the amount of his mortgage, any further liability of the mortgagor to him, has never been recognized or adopted in the decisions of the Courts of this country. *UDAYA CHANDRA RANA v. BHAAHARI JANA*, 2 B.L.R. App. 45 (a)=11 W.R. 310. [*R.*, 6 B. 168.]

(2)—*Tacking in mofussil.*—The English principle of tacking does not seem to apply to mortgages of land in the mofussil. *GOUR NARAYAN MAZUMDAR v. BRAJA NATH KUNDU CHOWDHRY*, 5 B.L.R. 463=14 W.R. 491. [*R.*, 6 B. 168.]

(3)—*Successive mortgages—English doctrine of tacking, not applicable in the mofussil of Bombay—Right of redemption.*—For the plaintiff, appellant in this case, the objection was taken that the tacking of a later to an earlier mortgage was improperly allowed as against one of an intermediate date. The three mortgages in this case were all found to be valid and genuine, but, it was held that the special and peculiar English doctrine of tacking is not one fit for introduction into the mofussil on the ground of justice or utility and that, therefore, the obligations secured by the three mortgages ought to be satisfied in the order of priority and the defendant's right as against the plaintiff was only either to redeem his mortgage, if he will, or else to hold the mortgaged premises until his own first mortgage be redeemed by the plaintiff. *NARAYAN VENKOBA v. PANDURANG KAMAT*, 7 B. 526. [*R.*, 12 C.P.L.R. 86, 5 C.L.J. 527.]

(4)—*Tacking of subsequent debts—Right to redeem.*—Where a mortgagor of immoveable property subsequently gives to the mortgagee a

Mortgage—continued.**—12.—Tacking—continued.**

number of bonds for money, in each of which it is stipulated that, if the amount of it were not paid on the due date, it should take priority of the amount due under the mortgage, and that redemption of the mortgage should be postponed till such debt is satisfied, such stipulation is enforceable against the mortgagor or subsequent vendee of the equity of redemption, although the bonds do not, in terms, create a charge upon the property, and the mortgagor cannot claim redemption on payment of the mortgage amount alone; and where such bonds are pleaded merely as a defence in a suit for redemption, it is no answer to say that the claims under such bonds are barred by limitation, for they are not put in suit. *ALLU KHAN v. ROSHAN KHAN*, 4 A. 85=A.W.N. 1881, 133. [*Not F.*, 26 A. 559=A.W.N. 1904, 23=1 A.L.J. 282; *Criticised*, 18 M. 368; *F.*, 2 P.R. 1890; *R.*, 16 A. 295, 8 O.C. 227, 31 A. 482=6 A.L.J. 654=2 Ind. Cas. 859; *D.*, 23 A. 429, 11 O.C. 248.]

(5)—*Suit for redemption of mortgage—Subsequent bonds by mortgagor—Tacking how far obtains—Rule of damdupat.*—In this suit for redemption, the defence was that, besides the suit mortgage deed, two other bonds had been executed by the mortgagor, each of which was alleged to contain a further charge disentitling the plaintiff to redeem without paying off such charge. The High Court held that the language of the bonds did not create any further charge as claimed, but, had however, the effect of preventing the original mortgagor who passed the bonds from redeeming the original mortgage without paying the amounts of the subsequent bonds. As to the number of years for which the mortgagee could claim interest, it was held that, though the Limitation Act was to be applied for the purpose, yet, as the rule of *damdupat* was not affected by the Acts of limitation, the defendants could not be allowed, as for interest, anything more than the amount of the principal sum agreed to be paid. *HARI MAHADAJI SAVARKAR v. BALAMBHAT RAGHUNATH KHARE*, 9 B. 233. [*R.*, 18 M. 368, 9 C.W.N. 789, 11 O.C. 248, 11 Bom.L.R. 318; *Doubted*, 27 B. 154; *D.*, 14 B. 113, 28 B. 349=6 Bom.L.R. 313.]

(6)—*Mortgagee paying assessment payable by mortgagor—Tacking of assessment to mortgage-debt—Offer by debtor to pay debt made through letter, whether amounts to a valid tender.*—A mortgagee in possession who has paid from his own funds, the Government assessment payable by the mortgagor in respect of the mortgaged land, has a lien on the estate for the amount, and has also the right to tack the amount of assessment paid by him on account of the mortgagor to his mortgage-debts. The lien for the extra assessment in such cases is not provided by the terms of the mortgage-deed, but is given by the general law. The mortgagee-defendant in this case was thus held to be entitled to a lien on the mortgaged property for the amount of the added assessment paid by him on behalf

Mortgage—continued.**—12.—Tacking—concluded.**

of the mortgagor. The mortgagor had by a registered letter made an offer to redeem. The lower Courts treated this offer as a tender and the defendant made no objection to its sufficiency. It was held, however, that a mere offer by letter to pay a certain amount cannot be treated as a sufficient tender and that in order to stop interest a strict tender would have to be proved. *KAMAYA v. DEVAPA*, 22 B. 440. [R., 14 M.L.J. 488, 18 M.L.J. 31, 32 A. 612 = 20 M.L.J. 890.]

(7)—*Fresh loan from mortgagee—Condition of re-payment—Tacking.*—A mortgagor, in consideration of having secured a fresh advance of money from the mortgagee, gave a bond in which he agreed that the amount should be re-paid before the mortgage is redeemed. Held that the bond bound the land which could not be redeemed by payment of the mortgage-money alone. *PARABH DIAL v. KHARKU*, 2 P.R. 1890. (4 A. 85, F.)

(8)—*Mortgage—Mortgagor left in possession as lessee of mortgagee—Suit for arrears of rent compromised—Compromise including mortgage amount—Instrument of compromise not registered—Effect.*—Suit to recover the amount due under a mortgage. The mortgaged property had been subject to a prior mortgage. The prior mortgagee, though entitled to possession, had leased the property to the mortgagor. The mortgagor-lessee failed to pay the rents, and the mortgagee sued to recover the arrears of rent and for possession of the land. The disputes were amicably settled and a compromise was put in. The compromise stipulated for payment of the mortgage amount also. The instrument of compromise was, however, not registered. Held, that the plaint mortgage was subject to the prior mortgage alone and, not to the amount specified in the compromise, as, in the absence of registration, no valid charge was created thereby. *UNNI v. NAGAMMAL*, 18 M. 368. [R., 9 C.W.N. 789, 11 O.C. 248.]

Conveyance in consideration of payment of all debts of owner—Right of mortgagee, to claim unsecured debt along with mortgage-debt—Tacking allowed to avoid multiplicity of actions—See MORTGAGE—REDEMPTION, 7 B. 101.

—13.—Usufructuary.

(1)—*Mortgage, usufructuary—Rights of mortgagee—Act IV of 1882 (Transfer of Property)*, ss. 67, 68.—A usufructuary mortgagee, so long as his possession is undisturbed, has, in the absence of any special covenant, merely a right to remain in possession of the property mortgaged to him until the mortgage-debt is paid. He has no right either of foreclosure or sale. Further the sale of his right of redemption by the mortgagor will not convert a usufructuary mortgage into a simple mortgage so as to enable the mortgagee to bring the property to sale. *LALAI RAM v. ANANT RAM*, A.W.N. 1892, 66. (6 A. 298, 11 A. 367, 12 M. 109, R.)

Mortgage—continued.**—13.—Usufructuary—continued.**

(2)—*Usufructuary mortgagee—What he can assign.*—A usufructuary mortgagee having no power of sale under his lease cannot give a third party power of sale. He can only assign his rights and remedies against the mortgagor, and these cannot be pursued in a suit to which the mortgagor is not party. *MUSSAMUT CHOHA-RAO DHAMIN v. CHUMUN LALL*, 21 W.R. 185.

(3)—*Sale—Reg. V of 1827, s. 15, cl. 3.*—S. 15, cl. 3, of Reg. V of 1827, does not authorize the sale of a usufructuary mortgage. *KRISHNAJI v. WASUDEO*, 3 Bom.L.R. 156.

(4)—*Mortgage usufructuary—Covenant to pay—Payment after a fixed period—Option to pay within time—Sale of the property by mortgagee—Reg. V of 1827, s. 15, cl. 3.*—A usufructuary mortgage, executed in 1869, provided as follows:—"The amount of Rs. 1,750, is borrowed on the said premises. We three of us shall, after paying off the said amount of debt after fifteen years from this day, redeem our premises. Perhaps any one of us three might within the period pay off at one time the amount of rupees according to his share, you should allow redemption of the premises proportionately after receiving the amount and you should pass a receipt for the monies received." The mortgagee sued in 1906 for recovery of the mortgage-debt. The first Court allowed the claim. The lower Appellate Court reversed this decree, holding that, where, in the case of a usufructuary mortgage, the mortgagor agrees to redeem by payment of the principal after a stated period, the mortgagor has no higher or better rights than he has under a simple usufructuary mortgage. Held, that the suit would lie, inasmuch as the mortgage in question was governed by s. 15 (3) of Reg. V of 1827 and there was nothing in the terms of the mortgage-deed which, either expressly or by implication, indicated that the property should not, by means of a civil suit, be applied in liquidation of the debt. *PARASHA-RAM VISHNU DAHKE v. PUTLAJIRAO KALAVARAO SALVI*, 11 Bom.L.R. 1315 = 34 B. 128 = 4 Ind. Cas. 593. (17 B. 425, F.; 16 B. 303, 20 B. 796, 10 Bom.L.R. 615, Expl.)

(5)—*Deed of mortgage—Sale.*—Where a mortgage is in other respects a usufructuary mortgage, the insertion therein of a personal covenant to pay the mortgage debt on demand unaccompanied by any hypothecation of the property the subject of the mortgage cannot alter the character of the mortgage and give the mortgagee a right to sell in the event of non-payment. *KRISHNA v. HARI*, 10 Bom. L.R. 615.

(6)—*Usufructuary mortgage—Decree for sale barred—Mortgagee obtaining possession after barring of decree—Whether mortgagee's right to possession put an end to before sale—Right of mortgagor to obtain possession.*—A usufructuary mortgagee, who was out of possession at date of his suit, obtained a decree for sale which

Mortgage—continued.—13.—**Usufructuary**—continued.

became barred. He subsequently got possession from the mortgagor. In an action by the mortgagor's representative for possession. *Held*, that the mortgage decree, which did not deal with the mortgagee's right to possession, did not put an end to his right until sale, and that the mortgagor, his representative or assignee could not oust him even though he had obtained possession after the date of his suit. **KAVERI AMMAL v. KALI AMMAL**, 8 M. L.T. 427=8 Ind. Cas. 130. (34 C. 150, P.C., 4 A.L.J. 109, 11 C.W.N. 249, 5 C.L.J. 106, 17 M.L.J. 43, 9 Bom. L.R. 304, 2 M.L.T. 75, R. & Expl.)

(7)—**Usufructuary mortgage-bond**—*Covenant to pay—Suit to recover money—Possession, delivery of—Subsequent dispossession—Transfer of Property Act (IV of 1882), s. 68, cl. (c)—Cause of action.*—In a usufructuary mortgage bond, there was a hypothecation of the land, a covenant to re-pay the sum advanced as also an agreement, under which the mortgagees were entitled to take possession of the land and to enjoy the profits of the land in lieu of interest: *Held*, it was not a pure usufructuary mortgage and the mortgagees were entitled to sue for their money. Cl. (c) of s. 68 of the Transfer of Property Act is wide enough to include every instance of failure by a mortgagor to secure the mortgagee in undisturbed possession, at any time during the period for which the mortgagee is entitled to remain in possession. The subsequent dispossession of the mortgagee, after possession has been once delivered to him, is a failure on the part of the mortgagor to secure him in undisturbed possession. (16 A. 318, Appr.) Where possession was delivered to the mortgagee, but, on his calling on the mortgagor to give additional or substituted security, the latter entered into occupation and thus deprived the former of his possession. *Held*, the mortgagee had a cause of action under cl. (c) of s. 68 of the Transfer of Property Act. **PARGAN PANDAY v. MAHATOM MAHATO**, 6 C.L.J. 143. (2 C.L.J. 493, 25 C. 450, 21 M. 242, R.; 24 C. 677, D.) [F., 6 Ind. Cas. 153.]

(8)—**Usufructuary mortgagee—Suit for money**—*Transfer of Property Act (IV of 1882), ss. 67, 68.*—The remedy of a usufructuary mortgagee, to whom possession had not been given, is to sue for possession under his contract, or to bring, under s. 68 of the Transfer of Property Act, a suit for money. He cannot turn his usufructuary mortgage into a simple mortgage and sue for sale of the property mortgaged. **LAZARANNESSA BIBI v. MAHOMED JAFFAR**, 13 Ind. Cas. 336. (24 C. 677, Rel. on; 27 M. 76, R.)

(9)—**Mortgagee entitled to possession—Dispossession by a third party—Suit for possession—Sale of the mortgaged property—Transfer of Property Act (IV of 1882), s. 68—Plaintiff—Relief—Pleading—Practice.**—Where a mortgagee entitled to possession under a usufructuary mortgage has been put in possession by the mortgagor, but is afterwards deprived of it by a third party

Mortgage—continued.—13.—**Usufructuary**—continued.

claiming under a purchaser from the mortgagor, the mortgagee's right is only to sue to recover the possession of which he has been deprived. He cannot sue for the mortgage-money and bring the property mortgaged to sale unless the dispossession was owing to the wrongful act or default of the mortgagor or the mortgagee had failed to secure the possession without disturbance by himself or some other person. **GOKUL v. SHRIMAL**, 6 Bom. L.R. 288.

(10)—**Mortgagee's right to sue—Prior usufructuary mortgage and subsequent hypothecations held by plaintiff.**—Where a person holds a usufructuary mortgage upon a property and two subsequent hypothecations on the same, such mortgagee is entitled to a decree for sale of the property with respect to the hypothecations, but subject to the prior usufructuary mortgage. **RADHAKRISHNIER v. MUTHUSAMI SHOLAGAN**, 18 M.L.J. 564=31 M. 530. (30 M. 408, R.; 29 A. 385, F.)

(11)—**Failure to give possession—Suit to enforce lien—Suit for compensation for breach of contract—Suit for money lent or for money had and received for plaintiff's use.**—Under a usufructuary mortgage, the mortgagor was to give possession of the property to the mortgagee, who was to set off profits against interest due on the mortgage money and the mortgage was to be redeemed by payment of the principal amount in a particular month of the year. But the property was not hypothecated for the amount. The mortgagor having failed to give possession, the mortgagee sued him for the principal and interest by enforcement of the lien. *Held* that though the claim for enforcement of the lien was unsustainable, yet it was inequitable to dismiss the suit as brought, and to relegate the plaintiff to a fresh suit for the money. The whole of the circumstances on the strength of which the plaintiff founded his cause of action being fully disclosed in the plaint and supported by the evidence, the claim for the money ought to be decreed, whether it was regarded as a suit for compensation in damages for breach of contract, or for money lent, or for money had and received for the plaintiff's use. **SHEO NARAIN v. JAI GOBIND**, 4 A. 281=A.W.N. 1882, 33. (4 A. 245, R.) [R., 7 A.W.N. 119.]

(12)—**Failure to give possession—Suit to enforce lien—Suit for compensation—Measure of damages.**—Under a usufructuary mortgage, the mortgage-money and the interest was to be discharged by the usufruct of the property, of which possession, was to be given to the mortgagee, but the property was not hypothecated as collateral security for the loan. The mortgagor having failed to give possession, the mortgagee sued for enforcement of the lien. *Held* that though the claim for the enforcement of the lien failed, it was inequitable to dismiss the suit for that reason, as the defendant having committed a breach of contract, the plaintiff was entitled to claim compensation; and though the suit was

Mortgage—continued.**—13.—Usufructuary—continued.**

not expressly framed to claim such a relief, yet, having regard to the pleadings and evidence it might be treated as one for that relief; and that in estimating the damages, the principal amount and the interest stipulated in the bond might be taken as a guide. **MAHESH SINGH v. CHAUHARJA SINGH, 4 A. 245 = A.W.N. 1882, 31. [R., 7 A.W.N. 119, 8 P.R. 1890.]**

(13)—*Decree on prior mortgage—Subsequent usufructuary mortgagee not a party—Execution sale—Sale certificate reciting prior mortgagee's undertaking to pay usufructuary mortgage—Resistance in obtaining physical possession by usufructuary mortgagee.*—A executed a simple mortgage of his property in favour of B and a subsequent usufructuary mortgage of the same property in favour of C. B obtained a decree on his bond in the suit brought against A alone without impleading C, and in execution of that decree, purchased the mortgaged property and, having obtained the sale certificate, procured judicial possession. The usufructuary charge on the property was publicly notified and was well known to B at the time of sale. The sale certificate recited B's undertaking to pay off the usufructuary mortgage. When B tried to obtain physical possession of the property, he was met by C's claim to hold on to the estate till his charge was paid off. B claimed to get rid of C's charge on the allegation that it was false, fraudulent, and non-existing. *Held* that there was no substantial reason for holding that the certificate of sale, which B took with his eyes open, was full of false and fraudulent allegations, defeating his purchase, and creating evidence against his interest in connection with the property and that, apart from those considerations, it was clear that when B purchased the rights and interest of the judgment-debtor in the property in suit, he acquired the interest that the judgment-debtor had in the property and nothing more, and that this interest was only the right to redeem the mortgaged property from any or all the charges created by him on it, including that of the usufructuary mortgagee, that therefore B brought the property charged with C's charge, and that, consequently, the suit ought to be dismissed. **MITHU LAL v. RAMCHANDAR, A.W.N. 1887, 125.**

(14)—*Usufructuary mortgage—Purchase by first mortgagee of equity of redemption—Extinguishment of first mortgage.*—A, a usufructuary mortgagee, purchased from his mortgagor the equity of redemption also. Between the dates of his mortgage and his purchase, the mortgagor had given a usufructuary mortgage of the property to B for a term of years. Now A sued B for the recovery of possession of the land as purchaser, and offered to redeem B, if his mortgage was found to be genuine. In second appeal, the plaintiff-appellant contended that, in equity, the prior mortgage to him should not be deemed to have been extinguished by his purchase of the equity of redemption, but should be deemed to be alive, and that

Mortgage—continued.**—13.—Usufructuary—continued.**

possession of the property should therefore be given to him as against the second mortgagee. *Held* that the position taken by the appellant in his plaint was inconsistent with the case made for him in second appeal. For, if he was a first mortgagee, there would be no obligation upon him to discharge a puisne incumbrancer, and his offer to do so was wholly unnecessary. Taking his claim as it really stood the appellant, who was occupying the position of the original mortgagor, could not compel the second mortgagee B, who was in possession of the property for a term of years yet unexpired, to accept his mortgage-debt at once. **BALDEO PRASAD v. BALDEO SINGH, A.W.N. 1883, 40.**

(15)—*Usufructuary mortgage-money, suit for—Usufructuary mortgagee, dispossession—Partition—Estates Partition Act (V of 1907, B.C.), s. 99.*—A usufructuary mortgagee can bring a suit for mortgage-money on dispossession, from land given in lieu of interest, by a co-sharer of the mortgagor who obtained the same on partition, and is not precluded from so doing by s. 99 of the Estates Partition Act. **TALIK SINGH v. JALAL SINGH, 11 C.L.J. 136 = 5 Ind. Cas. 130. [F., 6 Ind. Cas. 153.]**

(16)—*Mortgage—Claim for compensation—Set-off—Civ. Pro. Code (1877), s. 111.*—In a suit for money on a usufructuary mortgage, the defendant cannot set off the compensation claimed by him on account of waste committed by the plaintiff mortgagee. **RAGHU NATH DAS v. ASHRAF HUSAIN KHAN, 2 A. 252. [D., 15 M. 290.]**

(17)—*Agreement by mortgagor not to claim accounts, effect of.*—Where there is an express agreement in a mortgage-deed that the mortgagor will not claim accounts from the mortgagee, he is not entitled to an account at the time of redemption. **RAM PERSHAD v. KHEM KARAN, 9 Ind. Cas. 978. (7 A.L.J. 787, 7 Ind. Cas. 293, R.)**

(18)—*Usufructuary mortgage—Lapse of 60 years—Suit by mortgagor to recover possession.*—If sixty years have elapsed from the date of an usufructuary mortgage, a suit by the mortgagor for recovery of possession of the property mortgaged is barred, unless it can be shown that there is an acknowledgment signed by the hand of the mortgagee himself, to take the case out of the operation of the Act. **SUNDAR DAS v. FATIMUL UL-NISSA, 1 C. W. N. 513. (13 B.L.R. 177, P. C., F.)**

(19)—*Zur-i-peshgee mortgage, suit to redeem—Admission by defendant, denial of—New case in special appeal.*—An usufructuary mortgagor who had taken a *zur-i-peshgee* loan on his property sued to redeem it by paying the balance of the loan, still due, after deduction of certain sums of reserved rent (*hukajiree* on the hypothecated property), that had been retained by the defendant for the reduction of the mortgage-debt. The defendant pleaded that part of the land had been diluviated and that he had paid

Mortgage—continued.**—13.—Usufructuary—continued.**

the entire amount of the *hukajiree* agreed on. Both the lower Courts gave a decree for the plaintiff as they disbelieved the plea of the defendant. The defendant in special appeal to the High Court urged that the plaintiff had no cause of action. *Held*, that, as the defendant, without contesting the finding of the Court of first instance, accepted it and admitted that the plaintiff had ground for bringing his suit, by pleading to that suit as brought, and traversing the plaintiff's allegation as to non-payment of *hukajiree*, he was not entitled to set up an entirely different state of things in the High Court, or to deny what he had admitted in both the Courts below. **SHEO GOLAM SINGH v. ROY DINKUR DYAL, 12 W.R. 215.**

(20)—*Lease by mortgagee to mortgagor—Remedy of mortgagee arising upon non-payment of rent.*—One Husan Johan Begam mortgaged, by a usufructuary mortgage, certain immovable property to Kedar Nath, and put the mortgagee in possession. It was agreed that the mortgagee should take all the profits from the mortgaged premises in lieu of interest: it was also provided that should the mortgagee be disturbed in possession, or deprived of possession, or should it appear that the property was already mortgaged, the mortgagee should have a remedy by suit against the mortgagor and against the mortgaged property. On the day following the date of the mortgage, the mortgagee gave a lease for the mortgaged premises to the mortgagor for Rs. 150 per annum, payable half-yearly. The rent was paid for sometime, but afterwards fell into arrears, and the mortgagee lessor thereupon sued the mortgagor asking for sale of the mortgaged premises, and claiming to sell them, not only for the principal monies due, but also for the sums in arrear which were due as rent. *Held*, that the plaintiff mortgagee was only entitled to a money-decree for the principal amount of the mortgage-money. As to the rent, the plaintiff was entitled to a decree for three years' arrears. The plaintiff's remedy for recovery of the rent lay in a Revenue and not in a Civil Court; but the fact that an appeal had been preferred to the District Judge, rendered the question of jurisdiction (in view of ss. 206—208 of the N. W.P. Rent Act, 1881) in the present instance immaterial. **HUSAN JAHAN BEGAM v. KEDAR NATH, A.W.N. 1901, 109. [R., 6 O.C. 18; Cons., 6 O.C. 26.]**

(21)—*Lease on usufructuary mortgage—Long possession under sale-deed—Plea of purchase—Burden of proof.*—In answer to a suit for possession of property on the ground that it had been leased out of an usufructuary mortgage, the holder, who had enjoyed long possession, claimed to have bought it outright. *Held* that the burden of proof lay on the plaintiff; and that the lower Court was wrong in separating the question of possession from the deed filed by the defendant. **BUNKO BEHAREE MOOKERJEE v. KHETTRO NATH PAUL, 25 W.R. 317.**

Mortgage—continued.**—13.—Usufructuary—continued.**

(22)—*Mortgage by tenant of absolute occupancy holding—Surrender by tenant of the holding to landlord—Landlord accepting rent from mortgagee in possession—Effect on equity of redemption.*—The maxim "*nemo potest esse tenans et dominus*" (a person cannot be at the same time both landlord and tenant of the same premises) does not mean that a landlord cannot own the equity of redemption in respect of a holding as a separate interest. By effecting a valid mortgage a tenant splits his right into two parts, each of which being distinct from the other. It is competent to a landlord to take a mortgage direct from a tenant with an absolute occupancy right. (2 C.P.L.R. 16, 14 C.P.L.R. 9, R. & F.) Where an absolute occupancy tenant made a valid usufructuary mortgage of his holding, and afterwards surrendered his rights in the tenancy to the landlord, it was *held* that the landlord acquired the equity of redemption of such holding. *Held*, also, that the landlord's mere acceptance of rent from the mortgagee in possession did not extinguish his right of redemption. Mere acceptance of rent from the man in possession does not make that man a tenant. **BALI RAM v. RAM RAO MAHRATTA, 4 N.L.R. 57. (15 C.P.L.R. 99, F.)**

(23)—*Usufructuary mortgagee dispossessed by Court of Wards—Possession restored on Ward's death—Pro-notes for arrears of rent, executed by tenants in favour of Court of Wards' Manager, handed over to mortgagee, without endorsement, suit on—Ss. 18, 43, 55, 57, Act I of 1902, (Madras).*—If the Court of Wards, which, under direction of the Local Government acting under s. 43 of Madras Act I of 1902, has dispossessed a usufructuary mortgagee of the mortgaged property and has administered the estate itself, and on the death of the ward, takes no action under s. 57, its power of superintendence ceases *ipso facto* and the property ceases to be in the property of a ward within the meaning of s. 43. So in accordance with cl. (2), s. 55, the usufructuary mortgagee is entitled to be replaced in possession of the mortgaged property. He regains the right to collect the rents and profits, the effect of s. 43 being not to turn the usufructuary mortgagee into a simple mortgagee. Where the Court of Wards, on the death of the disqualified proprietor, releases the property from its superintendence and hands over to the usufructuary mortgagee, who was dispossessed under s. 43 of the Act, *inter alia*, certain promissory notes executed by tenants, for arrears of rent (due on the mortgaged property), in favour of the Court of Wards' Manager, *held* that, he having been replaced in possession of the mortgaged lands in accordance with s. 55 (2), is entitled to sue on those pro-notes without obtaining an endorsement from the Court of Wards, because, on the death of the ward, the power of the Court of Wards having ceased, there was no one who could legally endorse the notes. Property in a promissory note may

Mortgage—continued.**—13.—Usufructuary—continued.**

also pass by "operation of law." **SOWCAR LODD GOVINDA DOSS KRISHNA DOSS VARU v. LEPATI MUNEPPA NAIDU, 4 M.L.T. 341.**

(24)—*Usufructuary mortgage of occupancy-holding—N.W.P. Rent Act (XII of 1881), s. 9—Agra Tenancy Act (II of 1901) (Local)—Retrospective, effect of—Jurisdiction—Mortgagee's suit for possession, maintainable in Civil Court.*—The Agra Tenancy Act can have no retrospective effect, and if a usufructuary mortgage of his holding made by an occupancy-tenant was valid under the law which was in force at the time when the mortgage was made, and if the mortgagee was entitled to enforce his mortgage before the passing of the said Act, he would be equally entitled to do so after the passing of that Act. (3 A.L.J. 40, 26 A. 78, F; A.W.N. 1906, 302, D.) Where certain occupancy-tenants had usufructuarily mortgaged their holding to the plaintiffs in 1887 and agreed to redeem a prior mortgage and put the plaintiffs into possession at the end of Jeth, 1295 Fasli, but did not do so till after the Agra Tenancy Act had come into force, *held* that the plaintiffs were entitled to institute and maintain a suit for possession as mortgagees in the Civil Court. **HARBANS RAI v. SRINIWAS RAO KALIN, 8 A.L.J. 1301.**

(25)—*Landholder and tenant—Usufructuary mortgage by occupancy tenant—"Transfer"—Act XII of 1881 (N.W.P. Rent), s. 9.*—A mortgage with possession by an occupancy tenant of his cultivatory holding is a transfer within the prohibition of s. 9 of the Rent Act, 1881. **GANGA DIN v. DHURAN DHAR SINGH, 5 A. 495, F.B. = A.W.N. 1883, 89.** [Disappr., 15 A. 219, F.B.; R., 7 A. 557, F.B., 10 A. 130, 10 C.P.L.R. 53, 26 A. 78 = A.W.N. 1903, 192.]

(26)—*Usufructuary mortgage—Lease—Subsequent execution of mulgeni lease to stranger—No change of character as lessee—Lessor entitled to possession—Merger.*—**Sundara Iyer, J.**—Where, at the time of the execution of a usufructuary mortgage, the mortgagor takes a lease from the mortgagee of the mortgaged properties, the position of the mortgagor is that of a tenant of the mortgagee, and the value of the possession is not changed till the mortgage is redeemed by the execution of any *mulgeni* lease or by the assertion of any *mulgeni* right in himself. **Sadasiva Iyer, J.**—On the facts, the *mulgeni* lease executed by the mortgagors having been conferred on the head of the family of the mortgagors, ceased to exist by its merging in their own *mulgeni* right. **SUBRAYA KINI v. RAMAPPA ADIGE, (1912) M.W.N. 907.**

(27)—*Usufructuary mortgage—Suit for mortgage amount.*—In cases of usufructuary mortgages, the mortgagor is bound to deliver possession of the property and to secure quiet possession. If the mortgagee, before he recovers his debt, is disturbed in his possession by the mortgagor or those claiming under him, he is at liberty to sue for the money due to him. He is

Mortgage—continued.**—13.—Usufructuary—continued.**

not bound to sue for possession. Where an instrument of mortgage recited that possession of the property had been delivered to the mortgagee; that the profits were to be enjoyed in lieu of interest; that the mortgagor was allowed at any time to redeem, without any covenant that the mortgagee might call in his money when he pleased; *held*, that the mortgagee was entitled to sue for his money if the lessee of the mortgagor in whose possession the property was and who was paying the rent to the mortgagee refused to give possession after the expiry of the lease. **LALJI MAL v. MOHAN LAL, A.W.N. 1881, 71.**

(28)—*Usufructuary mortgage—Suit for recovery of debt.*—In this case, there was no regular mortgage deed, and the terms of the mortgage were to be gathered from an entry in one of the plaintiff's books. According to that entry the plaintiff was put in possession of a shop in consideration of a debt, and he was to retain possession till the debt was repaid by the mortgagor; the mortgagor did not make himself personally liable for the amount. *Held* that this amounted to a purely usufructuary mortgage, and that the mortgagee could not sue for the payment of the debt. He was entitled to remain in possession of the premises till the principal and the interest of the mortgage-debt were defrayed according to the terms of the agreement. Assuming that the suit would lie, it was *held*, that the mortgagee could not claim interest as there was no provision for payment of interest, and the language of the entry made it clear that the intention of the parties was that the rent of the shop was to go against the interest on the debt. **SOMAN MULL v. KANH CHUND, 15 P.R. 1870.** [Appr., 127 P.R. 1881.]

(29)—*Usufructuary mortgage—Suit for principal debt.*—Where the terms of the mortgage deed distinctly provided that the plaintiff (mortgagee) should receive the income and other benefits accruing from the house and the foreclosure of the mortgage depended on the will of the defendant the mortgagor, plaintiff was *held* to be debarred from bringing a suit for the principal amount of the mortgage. **GULAM HOSEIN v. MEHTAB, 57 P.R. 1873.** [R., 127 P.R. 1881.]

(30)—*Usufructuary mortgage deed and agreement for rent executed by mortgagors on same day—Terms in both identical in several respects—Intention of parties—Same transaction—Suit for sale—Maintainability.*—A mortgage deed contained the following provisions:—"We bind ourselves to pay to you or to those who may obtain your order, before the 25th of every month, Rs. 65—10—0, viz., Rs. 35/- for principal and Rs. 30/10-, being the interest accruing at 14 annas per cent. per mensem. You should let out the aforesaid house for rent and the rent derivable therefrom should be credited every month towards the aforesaid principal and interest. In case the rent derivable from

Mortgage—continued.**—13.—Usufructuary—continued.**

the said house should fall short of the amounts to be paid to you every month, or if no rent should be derived therefrom, we bind ourselves to pay otherwise the amount due for principal and interest, before the 25th of every month. Should we fail so to pay, we bind ourselves to pay compound interest for the amount of interest due for each month. In case we do not pay the amount payable by us for five months on the whole, you shall recover the debt from us” On the day that the mortgage bond was executed, the mortgagors executed a rent deed in favour of the mortgagee containing the following terms:—“as we have taken out from you on rent at Rs. 30/10/ for each month..... we or our heirs bind ourselves to pay to you or to those who may obtain your order before the 25th of every month the aforesaid Rs. 30/10/-. If we make default in so paying, we bind ourselves to pay compound interest on the amount of each month in which default is made. If perhaps you require the aforesaid house and bungalow, we bind ourselves to deliver it over with the key to you.....”. The mortgagors having made default in the payment of the amount as stipulated above, the Nidhi instituted the present suit. *Held* that in cases like the present it was the intention of the parties, irrespective of the mere form of instruments executed between them, that determines their rights. The striking identities in the provisions of the two instruments clearly pointed to the view that what purported to be the mortgage was not distinct from what purported to be the lease, that the two instruments were executed as parts of one and the same transaction, and that the intention was that the rights and obligations of the parties were to be gathered from the provisions of both. Taking the two together it was clear that the transaction was one entirely of mortgage with an express covenant to pay the principal and interest in instalments, and conferring a power on the mortgagee to take possession of the property mortgaged and apply the usufruct in discharge of the interest and principal. It was, however, not obligatory on the mortgagee to enter into possession and liquidate the debt by the usufruct. The express covenant to pay precluded the mortgage being taken as a purely usufructuary mortgage as defined by the Transfer of Property Act. Consequently, plaintiff could sue for sale on default in the payment of the amount due. *MADHWA SIDHANTA ONAHINI NIDHI v. VENKATARAMANUJULU NAIDU*, 26 M. 662. (2 M. I.A. 487, F.; 21 C. 841, R.).

(31)—*Mortgage, Construction of—Stipulation by mortgagee to pay Government revenue to mortgagor—Enhancement of revenue by Government—Liability to pay enhanced revenue—Transfer of Property Act (IV of 1882), s. 76.*—A deed of usufructuary mortgage contained a stipulation that the mortgagee was to pay the revenue, Rs. 4, to the mortgagor and appropriate the balance of profits towards interest. The Government enhanced the revenue during

Mortgage—continued.**—13.—Usufructuary—continued.**

the currency of the mortgage. *Held*, that, under the terms of the mortgage deed, the mortgagor was liable to pay the enhanced revenue. Assuming that, s. 76 of the Transfer of Property Act applied to usufructuary mortgages, there was here a contract to the contrary within the meaning of the section. *THIPPA RAMASWAMI v. KRISHNASWAMI*, 8 Ind. Cas. 845=9 M.L.T. 206. (20 M.L.J. 640, M.W.N. 1910, 333, 8 M.L.T. 173, 7 Ind. Cas. 321, 17 M.L.J. 517, R.)

(32)—*Usufructuary mortgage—Suit for recovery of money due upon a mortgage—Sale of mortgaged premises for Government revenue—Surplus sale proceeds, recovery of mortgage money from—Transfer of Property Act (IV of 1882), s. 73—Estoppel—Default to pay Government revenue, how to be determined—Covenant, how to be construed—Construction of lease.*—The Court is bound to give effect to the intention of the parties to a contract, but that intention must be gathered from the language used in the document, and not from any extraneous considerations. Where an Ijara lease provided for the payment of the Government revenue in equal shares by the lessor and the lessee, the mortgagor and the mortgagee, and also provided as follows:—“If the property be, may God forbid it, sold by auction on account of any Government demands or for any other cause, and goes out of possession of the Ijaradars, they, the said Ijaradars, shall be competent to realize the entire *peshgi* money with interest, at rupee one per cent. per mensem, from the surplus sale proceeds and from the person and other properties of me, the declarant.” *Held*, that, upon a reasonable construction of the lease as a whole, it cannot be said that, if there was default in payment of the Government revenue in contravention of the earlier clause, the benefit of the second clause would be lost to the mortgagee. *BIBI AZIRAN v. BIBI KASIMAN*, 10 C.L.J. 488=4 Ind. Cas. 439.

(33)—*Usufructuary mortgage—Interest not stipulated for—Construction.*—Where there is no stipulation for interest in a usufructuary mortgage-deed, the mortgagee is not entitled to interest, but the usufruct goes in lieu of interest. *GUNGA PERSHAD ROY v. EIBEE ENAYET ZAHERA*, 16 W. R. 251.

(34)—*Usufructuary mortgage—Construction of deed—Usufruct—Interest.*—In the case of pure usufructuary mortgages, the mortgagee has no right to sue for the debt. Where the mortgage deed merely gave the mortgagee the right of holding and enjoying the property till the debt shall have been paid off, and no reference was made to interest, the proper construction was that the enjoyment of the rents, profits and the possession of the mortgaged premises should go not only to the liquidation of interest but also of the principal, and so the mortgagee is prevented from suing in respect of the original debt. *RAMJEE DASS v. BABA KAKA NUND*, 81 P. R. 1870.

Mortgage—continued.—13.—**Usufructuary**—continued.

(35)—*Usufructuary mortgage*—*Mortgagee not in possession of a portion of the mortgaged property*—*Acquiescence of mortgagee in part performance*—*Stipulation for interest*—*Redemption without payment of interest*.—Where the mortgagors covenanted that “we shall pay the whole mortgage-debt in a lump on Baisakh Sudi, 15th of any year and we shall pay the money out of our own pocket, and if there is any defect in the mortgaged property or in the mortgagee's possession thereof, then we, the executants, will pay the principal with interest at 2 per cent. per mensem and besides this, damages and penalties,” and possession was not obtained by the mortgagee of a portion of the mortgaged property for a certain period, and in the subsequent suit for redemption, the mortgagee claimed interest for a period during which he had been out of possession, *held*, that by reason of his acquiescence, the mortgagee was not entitled to claim interest in respect of that period during which he had not obtained possession of a portion of the mortgaged property. (29 I.A. 148=24 A. 521, P.C., 27 A 313, R.) Further, where the lower appellate Court, having expressed the opinion that the mortgagee was entitled to the interest for the period of his dispossession, referred the question as to the length of that period to the Court of First Instance for determination, and subsequently dismissed the claim, *held*, that the course adopted was justified, and, assuming it was not, the whole case being before the High Court, the respondents were entitled to support the judgment on the ground of acquiescence. JHUNKU SINGH v. CHATKAN SINGH, 6 A.L.J. 247=31 A. 325=2 Ind. Cas. 221.

(36)—*Mortgage*—*Property security for interest*—*Personal liability*—*Effect of*.—Where a usufructuary mortgage-deed provided for payment of interest at twelve annas per cent. per mensem if the rents and profits were not sufficient to pay up the whole amount of interest, *held* that the mortgaged property was security not only for payment of the principal but also of interest. *Held*, further, that the mere fact that the mortgagor took a personal liability to pay up the interest did not relieve the mortgaged property from liability to satisfy the deficiency. CHINTAMAN v. DULARI, 7 A. L. J. 1087=8 Ind. Cas. 570.

(37)—*Personal covenant by the mortgagor to pay principal and interest within a certain period*—*Stipulation to pay interest*.—A mortgage-deed provided that the property mortgaged was to remain in mortgagee's possession until the principal and interest was paid to him and that the mortgagor within two years from the date of the deed was to pay principal and interest and if he failed to do so he should pay interest. *Held*, that the mortgage constituted by the deed, was not usufructuary. SHRIDHAR v. GANGARAM, 5 Bom. L.R. 119.

(38)—*Mortgage*—*Usufructuary mortgage, suit for sale of property under*—*Conversion of*

Mortgage—continued.—13.—**Usufructuary**—continued.

simple mortgage into usufructuary mortgage by mortgagors taking possession of mortgaged property—*Interest, obligations of mortgagor to pay, on mortgagees taking possession of mortgaged property, when so stipulated in deed*—*Transfer of Property Act (IV of 1882), ss. 58 (d) and 67 (a)*.—The defendants owned a 3 annas, 7 pies, and 4 karants share in a certain village, out of which, on the 15th March, 1877, they mortgaged to M a 2 annas, 7 pies, and 4 karants share, one of the conditions of the mortgage being that, if the principal and the interest secured by the mortgage were not paid within 5 years from the date of the mortgage, the mortgagee should be entitled to take possession of the mortgaged share. On the 27th June, 1877, the defendant mortgaged their 3 annas, 7 pies and 4 karants share to the plaintiff. The material portion of the mortgage-deed was as follows:—“Whereas we have borrowed Rs. 5,400 from H (plaintiff) and have fixed the interest of the said amount at Rs. 1-2-0 per cent. a month payable from the date of the execution of the deed to the date of payment: it is therefore hereby declared that we shall pay the interest yearly; that we shall pay the entire principal and the remaining interest within 8 years either in instalments or in one lump sum; that, in case of default in payment of interest, it shall be considered to be principal and we shall pay interest thereon at Rs. 1-2-0 per cent. a month; that if the interest for any year is not paid, then, on the expiration of three years, the said mortgagee shall be at liberty to take possession of the mortgaged property, hence these few words have been put into writing by way of a mortgage deed without possession.” On the 20th July, 1880, the plaintiff sued the defendants for possession of the share and, as he sought to establish that the prior mortgage was a fraudulent transaction, made M a defendant to the suit. The Subordinate Judge, on the 24th August, 1880, decreed possession of the share to the plaintiff, but *held* that the prior mortgage was not a fraudulent transaction. On the 30th May, 1881, the plaintiff obtained possession of the share in execution of the decree and retained possession of the same till the 21st November, 1883, when he gave possession to M of the share which had been mortgaged to the latter and also of additional 7 karants. On the 12th April, 1892, the plaintiff sued the defendants for Rs. 10,000, being the amount of principal and interest due on the mortgage and claimed to recover that sum by the sale of the share mortgaged to him, on the ground that the term of mortgage had expired and the mortgage money had become payable. The defendants defended the suit upon the grounds, amongst others, that the mortgage was a usufructuary one at the time of the suit, and therefore the suit, as one for sale of the mortgaged property, was not maintainable, and that, from the time the plaintiff obtained a decree for possession of the share, the defendant ceased to be liable to pay any

*Mortgage—continued.**—13.—Usufructuary—continued.*

interest. *Held*, that the mortgagee was not debarred from suing for the sale of the share. The mortgage-deed could not be interpreted to mean that the mortgagee should lose that right on taking possession of the share. Therefore, even if the mortgage was converted into a usufructuary one within the meaning of s. 58 (a), Transfer of Property Act, 1882, on the mortgagee taking possession of the share, the mortgagee was not precluded by the provisions of s. 67 (a) of that Act from bringing the share to sale under the mortgage; a usufructuary mortgagee being entitled when there is a contract that he may bring mortgaged property to sale if the mortgagor fails to pay according to his contract to sue for sale of the mortgaged property. *Held*, further, that the parties to the mortgage did not intend that, on the mortgagee obtaining possession of his share, the obligation on the part of the mortgagors to pay interest at the stipulated rate should cease, but they intended that, if the mortgagors failed to pay interest as agreed, the mortgagee might further receive himself by taking possession of the share, and that, if he did so, he should account for the profits, which should be set off against the interest agreed to be paid. *Held*, further, that the plaintiff was entitled to interest at the stipulated rate from the 24th August, 1880, to the date of suit, deducting from it the profits which the plaintiff admittedly received and also the profits of 7 karants which the plaintiff should have retained in his possession as part of the mortgaged property, which was not subject to M's prior mortgage, instead of placing the latter person in possession of the same. **KALLU AND GAJRAJ v. DAYA RAM AND SAMPAT RAM, 5 O.C. 286.**

(39)—*No provision in decree about possession and interest—Execution mortgagee in possession after decree—Taking account not necessary—Application for execution—Application for order absolute.*—In a suit on a usufructuary mortgage, the Court passed a Razi-namah decree by which the defendant was to pay Rs. 700 to the plaintiff within one year from its date, and in default the plaintiff was to realize the amount by sale of the mortgaged property. The terms of the compromise and hence of the decree were silent as to possession and interest, but by the mortgage instrument, the mortgagee was to be in possession of the land in lieu of interest and he continued in possession ever since the date of the decree. Upon an application for execution of the decree after one year by sale of the mortgaged property, *held* (a) that the fact that the mortgagee continued in possession since the date of the decree did not render it necessary that an account of the profits of the land should be taken for the purpose of being set off against the amount decreed, as, by doing so, the Court would be going behind the decree, and (b) that the application for execution, in which the decree-holder stated that there had been default in the payment of the decree amount and

*Mortgage—continued.**—13.—Usufructuary—continued.*

applied for sale, was an application for an order absolute. **APPA ROW v. KRISHNA AYYANGAR, 25 M. 537.** [R., 17 M.L.J. 201=2 M.L.T. 167=30 M. 255, 6 M.L.T. 361.]

(40)—*Mortgagee—Redemption—Mortgagor.*—Under a usufructuary mortgage, the mortgagee takes his chance of the rents and profits being greater or less than the interest which might have been reserved by the bond and the mortgagor is entitled to redeem on payment of the mortgage money. **RAJA PERTAB BAHADUR v. GAJADHER BAKHSI SINGH, 4 Bom. L.R. 845.**

(41)—*Redemption—Usufructuary—Right to redeem before satisfaction of debt by rents and profits—Assignment by mortgagee for lesser consideration—Right of assignee to recover entire amount due to his assignor—Interest, rate of—Appropriation of rent first towards principal and then for interest—Liability of mortgagor to pay enhanced assessment—Transfer of Property Act, s. 135.*—In the absence of an express recital to that effect, a mortgagor under an usufructuary deed of mortgage is not debarred of his right to redeem till the entire debt is satisfied by enjoyment by the mortgagee of the profits of the land. Where the mortgagee assigns his interest for a lesser amount than that due to him, without stating that the balance was conveyed as a gift, the assignee cannot recover from the mortgagor more than the consideration he paid for the assignment and reasonable interest thereon. Where, at the date of the assignment, a very small portion of the consideration was due for principal and the balance represented the interest, the assignee was held not entitled to the high rate of interest provided for in the original mortgage-deed, viz., 24 per cent. per annum, but was awarded only 6 per cent. per annum. The rents and profits have first to be applied towards principal and then towards interest. The mortgagor is liable for the enhanced assessment levied by Government after the date of the mortgage. **BURLE JAGGANNA v. YELUGULA LATCHANNA, 8 M.L.T. 420=7 Ind. Cas. 871.**

(42)—*Evidence—Admissibility in—Registration Act (III of 1877), s. 17—Usufructuary mortgage below Rs. 100—Proof of debt—Decree for money.*—I executed a usufructuary mortgage-deed in favour of B, the value of which was below Rs. 100. The deed was not registered. I did not put B, in possession. In a suit for possession, and in the alternative for recovery of money, brought by B, *held* that the document could be taken in evidence, in order to show that money was borrowed, and that the Court could pass a simple money decree, although it could not pass a decree for possession. **JADDU CHAUBE v. BHAGWAT CHAUBE, 7 A.L.J. 71=5 Ind. Cas. 519.**

(43)—*Evidence Act (I of 1872), s. 92—Variation of terms—Usufructuary mortgage—Arrangement as to mode of payment—Transfer of*

Mortgage—continued.**—13.—Usufructuary—continued.**

Property Act (IV of 1882), s. 76, cls. (g) and (h)
—No account at redemption—Subsequent passing of statute authorising collection of cesses—Mortgagee appropriating amount of cesses, if liable to credit to mortgage debt.—The parties in a deed of usufructuary mortgage did not intend that any account should be taken at the time of redemption. They arbitrarily fixed the income of the property and settled the amount to be paid thenceforth on account of Government demands and interest on the security. The remainder which was a fixed sum, was to be annually paid to the mortgagor as surplus profits. The mortgagees collected from the tenants sums which were realisable under a subsequent statute only by the proprietor mortgagor. The mortgagees alleged that, by a subsequent agreement between the parties, the mortgagor was placed in possession of a part of the mortgaged premises, the income whereof was sufficient to wipe out the annual debt. *Held*, that, as the arrangement was not in supersession or even variation of the mortgage, oral evidence was admissible to prove the transaction. (27 A. 313, D.; 10 C.L.J. 27, R.) *Held* also, that the mortgagor was entitled to credit for other sums *e.g.*, cesses, realised by the mortgagees out of the mortgaged-property. The rents and profits are incidents *de jure* to the ownership of the equity of redemption, and the mortgagee in possession is bound to apply whatever profits are actually received towards the satisfaction of the mortgage debt. *RAMAVATAR v. TULSI PROSAD SINGH*, 14 C.L.J. 507. (7 Agra S. D. 248, 8 Agra S. D. 178, *Expl.*)

(44)—*Transfer of Property Act, s. 65 (a)—Mortgage before Act but further charge after—Act if applies—Diminution of security in circumstances which mortgagee should have anticipated—Claim for damages, if admissible—Mortgage, usufructuary, followed by lease to mortgagor—Contemporaneous deeds—Interpretation—Lease on easy terms surrendered by mortgagor—Mortgagee if may insist on appropriation of whole profits to interest—Unregistered agreement to vary mortgage deed if admissible—Registration Act (1877), ss. 17, 49—Evidence of preliminary negotiations, if admissible—Evidence Act, ss. 91, 92.*—Where part of the mortgaged property was withdrawn from the security in consequence of a successful claim to it by the mortgagor's sister, but it appeared that the mortgagee was aware of the circumstances of the property and the position of the mortgagor's family. *Held*—that the mortgagee was not entitled to any damages or compensation for the diminution of his security. S. 65 (a) of the Transfer of Property Act did not apply to the case, the mortgage having been executed before the date of the Act, though one of the further charges was subsequent to it. Where, in a mortgage bond, it was stipulated that the mortgagee should be in possession of the mortgaged property and take the profits in

Mortgage—continued.**—13.—Usufructuary—continued.**

lieu of interest, but, by a practically contemporaneous instrument, the mortgagee granted a lease to the mortgagor on easy terms, reserving a rent of Rs. 4,200 only when the interest worked out to Rs. 6,000, but the mortgagor being unable to pay this rent gave up possession to the mortgagee. *Held*, in a suit for redemption of the mortgage, that the mortgagee was entitled to appropriate the whole of the profits realised by him towards interest, according to the terms of the mortgage-bond. That the mortgage and the lease were parts of one and the same transaction, but there was no inconsistency between the two instruments. It is not permissible to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations. An unregistered agreement purporting to set out in what manner the rents and profits of the mortgaged property were to be dealt with, at variance with the stipulation in that behalf contained in the registered mortgage-deed, was inadmissible in evidence by the provisions of the Registration Act. *SAIYID ABDULLA KHAN v. SAIYID BASHARAT HUSAIN*, 17 C.W.N. 233, P.C. = 13 M.L.T. 182.

(45)—*Mortgage—Stipulation to give mortgagee actual physical possession of plots mortgaged—Failure to get actual physical possession on account of mortgagor's fraud—Mortgagee entitled to simple money decree—Limitation Act, sch. (i), arts. 95, 97, 116 and 120.*—On 19th November, 1903, defendant-respondent executed a mortgage deed with possession for a certain specified plot of land in favour of the plaintiff-appellant. The contract was that the mortgagee should have actual physical possession and enjoy the entire gross rental in lieu of interest. The plot in question turned out to be the *sir* land of the defendant, and plaintiff obtained merely proprietary possession with the right to collect rent at a reduced rate from the mortgagors. It was found as a fact by the lower appellate Court that the contract was obtained from the plaintiff by defendant by means of a concealment of material facts amounting to fraud. *Held* that, upon the finding of the lower appellate Court, the plaintiff would be entitled to a simple money decree for the sum advanced with such interest as the Court might find due. *Held* further, that the claim must fall either under art. 95 or 97 of the first schedule to the Limitation Act; arts. 116 and 120 cannot apply to the case. *UDIT NARAIN v. SAHIB ALI AND OTHERS*, 13 O.C. 148 = 6 Ind. Cas. 1013.

(46)—*Limitation applicable to a suit for recovery of rents and profits by a usufructuary mortgage—Limitation Act, art. 109.*—The essence of a usufructuary mortgage is that the mortgagee looks to the rents and profits for the satisfaction of his advance, and, inasmuch as no time is fixed for payment, there can be no forfeiture. It is this forfeiture that gives rise to the remedies of foreclosure and sale, and

Mortgage—continued.**—13.—Usufructuary—continued.**

in its absence the mortgagee is not entitled to the remedies that spring out of it. In the absence of an express agreement to pay, a usufructuary mortgagee cannot obtain a personal decree. But where the mortgagee has failed to obtain possession he is entitled either to sue for possession or for recovery of his money. Where a usufructuary mortgagee is kept out of possession by the mortgagor, he is entitled to recover rents and profits received by the mortgagor during that period; but he can only recover profits received within three years of the commencement of his suit which will be governed by art. 109 of sch. II of the Limitation Act. **GOVINDRAV v. JIWANJI, 2 Bom. L.R. 201.**

(47)—*Mortgage-deed—Suit for possession—Nature of suit—Execution admitted—Consideration, want of—Proof—Onus on mortgagor—Delay in institution of suit—Presumption as to passing of consideration—Limitation Act (XV of 1877), sch. II, arts. 113, 135—Specific performance of contract.*—A mortgage-deed contained a recital that the mortgagor had received the mortgage money and put the mortgagee in possession of the property mortgaged. As a matter of fact the possession had not been given and the mortgagee sued for possession. *Held*, that the suit was not a suit for specific performance of a contract of mortgage. It was a suit for possession and was governed by art. 135 and not by art. 113 of the Limitation Act 1877. (A.W.N. 1884, 123, F.) In a suit for possession by the mortgagee, if the mortgagor admits the execution of the deed but denies the receipt of consideration, the onus lies on him to prove that he had not received the consideration. Mere delay in the institution of the suit does not shift the burden on to the mortgagee to prove that the consideration had passed. **THAKUR RAM CHAND v. BEHARI, 7 Ind. Cas. 646. (8 A. 641, D.; A.W.N. 1904, 163, 1 A.L.J. 423, 27 A. 71, F.)**

(48)—*Usufructuary mortgage—Ouster of mortgagees—Adverse possession.*—One of the purchasers of the equity of redemption in a usufructuary mortgage ousted the mortgagees and took possession of the entire mortgaged property, which he retained for more than twelve years; but it was found that he never denied the mortgagor's title, and that the mortgagors had no right to present possession. *Held* that there was no adverse possession as against the other mortgagees, although there was as against the mortgagees, and that the right of redemption was not lost; the ouster of the mortgagees did not entitle the plaintiff to re-enter into possession. **ISMADAR KHAN v. AHMAD HUSAIN, A.W.N. 1908, 25=5 A.L.J. 85=3 M. L.T. 125=30 A. 119. (27 A. 395, 18 B. 51, 4 C. 327, 12 B.H. C. 180, R.)**

(49)—*Usufructuary mortgage—Enhanced Government revenue, liability for—Transfer of Property Act, s. 76.*—In the absence of a contract to the contrary, an usufructuary mortgagee is liable to pay enhanced Government

Mortgage—continued.**—13.—Usufructuary—continued.**

revenue, which was not in the contemplation of the parties at the date of the mortgage. **KOLLI VALLAPPIL KALATHILE VEETIL KARNAVAN RAVUNNI NAIR v. NATUWATH PAPPU alias VALIYA ACHAN, 14 Ind. Cas. 590. (18 M.L.J. 31, F.; 14 M.L.J. 488, 17 M.L.J. 517, Diss.)**

(50)—*Pre-mortgage—Usufructuary mortgage—Mashrut-ul-rehan—Purchase-money—Apportionment of—Plaintiff entitled to pre-mortgage share of mortgagor under usufructuary mortgage alone.*—Certain persons made a usufructuary mortgage of their property. On the same day one of them executed a deed by way of *Mashrut-ul-rehan* in favour of the same mortgagee. In a suit for pre-mortgage of the share of the mortgagor who had created the further charge, *held* that the plaintiff was not liable to pay the sum secured by the *Mashrut-ul-rehan* deed which was a separate and independent transaction, but was entitled to pre-mortgage upon paying the proportionate amount due on the share of the said mortgagor. **KALLA v. HARGIAN, 9 A.L.J. 661=34 A. 416=15 Ind. Cas. 907.**

(51)—*Mortgage—Redemption—Ejectment, suit in—Claim to possession after discharge of usufructuary mortgage—Finding against discharge set up—Right of plaintiff to redeem mortgage—Form of decree—Taking of accounts—Mesne profits—Part payment of principal—Profits of usufruct, how to be appropriated—Defendant's costs of prior litigation wherein he supported plaintiff's cause—Whether defendant entitled to credit—Interest on amount—Transfer of Property Act, s. 72.*—Where a mortgagor alleges that the debt due on a usufructuary mortgage has been re-paid out of the usufruct, and seeks to recover the property mortgaged, the suit is in reality one for redemption. If, on accounts being taken, it is found that the whole of the debt has not been paid, the decree ought to be conditional on payment of whatever might be found due to the mortgagee. Even if such a suit is regarded as one in ejectment, the Courts have a discretion to allow redemption to the plaintiff. The proper course to pursue in such a case is for the Court to direct that accounts be taken of the amount due to the mortgagee and of any amount for which the mortgagee might be accountable to the mortgagor on account of the profits of the mortgaged property received by him, and then pass a final decree for redemption. Where a mortgage-bond stipulates for the appropriation of profits towards interest without mentioning the rate of interest, and a portion of the principal amount is received by the mortgagee, the Court in its decree should direct the appropriation of a portion of the rent proportionate to the balance of principal remaining unpaid towards interest and to hold the mortgagee accountable for the balance. If no portion of the amount paid would be debitable towards the principal, no question of accountability

Mortgage—continued.**—13.—Usufructuary—continued.**

for the profits would arise. Where a mortgagee defended a prior suit brought by a third party in which the mortgagor was interested: *Held*, that he was entitled to be reimbursed to the extent of the amount expended by him and to interest thereon at 9 per cent. per annum. **RANGANATHA PILLAY v. PARIPURNAM**, 16 Ind. Cas. 217.

See U.P. ACT XVIII OF 1873, A.W.N. 1885, 278.

See U. P. ACT XII OF 1881, s. 7, A.W.N. 1893, 177, 7 A. 553, F.B. = A.W.N. 1885, 108.

See U.P. ACT XXII OF 1886, s. 5, 2 O.C. 204.

Of *sir* lands—Possession not delivered to mortgagee—Rights of mortgagee—See U.P. ACT II OF 1901, ss. 10, 20, 7 A.L.J. 330 = 5 Ind. Cas. 557 = 32 A. 383.

Usufructuary mortgage—*Sir* sold after passing of Agra Tenancy Act—Position of mortgagee—Ex-proprietary tenancy—Transfer of holding—Ejectment—See U.P. ACT II OF 1901, s. 20, 9 Ind. Cas. 553.

Mortgage simple but to become usufructuary on default—Decree giving possession to mortgagee—Mortgagor's remedy to recover possession—See CIV. PRO. CODE, 1908, s. 47, 20 A. 506 = A.W.N. 1898 139.

See CIV. PRO. CODE, 1908, s. 47, 23 W.R. 156.

Lease of mortgaged property by usufructuary mortgagee to mortgagor—Hypothecation of same property as security for rent—Suit for rent in Revenue Court—Suit for enforcement of lien in Civil Court—See CIV. PRO. CODE, 1908, O. II, r. 2, 4 A. 318 = A.W.N. 1882, 46.

Creditor of mortgagee—Remedies by attachment—Practice and procedure—See CIV. PRO. CODE, 1908, O. XXI, rr. 46, 54, 13 Bom. L.R. 233.

Possession not given to mortgagee—Suit for possession compromised—Mortgagee taking simple money decree—Sale of mortgaged property—See CIV. PRO. CODE, 1908, O. XXXIV, r. 14, 7 A.L.J. 321 = 5 Ind. Cas. 419 = 32 A. 377.

Suit for possession not brought for twelve years—Presumption that no consideration passed—Burden of proof—See CONSIDERATION, 8 A.L.J. 368.

Suit for possession of property pledged in usufructuary mortgage—See CO-SHARERS—SUIT BY CO-SHARERS, 2 Hay 155.

See DELAY, 1 M.H.C. 70.

See JURISDICTION OF REVENUE COURTS, 8 W.R. 301.

Right of usufructuary mortgagee—Right to trees planted by him during tenure—See LANDLORD AND TENANT—PROPERTY IN TREES ETC. ON LEASED PREMISES, 1 Agra 281.

Mortgage—continued.**—13.—Usufructuary—concluded.**

Usufructuary mortgagee—Position of lessee from him—See LEASE—GENERAL, 8 A.L.J. 802.

Suit for redemption of usufructuary mortgage—S. 20 if applicable so as to extend limitation for suit—See LIMITATION ACT, 1908, s. 20 and art. 148, 18 A. 295 = A.W.N. 1896, 68.

Usufructuary mortgagee—Liability of, for damages for property not delivered to mortgagor—See LIMITATION ACT, 1908, s. 23, arts. 115, 116, 6 M.L.T. 239 = 33 M. 71.

Usufructuary mortgage—See MINOR—CONTRACTS BY MINORS, 3 B.L.R.A.C. 426 = 12 W.R. 378.

Possession under, nature of—See PARTITION—GENERAL, 5 Ind. Cas. 664.

Pre-emption suit—Usufructuary mortgagee cannot plead his mortgage as a shield when he himself is purchaser—Keeping alive of charge—See PRE-EMPTION—GENERAL, 10 O.C. 49.

Proprietary rights, losing or parting with—Ex-proprietary tenant—See REG. II OF 1877, s. 41, 7 A.L.J. 370 = 5 Ind. Cas. 503.

See RES JUDICATA—CAUSE OF ACTION, 11 A. 386 = A.W.N. 1889, 136.

Mortgage with possession—Duty of mortgagee to keep account of rents and profits—Interest—See RES JUDICATA—MATTERS IN ISSUE, 95 P.L.R. 1908.

Usufructuary mortgage by tenant—Subsequent relinquishment to landlord—Right of landlord to re-enter—Mortgage or out-and-out sale—See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT, 12 C.W.N. 878.

Specific Relief Act, I of 1877, s. 9, suit under, by mortgagee in possession—See SPECIFIC RELIEF ACT, 1877, s. 9, 5 B. 446.

Vendor agreeing to pay back purchase money if there be any prior hypothecation or vendee be dispossessed—Effect of prior usufructuary mortgage—See VENDOR AND PURCHASER—VENDOR, RIGHTS AND LIABILITIES OF, 6 Ind. Cas. 114.

—14.—Miscellaneous.

(1)—*Rule against breaking up mortgage security, applicability of.*—The rule of law against breaking up the integrity of a mortgage security is a rule aiming at protection of the mortgagee, but that rule does not apply to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property. **KUDHAI v. SHEO DAYAL**, 10 A. 570 = A.W.N. 1888, 231. [D., 22 M. 209 = 8 M.L.J. 309.]

(2)—*Equities of mortgagor, mortgaged property followed by, even where purchaser is mere agent—Notice to agent, notice to principal.*—On the sale of mortgaged property in auction subject to the right of redemption of the mortgagor, even when it happens that the purchaser

Mortgage—continued.**—14.—Miscellaneous—continued.**

has bought the property at the sale in the capacity of an agent and not as principal, the equities of the mortgagor follow the property. The principal cannot, through the hand of his agent, take the land free from the mortgagor's equities. The case is similar to the one in which notice to the agent of the purchaser is held to be constructive notice to the principal so as to fix him with a trust or a burden relative to the subject of purchase, which without notice he would have escaped. **SEEDER NAZEER ALI KHAN v. RAJAH OJODYA RAM KHAN, 8 W.R. 399.**

(3)—*Sale of property to wife by husband bona fides of mortgage entered into by wife, a material issue for decision — Finding of first Court against bona fides of transaction—Mere expression of concurrence in, by lower appellate Court not sufficient.*—In this case both the lower Courts had found that the alleged sale of the property (in the possession of the defendant mortgagee) to a wife by her husband was not *bona fide*. The defendant was entitled to a clear finding on the issue whether the mortgage executed in his favour by the wife with the knowledge of her husband was a *bona fide* one or not. The first Court had found that it was not a *bona fide* transaction without giving any satisfactory reasons for the finding. The first appellate Judge merely expressed that it concurred in the same and the High Court was of opinion that such mere expression of concurrence in an obscure judgment was not sufficient but that the Judge should have stated the grounds for his agreement with it and, that he was wrong in not having done so. **KHEL-LUCK CHANDER GHOSE v. NUND RAM SEIN, 2 W.R. 7.**

(4)—*Transfer.*—It is clear that in India, as in England, a mortgagee may transfer his rights to a third person, by way of assignment; but it should be without prejudice to the rights of the mortgagor. **CHINNAIYYA RAWUTAN v. CHIDAMBARAM CHETTY, 2 M. 212.** [Appr., 13 B. 42; F., 2 M.L.T. 93; R., 18 M. 126.]

(5)—*Validity of condition in mortgage-deed that mortgagee will not mortgage his interest.* **SULTAN KHAN v. JAWALA DAS, 131 P.R. 1888.** (2 P.R. 1886, D.)

(6)—*Mortgage in English form—Power of sale—Lands situated in Bombay Mofussil.*—A mortgagee, under a power of sale contained in a mortgage of the ordinary English form, can sell the mortgaged lands, without the intervention of the Court, even though the lands be situated in the Bombay Mofussil. The purchaser at such a sale acquires a valid title, when the sale has been fairly conducted and with all due notice to the mortgagor. **N.B.**—The position of the English mortgagee, selling under his power of sale, explained. **PITAMBER NARAYENDAS v. VANMALI SHAMJI, 2 B. 1.** [R., 14 C. 464.]

Mortgage—continued.**—14.—Miscellaneous—continued.**

(7)—*Mortgage in English form—Property situate in mofussil—Parties residing at Bombay—Suit for redemption filed—Injunction restraining power of sale.*—Although the mortgaged property was situated in the mofussil, where the parties were the residents of Bombay, conducting their transactions through Bombay solicitors, and the instrument of mortgage was a regular and formal deed in English form, held that the parties intended to contract with reference to English law and were entitled to enforce their rights according to that law. [R., 14 B. 377, 2 S.L.R. 90.] The mortgagee under an English mortgage cannot be restrained by an injunction from exercising his power of sale, merely because a suit for redemption has been filed against him by the mortgagor, and such a sale *pendente lite* can be stayed only by the mortgagor paying the amount due into Court, or by giving the *prima facie* evidence that the power of sale is being exercised in a fraudulent or improper manner. **JAGJIVAN NANABHAI v. SHRIDHAR BALKRISHNA NAGARKAR, 2 B. 252.** (*Rhodes v. Buckland*, 16 Beav. 212, D.; *Adams v. Scott*, 7 W.R. 213, F.).

(8)—*Mortgagee purchasing under power of sale contained in mortgage-deed — Mortgagor's consent — Effect.*—Where a mortgagee purchases the mortgaged property with the consent of the mortgagor under the power of sale contained in the mortgage-deed, he acquires an unimpeachable title derived from the power of sale, which is altogether distinct from his title as a mere incumbrancer; the effect of such a purchase being analogous to that of a foreclosure decree, which is to vest the ownership of, and the beneficial title to, the land for the first time in the person who previously was a mere incumbrancer. **PURMANAND DAS JIVANDAS v. JAMNABAI, 10 B. 49.** (*Heath v. Pugh*, 6 Q. B.D. at p. 361, R.) [R., 18 B. 51, 26 B. 82 = 3 Bom. L.R. 456, 27 B. 43.]

(9)—*Mortgage — Decree on first mortgage, second mortgagee not being joined—Purchase of hypotheca by decree-holder—Rights of second mortgagee—Mortgagee—Purchaser—Suit for redemption—Improvements—Mortgage decree—Interest at contract rate till date of decree.*—Where a prior mortgagee obtained a decree for sale on his mortgage without joining a puisne mortgagee as party to the suit, and purchased the property himself in execution, the puisne mortgagee can sue the mortgagor and the purchaser for sale on his mortgage without offering to redeem the first mortgage or to ask for sale subject to it. It is open to the first mortgagee who is the purchaser to redeem the second mortgage, or a decree for sale may be passed subject to the rights of the first mortgagee. [Expl., 10 M.L.J. 347 = 24 M. 171; R., 11 C.P.L.R. 75, 12 C.P.L.R. 125, 1 O.C. 53, 1 O.C. 105, 30 C. 599, F.B.; D., 26 M. 537.] The mortgagee-purchaser in this case, suing to redeem, cannot claim compensation for improvement made by him, for he is in no better

Mortgage—continued.**—14.—Miscellaneous—continued.**

position than the mortgagor spending money on his own property. [*F.*, 31 M. 425=18 M. L.J. 298=3 M.L.T. 397.] Interest should be allowed in a mortgage decree at the contract rate till date of decree, and at 6 per cent. from that date. **RANGAYYA CHETTIAR v. PARTHA-SARATHI NAICKER**, 20 M. 120.

(10)—*Usufructuary mortgage — Interest — Waiver.*—In a usufructuary mortgage, securing the repayment of a certain sum of money after a given time with interest at 1 % per mensem, there were a number of provisions for securing the payment of interest to the mortgagee, and *inter alia*, there was a provision that he should have possession of the property, and take the profits on account of interest, the profits being agreed at a certain figure, leaving an agreed balance of interest to be paid yearly in cash. There was also a provision that in the event of possession not being given, the mortgagee might treat the money as immediately due, and recover it at once with interest at Rs. 1-6-0 % per mensem. The mortgagee did not take possession of the security, and took no steps to obtain such possession or to recover the money for nine years, during which period no interest was paid. The mortgagee then sued for the recovery of the amount with interest at Re. 1-6-0 % per mensem from the date of bond to date of suit. *Held* that the fair inference of fact to draw from this state of things was that the creditor waived the provisions for securing and recovering the interest (as he was at liberty to do), and that the transaction must be looked at as simply one of a loan for the specific period at the agreed rate of 1 % per mensem. **GANGA SAHAI v. LACHMAN SINGH**, 8 A. 194=A. W.N. 1886, 50.

(11)—*Mortgagee's lien—Money decree—Waiver.*—A mortgage lien is rendered infructuous when the mortgagees waive their right of sale, and receive a money-decree. **SARUTH SINGH v. BHEENUCK SAHOO**, 14 B.L.R. 422, Note=12 W.R. 522. [*R.*, 14 B.L.R. 408=23 W.R. 187; *Cons.*, 5 C.L.R. 243.]

(12)—*Regulation XVII of 1806—District of Chupra—Waiver of rights.*—Regulation XVII of 1806, came into force in the District of Chupra on the 11th September, 1806. Indulgence or waiver of rights between a mortgagee and mortgagor cannot be extended to any but those parties. **SHAIKH BUKSHUSH HOSSEIN v. BIBEE FUZEELONISSA**, W.R. 1864, 189.

(13)—*Mortgage—Regulation XVII of 1806, ss. 7 and 8—Suit for possession—Suit for a declaration that the conditional sale has become absolute—Court Fees Act, 1870, s. 7 (IX) (3)—Amendment of plaint.*—A suit for a declaration that the conditional sale has become absolute is chargeable with Court-fee under s. 7, paragraph IX, clause 3, Court Fees Act. The term 'demand' in Regulation XVII of 1806, means a demand made immediately before the application for notice of foreclosure is filed in Court.

Mortgage—continued.**—14.—Miscellaneous—continued.**

In a suit for a declaration that the conditional sale has become absolute, the plaintiff must prove that the foreclosure proceedings were perfectly regular. Where the plaint stated that proceedings under Regulation XVII of 1806 had been taken by the plaintiff and prayed that possession of the land mortgaged be decreed in favour of the plaintiff, and, apparently at the suggestion of the Court, prayer for possession was withdrawn and a decree for a declaration that the conditional sale had become absolute was granted to the plaintiff, the Chief Court declined to allow withdrawal of the prayer for the declaration, but permitted the addition of the prayer for possession as mortgagee. **CHAUDHRI HAZARA SINGH v. MOHAMMAD KHAN**, 134 P.L.R. 1901.

(14)—*Mortgage bond — Equitable assignment of prior lien.*—A pledged certain lands to B in 1865, and, on the 24th of July 1868, granted a mokurari lease of the same lands to C. On the 5th of June 1868, shortly before the grant of the mokurari lease, A executed a simple mortgage of 8 annas of the same lands to D. It was proved that the consideration money given by C for the lease had been expended in paying off B's mortgage and that the bond had been made over to C, though not formally assigned to him. *Held* that under these circumstances C was entitled to stand in the place of the first mortgagee and that he was to be considered as having taken a regular assignment of the bond. **DULI CHAND v. MONOHUR LALL UPADHYA**, 2 C.L.R. 18.

(15)—*Mortgage—Property in two districts—Decree in one Court—Mortgage-lien—Permission of High Court—Act VIII of 1859.*—Plaintiff obtained a decree in the Bhaugulpore District on a mortgage bond which secured certain property a part of which was situate in that District and a part in the Patna District. The permission of the High Court was not obtained by the plaintiff to proceed against the Patna property. *Held* that, although on account of failure to get permission of the High Court, the decree must, as regards the Patna property, be regarded as a money decree only and could not be executed by sale of the lands in that district, yet, the plaintiff was entitled by a separate suit to enforce his mortgage lien against the property in the Patna District in the hands of a purchaser, whose purchase was subsequent to his mortgage. **BOLAKI LAL v. THAKUR PERTAN SINGH**, 6 C.L.R. 370. (19 W.R. 255, R.)

(16)—*Suit for declaration that mortgage-decree affects property comprised in mortgage, in which others have since become interested severally—Multifariousness.*—Where, in a suit, by the mortgagee of properties for a declaration that his mortgage-decree affected some of such properties, against the mortgagor and other persons, who had become interested in separate portions of such property severally, at sales in execution of other mortgage-decrees

Mortgage—continued.**—14.—Miscellaneous—continued.**

in respect of it, *held* that, as the plaintiff sued in respect of a single transaction affecting several items of property upon a single contract as between himself and his mortgagor, and as the plaintiff was compelled to sue by reason of the fact that, subsequent to the execution of his mortgage, several other persons had become interested in different portions of the property, which, as a whole, was the subject of his mortgage-bonds, the suit was not bad for multifariousness. **BUNGSEE SINGH v. SOODIST LALL, 7 C. 739 = 10 C.L.R. 263.**

(17)—*Mortgage—Test for registration—Unregistered mortgage—Money bond.*—The test in determining the value, for purposes of registration, of the interest created by the mortgage, is the amount of the least sum recoverable under it. It is the value of the interest created, not the consideration for the creation of the interest, which must be regarded. An unregistered mortgage is not receivable in evidence for the purpose of affecting immovable property, or in proof of any transaction affecting it, but it may be received as evidence of the personal obligation. **JAGAPPA v. LAT-CHAPPA, 5 M. 119.** [*Appr.*, 6 M. 422, 10 C. 82, 13 C. L. R. 256, 15 M. 336, 19 B. 36; *R.*, 23 M. 105, 25 M. 396; *D.*, 4 N. L. R. 90.]

(18)—*Mortgage—Registration—Possession—Notice—Presumption—Purchase at Court-sale—Decree for possession—Enforcibility.*—In the case of an unregistered mortgage without possession, there cannot be any presumption of notice against any subsequent registered mortgagee with possession. Where a certain property was purchased without notice of any prior incumbrance at a Court-sale in execution of a money-decree, a subsequent decree for possession obtained by a mortgagee of that property in a suit to which the purchaser was not a party, was valueless, as neither the title to, nor possession of, the land was then vested in the mortgagors. **TUKARAM bin ATMARAM v. RAMCHANDRA bin BUDHARAM, 1 B. 314.**

(19)—*Prior mortgage—Subsequent registered sale—Priorities of claim.*—In a suit by G against K and L on an instrument, dated 1861, described as a mortgage-deed, to recover the amount due by a decree against the executant K personally and against the mortgage property which was in the possession of L, under a registered deed of sale by K to him in 1866, where it was found that L was a *bona fide* purchaser for consideration without notice, *held* that G was entitled to a personal decree against K, and also to a decree against the property in the possession of L, for satisfaction of the debt, whether the instrument sued on was a mortgage, or whether its effect was merely to create a lien. **GOLLA CHINNA GURUVUPPA NAIDU v. KALI APPIAH NAIDU, 4 M. H. C. 434.** [*F.*, 5 M.H.C. 457, 12 M. 69; *Appr.*, 9 B.H.C. 121; *R.*, 7 M.H.C. 104, 10 M. 509, 13 A. 28.]

Mortgage—continued.**—14.—Miscellaneous—continued.**

(20)—*Earlier unregistered mortgage—Subsequent registered mortgage—Suit by second mortgagee—Sale of mortgaged property—Priority—Prior rights of first mortgagee over holder of money-decree against mortgagor—Transfer of Property Act (IV of 1882), s. 97.*—In execution of a decree obtained by the holder of a registered second mortgage, the mortgaged property was brought to sale. The first mortgagee of the same property whose mortgage was not registered, intervened, but the Court rejected his claim, holding that his mortgage, though earlier in date, must be postponed to that of the second mortgagee, by reason of non-registration. The property was sold and part of the sale-proceeds was applied in wiping off the debt due to the second mortgagee, part in paying off the holder of a money-decree against the mortgagor, and the balance returned to the latter. Thereupon the present suit was instituted by the first mortgagee for recovering his debt out of the sale-proceeds and from the mortgagor, the second mortgagee, the holder of the money-decree and the purchaser at the Court-sale. The lower appellate Court held that the plaintiff had a cause of action only as against the mortgagor, and that the holder of the money-decree could not be ordered to refund any portion of the money paid to him. *Held*, on second appeal, that, although plaintiff's mortgage was postponed to that of the second mortgagee by reason of its not being registered, the plaintiff had still the same rights over the balance of the sale-proceeds as if he had been the second mortgagee in point of date, under s. 97 of the Transfer of Property Act (IV of 1882) and, as such, entitled to priority over the holder of the money-decree. Under this section, the proceeds of sale, after satisfying the second mortgagee's debt, must be applied in paying off the plaintiff's incumbrance, and the holder of the money-decree would be entitled to any balance of the sale-proceeds subject to this equitable right of the plaintiff. **PADMANABH BOMBSHENVI v. KHEMU KOMAR NAIK, 18 B 684.** [*R.*, 33 C. 92 = 9 C.W.N. 989, A.W.N. 1907, 201 = 4 A.L.J. 492.]

(21)—*Mortgage—Subsequent sale in fraud—Evidence—Non-registration of deed.*—A sued on a bond given him by B (accompanied by a mortgage) and to set aside a subsequent sale of the property. B impugned the bond as a forgery. It was found that the only evidence against the bond was that of B himself; that B had two sons in business at the time and in difficulties; and that the bond was not registered. *Held*, that the evidence in favour of the bond preponderated; that the subsequent sale was in fraud of creditors; and that the non-registration did not invalidate the bond. **BABOO GUNGAPRASAD v. MOWJEE LALL, 6 M.J. 431.**

(22)—*Registered sub-mortgage—No notice of sub-mortgage to mortgagor—Payment by mortgagor to mortgagee in good faith—Registration, whether it is a notice to mortgagor.*—Where a

Mortgage—continued.**—14.—Miscellaneous—continued.**

mortgagor, who had no actual notice of a registered sub-mortgage, makes a payment to the mortgagee in good faith, the payment is not vitiated notwithstanding the fact that such payment was made subsequent to the registration of the sub-mortgage. Registration is notice for some purposes and it cannot be treated as notice for the purpose of vitiating payments made by a mortgagor to his mortgagee without actual notice of the sub-mortgage. **SAHADEV RAVJI BAGADE v. SHEKH PAPA MIYA, 29 B. 199.**

(23)—*Suit for possession under terms of registered mortgage-deed, containing also terms tending to operate by way of conditional sale—Application of s. 9 (3) Punjab Alienation of Land Act, 1900, to such cases—Duty of Appellate Court—Practice and Procedure.*—In a suit for possession by a mortgagee claiming under a registered deed, which contained besides other conditions two other clauses intended to operate by way of conditional sale, the Court of first instance decreed possession, without making any reference to the Deputy Commissioner, under s. 9 (2) and (3) of the Punjab Alienation of Land Act, 1900. *Held*, on a reference by the Divisional Judge to the Chief Court, that s. 9 (3), would apply, except where the plaintiff not only did not sue on the clause regarding conditional sale, but voluntarily surrenders that condition altogether and agrees to have it struck out, the mortgage would cease to be, as then no mortgage existed before the Court within the meaning of s. 9 (2), that s. 9 (2), (3), Punjab Alienation of Land Act, was imperative, and, it is clearly the duty of an Appellate Court to rectify any wrong order passed by the Court of first instance in this respect, and that under s. 582, Civil Procedure Code, the Appellate Court's procedure was the same as that of a Court of first instance in deciding the preliminary points noted therein, and then, if a reference to the Deputy Commissioner be still necessary under s. 9, it should be made either direct or through the lower Court; where the exercise of his powers under the Alienation of Land Act by the Deputy Commissioner would not dispose of the case, the Civil Court making the reference should dispose of it after the discharge by the Deputy Commissioner of his duties in regard to it. **NARAIN SINGH v. HAYAT, 20 P.R. 1903.** [*F.*, 38 P.R. 1905=89 P.L.R. 1905; *R.*, 91 P.R. 1903=22 P.L.R. 1904.]

(24)—*Mortgage—Agreement between mortgagee and third party for release of part of hypotheca from mortgage—Registration—Validity.*—An Agreement by a mortgagee to release a portion of the mortgaged property from the mortgage, entered into for a fresh consideration, with one who was not a party to the mortgage, need not be in writing and registered, for it is not one between the parties to the mortgage. Such an agreement can be enforced by the party in whose favour it is made, and can also be pleaded by him in avoidance of

Mortgage—continued.**—14.—Miscellaneous—continued.**

the claim of the mortgagees to sell the portion of the property comprised in it. **GURDIAL MAL v. JAUHRI MAL, 7 A. 820=A.W.N. 1835, 279.** (*Nath v. Armstrong*, 30 L.J.C.P. 286, *R.*). [*F.* A.W.N. 1904, 266=1 A.L.J. 693=27 A. 305.]

(25)—*Mortgage—Apportionment of mortgage-debt—Second mortgagee purchasing decree on first mortgage—Equity of redemption, purchase of, by second mortgagee—Civ. Pro. Code, 1882, s. 232—Regular suit.*—On the 2nd of July, 1876, Y mortgaged properties Nos. 1 and 2 to D. Subsequently, K and R became second mortgagees of properties 2 and 1 respectively by separate deeds, and on the default of the mortgagor to pay Government revenue on property No. 2, K purchased the equity of redemption in it. On the 19th November 1880, D got a mortgage decree against Y, the mortgagor and K as purchaser of the mortgaged properties; and afterwards assigned the decree to R who now sought to execute it. K was the benamidar of R. On R applying to execute the decree against plot No. 1, *held* that R, before he could be entitled to proceed against property No. 1 in the hands of Y, must credit the mortgagor with such portion of the mortgage debt as properly falls on the property in his possession. Under the above circumstances when R offered to allow property No. 2 to be first sold free of all incumbrances, R should not be relegated to a regular suit and thus put to additional expense and delay before he could settle his account with Y. **YAKOOB ALI CHOWDHRY v. RAM DOOL-LAL, 13 C.L.R. 272.**

(26)—*Decree—Security, extinction of—Merger—Charge, when kept alive—Transfer of Property Act (IV of 1882), s. 85—Parties—Appeal—Redemption, partial.*—It is not open to a mortgagee to throw the burden of the entire debt upon a portion only of the mortgaged property and release the remainder on the ground that it is subject to prior charges. [*R.*, 33 C. 613=10 C.W.N. 351=3 C.L.J. 576, 6 C.L.J. 46.] A first mortgagee, who purchases the mortgaged property from the mortgagor, may set up his prior security as a shield against a subsequent incumbrancer. (11 I.A. 126, 10 I.A. 62, 29 I.A. 9, *F.*) [*R.*, 10 C.L.J. 150] The same doctrine applies, even though the mortgagee may have sued on his mortgage and obtained a decree. A decree obtained on a mortgage does not extinguish the security, though the security may be merged in the decree. Where, therefore there, is a subsisting prior incumbrance, and a puisne mortgagee advances money for the purpose of discharging it, his right to keep it alive, if it is for his benefit to do so, is not affected by the fact that the prior incumbrance had, at the time, taken the form of a decree (31 C. 863, *Appl.*; 20 M. 486, *F.*) [*R.*, 7 C.L.J. 1.] A judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the judgment-creditor. [*R.*, 7 C.L.J. 1.] S. 85 of the Transfer of Property Act is strictly

Mortgage—continued.**—14.—Miscellaneous—continued.**

applicable to a mortgage-suit in all its stages, whether in a Court of first instance or in a Court of appeal. Where, however, the plaintiffs in the Court of first instance, deliberately abandoned their claim against some of the defendants and released the shares of the mortgaged property held by them and then obtained a decree against the remaining defendants, there was no duty cast by law upon these defendants to join as parties—respondents to an appeal preferred by them against the plaintiff, such of the defendants as against whom the plaintiffs had abandoned their claim. (7 M.L.J. 266, 9 M.L.J. 49, D.) When a mortgagee has acquired, in whole or in part, the share of a mortgagor, partial redemption may be allowed. *SURJIRAM MARWARI v. BARHMADEO PERSAD*, 2 C.L.J. 202. (4 C.W.N. 507, 5 C.W.N. 83, 30 C. 755, F.) [R., 5 C.L.J. 315 = 11 C.W.N. 403]

(27)—*Mortgage—Puisne mortgagee not made party to suit by prior mortgagee—Subsequent suit by prior mortgagee—Property purchased by a third party—Apportionment of redemption money—Security for mortgage debts, nature of.*

—Where a prior mortgagee has obtained a decree for sale without making the subsequent mortgagee a party to his suit, the right of redemption of the latter does not become extinct, and he is entitled to exercise it even after a sale has taken place in execution of the decree obtained upon the prior mortgage. He must be placed in the same position which he would have occupied had he been made a party to the suit, and, therefore, he could redeem the prior mortgage only upon payment of the whole amount due upon the mortgage. (25 A. 388, 19 A. 527, F.; A.W.N. 1895, 45, Appr.) [Affirmed, 25 A. 388; R., 11 C.W.N. 403 = 5 C.L.J. 315.] *Per Banerji, J. (Aikman, J., dissenting)*:—In the above case, if the prior mortgagee has realized only a part of the debt by the sale of the property, i.e., by enforcing the security on the property, and the subsequent mortgagee suing to redeem the prior mortgage pays the full amount of the debt, and thereby totally discharges the debt, the prior mortgagee is the person who has the right to appropriate that portion of the money paid by the subsequent mortgagee which represents the balance, the purchaser whose purchase money has satisfied the remainder of the debt being entitled to the remainder of the money paid by the subsequent mortgagee. One K holding a first mortgage on certain property, brought a suit for sale on his mortgage and obtained a decree for Rs. 3,306-14-6. B, a creditor of K, attached the decree, and having put up the mortgaged property for sale, purchased it himself for Rs. 1,050 which satisfied his decree. After this G, a puisne mortgagee of the same property, who had not been made a party to K's suit, brought a suit to redeem K's mortgage and for sale of the property. K, after the institution of the suit transferred his rights as mortgagee to P, who was thereupon made a defendant.

Mortgage—continued.**—14.—Miscellaneous—continued.**

G obtained a decree for redemption and sale. *Held, per Banerji, J.*, that P was entitled to the whole of the amount which G had to pay for redemption of the prior mortgage, with the exception of the amount of the purchase-money paid by B at the auction sale, which amount and which only, would be due to B or his representatives. (19 A. 527, Appr.) *Per Aikman, J. (dissenting)*:—that the auction purchaser B (or his representative) was entitled to the whole amount to be paid by G for redemption of the prior mortgage (19 A. 527, Diss.; 15 A.W.N. 45, D.) [Affirmed, 25 A. 388.] Every mortgage pre-supposes the existence of a debt, and it is for the purpose of securing the re-payment of the debt that a mortgage of property is made. In every simple mortgage, unless there is a specific covenant to the contrary, there is a personal obligation upon the mortgagor to pay the debt, and there is also the liability of the mortgaged property, so that the security for the debt is two-fold, viz., first, the personal security of the mortgagor, and next, the security of the property. The liability of each kind of security is to the extent of the whole amount of the debt. It is for this reason that, when a person entitled to redeem seeks to redeem the mortgage, he must pay the whole amount due for the time being upon the mortgage (*Per Banerji, J.*) *WAHID-UN-NISSA v. GOBARDHAN DAS*, 22 A. 453 = A.W.N. 1900, 160. [R., 29 M. 491.]

(28)—*Prior registered mortgage—Equity of redemption—Subsequent mortgagee—Parties to be impleaded in suit by prior mortgagee.*

—A mortgage for ten years was made in favour of one S. It was registered, but S was not let into possession of the property. The same property was subsequently mortgaged to the defendant R. The mortgage of S having been prior in date to that of R and being registered, S's claim was superior to that of R and S had a right to maintain a suit for sale of the land to satisfy her mortgage. S, however, should have made R a party to her suit inasmuch as the equity of redemption was vested in R. S omitted to implead her so as to offer her the opportunity of redeeming to which she was entitled and plaintiff, notwithstanding the notice of R's claim given to him at the sale, became the purchaser, although R was not a party to S's suit and, therefore, not bound by the decree in it. The plaintiff, however, had a good title to the interest of the mortgagor who, as a party to S's suit, was bound by the decree. The utmost relief which could be afforded to the plaintiff was held to be to permit him to amend his plaint by praying for redemption of the land from R's mortgage and to treat his suit which was in the nature of an ejectment suit as one for redemption. *RADHA-BAI v. SHAMRAV VINAYAK*, 8 B. 168. [F., 9 A. 125 = 6 A.W.N. 318; R., 16 B. 486, 17 M. 17, 20 B. 390, 20 B. 290, 23 A. 1, 28 B. 153, 5 Bom. L.R. 892, 64 P.R. 1908 = 132 P.W.R. 1908; D., 5 C.L.J. 527.]

Mortgage—continued.**—14.—Miscellaneous—continued.**

(29) — *Mortgage, Suit on—Parties—Minor—Guardian.*—During the pendency of a suit on a mortgage against the mortgagor, the latter died, and an *ex parte* decree was obtained against his widow who was substituted in his stead. On the application of the sister of the mortgagor, the decree was set aside after the death of the widow, the ground being want of proper service of process upon the widow. Thereupon, the sister was substituted as defendant, and a decree was passed ultimately for the sale of the mortgaged property. The mortgagee himself having purchased the property in execution sale, a certificate was granted to him and he was also put in possession of the property. About ten years after this sale, the son of the original mortgagor who was a minor at the time of the decree, brought a suit for setting aside the execution sale and for the recovery of possession of the property, alleging that the mortgage-bond sued on was a forged document, and that the decree and all the subsequent proceedings under it did not affect his rights, inasmuch as he had not been made a party to them. *Held* that on the death of the mortgagor, the plaintiff was his sole heir, that the equity of redemption in the mortgaged property vested in him, and that the inheritance was wholly unrepresented in the previous litigation inasmuch as the sister of the mortgagor was not appointed guardian of the plaintiff's person or administratrix of his estate, either under Madras Regulation V of 1804, ss. 2, 19, 23 or under Act XX of 1864, nor was she appointed his guardian *ad litem* in the mortgage suit, that, therefore, the plaintiff was entitled to have the genuineness of the mortgage-bond tried as against him, and that, if that was found to be genuine, he should be given an opportunity of redeeming the mortgage, and that if it was found to be not genuine, the property should be restored to him. *JATHA NAIK v. VENKTAPA*, 5 B. 14. [*R.*, 9 B. 86, 9 B. 429, 12 B. 18, 14 C. 464, 20 B. 338, 24 B. 135 = 1 B. 10m. L.R. 627, 7 C.W.N. 11.]

(30) — *Suit after mortgage—Mortgagee not a party—Sale of mortgagor's right.*—A mortgagee cannot be bound by a decision relating to the property mortgaged, in a suit instituted long after the date of his mortgage to which he was not a party, nor can he be deprived of his right to enforce his lien by a subsequent sale of the mortgagor's right, title and interest. *DUMA SAHU v. JEONARAIN LAL* 4 B.L.R. A.C. 27 Note = 12 W.R. 362. [*F.*, 4 C. 692, 8 A. 326, 22 C. 364; *Appr.*, 8 C L.J. 478 = 13 C.W.N. 281; *R.*, 4 B.L.R. A.C. 24 = 12 W. R. 491.]

(31) — *Mortgage decree — Sons of mortgagor not parties to suit—Liability of sons depending on binding nature of mortgage-debt.*—Where, in a mortgage suit, the sons of the mortgagor were not made parties, a decree passed in the suit could not bind the sons, if the mortgage-debt was not binding on them. If, in such a case, the mortgaged property was sold in execution of the decree so passed, the sale

Mortgage—continued.**—14.—Miscellaneous—continued.**

could not affect the shares of the sons in the property. *MARIMUTHU UDAIYAN v. SUBBARAYA PILLAI*, 13 M.L.J. 231.

(32) — *Mortgage—Purchase of decree by one of several judgment-debtors—Contribution—Relief claimed in second appeal inconsistent with pleadings.*—The proprietor of an estate comprising thirteen villages mortgaged the same in 1866, and the mortgagee obtained a decree thereon on 16th December 1874. In the meantime the proprietor had given another mortgage of the same estate in 1867 and the second mortgagee obtained a decree thereon on the 6th July 1872. On the 20th March, 1874, twelve villages of the estate were sold in execution of the second decree, three of the villages being bought by the second mortgagee himself and the remaining nine by the respondent. The appellant, the uterine brother of the second mortgagee, being joint and undivided in interest, estate and business, purchased the unexecuted and unsatisfied decree of the first mortgagee on the 29th July 1875, and thus stood in the shoes of the prior mortgagee and of the second mortgagee and purchaser of three villages of the estate. Taking out execution of the decree under the prior mortgage, the appellant sought to sell over again the estate in the hands of the respondent. The respondent successfully objected in the execution proceedings, whereupon the appellant brought the present suit against the respondent to establish his right to bring the estate to sale. The respondent contended that the suit was bad inasmuch as it was really a suit by a judgment-debtor, who had purchased the decree, to enforce the decree against himself and his co-judgment-debtor. *Held* that this contention was not sound. But, as the plaintiff, in the relief he sought, had not specified what amount he should himself contribute towards the discharge of the decree on account of his purchase of the three villages, a decree, if granted for the relief as sought, would be enforceable against the respondent alone, and up to the full amount of his purchase; and it was obvious that this was what the appellant meant and sought to do by means of his suit against his co-proprietor the respondent. This relief sought in this way, which was plainly tainted by bad faith if not by fraud, had been rightly refused by the lower appellate Court; and this was not a case in which he should be allowed to obtain a relief which would be inconsistent with the facts and equities and pleadings he chose to set forth in the first Court. *SHEQ SARAN SINGH v. AJUDHIA BAKHSI SINGH*, A.W.N. 1881, 136.

(33) — *Mortgage—Contribution.*—A number of villages had been mortgaged to B, who subsequently acquired the mortgagor's interest in some of them. A, who had purchased the equity of redemption in four of the villages mortgaged to B, brought this suit to have it declared that one of the four villages mortgaged to B should

Mortgage—continued.**—14.—Miscellaneous—continued.**

be held free from the lien created by the mortgage-deed of B, on the ground that the four villages he had purchased were liable to their proportionate share of the mortgage-debt only and as two of them had already been sold and fetched more than the proportionate share of the four taken together, the other two were absolved from further liability on the principle of contribution. *Held* that the suit as brought was not maintainable, as it was not competent to the Court to abrogate the conditions of the mortgage by a declaration releasing any one part of the hypothecated property from its proportionate chargeability. **AHMAD UD-DIN v. SHEORAJ SINGH, A.W.N. 1882, 38.**

(34)—*Registered mortgage deed signed by one party only—Breach of undertaking by other party—Limitation Act, sch. II, art. 116—Plaint, disclosure of cause of action in, when deemed sufficient.*—During the pendency of a second appeal in the High Court of a second appeal in a suit on a promissory note that the present defendant had brought against the present plaintiff, a compromise was arrived at by which the latter undertook to execute and did execute a mortgage for a certain sum of money to the former who, in turn, was to file petitions and stay the appeal releasing the responsibility of the plaintiff. The defendant, however, in spite of the compromise which he failed to notify to the Court obtained a decree in his suit and executed the same. Plaintiff now sued as for recovery of the amount so taken from him in execution, alleging that the cause of action for such suit arose on the date when the money was collected by the defendant under his decree. Although the only right of action to which the plaintiff was entitled was the right to recover damages as for the breach of the undertaking by the defendant to withdraw the second appeal, yet, it was held that since all the necessary allegations had found place in the plaint, and the defendant had understood what the claim against him was and had not been prejudiced by the plaintiff's omission to ask specifically for damages, the plaint disclosed a sufficient cause of action. Nor was the suit barred by limitation by reason of the breach by the defendant having occurred more than three years before the suit was filed. The defendant's agreement to withdraw the second appeal was embodied in the registered mortgage instrument which he accepted from the plaintiff, and the fact that that instrument was not signed by the defendant did not take the case out of the operation of art. 116 of the Limitation Act. **KHOTAPPA v. VALLUR ZAMINDAR, 25 M. 50. [F., 35 C. 683=12 C. W.N. 628=9 C.L.J. 1; Appr., 25 M. 55=11 M.L.J. 318.]**

(35)—*Usufructuary mortgage—Acknowledgment before Act XIV of 1859—Limitation—Mutation of names, proceedings for.*—In cases of mortgages executed before Act XIV of 1859, an acknowledgment of the mortgagor's title must be made within 60 years from the date of

Mortgage—continued.**—14.—Miscellaneous—continued.**

the mortgage, so that it may serve as a new starting point of limitation. Otherwise, the suit will be barred after the expiry of 60 years from the date of the mortgage. An application by the successor of an usufructuary mortgagee for mutation of names in the Collectorate Register as such mortgagee, being only an official proceeding, does not amount to an acknowledgment of title made to the mortgagor so as to keep alive the right of the latter to redeem. **FATIMA TULNISSA BEGUM v. SUNDAR DAS, 27 C. 1004, P.C.=27 I.A. 103=4 C. W. N. 565=7 Sar. 718. [R., 31 C. 314, 28 A. 333=3 A.L.J. 113=A.W.N. 1906, 23, 11 Bom. L.R. 318, 19 M.L.J. 288=5 M.L.T. 208.]**

(36)—*First and second mortgage—Dispossession of second mortgagee—Cause of action—Limitation.*—Where there were two mortgages on the same property, the condition in each being that, on failure to repay the amount within a fixed time, the mortgagee should be put in possession; the second mortgagee obtained a decree on his mortgage, and, in execution of it, took possession; the first mortgagee then sued on his mortgage, obtained a decree, and in execution of it ousted the second mortgagee; and finally the heirs of the mortgagor discharged the debt of the first mortgagee and resumed possession—*Held*, in a suit by the second mortgagee against the heirs of the mortgagor for possession of the lands; that the cause of action for the plaintiff arose, not on the date of his dispossession by the first mortgagee, who had a better title, but on the date when the heirs of the mortgagor, after discharge of the first mortgage, entered into possession of the land. When the first mortgage was paid off, the title of the plaintiff, which was always a good title against the mortgagor, was a valid title against every one, and when his title became a valid and good title, the heirs of the mortgagors had no right to enter upon the possession of their land. *Held* also, that the plaintiff cannot claim interest on the mortgage amount for the period during which he was dispossessed, as this was a suit for possession of the mortgage property and not for the mortgage amount. **NARAIN SINGH v. SHIMRHOOG SINGH, 1 A. 325=4 I.A. 51, P.C. [F., 38 P.R. 1894, 83 P.R. 1894, 2 O. C. 145 (Bench), 4 O.C. 171; D., 5 C.L.R. 227.]**

(37)—*Mortgage by conditional sale—Prior and puisne mortgages—Payment by puisne mortgagee, defendant in prior mortgagee's suit for foreclosure of amount due on prior mortgage—Application by puisne mortgagee for order absolute for foreclosure—Application refused—Separate suit by puisne mortgagee for foreclosure—Act IV of 1882 (Transfer of Property Act), s. 74—Civ. Pro. Code, s. 244.*—In July 1889, one Fateh Chand executed a mortgage by conditional sale of a certain village in favour of Bansidhar and Kunj Bibari Lal. In October, 1889, Fateh Chand executed a second mortgage of the same village, also by way of conditional sale, in favour of Bansidhar and Anant Ram. In October, 1891, Anant Ram transferred his

Mortgage—continued.**—14.—Miscellaneous—continued.**

interest in the second mortgage to Gaya Prasad. In September 1893, Bansidhar and Kunj Bihari instituted a suit for foreclosure of their mortgage. To that suit Raj Kumar, the son of the original mortgagor, and Gaya Prasad were made defendants. On the same date, Gaya Prasad instituted a suit for foreclosure under the puisne mortgage of October 1889. On the 22nd December, foreclosure decrees were passed in both suits, and six months' time was allowed for redemption. The time allowed for redemption was extended from time to time, and ultimately, on the 3rd of January 1896, Gaya Prasad paid into Court the sum which was due to the mortgagees on the mortgage of July 1889, which sum was drawn out by the mortgagees. Subsequently to this payment into Court, Gaya Prasad applied to the Court in the suit on the prior mortgage, and prayed that the right of the defendant in that suit to redeem the mortgage property might be extinguished, and an order absolute for foreclosure granted in the applicant's favour. This application was refused, on the ground that Gaya Prasad was only entitled to bring a suit for foreclosure and "had not acquired the status of a decree-holder," and that, while he was a defendant, he could not execute the decree as a decree-holder, and could not get a decree for absolute foreclosure. There was no appeal from this order, but Gaya Prasad submitted to it and brought a separate suit for foreclosure. *Held*, that, under the above circumstances, no such separate suit for foreclosure would lie. **BANSIDHAR v. GAYA PRASAD, 24 A. 179 = A.W.N. 1902, 3. (12 A. 61, 13 A. 278, 21 C. 818, R.) [Reversed, 27 A. 325, P. C. = 2 A.L.J. 336 = 9 C.W.N. 577 = 2 C.L.J. 173 = 7 B.L.R. 427 = 15 M.L.J. 191 = 32 I.A. 123; R., 26 A. 504 = A.W.N. 1904, 103, 27 A. 400 = A.W.N. 1904, 284 = 2 A.L.J. 13; D., 27 A. 403 = 2 A.L.J. 23 = A.W.N. 1905, 11.]**

(38) — *Sub-mortgage of mortgagee-rights—Acquisition of right of redemption by mortgagee—Effect—T.P. Act, IV of 1882, ss. 88, 89—Sub-mortgagee's right to sue for sale.*—Where a mortgagee sub-mortgages his right and subsequently acquires the right of redemption also, the accession in interest enures for the benefit of the sub-mortgagee who is thus enabled to sue for sale of the entire proprietary right. (3 C.W.N. 323, 5 C. 198, R.) [*F.*, 33 C. 1212.] A mortgagee's right cannot be ordered to be sold under ss. 88, 89 of the T.P. Act. **AJUDHIA PRASAD v. MAN SINGH, 25 A. 46 = A.W.N. 1902, 176. (13 A. 432, 18 A. 113, R.)**

(39) — *Mortgagee by mortgage of his rights as such, but without assignment—Rights of sub-mortgagee as against original mortgagee—Rights of puisne mortgagee—Transfer of Property Act (IV of 1882), Chap. IV—"Property," meaning of.*—G.P. and J.K. executed a mortgage-deed, whereby they mortgaged their mortgagee rights in certain properties, but made no assignment of the mortgage. The sub-mortgagees

Mortgage—continued.**—14.—Miscellaneous—continued.**

brought a suit for sale of the mortgaged properties. *Held* that the sub-mortgagees were entitled to bring to sale the interest mortgaged to them subject to the rights of redemption of the original mortgagor. (18 A. 113, *Overruled.*) *Per Stanley, C.J.*—The words 'mortgaged property' are used throughout Chapter IV of the Transfer of Property Act, as meaning the interest in specific immoveable property, which the mortgagor professes to transfer, whatever that interest may be. The words "property comprised in the mortgage," as used in s. 85, were probably intended to denote no more than the estate or interest, which is the subject of any particular mortgage, that is, if the mortgage be a mortgage of the absolute estate in the land, then the land itself, if it be a *puisne* mortgage, then the interest in the land of the mortgagor, that is, the equity of redemption. This would give the words the same meaning as the words 'mortgaged property' as used in s. 25 of the English Conveyancing Act of 1881. In a properly constituted suit, a *puisne* mortgagee may have a sale of the interest mortgaged to him, subject to the rights of a prior incumbrancer. *Query*—Whether such incumbrancer is a person having an interest in the equity of redemption, which alone can be the subject of a subsequent mortgage, within the meaning of s. 85, Transfer of Property Act? He holds under a paramount title and cannot be prejudiced by a sale of the equity of redemption. *Per Banerji, J.*—There is nothing in the Transfer of Property Act which forbids a sub-mortgage. In the case of a sub-mortgage, the property, which is the subject of the mortgage, is the interest of the sub mortgagor as the original mortgagee. And as it is this interest which is the mortgaged property, the sub-mortgagee is entitled, under s. 67 of the Act, to an order for the sale of such interest. Any other view would place the sub-mortgagee in the same position as the holder of a simple money debt, and the pledge made in his favour would be no security at all. *Per Aikman, J.*—In the Transfer of Property Act, the Legislature has divided the Act into sets of sections with headings prefixed. These headings may be regarded as preambles to those sets of sections, and may, therefore, be legitimately consulted for the purpose of ascertaining the meaning of the statute. There is no privity between the sub-mortgagee and the original mortgagor. There is nothing in the Transfer of Property Act, which would render a sub-mortgage invalid, or prevent its enforcement as a lawful contract. **RAM SHANKAR LAL v. GANESH PARSHAD, 4 A.L.J. 273, F.B. = A.W.N. 1907, 97 = 2 M.L.T. 248 = 29 A. 385. (13 A. 432, Diss.; 8 A. 105, F.B., *Appr.*) [*F.*, 31 M. 530 = 18 M.L.J. 564; *Appl.*, 10 C.L.J. 470; R., 2 Ind. Cas. 495, 31 A. 352 = 6 A.L.J. 427, 9 C.L.J. 429 = 2 Ind. Cas. 645; D., 31 M. 425 = 18 M.L.J. 298 = 3 M.L.T. 397.]**

(40) — *Purchase in execution of decree in suit for contribution—Purchase in execution of simple*

Mortgage—continued.**—14.—Miscellaneous—continued.**

money-decree—Priority—Charge—Transfer of Property Act (IV of 1882), s. 95.—Held that apart altogether from s. 95 of the Transfer of Property Act, where B, a purchaser of certain property under a simple money decree, has redeemed the whole mortgaged property, he has a charge on the shares of the other mortgagors and having obtained a decree for sale of their property and having caused that property to be sold, the purchaser's claim has priority over that of an auction purchaser at a sale in execution of a simple money decree, which sale was subsequent to B's decree though prior to B's sale. **MAHESH DUTT PANDEY v. TULSEE RAM, A.W.N. 1906, 178.**

(41)—*Suit on mortgage executed by managing member of joint Hindu family—Parties.*—Where the plaintiff who had two mortgages executed by the managing member of a joint Hindu family, got a decree against the mortgagor alone on the later mortgage, and then brought a suit on both the mortgages against the mortgagor and other members of the family, *held* that the latter were properly made parties to the suit and that the plaintiff was entitled to separate declarations as to both mortgages in the same decree. **JAS RAM v. SHER SINGH, 25 A. 162 = A.W.N. 1902, 223. (21 A. 301, 22 A. 307, 22 A. 394, R.)**

(42)—*Decree obtained by mortgagees against mortgagors—Purchasers of mortgagors' interest, not parties to decree.*—A decree obtained by the mortgagees against the original mortgagors does not bind the purchasers of the interests of the mortgagors when the latter were no parties to that decree, and when the transfer to them was before the institution of the suit in which the decree was passed; and the purchasers are in no way bound by the result of that suit. **BASUDEB GIRI v. BROJOMOHAN JANA, 7 C. W.N. 54.**

(43)—*Tenant-in-common—Mortgage by one of two co-tenants—Deterioration of mortgagor's interest by wrongful act of other co-tenant—Suit by mortgagee for damages against wrong-doer, maintainability of—Cause of action, accrual of—Limitation Act, art. 49, applicability of.*—A certain person who was a tenant-in-common with the defendant, mortgaged her interest in certain lands which contained trees to the plaintiff. Pending appeal in the suit instituted by the plaintiff to recover the mortgage-amount by sale of the mortgaged property, the defendant cut down all the trees on the land and appropriated the same to himself. In execution of his decree, the plaintiff realised only a portion of the decretal amount, by sale of the mortgagor's interest in the land, which took place after the removal of the trees. The suit was for damages for the injury caused to him by the defendant having appropriated to himself the mortgagor's share of the wood cut and was instituted within three years of the act complained of. The contention of the defendant was that the suit was not maintainable

Mortgage—continued.**—14.—Miscellaneous—continued.**

and was barred by limitation. *Held*, that the plaintiff-mortgagee was entitled to maintain an action for any wrongful act done by the mortgagor or by his authority or by any stranger, essentially impairing the mortgage-security. From the time of his lending money, the mortgagee, whether he be in or out of possession, acquires the right to have the mortgaged property secured from deterioration in the hands of the mortgagor or of any other person to whose rights those of the mortgagee are superior. *Held*, also, that the suit was governed by art. 49 and was not barred by limitation. It was not the act of cutting down all the timber, but the defendant's subsequent appropriation of the wood which ought to have been left for the share of the mortgagor that operated to the injury of the plaintiff, and limitation began to run only from the date when the defendant appropriated the wood to himself. **AIYAPPA REDDI v. KUPPUSAWMY REDDI, 28 M. 208 = 15 M.L.J. 249. [F., 28 M. 244, 18 M.L.J. 186; Appr., 30 M. 88, 16 M.L.J. 503 = 1 M.L.T. 377; R., 5 M.L.T. 210.]**

(44)—*Suit by one of two co-mortgagees for his half of the mortgage-amount, maintainability of.*—One of two mortgagees claiming to be severally, and not jointly, entitled to what was due under the mortgage, sued for half the amount due to him bringing as a defendant the other mortgagee, who was entitled to the other half and who had refused to join him as a plaintiff. *Held*, that the suit was maintainable as such and the procedure regular and that the decree in such cases ought to direct that, on the sale of the mortgaged property, the amount realised should be paid to the two mortgagees in due proportion to the sums due to them. **ATCHAMMA v. SUBBARAYADU, 15 M.L.J. 496.**

(45)—*Joint mortgage of several villages—Execution against one village—Owner of one village suing the owner of another for contribution—Whether the latter village would be liable for the mortgage.*—A who had a decree for a large amount enforcing a joint mortgage of 31 villages applied for execution against one such village S, and realised a certain amount. The owner of S sued the owner of another village H, the predecessor in title of the plaintiff in the present suit, for contribution, and obtained a decree and realized a certain amount by sale of the village. Thereupon A applied for execution and put the same village for sale. The plaintiff, therefore, brought the present suit for a declaration that the village would not be liable. *Held* that the suit was not maintainable. If the payment of contribution by the contributors to a portion of the debt obliterated the lien-holder's lien over the villages in the possession of the contributors, the lien-holders' security would melt away under action taken by the contributors to adjust their payments to one another, and the lien-holder would derive no benefit from these arrangements made by the contributors *inter*

Mortgage—continued.**—14.—Miscellaneous—continued.**

se: he could not control them, nor the results arising out of them; and he would be left without remedy in recovering his debt. *RAM CHAND v. SHEORAJ SINGH*, A.W.N. 1882, 56.

(46)—*Mortgage of several shares—Payment of whole amount by one sharer—Suit for contribution.*—The respondent and three others, co-sharers, mortgaged their shares and borrowed a certain amount. Two of them redeemed their shares and were released from all further liabilities. The mortgagee having obtained a money decree against K, one of the remaining two co-sharers, purchased that share in execution. The share was sold to the appellants for consideration. The mortgagee sued the respondent and K on the original mortgage-bond and obtained a decree against them both. In execution of this decree, the mortgagee caused the respondent's share alone to be proclaimed for sale, and in order to save it, the respondent was obliged to satisfy the decree. Now, the respondent sued to recover the contribution due from K and joined the appellants as defendants on the ground that the share of K in their lands was still liable to contribute its proportionate share of the amount secured by the bond. *Held* that, as the respondent offered no objection to the sale of K's share in execution of the money-decree, and as neither in the suit brought by the mortgagor against him, and K, nor in the proceedings taken in execution of that decree, did he raise any question as to the propriety of the mortgagee's conduct, or in his bringing the share of him, the respondent alone, to sale, the respondent could not claim in the present suit to stand in the position of the mortgagee of the original mortgage bond, so as to be entitled to enforce a lien upon the share of his co-mortgagor in the hands of third parties, purchasers for value. *KUSHAL SINGH v. DEBI*, A.W.N. 1881, 7.

(47)—*Joint mortgage—Liability, whether joint or several.*—The co sharers of an estate mortgaged it for a certain amount. The deed of mortgage contained also details of the share of each co-sharer of such estate; it did not contain a condition that each co-sharer might redeem his share by the payment of the share of the mortgage-money he had received. *Held* that the mortgagors were jointly liable for the whole sum advanced, and each mortgagor was not liable only to the extent of the money received by him. *SUKHNANDAN PRASAD v. GOPI CHARAN*, A.W.N. 1881, 11.

(48)—*Mortgage—Subsequent partition—Mortgagee's rights.*—The appellant sued for possession of certain land which had fallen to his share on partition of the mahal in which such land was situate. The land was in the possession of a usufructuary mortgagee, to whom it had been mortgaged before partition. *Held*, that the partition could not affect the rights of the mortgagee or change the character and extent of his security. The only possession the

Mortgage—continued.**—14.—Miscellaneous—continued.**

appellant could get of the property must be that of a mortgagor. *MADHO RAM v. KISHEN DIAL*, A.W.N. 1881, 31.

(49)—*Mortgage—Undivided share—Decree*—One of two co sharers of a house gave the plaintiff a simple mortgage of the house and subsequently sold it to a third person. In a suit brought against the purchaser and the mortgagor, the Court of first instance gave a decree, but the lower appellate Court reversed the decree on the ground that the mortgage was invalid, having been made without the consent of the other co-sharer. On second appeal, it was *held* that the decree of the lower appellate Court was wrong, but that the plaintiff ought not to be given a decree for a moiety of the house. *CHAIN SUKH v. ABU ALI*, A.W.N. 1881, 88.

(50)—*Mortgage—Release by mortgagee of the share of one of two joint mortgagors.*—It is competent to a mortgagee who holds a joint mortgage from two mortgagors to release the share of one mortgagor and realize the mortgage-debt from the share of the other only. In such a case, the right of the other to obtain contribution from the mortgagor whose share is released is unimpaired. *JAI GOBIND v. JASRAM*, A.W.N. 1898, 120. [R., 28 A. 174, F.B.=2 A.L.J. 630=A.W.N. 1905, 244; Diss., 33 C. 613=10 C.W.N. 551=3 C.L.J. 576.]

(51)—*Mortgage—Joint mortgagees—Rights of joint mortgagees as to realization of mortgage money.*—One of two joint mortgagees sued for her moiety of the mortgage debt and obtained a decree for sale of the whole mortgaged property. The other mortgagee would not join as plaintiff in that suit and was accordingly made a defendant. Subsequently the other mortgagee sued the mortgagor for recovery of his moiety of the mortgage debt by sale of the whole mortgaged property. *Held* that such a suit would not lie. *KANHAI LAL v. JWALA DEI*, A.W.N. 1896, 153.

(52)—*Of share of undivided joint property.*—If a sharer has an absolute right to dispose of his or her share, it follows that he or she may dispose of it whilst it is a share, and while the property is undivided. If a person who has only a share in property mortgages or joins in mortgaging such property, his doing so does not affect the shares of his co-sharers, but the mortgage is good and valid as regards his own share. *MAUNG THA NU v. MAUNG KYA ZAN*, L.B.R. 1903—1904, Vol. II, 167. (L.B.R. 1872—1892, 378, L.B.R. 1893—1900, 65, L.R.I.A. 106, 24 B. 385, F.) [R., L.B.R. 1907—1908, 128, L.B.R. 1905—1906, 66, 14 Bur. L.R. 205=4 L.B.R. 108.]

(53)—*Joint grant—Mortgage of undivided share before division—Share falling to another's lot—Effect.*—Where one of several persons, to whom land has been granted jointly, mortgages certain specified portion as representing his undivided share in the whole, and the said

Mortgage—continued.**—14.—Miscellaneous—continued.**

portion falls to the share of another person in a subsequent division, the latter acquires a complete title to that portion as against both the mortgagee and mortgagor, provided the division was not affected by fraud. *PULLAMMA v. PRADOSHAM*, 18 M. 316 = 5 M.L.J. 148.

(54)—*Mortgage of share of joint holding—Part of mortgaged land already alienated at date of mortgage—Liability of mortgagor to make good deficit from remainder of holding to which he has subsequently succeeded.*—Where in a joint holding consisting of a number of plots, one of the sharers mortgages his share mentioning the numbers of specific plots, all that the mortgagee obtains is a right to a partition; if in the partition, these specific plots fall to the share of the mortgagor, the mortgagee will obtain such plots; if not, he would be entitled to be compensated by the substitution of other land falling to the mortgagor's share. If a person mortgages property which is not his, and to which he has no title, and subsequently acquires a good title to it, he is bound to carry out the mortgage. This is a well known principle of equity. But if he mortgages a portion of his own share of a joint holding, which he has already alienated, he is no more bound, under the law of estoppel, or the equitable principle quoted above, to make the amount good out of the other half share to which he has succeeded subsequently, than he would be if the two plots had been entirely separate before the mortgage. *BABU RAI v. NATHU*, 32 P.R. 1900. [R., 89 P.R. 1903.]

(55)—*Mortgagor—Imposition of easement by mortgagor incompetent to deteriorate mortgaged property—Security rendered insufficient—Onus.*—A mortgagor in possession is incompetent without the sanction of the mortgagee, to do an act which may turn out to be destructive or permanently injurious to the mortgaged property. The validity of such an act, must be proved by the mortgagor or his representative in interest who must also establish that the act did not deteriorate the security. *BHAGWAN DEVI v. BUNYADI KHANUM*, 85 P.R. 1902.

(56)—*Mortgage to pay off earlier mortgage—Security turning out invalid—Additional security, equitable title to—Payment of mortgage—Extinction of charge—Presumption.*—Where money is lent upon a mortgage of immoveable property to pay off an earlier mortgage, the lender must be presumed to have lent it only upon the security expressed in the bond and stipulated for by him; equity cannot give an additional security, when and because the security relied upon turns out to be bad, as regards a portion of the lands included therein. Where money was borrowed upon mortgage of immoveable property for paying off an earlier mortgage, and the mortgagor claimed to be the owner of the property, and there was no intermediate incumbrance, it must be presumed that the money was intended to be applied in paying

Mortgage—continued.**—14.—Miscellaneous—continued.**

off the earlier mortgage and in extinguishing the charge. *MOHESH LAL v. MOHANT BAWAN DAS*, 9 C. 961 = 10 I.A. 62 = 13 C.L.R. 221, P.C. [F., 2 C.L.J. 202; R., 54 P.L.R. 1903 = 32 P.R. 1903, 4 C.L.J. 121 = 10 C.W.N. 1010 = 33 C. 1133; *Commented on*, 12 C.P.L.R. 70; D., 13 A. 581, 38 P.R. 1894.]

(57)—*Mortgagee residing on property managing for benefit of himself and co-mortgagees—Salary or allowance not allowed.*—A mortgagee residing on the property and managing it for the benefit of himself and his co-mortgagees cannot be allowed either a salary or allowance for his maintenance. *KADIR MOIDIN v. NEPEAN*, 26 C. 1, P.C. = 2 C.W.N. 665.

(58)—*Actual payment of mortgage debt necessary for freeing property mortgaged from charge.*—A mortgagor, while still maintaining the mortgaged property for himself, cannot by any act of his other than actual payment of the mortgage-debt get that property freed from the charge which he himself has created. (5 C.L.R. 227, R.) A mortgagor, by his purchase from the first mortgagee under a power of sale, cannot defeat the title of the second mortgagee. (*Otter v. Lord Vaux*, 2 K. and J. 650, 17 C. 32, R.) The mortgaged property still remains liable to a fresh sale, when a mortgagor-judgment-debtor himself is the purchaser at a previous execution-sale under a mortgage-decree, and the decree remains unsatisfied. *RAGHUNATH SAHAY SINGH v. LALJI SINGH*, 23 C. 397. [F., 25 A. 371 = 23 A.W.N. 75; R., 5 C.L.J. 95 = 11 C.W.N. 284]

(59)—*Proprietor of an estate and Hindu widow or shebait, distinguished—Mortgagor and mortgagee—Interest of mortgagee.*—A Hindu widow or a shebait must be held to represent the estate completely, as otherwise there could be no one to represent such estate. But the same thing cannot be said of the proprietor of an estate after he has mortgaged it. The mortgagee can always be ascertained; very often his interest in the estate may be much greater than that left in the mortgagor, or, where after a decree it was no part of the mortgagor's interest to protect the incumbrance, the interest of the mortgagor and the mortgagee are not identical. The balance of justice and expediency, therefore, is decidedly in favor of not allowing a mortgagee to be bound by a decree passed against a mortgagor, after the date of the mortgage. The provisions of the rent law do not furnish clear reasons against that view. A decree for rent of a tenure obtained against the registered tenants binds an unregistered transferee of the same, who can show no sufficient cause for not registering his name, and may be enforced by sale of the tenure. (12 B.L.R. 484, R.). But whether any such sale was insufficient conformity with the rent law to be operative in annulling a prior mortgage, or other incumbrance, must have to be determined in the presence of the party claiming the benefit of

Mortgage—continued.**—14.—Miscellaneous—continued.**

the incumbrance. *SOSHI BHUSUN GUHA v. GOGAN CHUNDER SHAHA*, 22 C. 364. (18 W. R. 206, 4 C. 520, R.) [R., 5 M.L.T. 37.]

(60)—*Mortgage of hak, sale of property in execution of decree on—Absence of Collector's certificate to mortgagee under Act XXIII of 1871 s. 6, effect of, on purchaser's title.*—This suit was instituted with the permission of the Collector for a declaration of the plaintiff's right to be the holder of a *desaigiri hak* against the defendant who was the purchaser at an auction sale in execution of a decree passed in a suit instituted by a mortgagee against the plaintiff, as the representative of the original mortgagor to enforce the mortgage-debt by sale of the *hak*. Plaintiff urged that the proceedings in the suit by the mortgagee took place without the certificate of the Collector as required by s. 6 of Act XXIII of 1871 and therefore conferred no title on the defendant, and it was held that in the previous suit the Court had clearly no jurisdiction, as regards the subject matter, to entertain the suit, and the decree was therefore null and void and could not constitute the basis of any title in the purchaser or preclude the plaintiff from maintaining his right to the *hak* as a life holder thereof. *VASANJI HARI-BHAI v. LALLU AKHU*, 9 B. 285. [R., 28 M. 84=14 M.L.J. 468; D., 28 B. 125.]

(61)—*Ancestral estate—Conflicting claims of alleged co-heirs—Evidence of separate possession by one branch of family—Effect of mortgage by that branch.*—The attention of the Courts below must be invited to the instruction on the subject of documentary evidence, and they must be asked to see that they are carefully followed in future. It may be noted in this place that stamp-duty and penalty appear to have been levied on a number of documents executed in the time of the Burmese Government. If this is really so, the District Judge will have to take measure for the refund of the amounts improperly exacted on documents executed before the introduction and for the setting aside of any proceedings that may have been incorrectly instituted in the matter. *MAUNG PON GYAW v. MAUNG SAUNG GYI*, U.B.R. 1892—1896, Vol. II, 558.

(62)—*Covenant by mortgagor to pay within stipulated period—Post diem interest.*—Whether *post diem* interest is or is not payable, depends entirely upon the intention of the parties to a contract, to be gathered from its terms. If it is their intention, that interest should continue to be paid even after the due date, the amount accruing due may be recovered as *interest*. If such is not their intention, it may be recovered as damages, so long as the principal remains unpaid. Such damages may be recovered for six years before suit, the cause of action accruing every moment of the time during which the principal remains unpaid. *MATHURA DAS v. RAJA NARAIN BAHADUR PAL*, 1 C. W.N. 52, P.C.=19 A. 39=23 I.A. 138. (17 A. 581, F.B., Overruled.) [F., 20 M. 149, 20

Mortgage—continued.**—14.—Miscellaneous—continued.**

M. 371, 20 A. 171, 25 C. 246, 11 M.L.J. 183; R., 23 M. 534=10 M.L.J. 101, 24 C. 699, F.B.=1 C.W.N. 437, 20 A. 219, 23 M. 637.]

(63)—*Mortgage subject to some encumbrance—Subsequent removal of the encumbrance—Mortgagee's security, increase of—Accession to mortgaged property—Sale in execution of money decree—Property subject to mortgage*—When a person mortgages his interest in a property—that interest being restricted or limited in some manner at the time of the mortgage—the mortgagee's lien is not limited to the interest so restricted and does not cease on the restriction being removed. The enlargement of, or the removal of encumbrances from, the estate of a mortgagor, effected by himself, will generally enure to the benefit of the mortgagee by increasing the value of the security. [F., 33 C. 1212; R., 25 A. 46, 11 C.W.N. 284=5 C.L.J. 95.] The purchaser at a sale in execution of a money-decree takes subject to a previous mortgage. *SHYAMA CHURN BUTTACHARJEE v. ANANDA CHANDRA DAS*, 3 C.W.N. 323.

(64)—*Mortgage—Right to purchase in favour of mortgagee—Part-payment of mortgage money after date fixed for redemption—Forfeiture of right to purchase.*—Where a mortgage instrument provided for a right of purchase in favour of the mortgagee on default in the payment of the mortgage money within a certain time and the mortgagee received certain amount in part-payment of the mortgage money after the expiration of the term limited for the redemption of the mortgage, the mortgagee lost his right to purchase by reason of such receipt. *VENKATACHARI v. ANANTACHARI*, 1 M.H.C. 69.

(65)—*Mortgagee not entitled to sale proceeds—Mortgaged property attached and brought to sale in suit by creditor of mortgagor—Mortgagee's right—Surplus sale proceeds.*—A mortgagee is not entitled to be paid from the sale proceeds of property attached and sold in a suit instituted by a creditor of the mortgagor, in preference to the judgment-creditor at whose instance the property was attached. The surplus, if any, may be paid to the mortgagee, when there are no other unsatisfied decrees against the mortgagor, provided the sale was not made with notice that the right, title and interest of the execution-debtor was that of the mortgagor. *KUPPAIYA CHETTI v. THASAMATHASI CHETTI*, 4 M.H.C. 49.

(66)—*Execution-purchaser—Subsequent decree by mortgagee.*—A decree-holder, who himself purchases his judgment-debtor's property at the execution-sale, during the pendency of a suit by the mortgagee of the same property, gets only the right and interest of the mortgagor in such property viz., the equity of redemption, and does not acquire the property free from the encumbrance created by the debtor. (21 W.R. 349, F.) The mortgagee was held to be relieved of the obligation, if any had existed, of giving the decree-holder notice of his

Mortgage—continued.**—14.—Miscellaneous—continued.**

proceedings in execution of the decree establishing the mortgage lien as the latter, by his own conduct, made it impossible for the mortgagee to be aware that he claimed any interest whatever in the mortgaged property. *LALA KALI PROSAD SINGH v. BULI SINGH*, 4 C. 789=3 C.L.R. 396. [R., 2 O.C. 330.]

(67)—*Mortgage decree—Prior Revenue sale—Subsequent suit by mortgagee for lien over balance of sale proceeds attached by mortgagor's creditors—Act VIII of 1859, s. 7.*—A suit by the mortgagee to establish his mortgage debt and his lien on the mortgaged properties alone against the mortgagor would not, under s. 7 of Act VIII of 1859 (old Civ. Pro. Code), bar a subsequent suit by him against certain attaching creditors of the mortgagor for a declaration of his lien over the balance of money realised by sale of the properties for arrears of revenue, though such revenue sale had been effected at the time of the first suit. The decree in the first suit declaring the lien on the mortgaged properties would cover the balance of sale money in the Collector's hands, such money representing the properties as between the mortgagee and mortgagor's attaching creditors. *KRISTO DASS KUNDU v. RAM KANT ROY CHOWDHRY*, 6 C. 142=7 C.L.R. 396. (16 W.R. 222, F.) [R., 87 P.R. 384.]

(68)—*Mortgage during infructuous attachment—Subsequent attachment and sale—Effect.*—Where property had been attached prior to a mortgage, under an *ex parte* decree which was set aside, the attachment being withdrawn, and the property was purchased under a subsequent attachment under a subsequent decree, the purchaser cannot set up his purchase as against the earlier mortgage. *RADHANATH KUNDU v. LAND MORTGAGE BANK OF INDIA, LTD.*, 6 C. 559=8 C.L.R. 10.

(69)—*Notice—Mortgage and lease—Provision to give notice to mortgagee in case of sale of property—Withdrawal by mortgagor of sale proceeds.*—On the date of the mortgage, the mortgagor granted a lease to the mortgagee, extending over a number of years, in which provision was made for the satisfaction of the mortgage-debt. The mortgage-deed provided that in the event of the sale of the interests of the mortgagor, the mortgagee could take the amount lent by him from the surplus sale proceeds by throwing up his lease. The mortgaged property was sold as contemplated. *Held*, that the mortgage deed gave an option to the mortgagee to throw up his lease and claim immediate payment out of the sale proceeds. Consequently, before the mortgagor could withdraw the surplus sale proceeds from the Court, it was necessary for him to give notice to the mortgagee of his intention to do so, in order to enable him to determine whether he would take advantage of the particular clause in the mortgage deed or continue to hold on under the mortgage. *BHOOBUN JOY ACHARJEA v. ANUND LALL CHOWDHRY*, 22 W.R. 47.

Mortgage—continued.**—14.—Miscellaneous—continued.**

(70)—*Mortgage—Power of sale—Surplus proceeds—Interest from date of sale—Tender, when effective.*—A mortgagee sold the mortgaged property under his power of sale and had some surplus left in his hands. *Held* that the mortgagee was bound to pay the surplus to the mortgagor with interest from the date of sale. The mere fact that the mortgagee kept the money idle in his hands cannot absolve him from his liability to the claim of the mortgagor for interest. [R., 6 O.C. 135.] A tender of only part of what is admittedly due is bad and ineffectual. The rule laid down in *Dixon v. Clark*. (5 C.B. 365=16 L.J.C.P. 237) applies only where the party making the tender admits more to be due than is tendered. A plea of tender before action must be accompanied by a payment into Court after action. *HAJI ABDUL RAHMAN v. HAJI NOOR MAHOMED*, 16 B. 141. [Diss., 4 L.B.R. 103; Appr., 11 C.L.J. 226=14 C.W.N. 617=5 Ind. Cas. 165; R., 5 C.L.J. 270=34 C. 305, 4 M.L.T. 335; D., 5 C.L.J. 78, Note.]

(71)—*Prior mortgage on property—Notice of sale by mortgagee to mortgagor—Subsequent mortgage—Offer to redeem—No notice to subsequent mortgagee by prior mortgagee—Delay in selling—Rescission of notice—Injunction to restrain sale by prior mortgagee—Prior mortgagee's rights.*—The plaintiffs in this case were subsequent mortgagees (3-9-1891) and the defendants' prior mortgagees (1885) of the same property. Under the power of sale contained in their mortgage, the defendants gave notice of sale to the mortgagors on 31-8-1891, but they did not proceed any further in the matter. The plaintiffs alleged that, on 18-11-1892, they offered to transfer their mortgage to the defendants or to join with them in selling the property, that in case the defendants did not accept any of these proposals, they requested the defendants to render an account of the sum due to them in order that their mortgage might be redeemed, but that the defendants did not comply with any of these proposals, and that the defendants, in collusion with the mortgagors, for the purpose of defrauding the plaintiffs, had advertised the property for sale on 27-4-1893 without giving notice of sale to them. The plaintiffs, therefore, brought the present suit, offering to redeem the defendants (as prior mortgagees) and for obtaining an injunction restraining the defendants from selling the mortgaged property. *Held*, (1) that no notice need be given to the plaintiffs, they being assigns who must take things in the estate in which they find them, and they cannot claim to alter rights which accrued before they had any authority to interfere. Proper notice having been given to the mortgagors on 31-8-1891. (i.e.) previously to the time when the plaintiffs had any interest in the equity of redemption, any further notice would not be required to be given to any one, who at that time was not an assign, for enabling the defendants to sell under that notice. (2) and that the evidence in the case showed that the plaintiffs were never willing and ready

Mortgage—continued.**—14.—Miscellaneous—continued.**

to redeem the defendant's mortgage, because they had not the money in hand and because they had to make arrangements for obtaining it, and (3) that an injunction could not be granted in this case, because the mortgage-deed in question provided that "the remedies of the mortgagors, their heirs, administrators, and assigns in respect of any breach of the clauses or provisions lastly hereinbefore contained, (i.e., with regard to notices and sales) or of any impropriety and irregularity whatever in any such sale shall be in damages." With reference to the contention advanced on behalf of the plaintiffs that, since there was a long delay between 31-8-1891 (when the notice was given by the defendants to the mortgagors) and the actual sale, that notice was rescinded and a fresh notice was necessary, the Court held that, there having been no actual withdrawal of the notice of 31-8-1891, the defendants were not bound to give a fresh notice before 27-4-1893, when they last brought the property to sale. The mere fact of a long delay taking place between the maturing of the notice of sale and the actual sale does not make a fresh notice necessary. *MUNCHERJI EURDOONJI MEHTA v. NOOR MAHOMEDBHOY JAIRAJBHOY PIRBHOY*, 17 B. 711.

(72)—*Mortgage—Prior and subsequent incumbrancers—Suit by prior mortgagee, to which puisne mortgagee was no party—Auction purchase of first mortgage decree—Subsequent assignment of first mortgagee's right—Redemption by second mortgagee—Apportionment of amount.*—In a suit brought by the first mortgagees of certain properties, to which the subsequent incumbrancers were no parties, a decree for sale was passed. This decree was attached in execution of certain money decree which a third person had obtained against the first mortgagees. He himself bought this property at Court auction and transferred the same. The second mortgagee subsequently brought a suit for sale on his mortgage and obtained a decree. But he was not permitted to bring the property to sale by reason of the prior mortgage. He thereupon assigned his decree. The assignee of the second mortgagee brought the present suit for redemption of the first mortgage. After the institution of the suit the first mortgagees conveyed to another all their rights under the mortgage and the decree obtained on their mortgage, and this transferee was also made a party to the suit. Held that the second mortgagee was entitled to redeem the first mortgage on payment of the whole amount found due upon the first mortgage with interest. Held further that the assignee of the entire rights of the first mortgagees was entitled to the whole amount which the second mortgagee had to pay for the redemption of the first mortgage with the exception of the purchase-money which had to be paid by the purchaser in auction sale held in execution of the decree for sale, which the representatives of the auction purchaser would be enti-

Mortgage—continued.**—14—Miscellaneous—continued.**

tled to (19 A. 527, Appr.) The rights of a puisne mortgagee who is not impleaded as a party to the suit brought by a prior mortgagee discussed. *WAHI-UN-NISSA v. GOBARDHAN DAS*, 25 A. 388, F.B. = A.W.N. 1903, 86. [R., 5 C L J. 315 = 11 C.W.N. 403.]

(73)—*Hindu Law—Mortgage by widow—Mother's right to maintenance—Possession of mother—Notice to mortgagee—Right of mortgagee.*—The plaintiff, as assignee of a mortgage executed by a widow of her husband's property, sued the widow and her mother-in-law for possession of the mortgaged property. The mother (second defendant in the suit), claimed a right to hold possession of the land unaffected by the mortgage executed by the widow. The lower Court, on the supposition that there was no other property out of which the second defendant could be maintained, held, that possession should not be given to the plaintiff until a proper arrangement was made by him in respect of her maintenance. Held, on appeal, that the lower Court was in error in making the second defendant's right to remain in possession dependent on there being no other property. It was unnecessary to decide whether, if there was such other property available for the purpose, the second defendant should be removed from possession. The mortgagees having lent the money with knowledge of her possession in virtue of her claim to maintenance, she must not be compelled to accept from the plaintiff maintenance in some other form in lieu of the land. *RACHAWA v. SHIVAYOGAPA*, 18 B. 679.

(74)—*Mortgage suit—Question whether suit amount belongs to mortgagee personally or to trust-funds in his hands—Evidence.*—In a suit by the creditor of a person to whose estate he had obtained letters of administration, for the recovery of a sum due on a mortgage which had been executed in favour of the latter, where it appeared that the latter was a trustee, and the Official Trustee appointed in his place after his death was also made a defendant, held that the Official Trustee could adduce evidence in this suit to show that the money was advanced out of the trust-estate. *SAKAH GABRIEL v. R. D. SOLOMON*, 4 C.W.N. 70.

(75)—*Pre-emption.*—Pre-emption before sale applies against an outsider only and not against a co-heir. *MAUNG CHEIK v. MAUNG TALOK*, U.B.R. 1897—1901, Vol. II, 511. (U.B.R. 1897—1901, Vol. II, 155, 162, R.)

(76)—*Mortgage—First mortgagee, suit by—Decree—Sale—Interest—Second mortgagee not party—Right to redeem.*—A purchaser at a sale in execution of a decree on a mortgage acquires the estate of the mortgagor as it existed when he executed the mortgage. (5 B. 8, 6 B. 495, R.) A prior mortgagee obtained a decree for sale against the mortgagor, and, in execution of that decree, purchased the property himself. When he entered on the land to take possession, he was resisted by a subsequent

Mortgage—continued.**—14.—Miscellaneous—continued.**

mortgagee who was not a party to the suit in which he obtained the decree. He then sued the subsequent mortgagee for possession. *Held* that the subsequent mortgagee was entitled to have an opportunity of redeeming the property from the plaintiff on payment of what was then due on the mortgage. **DADOBA ARJUNJI v. DAMODAR RAGHUNATH, 16 B. 486.** [R., 19 A. 527, 10 C. 53, 5 Bom. L.R. 892=28 B. 153, 5 C.L.J. 315=11 C.W.N. 403; D., 17 M. L.J. 431=30 M. 500.]

(77)—*Mortgage—Sale of equity of redemption—Purchase by mortgagee and possession whether amounts to adverse possession against true owner of equity.*—In the absence of any act showing that the mortgagee was asserting himself against the owner of the equity of redemption, the possession by the mortgagee cannot be deemed to have been adverse as against the true owner for purposes of limitation. The mere assertion of his claim by a mortgagee, based upon his purchase of the equity of redemption from a person having no title to it, could not in any way affect the right of the real owner of the equity. **PANDU v. ANPURNA, 21 B. 793.**

(78)—*Mortgage—Mokurruree lease by mortgagor—Suit by mortgagee for possession and for setting aside of lease—Onus of proof.*—Where plaintiff, a zur-i-peshghee mortgagee, sued for possession and for setting aside a mokurruree lease alleged to have been granted by the mortgagor to the defendant previously to the mortgage, and under which the defendant had been in possession as per order of a Criminal Court, *held*, that, in the first instance, it was for the plaintiff to give some evidence to impeach the validity of the mokurruree, that, on this being done and a strong *prima facie* case made out for impeaching the validity of the deed, the *onus* shifted, and that it was then incumbent on the defendant to show by satisfactory evidence that the mukurruree was really executed before the date of the zur-i-peshghee, and that it was granted *bona fide* for a real consideration and intended to be operative as between the mortgagor and the defendant (lessee). **SHAM-NARAIN v. THE ADMINISTRATOR, GENERAL OF BENGAL, 23 W.R. 111.**

(79)—*Prior mortgage—Purchaser of insolvents' rights, from Official Assignee.*—A prior mortgage established—as being *bona fide*, against a purchaser of the rights of the insolvent from the Official Assignee. **NADIROON-NISSA BEEBEE v. TARA CHUND BANERJEE, 1 W.R. 137.**

(80)—*Ganteedars—Dur-ganteedars.*—To a claim by the plaintiff as Dur-ganteedar, it was objected that the former Zemindars could not execute a lease to the prejudice of a mortgagee. But as the Gantee pottah was granted with the knowledge and consent of the mortgagee, it was held to be valid. **PRAN NATH ROY CHOWDHRY v. PREO NATH ROY CHOWDHRY, 1 W.R. 358.**

Mortgage—continued.**—14.—Miscellaneous—continued.**

(81)—*Mortgagee's right to—Sub-mortgagee's right on redemption by original mortgagor—Notice—Privity between original mortgagor and sub mortgagee.*—A mortgagee may make a sub-mortgage of his interest in the mortgaged property. There is privity between a mortgagor and his sub-mortgagee. If the original mortgagor, at the time he paid the mortgage money to his mortgagee, had no notice of the existence of a sub-mortgage, the sub-mortgage is extinguished and the sub-mortgagee has no claim upon the original mortgagor and cannot hold the property against him; but if the original mortgagor had such notice, the mortgage-debt due to the sub-mortgagee is not discharged by the payment to the original mortgagee, and the sub-mortgagee is entitled to hold the mortgaged property, until his sub-mortgage is redeemed. **NGA KYE v. NGA PO MIN, U B R. 1906, Sub-mortgage, 1.** (2 M. 212, 15 B. 692, 20 M. 35, 20 B. 549, 18 A. 113, 12 P.R. 1895, R.) [R., U.B.R. 1910, 4th Qr. Civil, 75.]

(81-a)—*Suit for redemption—Plea, conversion of mortgage into a sale—Burden of Proof—Map showing defendant as owner, production of—No sufficient indicia of ownership.*—The plaintiff respondent brought a suit for redemption. The defendant-appellant admitted the mortgage, but contended that it had been converted into a sale one year after the mortgage. There was no evidence for the defence except a map showing the defendant's name as the owner. *Held*, that the burden of proof lay on the defendant and that she had failed to discharge it. (1 L.B.R. 215, F.; 8 B.L.R. 189, D.) The mere production of a map showing the defendant as the owner was not enough to shift the burden of proof as it was not a sufficient indication of title to the property. **MA DAN DA v. KYAW ZAN, 3 L.B.R. 5.** [R., 3 L.B.R. 250.]

(82)—*Mortgage—Prior and subsequent mortgagees—Subsequent mortgagees paying off part of prior mortgage—Suit for partition between subsequent and prior mortgagees.*—The joint owners of three houses granted a usufructuary mortgage thereof to D.C. and P.C. and put the mortgagees in possession. Subsequently the mortgagors granted a simple mortgage of the same property to other mortgagees. Part of the mortgage money of the second mortgage was left with the mortgagees for the discharge of the first mortgage. The second mortgagees took part of that money and paid off the interest of one of the mortgagees in the former (usufructuary) mortgage. The second mortgagees then sued for possession by partition of one half of the mortgaged property. *Held* that the suit would not lie. **PURAN CHAND v. RAM RATAN, A W.N. 1896, 171.**

(83)—*Mortgage—Prior and subsequent incumbrances—Purchase of mortgagor's rights by purchaser paying off first mortgage—Shield.*—Where, on the sale of the rights of the mortgagor in certain property which was subject to

Mortgage—continued.**—14.—Miscellaneous—continued.**

two mortgages, a certain portion of the purchase money was left with the purchasers to pay off the prior mortgage, it was held in a suit for sale by the second mortgagee that the purchasers must be taken to have intended to keep the first mortgage alive for their benefit, and that the second mortgagees were not entitled to sale without redeeming the first mortgage. **KALLU v. SANT LAL, A.W.N. 1896, 129. (10 C. 1035, R.)**

(84)—*Agreement not to alienate—Subsequent mortgage to pay off former one.*—A stipulation not to alienate cannot operate to annul a *bona fide* conveyance to a third person by the mortgagor for the purpose of paying off the original mortgage debt. **DOOKHCHORE RAI v. HIDAYUTOLLAH, Agra F.B. 7=Ed. 1874, 5.**

(85)—*Mortgage—Alienation for necessity—Assent of the next reversioners—Right of the subsequent mortgagee to contest the previous mortgage.*—A mortgage by a female is valid, if the next heir assents to it at the time when the mortgage is made or afterwards. But when a subsequent mortgage has been effected by the next heir, the subsequent mortgagee does not acquire the right of an heir to contest an alienation by a female on the ground that the alienor was not a full owner and could not alienate save for necessity and that there was no necessity for the alienation. **MAULADAD v. RAM GOPAL, 22 P. R. 1900.**

(86)—*Agreement not to alienate—Breach—Suit against transferee—No cause of action.*—In consideration of Rs. 100 paid by A to B, the latter agreed to sell her house to the former in case she desired to sell it and not to sell or mortgage it to any other person. B afterwards usufructually mortgaged the house to C. Then A sued C for possession and offered to pay his mortgage-money. *Held* that C could not be made liable to surrender possession of the house, there being no priority of any kind as between A and C on which any cause of action could arise. **MUHAMMAD HUSAIN v. MUMTAZ BEGUM, A.W.N. 1883, 134.**

(87)—*Equitable mortgage—Evidence—Transfer—Payment.*—A petition having been presented to prevent the sale of a house and premises under attachment, in satisfaction of a decree, on the ground that the owner was an infant, and unrepresented in Court; and an order made thereon for the production of evidence in support of these facts: the petitioner, not having produced such evidence, and the sale being about to take place, filed a plaint, claiming the premises in question on his account, as equitable mortgagee; but having failed in proving either the transfer or payment of the alleged mortgage, the Sudder Court dismissed his suit, and their decree was affirmed, but without costs, upon appeal to His Majesty in Council. **PANDOURUNG BULLAL PUNDIT v. BALKRISHEN HURBAJEE MAHAJUN, 2 M.I.A. 60.**

Mortgage—continued.**—14.—Miscellaneous—continued.**

(88)—*Revenue arrears—Advertisement of mootah for sale—Principal and surety—Kararnamah—Mortgage—Defeasance, Instrument of.*—A *mootah* being advertised for sale, by order of the Collector, for arrears due to the Government, the proprietor applied to a party to become security for the payment thereof by certain instalments; and thereupon deposited a *Sunnud* and *Arzi* in the hands of a third party, and executed a *kararnamah* or agreement, by which the transfer of the *mootah* to the guarantee was made absolute, in case of default by the proprietor in payment of the instalments. The party becoming security at the same time executed a counter-*kararnamah* or deed of defeasance, agreeing to give up the *mootah* when satisfied out of the rents &c., the principal sum, and interest, which he might advance on account of the security. Default having been made in payment of the first instalment by the proprietor, the guarantee obtained possession of the *Sunnud* and *Arzi*; and, upon a further default by the proprietor, made himself registered as owner, and obtained possession of the *mootah*, insisting, notwithstanding the counter-*kararnamah*, that his title was absolute. On a suit brought by the original proprietor, for possession of the *mootah* and payment of the surplus, after satisfying the advances made on account of the arrears, the Privy Council held that the transaction was in the nature of a mortgage, and that the party to whom the *kararnamah* was executed was only entitled to retain possession of the *mootah* until he had reimbursed himself, out of the rents and profits, the sums advanced by him on account of his security, the counter-*kararnamah*, though not registered, being a valid instrument, and operating as a deed of defeasance to the title acquired under the first agreement. **SRI RAJAH KAKERLAPOODY JAGGANADHA JAGGAPUTTY RAZ v. SRI RAJAH VUTSAVOY JAGGANADHA JAGGAPUTTY RAZ, 2 M.I.A. 1.**

(89)—*Mortgagor and mortgagee—Failure of mortgagor's widow to pay revenue—Deposit of money by mortgagee to prevent sale—Action by mortgagee under Act I of 1845—Decree against widow, executable only against her interest.*—The owner of a talook having mortgaged it, died leaving a childless widow S.K. who continued in possession of the talook. Respondent was the daughter of the mortgagor by a previous marriage. The mortgagee died shortly afterwards leaving S. G. his widow who became entitled to the rights of her husband as the mortgagee of the talook S. K. having failed to pay the revenue due to Government, the talook would have been put up for sale and sold under Act I of 1845 if S.G., in order to save it from sale, had not borrowed and deposited the necessary amount to discharge his debt. On a decree having been obtained by S. G. against S.K., the rights and interests of the former under that decree had been transferred to the appellant. The question raised on this appeal was whether the appellant was entitled to

Mortgage—continued.— 14.—*Miscellaneous—continued.*

charge on the talook and to have it sold in its entirety to pay the amount of the money paid to the Government as revenue. Their Lordships of the Judicial Committee were of opinion that what they had to decide was not whether such a charge originally existed or whether subsisted at present, but whether appellant could enforce such a charge in the present suit. The question was not whether one who pays the arrear of the rent does not acquire thereby a charge on the talook which he saves from sale, but whether, if he seek to enforce that right, he must not do so in a suit properly framed for that purpose and not merely in a suit confined to a personal remedy against the person in possession of the talook. Their Lordships held, concurring with the opinion of the High Court, that where the person who had paid the arrears sought repayment only under s. 9 of Act I of 1845, as against the person in possession of the talook having but a limited interest therein, and confined his suit to that object, the decree so obtained against the person in possession can only be made effectual against the property of that person, including such interest as she had in the talook. Their Lordships wished it to be understood that the above ruling should not be taken to impair the general rule that in a suit brought by third person, the object of which is to recover or to charge an estate of which a Hindu widow is the proprietress, she could, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest. **NUGENDER CHUNDER GHOSE v. SREEMUTTY DOSSEE, 8 W.R. P.C. 17=11 M.I.A. 241.** [*Appr.*, 24 W.R. 306; *Rel. on.*, 30 C. 794=7 C.W.N. 609; *R.*, 17 W.R. 421, 22 W.R. 411, 1 C. 133=2 I.A. 275, 2 C. 222, 3 C. 198, P.C.=1 C.L.R. 49=4 I.A. 247, 2 C. L.R. 538, 4 C. 539=6 C.L.R. 28, 5 C. 144=4 C.L.R. 465, 5 C. 425=5 C.L.R. 112, 8 C. 517, 8 C. 898=10 C.L.R. 505, 4 A. 532=2 A.W.N. 133, 6 B. 564, 7 B. 91, 10 C. 823, F.B., 8 A. 384, 11 B. 119, 11 B. 313, 14 C. 809, F.B., 14 A. 273, F.B., 22 C. 974, 20 B. 338, 22 B. 440, 22 M. 332=9 M.L.J. 166, 3 Bom. L.R. 322, 26 B. 437=4 Bom. L.R. 90, 5 Bom. L.R. 885, 26 M. 686, F.B., 6 C.L.J. 490, 17 M.L.J. 160; *Cons.*, 13 A. 195=10 A.W.N. 228; *D.*, 23 W. R. 174.]

(90)—*Mortgage—Purchaser of mortgaged property—Liability.*—The plaintiff sued the mortgagor and a purchaser, under a right of pre-emption of one-third of the hypotheca, and obtained a decree in these terms:—"The claim is decreed against the purchaser and the property acquired by pre-emption." Held, that, under such a decree, the decree-holder's remedy was confined to that piece of property mortgaged, and would not extend to the other property of the purchaser, nor could it be executed against the person of the purchaser. **ALLAH DIN KHAN v. MISRI BIBI, A.W.N. 1881, 85.**

(91)—*Mortgage-decree—Amount to be realised by sale of hypothecated property—Rights of*

Mortgage—continued.— 14.—*Miscellaneous—continued.*

mortgagee for balance and costs.—Where a decree of the High Court directed that the plaintiffs should recover a certain amount with interest by sale of the "hypothecated property" mentioning the same by name, the balance of money due after the sale could not be recovered by executing the decree either against the mortgagor's person or his other property; but there was nothing, however, in the decree to prevent the decree-holders from recovering their costs in the suit by sale of property of the judgment-debtor other than that hypothecated. **HAR NARAIN v. RAM DAT, A.W.N. 1881, 61.**

(92)—*Conditional mortgage—Liability of mortgagee for collection of rents, etc.*—In a conditional sale-deed, provision at the rate of 15 annas per cent. per mensem, was made for interest on the sale consideration, which interest was recoverable by the conditional vendees, if the profits of the land did not meet it, in any way they liked, with interest on such interest. The management of the estate was to be by servants appointed by the vendees and the vendor. Out of the profits realised a certain fixed sum was to be paid to the servants employed for the management of the estate, and the vendees should not be responsible for the rents not collected, and the vendor should pay rent on the *sir* land held by him. In a suit for recovery of interest together with interest thereon, alleging that the profits of the land were not sufficient to meet the interest, the High Court in remanding the case, observed that in the case of the vendor's agents being associated with the vendee's agent in the management of the estate or in the case of the entire management being in the hands of the vendor, the vendee could not be held liable for losses. If, on the other hand, the vendees had the entire control of the estate they would be responsible for the deficit. In the latter case, the items of the account should be gone into, and it should be determined for what particular sums the vendee was liable. With regard to charging the vendor with the payment of his servant's wages, it was necessary to find, in the first place, that the sums were paid, and, secondly, whether they were paid after the dismissal of the servants or after the vendor had intimated that they should not be paid. On these points depended the question whether the vendor could be charged with such sums. As to the rents on the vendor's *sir* land, the vendor had to pay these rents into the general account and the appellant could not be charged in the account for their non-relaization. **MADAN GOPAL v. MANZUR BEGAM, A.W.N. 1881, 10.**

(93)—*Purchase by mortgagee—Keeping mortgage alive.*—B and S jointly gave the appellant, on different dates, in the same year, two mortgages of the same property with possession. B sold subsequently his moiety of such share to the appellant, his moiety of the mortgage-money being part of the consideration money.

Mortgage—continued.—14.—**Miscellaneous**—continued.

S, thereupon, sued the appellant to enforce his right of pre-emption, in respect of such moiety and obtained a decree. In order to raise the money for the purchase, he gave the respondents a bond on which he hypothecated the whole share. Subsequently, S sold a moiety of the share to the appellant, the remaining moiety of the mortgage-money being part of the consideration. After this, the respondents sued on their bond claiming the enforcement of their lien on the share. To this suit, the appellant was a party, and it was defended by him. The respondents obtained a decree in the suit, in execution of which they caused the share to be brought to sale, and purchasing it themselves. The appellant thereupon sued, claiming from the respondent's possession of a moiety of the share, under the prior mortgages to him, on the ground that the sale of a moiety to him, the consideration for which had been a moiety of the mortgage-money, had been declared invalid in the respondents' suit. *Held*, that, as in the suit brought by the respondents, the appellant did not set up his mortgages, as a matter of defence, and could not have done so, it being clear that he intended to absorb his interests as mortgagee in those of purchaser, and there being nothing to indicate that he contemplated keeping his incumbrance alive, the suit of the appellant was properly dismissed. **FAZAL v. KESHO, A.W.N. 1881, 6.**

(94)—*Cause of action—Mortgage—Direction to discharge mortgagor's debts—Breach—Effect.*—The non-payment or the incomplete payment by a mortgagee of the debts of the mortgagor, according to the stipulation in the mortgage-deed will not be a cause of action for the mortgagor to sue and recover the mortgage-money from the mortgagee, especially when no condition was to be found in the deed or elsewhere as to the time or mode in which these liabilities undertaken by the mortgagee were to be discharged. It is no concern of the mortgagor how or when his debts were paid for him so long as they have been cleared off and no liability for them in any way or to any extent remains. **HAR NARAIN SINGH v. ZALIM SINGH, A.W.N. 1883, 213.**

(95)—*Cultivable land—Conversion.*—It is not competent to a mortgagee in possession of certain cultivated land to assign a portion of it to another to make a grove and to confer on him rights adverse to the rights and interests of the proprietor of the soil. Such assignment cannot be allowed to have effect beyond the term of the mortgagee's interest in the land. **MADHO RAM v. SHAMSHUDDIN, A.W.N. 1883, 203.**

(96)—*Sir land.*—If mortgagees received certain land as *sir* from their mortgagors, it may be that by their treatment of it, by locating tenants on it, and not guarding their interest in it as *sir*, those tenants might acquire rights of occupancy which the mortgagors on redemption could not dispute. Where no such

Mortgage—continued.—14.—**Miscellaneous**—continued.

rights are set up against the mortgagor and the latter have redeemed the land and entered in possession, the land, if *sir*, would remain *sir*. **SHAM LAL v. UMED SINGH, A.W.N. 1886, 124.**

(97)—*Mortgage of zamindari and sir lands—Loss by mortgagor of proprietary rights—Mortgage to be effective against ex-proprietary rights of mortgagor—Surrender during subsistence of tenancy—Validity.*—A mortgagee is entitled for the purposes of his security to all such interests as may be acquired either as accretions to or in place of the original interest which was conveyed to him. Where, therefore, a zamindar having made a usufructuary mortgage of his zamindari together with his *sir* lands, lost his zamindari rights and became an ex-proprietary tenant of the *sir*, *held* that the mortgage did not become ineffectual as regards the *sir*, but took effect as a mortgage of the ex-proprietary rights. (15 A. 219, 16 A. 398, R) [R., 17 C.P.L.R. 33.] In such a case as is mentioned above the ex-proprietary tenant cannot, to the prejudice of the mortgagee, surrender to the zamindar his ex-proprietary interest. **SHAM DAS v. BATUL BIBI, 24 A. 538 = A.W.N. 1902, 155. (18 A. 354, R) [R., 27 M. 401, 26 A. 540 = A.W.N. 1904, 101; D., 7 O.C. 265.]**

(98)—*Sir lands, hypothecation of—Purchase in Court auction—Rights of purchaser—Ex-proprietary tenant.*—M hypothecated to the plaintiff's assignor his zemindari rights including *sir* lands; subsequently M gave a possessory mortgage of his *sir* lands to the defendant. Plaintiff's assignor sued on his mortgage and obtained a decree. He purchased the property in auction sale in execution of his decree and assigned the property to the plaintiff. The plaintiff sued to eject the defendant from the *sir* lands. *Held* that the plea of the defendant that the plaintiff was not entitled to possession by virtue of his purchase, which he alleged only gave him the proprietary rights of the mortgagor and not the occupancy right in his *sir*, which was with the mortgagor after the sale, was not tenable. Whether or not the mortgagor might resist the plaintiff's entry on such a ground, the defendant could not; as against him, the plaintiff had established a good and sufficient title as owner of the land. **MOMIN ALI v. LALTA PRASAD, A.W.N. 1882, 4.**

(99)—*Mortgage of sir land—Partition of village—Mortgaged portion going into other hands—Rights of mortgagee and of person entitled to mortgaged property under partition.*—A co-sharer in a village mortgaged a portion of his *sir*-land to the father of the respondents, and gave him possession. Subsequently the land in question was transferred to the *patti* of the appellants, in a partition in the village. But the mortgagee continued to be in possession. In course of time, the proprietary right of the mortgagor were put up for sale in execution of a decree and were purchased by the

*Mortgage—continued.**—14.—Miscellaneous—continued.*

mortgagee, the respondent's father, and two others. The other two auction-purchasers proceeded to dispossess the mortgagee of their share of the *sir* land of which he was in possession under his mortgage. Upon this, the mortgagee sued the other two for his mortgage-debt minus a portion thereof equal to the proprietary interest he had himself acquired in his mortgagor's estate, and got a decree, in execution of which he purchased the *sir* land which had been mortgaged to him. In the course of these sale proceedings the appellants, to whose *patti* the land had been transferred, objected to the attachment and sale of the land under the provisions of s. 246 of Act VIII of 1859, setting up their proprietary right and denying that of the auction-purchasers mentioned above. This objection being disallowed, and a regular suit to save the land from sale having also failed, the appellants took proceedings in the Revenue Court on the basis of the partition, and obtained a decree for rent against the respondents, the sons of the mortgagee, as though they were tenants only of the land, and an order of ejectment from the same as being mere tenants-at-will. Upon this, the respondents sued the appellants in the Civil Court for a declaration of their proprietary right to the land. *Held*, that the respondents had, by virtue of the auction sale mentioned above, and of the now final decree in the suit arising out of the proceedings held under s. 246 of Act VIII of 1859, become the absolute owners of the *sir* land, and consequently the proceedings in the Revenue Court must be deemed to be inoperative and invalid. *RAMADHIN SINGH v. BAGESHRI SINGH, A.W.N. 1882, 104.*

(100)—*Mortgage—Enjoyment of profits in lieu of interest—Provision for interest when dispossessed—Mortgagor's representative obstructing enjoyment of profits—Cause of action.*—The deed of mortgage by which certain sharers in an undivided village mortgaged their shares, provided that the possession of the share should be delivered to the mortgagees and the profits to be taken in lieu of interest; and that, if the mortgagors disturbed their possession, the mortgagees might sue at once for the mortgage-debt with interest at 24 per cent. Subsequently, the mortgagors sold their shares to the *lambardar* of the village, who obstructed the mortgagees' enjoyment of the profits. After a period of 5 years in which they enjoyed no profits, the mortgagees sued to recover the mortgage-debt with interest at 24 per cent. alleging dispossession by the mortgagors' representative, the *lambardar*. *Held* that a cause of action had accrued to the mortgagees entitling them to maintain the present suit, according to the terms of the mortgage-deed. *KHUSHALI RAM v. MAKUNDI, A.W.N. 1882, 99.*

(101)—*Mortgage of mortgagee's lien—Purchase by him of mortgaged property and sale of same—Respective rights of transferee and lienholder.*—Father and son mortgaged their share

*Mortgage—continued.**—14.—Miscellaneous—continued.*

in a village and the mortgagee sued on his mortgage and obtained a decree for sale. Subsequent to this, the father alone re-mortgaged a portion of the share to A and R who, in their turn borrowed from the respondents, pledging as security for the loan their rights as mortgagees. The first mortgagee sold the property in execution of his decree, and A purchased it at public auction and sold it to B in private sale. The respondents sued to recover their debt with interest from A, the obligor of the bond and from B the former's vendee at the private sale, praying to charge their debt on the estate in the hands of B. *Held* that the decree of the first Court dismissing this part of their claim, and giving them a decree against A and against the estate of his co-debtor R only, was a proper decree, the remedy thus given being the only remedy that remained to the respondents after the execution sale under the first mortgage, which sale put an end to the mortgage rights mortgaged to the respondent. *BHOLI SINGH v. DURGA PRASAD, A.W.N. 1882, 66.*

(102)—*Mortgage—First and second mortgages—First mortgagee purchasing equity of redemption—His rights.*—Where the first mortgagee purchases the equity of redemption from the mortgagor in satisfaction of his mortgage and in consideration of other sums, the first mortgagee can resist a suit by the second mortgagee, whose mortgage was created prior to the sale of the equity of redemption, by reason of his holding the prior mortgage. *MUHAMMAD IBRAHIM v. TEKCHAND, A.W.N. 1882, 59. [R., 13 A. 432, 1 O.C. 105.]*

(103)—*Mortgage—First mortgage of portion—Second and third mortgages of entire property—First mortgagee erroneously purchasing property in execution of third mortgagee's decree and entering satisfaction—Lapse of first mortgage.*—The proprietors of a certain share in a village first mortgaged a portion of this share to the appellants and subsequently mortgaged this whole share to K, and again mortgaged the entire share to J and two others. All the three obtained decrees on their respective mortgages, and K, the second mortgagee transferred his decree to the respondents. The appellants alleged that they brought to sale the portion mortgaged to them in execution and had, on purchasing it, filed a receipt for the liquidation of the decree. But it was found that such property was not sold in execution of the appellant's decree but in execution of the decree on the mortgage to J and others. The respondents contended that the appellants were bound to satisfy their debt. *Held*, that the share in dispute having been sold and purchased in execution of the decree of J and others, the claim of the respondents should be decreed. The appellants' decree had been extinguished, but without the enforcement of the lien, and that lien therefore passed out of practical existence and the appellants took the estate subject to the respondents' lien which was next in

Mortgage—continued.**—14.—Miscellaneous—continued.**

seniority to the appellants' lapsed lien. **RAM PRASAD v. INTIZAM BEGAM, A.W.N. 1882, 14.**

(104)—*Suit for mortgage-amount—No personal remedy prayed for.*—Held that as, in the previous suit (*Ratan Rai v. Hanuman Das*) the plaintiff had only asked for the sale of the mortgaged property, he would not be entitled to any personal remedy against A. **NUR MUHAMMAD v. RATAN RAI, A.W.N. 1881, 139.**

(105)—*Mortgage of mortgagee rights—Legal position of sub-mortgagee—Transfer of Property Act, s. 85.*—The sole right of a sub-mortgagee as against the original mortgagee is to obtain a money-decree against him, that is, he acquires no interest in, or charge upon, the property. He is, therefore, bound by a decree fairly obtained against the mortgagor and the mortgagee. **MISRI LAL v. ABDUL AZIZ KHAN, A.W.N. 1901, 153. (18 A. 113, F., but doubted.) [Overruled, 27 A. 472=2 A.L.J. 208=A.W.N. 1905, 58.]**

(106)—*Prior and subsequent mortgagees—Purchase by prior mortgagee—Suit for sale by subsequent mortgagee ignoring lien of prior mortgagee.*—In a suit for sale upon a mortgage, certain defendants were impleaded as being "incumbrancers and also subsequent purchasers," but the plaint made no mention of any person as holding a prior incumbrance on the property affected by the suit. Two of the defendants above alluded to pleaded that they had a lien on the property prior to that of the plaintiff, and that the suit ought to be dismissed as no offer to redeem them had been made. On the day fixed for the hearing of the suit, the plaintiff filed a petition, denying that the property, the subject-matter of the suit, was mortgaged to the said defendants, but offering to pay off the mortgage if it was found to be valid and prior to that of the plaintiff. *Held*, that, under the above circumstances, the Court below were wrong in dismissing the suit. **BALDEO SAHAI v. NANAK CHAND, A.W.N. 1901, 68. (12 A. 548, D.)**

(107)—*Covenant by mortgagee to pay off a prior mortgage—Breach of such covenant by second mortgagee—Suit by mortgagor for compensation—Measure of damages.*—On a mortgage of immovable property, the mortgagor left with the mortgagee Rs. 200 in order that he might discharge a small prior incumbrance on the property. The second mortgagee did not pay off the prior incumbrance, but kept the money in his pocket. Some years afterwards the first mortgagee brought a suit against the mortgagor to recover his debt, which had by that time reached a sum far in excess of the original two hundred rupees, and obtained a decree. *Held* that the mortgagor was entitled to recover from the second mortgagee the full amount of the decree obtained against him by the first mortgagee. **RAGHUNATH RAI v. BRIJMOHAN SINGH, A.W.N. 1901, 14.**

Mortgage—continued.**—14.—Miscellaneous—continued.**

(108)—*Purchase by mortgagee of property mortgaged at sale under a decree of a third person, the mortgagee's lien being notified at sale—Suit by mortgagee subsequently to recover whole of mortgage-debt by sale of remaining moiety.*—A mortgagee, who had bought in a moiety of the property mortgaged to him at an auction sale in execution of a money decree held by a third person, at which auction-sale the incumbrance created by his mortgage was notified, could not subsequently sue for the satisfaction of the whole of the mortgage money due to him by sale of the remaining moiety of the mortgaged property, without taking into account the moiety already purchased by him. **SUMERA KUAR v. BHAGWANT SINGH, A.W.N. 1895, 1. [F., 19 A. 196; D., 18 A. 81; Cons., 22 A. 284, F.B.; R., 20 A. 23, F.B.]**

(109)—*Mortgage-decree—Execution-purchaser—Second mortgage—Sale—Right of former purchaser to resist.*—In 1870, R mortgaged his property to S. The latter got a decree on the mortgage in 1874. In 1879, he executed his decree; and the property was purchased by the defendant in this suit. In the meanwhile in 1876, R and S jointly executed a bond in favour of the plaintiff in this suit mortgaging the rights and interests in the same property which had been the subject of the former bond and decree. Now, the plaintiff sought in this suit to bring the property to sale. *Held* that the defendant, the purchaser in execution of S's decree, could not resist the sale by reason of his purchase. At the time he purchased the property it was liable to the mortgage created in favour of the plaintiff by both R and S, and, as purchaser, the defendant can only take it subject to this liability, for, it was a liability which neither the judgment-debtor whose interests he bought, nor the decree-holder at whose instance the sale was made, could resist. **RAMTAHAL RAM v. KEWAL RAI, A.W.N. 1883, 233.**

(110)—*Mortgage—Covenant to repay if possession not given—Acceptance of part performance—Right to sue.*—A usufructuary mortgage deed dated 1869 contained a stipulation to the effect that, if the mortgagor failed to put the mortgagees in possession, the latter might recover the mortgage-money. The mortgagees obtained possession of all the property except a small part and they were in possession till 1881 when the present suit was brought by them. In this suit they claimed to recover the mortgage money on the ground that there had been a breach of the contract, as they had not obtained possession of the whole property. *Held*, that the mortgagees were not at liberty to bring the suit. They could not, at one and the same time, avail themselves of the benefit of the contract and of the remedy provided for its breach. **LACHMAN DAS v. BALDEO SINGH, A.W.N. 1883, 91. [R., 31 A. 325=6 A.L.J. 247.]**

Mortgage—continued.**—14.—Miscellaneous—continued.**

(111)—*Extinguishment of prior mortgage—Subsequent mortgage.*—The father of the plaintiff gave a lease of certain villages to G, and on the 24th June, 1869, the said G, agreed to pay rent in respect of such villages by certain instalments; and as a security for the faithful discharge of the conditions of the *kabuliyat* in respect of his payment of rent, he hypothecated his village K. According to the terms of the *kabuliyat*, so long as G remained the lessee of the father of the plaintiff, and so long as the *kabuliyat* lasted, so long there would subsist the security that he had given for the faithful performance of the agreement under the *kabuliyat* to pay the rent. G fell into arrears. The plaintiff, who had succeeded his father, brought a suit in the Revenue Court upon the *kabuliyat*, and got a money decree, which alone the Revenue Court could have given, for the arrears of rent due to him from G. He put his decree into execution and obtained part satisfaction thereof, and a balance remained due from G. In 1871, G took from the defendant a loan of Rs. 300, and as security for the loan, he hypothecated to the defendant the village K, that was charged under the bond of 1869 to the plaintiff's father. In 1876, G, having been called upon to pay up the balance of the amount due under the decree of the Revenue Court, entered into a fresh arrangement in respect of such balance as was due and the interest due thereon, and he gave the plaintiff a second bond hypothecating the village K. *Held*, that there was no new contract in 1876 superseding the old contract of 1869, and that the plaintiff had no wish to abrogate and put an end to the contract of 1869 and that therefore the security of 1869 was in existence and was not superseded by the transaction of 1876. **RAMZAN ALI v. JAGAT SINGH, A.W.N. 1886, 18.**

(112)—*Lease of mortgaged property to mortgagor—Subsequent sale of equity of redemption—Removal of portions of mortgaged property by mortgagor—Suit for damages against mortgagee—Maintainability.*—The suit house was mortgaged with possession to the defendants who subsequently leased it to the mortgagors. The plaintiff afterwards purchased the equity of redemption at an execution sale. The mortgagors who remained in possession as lessees removed portions of the house. Thereupon the plaintiff sued the mortgagees for redemption and for damages for removal of such portions. The claim for redemption was decreed and the claim for damages was dismissed on the ground that the mortgagees had not by any act or omission caused the destruction of the house and also because they were not in possession but only the mortgagors, who remained in possession as tenants of the mortgagees. **BAQAR ALI v. NISAR HUSAIN, A.W.N. 1885, 262.**

(113)—*First and second mortgages—Subsequent sale of equity of redemption to first mortgagee—Merger—Decree on second mortgage—*

Mortgage—continued.**—14.—Miscellaneous—continued.**

Sale by second mortgagee—Rights of first mortgagee.—Where a first mortgagee on certain property subsequently purchases the equity of redemption from the mortgagor, he does not lose the benefit of his prior charge when the money due therein is set-off against the sale consideration. And where a second mortgagee on the same property, in execution of a decree on his mortgage, brings the mortgaged property to sale, the first mortgagee is entitled to resist the sale of the property until his prior charge is satisfied. **PARSI v. GIRAND SINGH, A.W.N. 1885, 155.** [Cons., 22 C. 33; R., 13 A. 432.]

(114)—*First and second mortgage—Decree on first mortgage and purchase of mortgaged property by the mortgagee—Merger—Priority.*—The defendants, who held a prior mortgage of the suit property under a registered deed dated 20th September, 1878, sued on the bond obtained a decree and purchased the mortgaged property by private sale on 3rd September 1881. The plaintiffs, in execution of a decree which they had obtained on a mortgage of the same property, dated 17th July 1880, brought the property to sale and bought it themselves on 20th July 1883. They then brought the present suit to recover possession of the property from the defendants, alleging that the defendants' sale of 3rd September 1881 was collusive, and that the defendants had acknowledged in the sale deed their liability to pay the mortgage debt of 17th July 1880. It was found by the lower appellate Court that, when the defendants secured the deed of sale in 1881, they had agreed therein to pay the mortgage-money due to the plaintiffs under their deed of July 1880. *Held* that the plaintiffs were entitled to recover possession of the suit property from the defendants. Although the defendants' mortgage and their purchase were prior to those of the plaintiffs, yet it was clear from the terms of their sale deed that their mortgage merged in the purchase, and that they bought the property subject to the payment of the plaintiffs' mortgage upon it, the latter debt being taken account of in the sale consideration. They had therefore, bought the property subject to its re-sale to satisfy plaintiffs' mortgage. **NATHU v. BINDRABAN, A.W.N. 1885, 130.**

(115)—*Prior mortgagee—Subsequent purchaser—Notice.*—The right of a prior incumbrancer to recover his money by bringing the mortgaged property to sale cannot be defeated or prejudicially affected by the simple fact of a third person taking a conveyance without notice of such prior incumbrance. *Per Straight, J.*—Where a person hypothecates his property to another and subsequently sells it to a third person, the mortgagee's right to have the whole property brought to sale is not affected by the subsequent sale, whatever might have been the rights and equities of the vendor and vendee *inter se*. *Per Mahmood, J.*—The equitable doctrine of the marshalling of securities which has been formulated in s. 81, Transfer of Property Act, is

Mortgage—continued.**—14.—Miscellaneous—continued.**

confined there only to puisne incumbrances. But the equities which apply to a puisne incumbrancer in the marshalling of securities apply to a *bona fide* purchaser for value without notice. **BENI BAHADUR SINGH v. RAM BARAN SINGH, A.W.N. 1887, 183.**

(116)—*First and second mortgages—Suit by first mortgagee—Second mortgagee not made party—Effect.*—To render a decree for foreclosure or sale effectual, the mortgagee must make subsequent purchasers or encumbrancers parties to the suit, at least if he have notice of them, or if circumstances exist which should have put him on inquiry as to the claim by them of an interest in the mortgaged property, and, where they are not made parties, they are entitled to redeem the first mortgage. **JOHARI MAL v. HAR SARUP, A.W.N. 1887, 97. (14 M.L.A. 101, 5 M. 184, Rel. on.)**

(117)—*Ancient claims to land—Evidence.*—When land has become valuable in the course of time there is a great temptation to put forward ancient claims to it and to support those claims up by unscrupulous means, or to set up claims that are altogether fictitious. Need for clear proof of ancient claims to land after long undisturbed possession. Renewal of old mortgage in favour of claimants under original mortgagor. **MAUNG SHWE KYU v. MAUNG AUNG GYI, U.B.R. 1892—1896, Vol. II, 551.**

(118)—*Mortgage of occupancy holding—Mortgagor denying validity of mortgage of his occupancy holding against mortgagor—Oudh Rent Act, s. 5—Estoppel—Possession, Suit for.*—The first defendant, who held certain land as a tenant with a right of occupancy under s. 5 of the Oudh Rent Act, gave an usufructuary mortgage of his holding to the plaintiff and put him in possession. Subsequently he dispossessed the plaintiff and made over possession to the second defendant. The plaintiff brought a suit for possession of the land against both the defendants on the basis of his mortgage. The first defendant's defence was that the mortgage, being a transfer of an occupancy holding, was illegal and conferred no right upon the plaintiff. *Held*, that the mortgage of his occupancy holding by the first defendant to the plaintiff was opposed to the provisions of s. 5, Oudh Rent Act of 1836, and that he was not estopped from denying its validity. **BENI MADHO v. KALI PERSHAD SINGH, 6 O.C. 331. [R., 11 O.C. 345.]**

(119)—*Mortgage—Mortgagee's suit for mortgage-debt against mortgagors holding mortgaged property under lease executed in his favour—Kabuliat of mortgaged property executed by mortgagors against mortgagee, suit based on—Jurisdiction of Civil Court—Interest—Mortgagee's claim for interest on mortgage.*—The defendant executed a mortgage on June 20th, 1891, and a deed of further charge on August 4th, 1893, in favour of the plaintiffs. The plaintiffs redeemed a prior mortgage on the property and became

Mortgage—continued.**—14.—Miscellaneous—continued.**

entitled to possession of the property, but instead of taking possession they leased the property to the defendants. The latter executed a *kabuliat* on January 22nd, 1894, by which, after reciting the deeds of June 1891 and August 1893, they undertook to pay as rent interest at the rate of 12 annas per cent. per mensem upon the deeds along with the amount of the Government revenue. This *kabuliat* provided that, if the instalments were not paid, the mortgagees might sue for the same and recover them from the mortgaged property, etc., etc. In the present suit, the plaintiffs claimed the principal sums secured by the deeds together with interest thereon and the amount of land-revenue paid by them. The defendants' contention was that the mortgage-deeds of 1891 and 1893 were quite distinct from the *kabuliat* of 1894 and that the mortgagees could not recover in this suit any sum payable under *kabuliat*, because a suit on the *kabuliat* would lie only in a Revenue Court and that in any case mortgagees were not entitled to recover more than 3 years arrears of any sums payable under the *kabuliat*. *Held*, that the mortgagees were entitled in the suit to recover from the mortgagors all sums payable to them under the two mortgage-deeds of 1891 and 1893 as modified by the contract for the reduction of interest contained in the *kabuliat* and were not bound to sue upon the *kabuliat* in a Court of Revenue. **SHEO RATAN SINGH v. BALKISHAN, 6 O.C. 18.**

(120)—*Held by banker against customer—No direction given by customer to banker to charge mortgage amount against current account—Liability of customer to pay interest on mortgage—Concurrent findings of two Indian Courts on a question of fact—Practice of swelling up record before Judicial Committee with irrelevant matter condemned.*—The Court of a Subordinate Judge directed accounts to be taken between the plaintiff and defendant, who stood in the relation of customer and banker. There were objections to ten items charged against the plaintiff. *Held*, the lower Courts had the advantage of seeing and examining, for themselves, the account books and other books produced by the parties. Their Lordships not having had that advantage, it was unnecessary to go through those items one by one. As regards items 2 to 8, there were concurrent findings of the two Indian Courts, the question in each case being a pure question of facts to be determined on the evidence adduced. The last item related to the charge of interest on a certain mortgage held by the defendant against plaintiff, and there was difference of opinion in the Courts below. No direction was given by the plaintiff to the defendant to charge the amount of the mortgage against his current account and no objection could validly be made to the charge of the interest upon it until the plaintiff gave directions that the principal should be paid off. Finally their Lordships condemned the practice of swelling

Mortgage—continued.**—14.—Miscellaneous—continued.**

up the record before the Judicial Committee with irrelevant documents, thereby causing unnecessary trouble and expense. **THAKIER JAWAHIR SINGH v. LACHMAN DAS**, 9 C.W. N. 745, P.C.

(121) — *Usufructuary mortgage — Suit for money by mortgage, when lies—Mortgagee, dispossessed or not put in possession by mortgagor—Zurpesbgi lease—Transfer of Property Act*, s. 67 (a) & s. 68, cls. b & c.—Clause (a) of s. 67 of the Transfer of Property Act should be read with and as subject to the provisions in cl. c of s. 68 of the Act. A usufructuary mortgagee, as such, is entitled to sue the mortgagor for the money lent on the mortgage, when the mortgagor fails to deliver to him possession of the property or to secure to him quiet possession thereof. **ABDUL IASALAM v. MUSST. RAFIAT**, 2 C.L.J. 493. (16 A. 318, F.) [R., 6 C. L. J. 143=11 C. W. N. 240, Note.]

(122) — *Mortgage-deed — Pardanashin Lady—Independent advice — Nature of liability not understood—Receipt by lady of consideration—Creditor entitled to simple money-decree—Simple interest.*—Where the evidence showed that a *Pardanashin* lady, who had executed a mortgage-deed (1) did not receive any independent advice and (2) did not fully understand the liability she was incurring, but (3) that the money borrowed was made over to her, the High Court (*Knox and Aikman, JJ.*) passed a simple money-decree with simple interest at the rate of 9 per cent., though the bond provided for compound interest with six monthly rests. **MUS-SAMMAT SHARIFUNNISSA v. LALA AND LALA CHUNNI LAL v. MUSSAMMAT SHARIFUNNISSA**, 2 A.L.J. 436.

(123) — *Money left with subsequent mortgagee to pay two prior mortgagees—Money not paid to both—Right of equitable subrogation.*—Where a third incumbrancer paid off the first mortgage, but did not pay off the second incumbrance which he had undertaken also to discharge, held, in a suit by the second incumbrancer, that the third mortgagee was not entitled, by reason of his discharging the first mortgage, to claim to be subrogated to the rights of such first mortgagee. **DALIP RAI v. BIRNAIK RAI**, 6 A.L.J. 549=2 Ind. Cas. 207. [R., 7 A.L.J. 914.]

(124) — *Mortgage—Extinguishment of charge by the subsequent mortgagee or vendee—Presumption.*—In the absence of circumstances proving otherwise, it must be presumed that a subsequent vendee or mortgagee intends to keep alive the prior mortgage redeemed by him as a charge upon property for his benefit and the charge may be held as a shield against the pre-emptor of the property conveyed. **JHABAR v. SINGH RAM**, 67 P.R. 1899.

(125) — *Mortgage—Mortgagor's title defective—Acquisition of other lands—Estoppel.*—One Bhola mortgaged 54 kanals of lands to the

Mortgage—continued.**—14.—Miscellaneous—continued.**

plaintiff. The mortgage-deed specifically recited that Bhola was owner of one-half of a holding held jointly by him with one Ishar his nephew, that out of his own share he mortgaged 54 kanals, giving specific numbers of certain fields and that the mortgagee had a right to effect partition with the mortgagor's co-sharer. At the time of the execution of the mortgage, Bhola had already made other alienations of portions of his share and consequently had less than 54 kanals free of encumbrances. Partition was never effected between him and his nephew. On the death of the latter Bhola succeeded to his share. After Bhola's death the plaintiff claimed possession as mortgagee of 54 kanals. It was contended for the plaintiff that he was entitled to have possession of 54 kanals of unencumbered land and Bhola having succeeded to the share of Ishar was bound to carry out his engagement which he was otherwise unable to do. Held that when a mortgagor alienates certain land to which he has no title and subsequently acquires a good title to it, he is bound to carry out the transfer, but, if he mortgages a portion of his own share of a joint holding, which he has already alienated, he cannot be compelled to make good the amount out of the other half-share to which he had subsequently succeeded. **BABU RAI v. NATHU**, P.L.R. 1900, p. 337.

(126) — *Mortgage—Rights of assignees of sub-mortgages.*—Held, by Full Bench, that a purchaser of a sub-mortgage of property is entitled to retain its possession against the representatives of the original mortgagor, until the amount due on the sub-mortgage is paid off; and he is not obliged to seek his remedy against the transferor, i.e., the original mortgagee. **CHELA RAM v. WALIDAD**, P.L.R. 1900, p. 219=30 P.R. 1900. (20 M. 35, F.; 18 A. 113, 20 B. 549, 12 P.R. 1895, Diss.) [R., 48 P.R. 1906=104 P.L.R. 1906; F., 8 P.R. 1903, Rev.; Cited., 123 P.R. 1907=3 M.L.T. 53=82 P.W.R. 1907=58 P.R. 1905=59 P.L.R. 1905.]

(127) — *Suit by mortgagee to declare lien—Subsequent suit for possession.*—Where a suit by a mortgagee, who purchased the mortgaged property in execution of a money-decree only, for a declaration of his lien over the property, against the defendant who had purchased the same property in execution of another decree against the mortgagor, was dismissed on appeal by the High Court, held by a Full Bench that a subsequent suit for possession of the property would not lie, that his first suit for declaration of lien was properly brought, and that such mortgagee was entitled to a review of the former judgment; and held by the Bench, before which the review came to be heard, that he was entitled to such review and to declaration of the lien. **JONMENJOY MULLICK v. DASS-MONEY DASSEE**, 8 C. 700.

(128) — *Mortgage-deed—Combination of usufructuary mortgage and hypothecation—Right of mortgagee to a decree for sale—Res judicata—*

Mortgage—continued.**—14.—Miscellaneous—continued.**

Previous suit for rent against mortgagor, no bar to subsequent suit on mortgage.—A suit for sale, brought to recover the sum due under a mortgage-deed, by which some of the properties were usufructually mortgaged, while the others were merely hypothecated to the plaintiff, was dismissed by the lower Court, on the ground that the mortgage was a usufructuary one and a suit for sale will not lie, in the absence of a covenant for payment. As to the items in the deed merely hypothecated, there was nothing to prevent the plaintiff from suing for the mortgage-debt or for sale of the mortgaged property. He cannot split the mortgage, and so, in order that he may obtain his legal rights over the hypothecated items, he will have to be allowed to bring the entire property to sale inclusive of the items usufructually mortgaged. Decrees in previous suits for rent, instituted by the mortgagee against the mortgagors, for arrears of rent accrued due under distinct pattamchits executed by the latter at the date of the mortgage, cannot be taken to operate as *res judicata*, so as to preclude the former from suing and obtaining a decree for sale for recovery of the principal and interest due under the mortgage-deed. **NANU v. RAMAN, 16 M. 335.**

(129)—*Suit on hypothecation bond—Nature of decree to be passed.*—In a suit on a hypothecation bond, it was necessary for the plaintiff to prove that there was an actual pledge, and that the land was part of the estate of the debtor at the time of the pledge, and on proof of these facts, the Court was bound to pass a decree for sale of the property hypothecated, unless the debtor paid the amount due with interest within the time named in the decree. **CHETTI GAUNDAN v. SUNDARAM PILLAI, 2 M.H.C. 51.** [*F.*, 27 M. 528=13 M.L.J. 445, *F.B.*; *R.*, 4 M.H.C. 434, 13 A. 28, U.B.R. 1897—1901, 573.]

(130)—*Prior and subsequent mortgages—Money decree—Lien on hypothecated property.*—The mere fact of a money decree having been obtained on a bond, by which property is hypothecated, does not destroy the lien on that property, and, therefore, if a plaintiff has any right, that right may be established on the bond as well as on the decree. **HASOON ARRA BEGUM v. JAWADOONNISSA SATOODA KHANDAN, 4 C. 29.** (14 B.L.R. 408, *F.B.*, *F.*) [*F.*, 10 C. 567, 8 O.C. 86.]

(131)—*Mortgagor's debts in respect of the property—Liability of mortgagee in possession.*—A mortgagee of an indigo factory, obtaining possession of it under a decree, is not liable, in the absence of an agreement, for the mortgagor's debts in respect of the factory, (*i.e.*) for the price of indigo seed supplied to the factory before the possession of the mortgagee. There is no lien by custom, in India, upon an indigo factory, or upon its produce, in respect of any debt of the factory. **MONOHUR DASS v. MC NAGHTEN, 3 C. 231.**

Mortgage—continued.**—14.—Miscellaneous—continued.**

(132)—*Money secured by mortgage, payable "on demand."*—Where money secured by a mortgage was expressed to be payable "on demand," held, *Per Garth, C. J.*, that a demand was necessary, and *Per Markby, J.*, that the money was payable at once. **RAM CHUNDER GHOSAUL v. JUGGUT MON-MOHINEY DABEE, 4 C. 283=3 C.L.R. 336.**

(133)—*Purchase of portion of mortgaged property by mortgagee and subsequent re-sale to mortgagor—Equitable right of mortgagee to entire mortgaged property.*—Where, after a mortgage, a portion of the mortgaged property being sold by the mortgagor to the mortgagee, such property is re-sold by the mortgagee to the mortgagor, the mortgagee will have an equitable right to proceed against the whole property, including the portion sold to him and re-sold by him to the mortgagor. So long as the mortgagor had a less extent in his possession, the security was reduced to that extent; but, when he subsequently became entitled to the full extent to which he had contracted to hold the mortgage, the mortgagee became entitled to proceed against the security to such extent. **DEOLIECHAND v. NIRBAN SINGH, 5 C. 253=4 C.L.R. 150.** [*Cons.*, 18 M. 492.]

(134)—*Mortgage—Annulment of settlement of land mortgaged—Fresh settlement—Liability of succeeding proprietor under mortgage—Act XIX of 1873 (N.W.P. Land Revenue Act), ss. 43, 159, 165, 241 (f).*—Under s. 159 of the Land Revenue Act, it is only so long as the farm or *Kham* management continues, as to land the settlement of which has been annulled, in consequence of the revenue having fallen into arrears, that all contracts made by the persons who, immediately before such annulment, were in possession of the land comprised therein, relating to such lands, are not binding on the Collector of the District, or his agent or lessee; but when the term of the farm and *Kham* management has ceased, and the land is made over to another person, not as a farmer, but as a proprietor with whom a fresh settlement is made under ss. 165 and 43 of the Act, there is nothing in the law, by which contracts made by such person's predecessor in title are not binding on him, just as they would be binding on his predecessor. And it is not for Civil Courts to enquire whether the subsequent settlement made by the Collector with a certain person has been legally made. S. 241 (f) of the Land Revenue Act bars such enquiry. Therefore, where, under the above circumstances, land under mortgage has been taken under *Kham* management after annulment of the settlement with the mortgagor, and is subsequently settled with the mortgagor's wife as proprietor, she must be held to represent such rights and interests as her husband, the mortgagor, possessed, and she is therefore liable to the mortgagee under the mortgage. **BARI BAHU v. GULAB CHAND, 7 A. 454=A.W.N. 1885, 72.**

(135)—*Subsequent mortgage—Prior mortgage—Right to dispossess.*—Where, of two

Mortgage—continued.**—14.—Miscellaneous—continued.**

mortgagees of the same property, the prior is a simple mortgagee and the subsequent is a mortgagee with possession, and the prior mortgagee enforces only the personal covenant and obtains a money-decree in a Small Cause Court and becomes purchaser of the mortgaged property by bringing the right, title and interest of the mortgagor to sale, he (purchaser) is not entitled to disturb the possession of the subsequent mortgagee, so as to be put in possession of the property. When a second mortgage is created in favour of a person, who is not the holder of the first mortgage, the second mortgagee is entitled to pay off the first mortgage. Similarly, the acquisition by the first mortgagee of the right remaining in the owner does not deprive the second mortgagee of his right to enforce his charge by a sale of the property subject to the right of the first mortgagee. **VENKATACHELLA v. PANJANADIEN**, 4 M. 213; (7 M.H.C. 229, R.) [Diss., 13 A. 432; Appr., 22 C. 33; R., 29 A. 335 = A.W.N. 1907, 97 = 4 A.L.J. 273 = 1 O.C. 111.]

(136)—*Usufructuary mortgage—Delegation of powers under the Rent Act by mortgagor—Effect of.*—A usufructuary mortgagee of a zemindar is entitled to enforce the acceptance of a patta, under the provisions of the Rent Act, if the Zemindar has delegated by the mortgage deed, all his powers under the Act to the mortgagee. **NARAYANA v. MUKUNDA**, 5 M. 87, F.B.

(137)—*Mortgage—Suit for possession—Right of reversioner.*—One Mussammat Indar Kaur, holding a mortgage from one Bhagwan Singh, sued the defendants for possession of the land mortgaged to her. The defendants, who were near reversioners of Bhagwan Singh pleaded that the mortgage was effected without lawful necessity, and the mortgagor, being a sonless Jat, was not permitted by custom to make it. It was alleged by the plaintiff and denied by the defendants that a lawful marriage by *Chadarandazi* had taken place between the plaintiff and Bhagwan Singh, and that a son had been born to them, and who, and one Mussammat Sadan, the widow of a nearer reversioner, precluded the defendants from inheriting the lands. The Chief Court finding that the plaintiff had paid a portion of the mortgage-money, and without determining other questions raised by the parties, passed a decree in favour of the plaintiff to hold possession of the mortgaged lands pending re-payment of the amount that may be found justly due from the person or persons entitled to redeem. **MUSSAMMAT INDAR KAUR v. HUKAM SINGH**, 13 P.L.R. 1902.

(138)—*Mortgage—Suit by puisne mortgagee—Material alteration by prior mortgagee—Effect of alteration.*—In a suit brought by a mortgagee for the redemption of a prior mortgage and the sale of the hypothecated property, the fact that the prior mortgage-deed when tendered in evidence by the prior mortgagee

Mortgage—continued.**—14.—Miscellaneous—continued.**

is found to have been tampered with and a material alteration made in it, does not render the instrument void *in toto* so as to justify the Court in ignoring its existence and framing a decree in favour of the plaintiff for sale of the property comprised in it without payment of the amount due under it or any part of that amount. *Per Stanley, C.J., and Banerjee, J., Aikman, J., contra.* A mortgage-deed which has been altered in a material particular can be used in evidence to prove the nature and extent of the right created in favour of the mortgagee by the fact of its having been executed, and it is admissible to prove the original transaction of mortgage, both as regards the property mortgaged and the amount of the mortgage money. (*Davidson v. Cooper*, 13 M. & W. 343. *Pigot's case*, 11 Co. 26 (b). *Master v. Miller*, 1 Smith, L.C. 10th Ed. 747, 4 A. 62, 7 C. 616, 7 D. 418, 9 M. 399, 3 M.H.C. 247, *Suffell v. Bank of England*, 9 Q.B.D. 555. 23 M. 137, *Beanland v. Hirst*, 23 R.R. 756, *Hutchine v. Scott*, 46 R. R. 770, *Stewart v. Aston*, 8 Ir. C.L.R. 35, *Browne v. Lockhart*, 10 Sim. 420. *Chichester v. Marquis of Donegall*, L.R. 5 Ch. A. 497, *Kennedy v. Green*, 6 Sim. 6, *West v. Steward*, 14 M. & W. 47, *Agricultural Cattle Insurance Company v. Fitzgerald*, 16 Q.B. 432. R.) **MAN-GAL SEN v. SHANKER SAHAI**, 25 A. 580, F.B. = A.W.N. 1903, 122. (4 A. 62, 7 C. 616, 7 B. 418, 9 M. 399, 3 M.H.C. 247, 23 M. 137, R.) [F., 6 N.L.R. 1; D., 33 C. 812 = 3 C.L.J. 363 = 10 C.W.N. 788.]

(139)—*Sale of property by executor for paying debts—Mortgage of same for paying Government revenue—Priority of title.*—As between a purchaser of property sold by the deceased owner's executor for the purpose of paying his debts and another claiming under a mortgage executed by the executor's representatives for the purpose of paying Government revenue on such property, the latter's title will have priority over that of the former, unless the mortgagee was proved to have notice of the existence of unpaid creditors of the deceased and of the fact that the representatives intended to misapply the money so advanced to them. **KASEEMUNNISSA BEBEE v. NILRATNA BOSE**, 8 C. 79 = 9 C.L.R. 173 = 10 C.L.R. 113. (4 C. 897, R.) [R., 25 B. 202.]

(140)—*Mortgage—Mortgagee accepting surplus proceeds in revenue sale—Subsequent discovery that mortgagor was real purchaser—Right to proceed against mortgaged property.*—Where a mortgagee takes the surplus proceeds of the mortgaged property sold at an auction by the revenue authorities for arrears of revenue, and subsequently finds that the purchaser at the revenue sale was really the mortgagor, though the property had been purchased by a third person, held that the mortgagee is entitled to have the same property sold in execution of the decree upon his mortgage, although the property is in the hands of a purchaser from the

Mortgage—continued.**—14.—Miscellaneous—continued.**

mortgagor's successor in title. *GANGA SAHAI v. TULSI RAM*, 25 A. 371 = A.W.N. 1903, 75. (23 C. 397, R.) [R, 5 C.L.J. 95 = 11 C.W.N. 284.]

(141)—*Suit on mortgage—Proof of consideration against mortgagor and subsequent transferee.*—Where in a suit on a mortgage the mortgagor denied having received the full consideration but failed to give evidence in support of such plea as against the previous admissions he had made of such receipt, but, at the same time, the mortgagee failed to prove consideration beyond a certain sum as against a subsequent transferee of a portion of the hypotheca who put him to proof of the mortgage and the consideration, held that the mortgagor was entitled to the benefit of the finding of the Court in regard to the amount due as against the transferee and that a decree only for the lesser sum could be passed. *JANKI DAS v. AHMAD HUSAIN KHAN*, 25 A. 159 = A.W.N. 1902, 218. (3 A. 824, R.)

(142)—*Decree for money against mortgagor—Subsequent mortgage by conditional sale, decree for possession under—Rights of purchaser in execution of money-decree.* Every attaching creditor who has obtained an order for sale thereby acquires a charge on the property attached. So, an attaching creditor of mortgaged property who has a right, under cl. (f), s. 91 of the Transfer of Property Act, to redeem the mortgage, is a necessary party to a suit on the mortgage, and could not be deprived, by a foreclosure decree obtained behind his back, of the charge which the attachment and order for sale obtained by him created in his favour. The requirements of s. 86 of the Transfer of Property Act are provided for the benefit not only of the mortgagor, but of all persons entitled under s. 91 of the Act to redeem the mortgaged property, and the mortgagor could not, in proceedings to which such persons were not parties, destroy their right of redemption. *GHULAM HUSAIN KHAN v. DINA NATH*, 23 A. 467 = A.W.N. 1901, 143. (5 C. 148, 4 M. 1, 5 B.L. R. 691, R.)

(143)—*Mortgage incorporating prior mortgage—Suit based on later mortgage only—Effect on prior security.*—On the 4th of May 1883, certain properties were hypothecated to the appellants. On the 30th of June 1883, a bond hypothecating the same properties was executed in favour of the respondent. The above bond of the 4th May was renewed on the 3rd November 1883 by a fresh bond in favour of the appellants under which the prior charge in their favour was expressly kept subsisting. The appellants sued on the later bond and obtained a decree. The contention by the respondent in this case that the appellants, by suing on the bond of November alone, had relinquished their rights under the bond of May, was held untenable. There was no need for the appellants to sue on the earlier bond in order to obtain a sale for the whole of their debt, that having been comprised in the later bond in their favour and,

Mortgage—continued.**—14.—Miscellaneous—continued.**

in suing on the bond of November, they did nothing to imply, or to lead others to believe, that they abandoned what, apart from the abandonment, was a subsisting hypothecation. *SHANKUR SARUP v. MEJO MAL*, 23 A. 313 = 5 C.W.N. 649 = 3 Bom. L.R. 713 = 28 I.A. 203, P.C.

(144)—*Possession given under usufructuary mortgage—Kabuliat of even date by mortgagor to mortgagee, suit not maintainable on, as one transaction what mortgage.*—By an instrument of even date the mortgagor, defendant-appellant, (who under a usufructuary mortgage had put the mortgagee in possession) executed to the latter a kabuliat, or rent agreement, by which he acknowledged to have received from the mortgagee a lease of the mortgaged premises, to hold good up to the redemption of the mortgage, at a certain fixed annual rental. The mortgage-deed authorised the mortgagee to recover his principal and interest from the mortgagor and the mortgaged property, while under the kabuliat the lessor, in order to recover arrears of rent, was authorised to make use of the provisions of the Rent Act for the purpose of ejecting the defendant on his failure to pay rent. In his suit on the mortgage, the plaintiff-respondent claimed the principal amount as due under the mortgage-deed, but for the interest turned to the kabuliat, claiming the rent payable under it as realizable along with the mortgage money. The High Court, however, held that the plaintiff was not entitled to treat the instruments of mortgage and lease as one transaction so as to found a part of his claim on the mortgage and the remainder on the lease. The kabuliat did not make the rent reserved in it chargeable on the mortgaged property, and plaintiff could therefore, be given a mere money decree, and that only for the rent of three years previous to the institution of the suit. *CHIMMAN LAL v. BAHADUR SINGH*, 23 A. 338 = A.W.N. 1901, 95. (19 A. 496, D.) [F., 23 A. 341, Note; R., 6 O. C. 18, 6 O. C. 26.]

(145)—*Mortgage—Purchase in succession by mortgagees in execution of mortgage decrees—Delivery of possession—Date of delivery—Priorities.*—The second mortgage of certain property brought a suit on his mortgage. In execution of the decree obtained by him, he himself became the purchaser and obtained delivery through Court. Thereupon, the first mortgagee sued on his mortgage and himself became the purchaser in execution of the decree obtained by him and obtained possession through Court. Subsequently, however, he sued to recover possession. The question was as to the priority between the two purchasers. Held that priority in the case had to be determined not by reference to the dates of the mortgage documents, but according to the dates of the sales and recovery of possession under them. The second mortgagee, having first obtained possession, was entitled to priority over the first

Mortgage—continued.**—14.—Miscellaneous—continued.**

mortgagee, who obtained possession later on. Such rights as the first mortgagee had on the strength of his mortgage could be enforced only in another suit. *AKATTI MOIDIN KUTTY v. CHIRAYIL AMBU*, 26 M. 486. [*F.*, 32 M. 485; *D.*, 32 C. 891=9 C.W.N. 728=1 C.L.J. 371; *R.*, 19 M.L.J. 728.]

(146)—*Mortgage—Decree for sale obtained by first mortgagee—Second mortgagee not party to suit—Execution of decree—Purchase by decree holder of mortgagor's undivided share—Right of second mortgagee to claim redemption.*—In a suit for sale brought by the first mortgagee of certain property the second mortgagee was not made a party. In execution of the decree passed in the suit, the first mortgagee himself purchased the mortgagor's undivided interest in the mortgaged property, and then sued for partition and possession. The second mortgagee who was made a defendant to this suit, contended that he was entitled to redeem the plaintiff's mortgage. *Held* that the plaintiff could not obtain possession without paying off the second mortgagee, who was in possession. The second mortgagee was not liable to suffer, because the plaintiff failed to make him a party to the prior suit, and it made no difference to the second mortgagee whether the plaintiff's failure was wilful or due merely to ignorance of the existence of the second mortgage. The amount payable by the second mortgagee was the same as that which he would have had to pay if he had been made a party to the plaintiff's prior suit. *RANGASAMY NAIKEN v. KOMARAMMAL*, 26 M. 484=13 M. L.J. 131. [*Rel. on*, 5 Bom L.R. 892; *R.*, 28 B. 153, 6 C.L.J. 612=12 C.W.N. 107.]

(147)—*Mortgage—Sale in execution of decree on prior mortgage—Decree for sale on subsequent mortgage subject to prior mortgagee's right—Sale in execution—Right to possession as between respective purchasers.*—A prior mortgagee instituted a suit on his mortgage. Though there was a subsequent mortgage on the property, the second mortgagee was not made a party to the suit. In execution of this decree, the prior mortgagee purchased the mortgaged property, and his vendee applied for and obtained delivery of possession. Later on, the second mortgagee instituted a suit on his mortgage and obtained a decree for sale, subject to the right of the said vendee. In execution, the second mortgagee purchased the property and his successors in title obtained possession through Court. The above said vendee applied for re-delivery of possession. *Held* that as the decree on the second mortgage was made subject to the right of the applicant and as his sale was of prior date, he was entitled to be in possession until redeemed in accordance with the decree on the second mortgage. *MUHAMMAD USAN ROWTHAN v. ABDULLA*, 24 M. 171. [*F.*, 26 M. 537; *R.*, 30 C. 599, *F.B.*]

(148)—*Recitals in mortgage-deeds—Effect of.*—Recitals in mortgage-deeds and in petitions

Mortgage—continued.**—14.—Miscellaneous—continued.**

sent to officials that certain property has been transferred could not effect a transfer of such property. *IMMUDIPATTAM THIRUGNANA KONDAMA NAIK v. PERIYA DORASAMY*, 24 M. 377=5 C.W.N. 217=28 I.A. 46, P.C.=7 Sac. 811. [*R.*, 29 M. 339.]

(149)—*Mortgage—Lease of land to purchaser of plantain plantation thereon—Mortgage of plantation by such purchaser—Right of mortgagee to security of plantain trees after termination of lease.*—Where a person purchased out and out certain plantain trees from the party from whom he took on the same day a lease of the land upon which the trees were growing, and subsequently mortgaged the plantation to another, the latter acquired, as regards the trees on the land, the rights of a mortgagee, and his rights were not affected by the fact that his mortgagor's lease had since become determined. *RANGASAMI KONAN v. SELLA-PARUMAL PADAYACHI*, 13 M.L.J. 3.

(150)—*Mortgage—Personal covenant by mortgagor to pay mortgage-money in instalments—Provision in mortgage deed for mortgagee to be placed in possession on default—Suit for sale and to enforce personal covenant on failure to pay each instalment—Maintainability.*—A mortgage deed payable by instalment contained a personal covenant to pay as each instalment fell due. The deed also contained a covenant that, at the termination of the period on which the instalment was to fall due, if any sum still remained due, possession of the property was to be given to the mortgagee. On default being made in the payment of some instalments, the mortgagee sued for sale of a portion of the mortgaged property and for a personal decree against the mortgagor. *Held* that the fact that there was provision for delivery of possession to the mortgagee on default being made did not deprive the mortgagee of his right to sue for each instalment as it fell due, and recover the same by sale of a portion of the mortgaged property, and personally from the mortgagor. *RAMAYYA v. VENKATARAMA GURRAJU*, 13 M.L.J. 2.

(151)—*Mortgage—Holder of decree for redemption misled by current erroneous decisions—Time limited allowed to lapse—Application to extend time—Exercise of discretion.*—Where the plaintiffs who held a redemption decree were misled by the decisions of the Courts, prior to the Full Bench decision reported in *Vedapuratti v. Vallbha Valia Raja* (25 M. 300), into the belief that a redemption decree was not a bar to a second suit for redemption and that there was no necessity for redeeming strictly within the time limited by the decree on pain of altogether losing the right to redeem, and in consequence allowed the time limited by the decree to lapse, the Court in the exercise of its discretion could extend the time for redemption granted by it. *SABAPATHY PATTAR v. MURUKHAN*, 13 M.L.J. 266.

Mortgage—continued.**—14.—Miscellaneous—continued.**

(152)—*Mortgage—Sale of mortgaged property in execution of personal decree—Order for sale free of mortgage—Sale subject to mortgage—Legality of sale.*—Where with the consent of the mortgagee the mortgaged property was ordered to be sold free of incumbrances in execution of a personal decree against the mortgagor, and the Court without notice to the mortgagee or the judgment-debtor, sold the property subject to the mortgage, the sale was invalid. **SINNU SASTRYAL v. SUBRAMANIA SASTRYAL, 13 M. L.J. 227.**

(153)—*Mortgage—Equitable mortgage by mortgagee—Power of sale under original mortgage—Sale by mortgagee after satisfaction of equitable mortgage.*—Where a mortgagee with a power of sale parted with the title-deeds in pursuance of an equitable mortgage and sold his right in the property mortgaged after he had got back the title-deeds, the original rights as mortgagee with power of sale having re-vested in him on his getting back those deeds, the purchaser from him acquired all the rights held by him under his mortgage. **MUTHUSAMI MUDALI v. AYYALU BATHADU, 13 M.L.J. 367.**

(154)—*Sub-mortgage—Assignment by sub-mortgagee—Intention to keep alive mortgage—Suit for redemption by original mortgagor—Nature of decree to be passed.*—A kanomdar executed a mortgage to another and the sub-mortgagee assigned his right to a third person. The original mortgagor having sued for redemption, *held* that, as the title passed under the express assignment, no question as to whether there was an intention to keep alive the sub-mortgage could arise, and the mortgagor was entitled to a decree for redemption on payment of the amount due under the sub-mortgage and the value of improvements. A decree for possession of the property under s. 264 of the Civ. Pro. Code, 1882, was not the proper form of decree to be passed. **SHOURI ANNA v. ANTHONI MUTHU, 13 M.L.J. 375.**

(155)—*Mortgagee covenanting to pay Government kist—Enhancement of kist—Liability—Right of suit before redemption.*—Under a mortgage instrument, a usufructuary mortgagee covenanted to pay the Government revenue payable on the land mortgaged and to take the profits in lieu of interest without reference to whether the profits were more or less in particular years. Subsequently, the Government revenue on the land was enhanced. The enhanced portion of the revenue was paid by the mortgagor and he brought a suit to recover the same from the mortgagee. *Held* that the usufructuary mortgagee was not, in the absence of a contract to the contrary, liable, as between himself and the mortgagor, to pay the enhanced revenue, as the enhancement was subsequent to his mortgage. The reasonable view is that the revenue payable under the settlement in force was all that the mortgagee undertook to pay, the ultimate responsibility in respect of any addition to the

Mortgage—continued.**—14.—Miscellaneous—continued.**

land revenue devolving on the mortgagor. (9 I.A. 68, R.) *Quære*:—Whether the mortgagor can maintain a suit against the mortgagee for the amount of revenue payable by the latter and paid by the mortgagor, without offering to redeem? **KRISHNIER v. ARAPPULI AIYER, 14 M.L.J. 488.**

(156)—*Mortgagor not owner of property mortgaged—Decree for money—Right to recover property not mortgaged.*—Two brothers partitioned between them two plots of land. Subsequently one of them mortgaged the plot which fell to the share of the other. The mortgagee obtained a decree for sale of the mortgaged property and purchased it himself. *Held* that the decree-holder purchaser would not be entitled to recover the plot actually belonging to his mortgagor. The plaintiff was not entitled to possession of the plot which was not mortgaged to him, and he was not entitled to another decree for money as he had already got one. **LAKSHMAMMA v. KRISHNIAH, 14 M.L.J. 490.**

(157)—*Mortgage of a jote—Lease, renewal of, by mortgagee—Right of mortgagor to the lease.*—The proposition that if a trustee or mortgagee obtains a lease during the continuance of the trust or mortgage, the benefit of the lease taken by the mortgagee or trustee enures to the benefit of the *cestui que trust* or the mortgagor is also applicable to the case of the mortgage of a jote. **BALINATH SINGH v. HARIKISHEN BHAGAT, 6 C.W.N. 372.**

(158)—*Mortgage—Decree for redemption—Title deeds lost by mortgagee—Liability of mortgagee to give security before drawing decree amount.*—The decree in a suit for redemption directed that, on payment by the mortgagor of the amount decreed, the mortgagee should reconvey the mortgaged properties and deliver the title deeds in his possession or power to the mortgagor. The mortgagee having alleged that he lost the title deeds the Court passed an order directing him to furnish security for the value of the properties before drawing the money paid into Court by the mortgagor. *Held* that as there was no direction in the decree that the mortgagee, in default of delivering up the title deeds of the properties to the mortgagor, should furnish security for the value of the properties, the order directing security to be furnished was not maintainable. **SUBBARAYA IYEN v. PADHMANABHA VADHYAR, 12 M. L.J. 63.**

(159)—*Mortgage—Suit to recover mortgaged property and for injunction—Prayer for further relief—Mortgage not valid—Right of mortgagee to obtain decree for money.*—A usufructuary mortgagee sued to recover the mortgaged premises and for an injunction preventing the defendant from interfering with his possession. He further prayed for such other relief as the Court may think proper. It was found that the mortgagor had no right to mortgage the premises. The question was whether under the general prayer in the plaint the plaintiff

Mortgage—continued.**—14.—Miscellaneous—continued.**

was entitled to get a decree for money in lieu of a decree for possession. *Held* that the plaintiff's claim for possession and injunction was inconsistent with any claim for money. The only relief he was entitled to in such an action was relief *ejusdem generis* with his claim. In the absence of any claim for money, the plaintiff was not entitled to a judgment for the mortgage-money. **CHINNASAMI AIYANGAR v. KUPPUSAMI AIYANGAR, 7 M.L.J. 50.**

(160)—*Usufructuary mortgagee paying off prior mortgage decree—Decree for redemption without mortgagee being paid the full amount—Subsequent suit to recover money.*—Where a usufructuary mortgagee paid off a prior mortgage-decree and subsequently the mortgagors obtained a decree for redemption against him upon payment only of the mortgage amount, and the mortgagee did not appeal from that decree so as to secure his right to be paid in full including the amount he advanced towards the satisfaction of the previous mortgage-decree, and subsequently brought a separate suit for the recovery of that amount, *held* that the suit was not maintainable, that if, by paying off the mortgage he obtained any right under s. 74 of the Transfer of Property Act, his remedy was to proceed in execution, and that if he obtained any right under s. 72, the right he acquired was to add the amount to his own debt, and that his only right was to insist upon being paid in full before he could be turned out, and that it was not a case where it could be said that the plaintiff was turned out unlawfully. **BAVANNA v. BALAGURIVI, 9 M.L.J. 177.**

(161)—*Mortgage — Priority, relinquishment of.*—On 4th May 1883 certain villages were mortgaged to S for Rs. 15,000. On the 30th June 1883, the same were mortgaged to P for Rs. 7,000. On the 3rd November 1883, a fresh bond executed in favour of S, for Rs. 20,000; which, by its terms, kept alive the bond of 4th May 1883. S sued on the bond of November 1883 only and not on the bond of May 1883, and obtained a decree on the bond of November. P also brought a suit on his bond of June 1883, and obtained a decree. *Held*, that the mere suing on the bond of November did not amount to a relinquishment by S of his rights under the bond of 4th May 1883. There was no necessity for S to sue on the bond of May in order to obtain a sale for the whole of their debt. **SANKAR SARUP v. LAL PHUL CHAND, 5 C.W.N. 649, P.C.=3 Bom. L.R. 713=28 I.A. 203=23 A. 313.**

(162)—*Payment of prior mortgage by subsequent mortgagee — Intention to keep alive — Transfer of Property Act (IV of 1882), s. 80 — Wrong conclusion from fact found — High Court's power to interfere.*—The intention to keep alive an earlier lien may be found in the circumstances attending the transaction, or may be presumed from a consideration of the fact whether it is or is not for the benefit of the

Mortgage—continued.**—14.—Miscellaneous—continued.**

subsequent mortgagee that the charge should be kept alive. The conclusion by an Appellate Court that the subsequent mortgagee could not have intended to keep alive an earlier lien simply because he was not, at the time of the execution of his mortgage, aware of the earlier lien which he paid off cannot be legitimately drawn from the fact found by that Court. The error was one which, under the rule laid down in 19 I.A. 228, the High Court could interfere with in second appeal. **GIRDHAR DAS v. RAM AUTAR SINGH, 8 C.W.N. 690.**

(163)—*Mortgage — Mortgages discharging prior mortgage—Priority how determined—Limitation—How reckoned—Suit by subsequent mortgagee—Prior mortgagee made party—Mortgage not pleaded—Res judicata—Civ. Pro. Code, 1882, s. 13, Expl. II—Properties subsequently acquired—Whether mortgage extends to them.*—Where a mortgage bond of 1876 was discharged by two different bonds executed in 1884 by two persons who divided among themselves the hypotheca and the debt due on the original mortgage, but providing a different rate of interest, *held* that in determining the priority between this mortgagee and a mortgagee under a deed of 1877, the rights of the former should be taken as relating back to 1876. In determining, however, the period of limitation for a suit on the later two bonds, the time should be reckoned from the date of these bonds and not from 1876. Where, in a suit on the mortgage of 1877, the mortgagee of 1876, who was made a party, did not mention the mortgage of that date but only the two later bonds, admitting himself to be a subsequent mortgagee, *held* that, so far as the question of priority was concerned, the latter suit by the mortgagee of 1876 was barred by the rules of *res judicata*, though not by estoppel. [*D.*, 2 C.L.J. 574, 1 C.L.J. 337.] Where, at the time of mortgage, the owner owned only a certain share in the estate, but after that date acquired an additional share, *held* that the mortgagee had no lien against the later acquisition. **BARANASHI PERSHAD CHOWDHURY v. JOHORI LAL, 8 C.W.N. 385.**

(164)—*Suit by prior incumbrancer without impleading puisne incumbrancer—Decree for sale—Purchase by decree-holder—Actual possession delayed—Suit by puisne encumbrancer—Prior mortgagee's right to interest till date of actual possession.*—The defendants, who were prior mortgagees, sued upon their mortgage without impleading the puisne encumbrancer, the plaintiff, and obtained a decree, in execution of which they purchased a part of the mortgage property. They obtained formal possession of the same on 17th April 1887, and actual possession on 11th May 1897, the delay having arisen from the opposition of some mortgagees who claimed to hold the property under an earlier mortgage and who were not impleaded by defendants in their suit. In a suit by plaintiff, the puisne incumbrancer, for redemption of the

Mortgage—continued.**—14.—Miscellaneous—continued.**

defendants' mortgage and sale of the mortgaged property, *held* that the defendants were entitled to get interest up to the date of obtaining actual possession. *KEDAR NATH v. KEDAR NATH*, 1 A.L.J. 492.

(165)—*Mortgagee making payments to save mortgaged property from being sold for arrears of revenue—Lien—S. 310-A, Civ. Pro. Code, 1882 (=O. XXI, r. 89, new Code).*—A mortgagee, making payments to save a mortgaged property from being sold for arrears of revenue, has, according to the general principles of justice equity and good conscience, an additional lien on the property for the sums so paid by him. *RAKHOHARI CHATTA RAJ v. BIPRADAS DEY*, 31 C. 975. (30 C. 794, F.)

(166)—*Prior mortgagee having no notice of puisne mortgagee, failing to implead him—Value of decree obtained by prior mortgagee—Right to possession determined by priority of respective sales—Purchaser at prior sale and a mortgagee—Purchaser at subsequent sale.*—When a prior mortgagee, not having had direct notice of the mortgage (though registered) in favour of the puisne mortgagee, fails to implead him in his mortgage suit, the decree for sale obtained by the prior mortgagee and the proceedings based thereunder are valid, subject to the rights of the puisne mortgagee. (18 C. 164, P.C., R.) A puisne mortgagee's right, when he was not a party to the first mortgagee's suit is limited to a right of redemption or sale of the mortgaged premises, subject to the lien of the first mortgagee or auction-purchaser on a decree by the latter. (30 C. 599, R.) He cannot compel him to part with possession without redeeming the first mortgage. (25 W.R. 16, 20 B. 390, 7 C.W.N. 11, F.) A first mortgagee in possession under a prior sale may always shield himself under his mortgage and his purchase, although his right to possession may be defective. [R., 6 C.L.J. 612 = 12 C.W.N. 107.] Inasmuch as the right to possession depends upon the purchase of the outstanding equity of redemption, and is ordinarily determined by the priority of the respective sales, at the instance of the different mortgagees, the purchaser at the prior sale is entitled to retain possession as against a mortgagee who purchases at a subsequent sale. *RAM NARAIN SAHOO v. BANDI PERSHAD*, 31 C. 737. (5 C. 265, 269, 21 C. 116, R.) [R., 32 C. 891 = 1 C.L.J. 371 = 9 C.W.N. 728.]

(167)—*Mortgage-decree, execution of—Sale—Objection by mortgagor not raised at earlier stage.*—A mortgagor is precluded from raising the objection that the sale in execution of the decree in the mortgage suit is invalid by reason of the decree *nisi* in that suit never having been made absolute, if such objection is not raised at an earlier stage of the proceedings. *GUNINDRA PROSAD v. BAIJNATH SINGH*, 31 C. 370.

(168)—*Mortgage by ostensible owner of property—Transfer by benamidar, when not void-*

Mortgage—continued.**—14.—Miscellaneous—continued.**

able—Notice of benami purchase.—The plaintiff sued defendant 1 and defendant 2 for a declaration, that three mortgage-deeds executed by defendant 1, in favour of defendant 2, and the decrees obtained on them, were null and void as against him. He alleged that his father purchased by several sale-deeds the property in suit *benami* in the name of defendant 1 (his wife and plaintiff's mother). He further alleged that he was unaware of the mortgages until the proclamation for the sale of the property was issued in March 1898. The first defendant admitted all the facts alleged in the plaint, but pleaded nevertheless that the suit should be dismissed. The second defendant pleaded that the first defendant was the real purchaser of the property, and that the mortgage-money was advanced to her in good faith, believing her to be the absolute owner of the property. It was proved in the course of the trial that the sale-deeds were all in the name of defendant 1, that mutation of names was effected in her favour in the register of proprietors that she had previously mortgaged the property and taken possession of it and retained it after her husband's death. *Held*, that under all the circumstances of the case there was no constructive or other notice which put the defendant 2 to further inquiry. *Held*, further, that, even if defendant 1 was merely the *benami* owner of the property in suit, the mortgages and the decree obtained on them by defendant 2 were not voidable, as she was, with the consent of the persons interested, the ostensible owner, when the mortgages were effected. *JAGANNATH BAKHSH THAKUR, v. THAKURAIN DHIRAJ KUAR*, 4 O.C. 192.

(169)—*Agreement between co-mortgagors accepted by mortgagee—Arrangement between mortgagee and some only of the co mortgagors, effect of—Other co-mortgagors, extent of liability of.*—Suit upon mortgage executed by the defendant and his three undivided paternal cousins. Subsequent to the mortgage, there was a partition suit as to the entire joint family property, inclusive of the mortgaged lands, in which it was decreed that each of the four sharers was to take a fourth share of the joint estate paying a fourth share of the family debts inclusive of the above mortgage-debt. Plaintiff, the mortgagee, was not a party to the partition suit, but, subsequent to the decree in that suit and in accordance with its terms, he entered into arrangements with each of the three mortgagors other than the defendant, by which their shares of the property mortgaged were to be realised by him on payment of their shares of the mortgage-debt. Defendant not having entered into any such arrangement with the plaintiff, nor discharged his one-fourth share of the mortgage-debt, the present suit was instituted for the recovery of that share of the debt due by the defendant by sale of his portion of the mortgaged lands. The suit was dismissed by the lower appellate Court on the ground that it was not maintainable, as it was only for a part of the

Mortgage—continued.— 14.—*Miscellaneous—continued.*

mortgage-debt and for sale of a part of the mortgaged property. Reversing the decision of that Court, *held*, it was competent to the mortgagee in acceptance of the terms of the decree between the mortgagors to validly release each mortgagor on payment of his *quota* of the debt and proceed separately against such of them as might make default (15 B. 257, 30 C. 755, R.) in paying their share of the debt as settled by the decree. The rule that an arrangement between one or more of several mortgagors and the mortgagee, whereby the former are released from their liability under the mortgage, in consequence of payment of a portion of the debt or otherwise, does not affect mortgagors not parties to the arrangement, if their right as against the co-mortgagors is likely, in any way, to be prejudiced thereby, has no application to the present case, for, here, the defendant co mortgagor has been sought to be made liable only for his just share of the debt and no more. **VENKATACHELLA CHETTY v. SRINIVASA VARADA CHARIAR, 28 M. 555 = 15 M.L.J. 442.**

(170)—*Completion of mortgage by registration and payment of consideration—Failure to comply with subsequent directions for payment of consideration-money—Rescission of contract.*—Plaintiff executed and registered a usufructuary mortgage of her land in favour of defendant, who paid her the consideration-money before the registering officer and the mortgage became complete on registration, by reason of s. 59 of the Transfer of Property Act. Subsequently, plaintiff entrusted the money to the defendant asking him to pay off certain creditors, one of whom was in possession under a prior mortgage of the land. Defendant having failed to pay up, accordingly, plaintiff instituted this suit to have the mortgage rescinded, and both the lower Courts decreed in her favour. *Held*, reversing the decrees in both the Courts below, that plaintiff was not entitled to a decree for rescission of the mortgage. The subsequent direction to the mortgagee to pay the creditors of the mortgagor on her behalf was none the less a separate transaction, because it took place after the completion of the mortgage by registration and payment of the consideration. The mortgage became a perfected conveyance, as distinguished from a contract, and the defendant became entitled to possession under the mortgage; and, even if the consideration had not been paid at all, plaintiff's remedy would be by suit to recover the money. **KHUDKIA alias ABDUL RAHMAN v. MT. LANKI, 1 N L.R. 146. (14 C.P. L. R. 57, 23 B. 522, R.; 4 C.P.L.R. 120, D.)**

(171)—*Subrogation—Charge, keeping alive of—Equity of redemption, purchaser of—Purchaser, payment by, one of two charges—Non-payment of the other, effect of—Lis pendens in mortgage suit, applicability of.*—If a person purchases property, which is subject to two

Mortgage—continued.— 14.—*Miscellaneous—continued.*

mortgages, and retains a portion of the purchase-money for payment to the mortgagees, but pays the first of the two incumbrancers and not the second, he cannot treat the first mortgage as kept alive to be used as a shield against the second, nor can he claim to be subrogated to the position of the mortgagee, whose debt he has satisfied. [R., 10 C.L.J. 150, 6 A.L.J. 549.] The doctrine of subrogation does not apply when a person simply performs his own obligation or covenant and pays off a charge, which he has undertaken or is bound to satisfy. (17 M. 62, *Appl.*) [R., 6 C.L.J. 134.] The question whether a mortgage, which has been paid off, is to be considered as extinguished or kept alive for the benefit of the person, who makes the payment, is one of intention to be determined with reference to the surrounding circumstances as they exist at the time when the mortgage is discharged. (10 I. A. 62, *F.*) [R., 6 C.L.J. 134, 11 C.L.J. 226.] In the case of a mortgage-suit, the *lis* continues after the decree *nisi* and the doctrine of *lis pendens* is applicable to proceedings to realise the mortgage after the decree for sale. **SURJIRAM MARWARI v. BARHAMDEO PERSHAD, 2 C.L.J. 288. (22 B. 939, 26 C. 966, 9 C.W.N. 171, 23 A. 331, *F.*) [R., 7 C.L.J. 1, 9 C.L.J. 346, 9 C.L.J. 485.]**

(172)—*Money-decree—Mortgage-decree—Mortgagee's lien, Res judicata—Civ. Pro. Code, 1882, s. 43.*—A plaintiff who omits to obtain a mortgage-decree and merely claims a money-decree on a mortgage-bond cannot enforce his mortgage lien on the property after it has been sold to a third party. Rulings in suits decided before the amendment of C. P. C., s. 43, by Act XII of 1879, and in suits in provinces where the Transfer of Property Act is in force, held to be inapplicable. **MAUNG MYAT MIN v. MAUNG KYAN, L.B.R. 1893—1900, 14 (14 B.L.R. 408, 4 B. 57, 4 A. 257, 7 C. 714, R.)**

(173)—*Of a boat or of immoveable property—Hirer of boat—Lessee of house—Cost of repairs.*—The hirer of a boat or the lessee of a house cannot claim from the owner costs of repairs unless there is an express agreement. The mortgagee of a boat or of immoveable property is entitled to credit for necessary repairs when he has to account for profits and not otherwise. **ARBAN ALI v. YOSUF ALI, L.B.R. 1893—1900, 73. (4 B. 589, R.)**

(174)—*Claim against specific portion of an undivided estate.*—A mortgage of his joint interest by one of several co-parceners in an estate does not entitle the mortgagee to possession of such estate. The mortgagee's claim cannot be enforced against any specific portion of the estate as the specific share of the mortgagor, until the share has been ascertained and separated by division of such estate. **MA PA U v. MAUNG THA LU, L.B.R. 1893—1900, 189.**

(175)—*Payment of prior mortgage by third person—Right of such person to use it as shield against subsequent mortgage.*—Where a third

Mortgage—continued.—14.—**Miscellaneous**—continued.

person who paid off a prior mortgage intended to keep that mortgage alive, he can use it as a shield against a subsequent mortgagee. **SEETARAM v. LACHMAN**, 12 C.P.L.R. 70. (10 C. 1035, F.)

(176) — *Mortgage — Prior and subsequent incumbrances in favour of same parties—Notice of existence of prior incumbrances in case of sale under subsequent incumbrance—Bona fide purchaser.*—Certain mortgagees holding several mortgages of different dates on varying proportions of the same property, which was held jointly by the mortgagors, obtained a decree under the last of such mortgages and sold the property mortgaged in execution thereof. Before sale, the mortgagees applied to the Court executing the decree to give notice of their prior mortgages; but the Court did not do so. *Held* that the mortgagees had done all in their power to give notice of the prior incumbrances on the property sold and that they were not precluded, as against a bona fide purchaser at the auction sale, from afterwards suing on the former mortgage deeds. **ABDUL ALI KHAN v. KHET SINGH**, A.W.N. 1891, 86.

(177) — *Mortgage—Prior and subsequent incumbrances — Right of subsequent mortgagee satisfying prior claim as against intermediate mortgagee—Transfer of Property Act, s. 74.*—The plaintiff was mortgagee under a bond dated the 27th July, 1883, of certain properties, namely (1) 20 Biswas of mouza Jalaluddin Ganauri, (2) 20 Biswas of mouza Sarawah, and (3) 19 biswas of 6 kach, 13½ tan. of mauza khalsia. Of these properties, (1) was already mortgaged to the plaintiff under a bond dated the 21st August, 1878, for Rs. 30,000; (2) was also mortgaged under the same bond to the plaintiff; (3) was already hypothecated to one Pirbhu Dyal for Rs. 15,000, under a bond dated the 28th August, 1878. The consideration for the plaintiff's mortgage of the 27th July, 1883, was Rs. 16,500. Out of this sum, the plaintiff was found to have made at the instance of the mortgagors the following appropriations or payments, viz., Rs. 3,171 as interest due to himself on his bond of the 21st August, 1878. Rs. 9,080 to Lakshmi Chand, Tej Ram, principal and interest on their bond for Rs. 15,000 of the 13th August, 1880 and Rs. 817 to Pirbhu Dyal as interest on his bond of the 28th August, 1878. The defendants held a mortgage for Rs. 15,000, dated the 15th July, 1883, on the three villages Jalaluddin Ganauri, Sarawah, and Khalsia, on which they obtained a decree and having brought the villages to sale purchased themselves. The plaintiff then sued to recover the sum of Rs. 14,283 by sale of the villages mentioned above on the allegation that the property was liable to that extent in consequence of the disposition made by him at the request of the mortgagors of the moneys advanced by him under the mortgage of the 21st August, 1883. *Held* that, as to the sum of Rs. 3,171 credited to the mortgagors as interest

Mortgage—continued.—14.—**Miscellaneous**—continued.

on the mortgage of the 21st August, 1878, and the sum of Rs. 9,080 paid to Lakshmi Chand, Tej Ram in complete satisfaction of their bond of the 13th August, 1880, the plaintiff must be considered to have intended to keep those charges alive for his benefit, and, this being so, he would be entitled to bring the properties mortgaged to sale for such amount; but, in respect of the sum of Rs. 817 paid to Pirbhu Dyal as interest on his bond of the 28th August, 1878, that the plaintiff was not entitled to recover the amount from the properties mortgaged. The principle of equity under which the property mortgaged were made liable to the two preceding payments could not be extended to cover the payment to Pirbhu Dyal. To do so would be to create a second charge under the same mortgage. **SANT LAL v. KISHUN SAHAI**, A.W.N. 1891, 121.

(178) — *Mortgage — Covenant as to right of mortgage under certain contingencies to recover the mortgage-money before due date—Construction of covenant—Act IV of 1882 (Transfer of Property Act), ss. 67, 68.*—The plaintiff executed a simple mortgage in favour of one T.P. on the 26th March, 1881. On the 29th March, 1883, he executed a second mortgage of the same property in favour of one D.D. This second mortgage purported to be an usufructuary mortgage, but the mortgagee never got possession under it. It contained, amongst others the following covenant;—"If the mortgagee come to know of any hypothecation, he may at that very time recover his money by suing me (the mortgagor) personally, and if I wish to pay off the money in part, it shall be impossible." The second mortgagee came to know of the first mortgage before the term of his mortgage had expired, and thereupon sued the mortgagor for possession and mesne profits. He obtained a decree in appeal for sale of the mortgaged property and against the mortgagor personally. The mortgagor then appealed to the High Court. *Held* that the decree, so far as it was for sale of the mortgaged property, was wrong. The only decree which could properly be given under the circumstances was a decree for money. **MADHO PRASAD v. DEBI DIAL**, A.W.N. 1891, 168.

(179) — *Mortgage — Covenant for personal liability—Suit by mortgagee for sale—Claim to enforce personal liability if sale proceeds insufficient to discharge debt—Act IV of 1882 (Transfer of Property Act), s. 88.*—A deed of mortgage of immoveable property executed in 1875 contained a covenant, whereby the mortgagor made himself personally liable for payment of the mortgage-debt. The mortgagee having become insolvent, the Official Assignee brought a suit in which he prayed, first, for enforcement of the mortgage by sale of the mortgaged property, and secondly, in the event of the sale-proceeds being insufficient to discharge the debt, for enforcement of the personal covenant. The Court granted the former relief, but refused to grant the

Mortgage—continued.**—14.—Miscellaneous—continued.**

latter on the ground of delay in bringing the suit and of hardship to the defendant. *Held* that the plaintiff was entitled to join, with his claim for enforcement of the mortgage, the further claim to a declaration that, in the event of the sale proceeds being insufficient to discharge the debt, its discharge might be enforced against the person and other property of defendant and that the claim to enforce the personal covenant ought to have been decreed. *MILLER v. DIGAMBAR DEBYA*, A.W.N. 1890, 142. (A.W.N. 1889, 149, D.) [D., 13 A. 356, 360; R., 14 A. 513; F., 28. A. 365=3 A.L.J. 171=A.W.N. 1906, 44.]

(180)—*Possession, suit for, by mortgagee—Declaration concerning mortgage money when premature.*—The plaintiff alleged that, in 1891, the defendant's father executed in his favour a mortgage-deed in lieu of Rs. 43,000. The principal was re-payable within ten years; interest was payable year by year; and, in default of payment of interest, the mortgagor was to deliver possession of the mortgaged villages to the mortgagee. The plaintiff asked that a decree might be passed for possession of the mortgaged villages in lieu of what, according to his calculation, was the amount of the mortgage-money then due to him from the defendants. The defendants disputed the correctness of that amount. The Court of first instance decreed the plaintiff's possession in lieu of Rs. 43,000 plus one year's interest. *Held*, that the suit, in so far as it related to any declaration concerning the mortgage-money, was premature. The question as to the correct amount due on the footing of the mortgage will arise only when the mortgagor is ready and willing to redeem the mortgage. *JAWAHIR SINGH v. CHANDIK BAKHSI*, 2 O.C. 145. (1 A. 325, F.)

(181)—*Of joint family property—Liability of son under decree obtained by mortgagee against father—Partition, decree for—Execution of decree—Interest and costs, decree for—Non-joinder of parties.*—In October 1894, the appellant obtained against his father and brothers, a decree for partition of his share of the family property. In 1889, the father executed two mortgages of a part of a family property. The mortgagees obtained a decree for sale of the mortgaged property in December 1894 against the appellant's father. The appellant sued to have it declared that his share of the property was not liable to sale in execution of the decree, as he had obtained a decree for partition before the mortgagees obtained a decree on the mortgages, and was not a party to the suit on the mortgages. *Held*, that the appellant's share was liable to be sold under the decree obtained by mortgagees against his father, and that the mere circumstance, that he obtained a decree for partition of his share before the mortgagees obtained their decree, did not distinguish his case from that of *Sheo Rattan v. Raja Jagmohan Singh* (1 O.C.

Mortgage—continued.**—14.—Miscellaneous—continued.**

53, R.) *Held*, further, that the appellant was liable for the interest and costs payable under the decree. *RAM ADHIN v. SHAMESHUR DATT*, 4 O.C. 93.

(182)—*Absolute estate, condition in restraint of alienation of—Alienation, what amounts to be condition in absolute restraint of—Transfer of Property Act, s. 10.*—In a suit brought by H against B for possession of a village, the parties entered into a compromise, in which it was stipulated that the village should remain in possession of H as owner for ever, that H and his heirs (that is, male issue) should always remain in possession, but should have no power to sell, mortgage, or transfer to a stranger; the reason of this condition being that the village was sold by H's father to the grandfather of B. A decree in accordance with the compromise was passed. Subsequently H mortgaged the village to the defendant, who obtained a decree against H for the sale of the mortgaged property. The plaintiff (H's son) sued the defendant and his father H for a declaration that the mortgage was illegal, null and void, and the village was not liable to be sold in execution of the decree, etc. *Held*, that the estate which, under terms of the compromise, H acquired in the village, was an absolute estate, and the condition in restraint of alienation, except to B and his heirs and representatives, was one in absolute restraint of alienation and was void. *Held*, therefore, that the mortgage made by H in favour of the defendant was a perfectly legal and valid transfer. *FAIYAZ HUSAIN KHAN v. NILKANTH*, 4 O.C. 163. [F., 10 O. C. 136.]

(183)—*Purchase of mortgagor's rights by mortgagee at sale in execution of decree of third party—Mortgagor's rights, purchase by mortgagee of, for fair price—Transfer of Property Act, ss. 99—Leave of Court to bid at auction sale—Code of Civil Procedure, s. 294—Trusts Act, ss. 88 and 90—Execution of decree.*—The appellant and three other persons obtained a money decree against the owner of a village in execution of which they attached the village on May 6th, 1899. B and another, who had likewise obtained a money-decree against the owner of the village, attached it on May 26th, 1899, and had it put up for sale on October 20th, 1900, when it was knocked down to the respondent for Rs. 14,633. The respondent was at the time mortgagee of the village and his mortgage was entered in the proclamation of sale as an incumbrance of the property. It was not suggested that the price paid was less than the market value of the village, or that the respondent was guilty of any misconduct. *Held*, that the purchase of the mortgagor's rights by his mortgagee, the respondent, extinguished the mortgagor's right to redeem, and that, therefore, the mortgagor, had no rights which could be put up for sale in execution of the decree held by the appellant. Within the meaning of ss. 88 and 90 of the Trusts Act, a mortgagee does not avail himself of his position

Mortgage—continued.—14.—**Miscellaneous**—continued.

as such merely by bidding at an auction for his mortgagor's property, nor does he gain an advantage for himself within the meaning of those sections, when he pays a fair price for the property; such a purchase has the same effect as a purchase made by a stranger; and neither s. 294 of the Civil Procedure Code, nor s. 99 of the Transfer of Property Act, applies. **THAKUR DURGA SINGH v. SETH JAI DAYAL**, 7 O.C. 307. [R., 8 O.C. 327.]

(184)—*Mortgage—Mortgage of common holding—Part of mortgaged land already heavily encumbered—Remedies of mortgagee.*—A person in possession of a portion of a common holding mortgaged certain specific portions out of it, but the mortgagee was later on deprived of his security as mortgagor's title was defective and as a prior mortgage existed. The mortgagee then claimed to have his security substantiated out of the remainder of the mortgagor's share. The Chief Court held that he was entitled to have his security so made good to him. **SUNDAR SINGH v. NATHA**, 89 P.R. 1903. (21 W.R. 233, 101 P.R. 1894, 18 M. 492, 32 P. R. 1900, R.)

(185)—*Decree on mortgage—Alleged satisfaction of decree—Declaratory suit by sub-mortgagee not maintainable—Specific Relief Act, s. 42.*—In a suit by a sub-mortgagee, for a declaration that a decree held by a mortgagee had been paid up and satisfied and so became incapable of execution; held, that the suit was not maintainable. A suit for the redemption of the earlier mortgage upon the strength of these allegations ought to have been brought by the sub-mortgagee, and, in that suit, he might have raised these pleas and claimed costs in the event of his allegations being found correct. In order to obtain a declaration that the decree was incapable of execution, it was necessary for the sub-mortgagee, as plaintiff, either to have the decree set aside or else to show the Court that the money due under it had been satisfied and, therefore, to have accounts taken. This is not such a decree as the Court, in the exercise of its discretion, ought to pass under the provisions of the Specific Relief Act. **HAR PARSHAD v. PHUL CHAND**, 2 A.L.J. 609.

(186)—*Mortgage decree obtained by puisne mortgagees—Parties to suit—Sale of mortgaged properties—Suit to establish priority and enforce subsequent mortgage—Intention to keep previous mortgage alive—Zurpeshgi deed, and decree obtained thereon, previous, effect of—Limitation—Subsequent sale of properties previously sold—Knowledge of previous suit and proceeding—Service of summons—Lis pendens—Lien of puisne mortgagees—Evidence.*—Decrees obtained by previous mortgagees are admissible as evidence against subsequent mortgagees or their assignors who had executed the subsequent mortgages, after the institution of the suits by previous mortgagees, unless they can show that the non-service of summonses detracts from their evidentiary value and binding character.

Mortgage—continued.—14.—**Miscellaneous**—continued.

When subsequent mortgagees are made parties, to a suit to enforce a mortgage, as puisne mortgagees, who have the right to redeem, and they do not set up their title as prior mortgagees and a decree is obtained, and a suit is subsequently brought by the assignees of the puisne mortgagees, who were so made parties, and the same title on the basis of the same deed is set up to establish priority, the omission to raise the title in the previous suit, will, under s. 13, exp. II of the Code of Civil Procedure, be a bar to their now relying on their prior mortgage, even if they could get the benefit of the prior mortgage (29 I.A. 118, 8 C.W.N. 385, 31 C. 428, F.) (See, however, 1 C.L.J. 337.) A suit brought by the assignees of a *Zuripeshgi*, more than 12 years after the mortgagees ceased to enjoy the usufruct of hypothecated properties for realization of the mortgage money covered by it, is barred by limitation. If, however, the payment of the *Zurpeshgi* debt had the effect of subrogation, the plaintiffs are bound by the same rules of law and equity as the original mortgagee and the suit, in so far as it is on the footing of the *Zurpeshgi*, would be barred (8 C.W.N. 385, D.) The question of the intention of the parties to a mortgage, whether it was intended to keep the mortgage alive, is essentially a question of fact, and the presumption that a subsequent mortgagee, intended to keep alive the prior mortgage, which has been discharged with the money advanced by him and that he is entitled to use the prior mortgage as a shield against intermediate encumbrances is a rebuttable one and the Courts are to look, in each case, to its own facts and circumstances in coming to a conclusion (9 C. 961, 10 C. 1035, R.) A plaintiff ought not to be allowed, after a long lapse of time, when other rights have grown up without the slightest objection or action on his part, to take advantage of a stale claim. **BAIJNATH SINGH v. MAHOMED IBRAHIM HOSSEIN**, 2 C.L.J. 574.

(187)—*Application of mortgage money to discharge a prior encumbrance—Whether mortgage binding on a non-executant whose interest was covered by prior mortgage—Mortgagee's right—Subrogation.*—A portion of the mortgage money was applied in satisfaction of a prior encumbrance, which covered the entire mortgaged property, including the 6th defendant's share. The 6th defendant was no party to the execution of the subsequent mortgage. On the question of the 6th defendant's liability; held, that the subsequent mortgage was not binding on 6th defendant's interest in the property; and that plaintiff was not entitled to claim subrogation and stand in the shoes of the earlier mortgagee. **CHELLAMCHERLA KALAGAYYA SUNDARAMAYYA v. MUMMAREDDI YANADAMMA**, 9 Ind. Cas. 139=9 M.L.T. 258=21 M.L.J. 180. (9 C. 961, 13 C.L.R. 221, 10 I.A. 62, 2 C.L.J. 288, 6 C.L.J. 134, 20 M.L.J. 380, 8 M.L.T. 132, M.W.N. 1910, 390, 6 Ind. Cas. 781, F.; 10 C. 1035, R.)

Mortgage—continued.**—14.—Miscellaneous—continued.**

(188)—*Suit on sub-mortgage—Original mortgagor not a necessary party—Party to suit—Practice.*—A derivative mortgagee is entitled to sue the original mortgagee without making the original mortgagor a party. **SOMESHWAR AMRATLAL v. NARANBHAI JORABHAI**, 13 **Bom. L.R.** 90 = 9 **Ind. Cas.** 765.

(189)—*Hypothecation of moveables not accompanied by possession—Mortgage of chattels—Validity.*—Although no provision has been made either in the Transfer of Property Act or the Contract Act with regard to chattel mortgages or hypothecation of moveable property, it does not follow that such transactions are invalid. The hypothecation confers a good title on the hypothecatee although not accompanied by possession (2 **Hyde** 267). **SHRISH CHANDRA ROY v. MUNGRI BEWA**, 9 **C.W.N.** 14. (3 **N.W.P.** 54, 5 **W.R.** 189, 3 **N.W.P.** 71, 10 **A.** 20, **R.** ; 23 **C.** 592, 25 **M.** 406, **D.**) [**F.**, 12 **C.W.N.** 167, **Note.**]

(190)—*Transaction originally a sale—Temporary conversion into mortgage for fraudulent purpose—Sale not affected.*—Plaintiff sued for redemption of an alleged mortgage and for possession of the property and for reversal of the sale of the same. It appeared that the original transaction regarding the property in suit was a sale subsequently, for certain fraudulent objects touching third parties, converted temporarily into a mortgage, but voluntarily, as between parties to the fraud, restored to its old form and nature of a sale by a return of the *ekrar* executed on the part of the plaintiff, and that the defendants held the property not as mortgagees but as purchasers; and the plaintiff having no equity of redemption, his suit must be dismissed. On special appeal plaintiff urged 1st, that defendant cannot be allowed to plead his own fraud; 2nd, that the transaction being a mortgage, a mere return of the *ikrar-namah* of the plaintiff cannot get rid of the necessity of foreclosure. The High Court held that the finding of the lower Appellate Court was correct and legal. The transaction was in its inception a sale, but it was converted into a mortgage temporarily for certain fraudulent purposes, and, as between the parties to the fraud, subsequently voluntarily restored to its original *bona fide* state. As to the truth of the principle, "once a mortgage, always a mortgage," there could be no question, but in the present case the transaction was a sale only temporarily made a mortgage, and by the voluntary act of the plaintiff, such mortgage was restored to its original shape of a sale, and in such a case, therefore, there was no necessity of foreclosure. **KANHYA LAL v. MAHADEO SINGH**, 6 **W.R.** 293.

(191)—*Claim based on fraudulent transaction—Court's assistance not to be given.*—Plaintiff sued on a registered mortgage from the defendant. The latter pleaded that no consideration passed and that the mortgage was a collusive transaction to defeat creditors. The

Mortgage—continued.**—14.—Miscellaneous—continued.**

lower Courts found that this was a fact. *Held* that, upon the occurrence of a fraudulent transaction, the best rule was to prevent either party obtaining the assistance of a Court of law in recovering by virtue of it. **ANOOBA v. BHAN SINGH**, 65 **P.R.** 1871.

(192)—*Mortgagee in possession—Account—Reg. XV of 1793.*—A loan-transaction of 1837 was effected by two deeds—first a *kobala* or absolute deed of sale, and secondly, an *ikrar-namah* or deed of agreement, constituting a mortgage. The *ikrarnamah* provided that if the mortgagor paid, within ten years, a lump sum at the rate of 12 per cent. interest, he was to recover back the estate and the balance of collections, less charges. The mortgagee entered into possession. No interest on the principal sum was paid at the time stipulated and, in 1859, a suit for possession by redemption was brought by the mortgagor's heir. *Held* (1) that the *ikrarnamah* did not take the case out of an ordinary mortgage-transaction; (2) that **Ben. Reg. XV of 1793** did not apply. An account was also directed to be taken of what had been received by the mortgagee, upon the footing, that the interest which accrued, from time to time, was to be set off against the rents and profits received, and the mortgagee only to account to the mortgagor for the rents, profits, and interest which he might have received over and above the interest then due to him on the mortgage. *Semle*: s. 6 of that Regulation is repealed by s. 7, Act No. XXVIII of 1855. **RADHABENODE MISSER v. KRIPAMOYEE DABEE**, 10 **B.L.R.** 386, **P.C.** = 17 **W.R.** 262 = 14 **M.I.A.** 443.

(193)—*Collusive mortgage—Sale to auction-purchaser—Evidence.*—A sued to recover property mortgaged to him by B, which mortgage he had foreclosed. C set up that he had purchased the property at an auction sale, and that A's mortgage was collusive and fraudulent. *Held*, that had the mortgage been *bona fide*, A would have had it in his power to produce better evidence of it than he had done. **WOOMESH CHUNDER ROY v. GOOROODOSS ROY**, 7 **M.J.** 77.

(194)—*Money decree for instalments of mortgage debt—Sale of mortgaged property in execution—Omission to specify mortgagee's lien for further instalments, effect of—Right of purchaser to hold property free of such lien.*—In the suit filed by the plaintiff to recover the instalments that had fallen due under his mortgage-bond, he had also prayed that the mortgaged property should continue to be liable for the instalments that were still to fall due. In execution of the simple money decree which the Court gave him in the suit, he brought to sale the mortgaged property without mentioning his lien for future instalments. The purchaser at the sale, under such circumstances, having been left to suppose that he was purchasing the full proprietary title in the property, was held to have acquired it free of any lien. **Ss.** 237 and

Mortgage—continued.—14.—**Miscellaneous**—continued.

287 of the Civ. Pro. Code, 1882, clearly impose the duty on the applicant to disclose to the Court his own lien in his application for sale and, on the Court, the duty of specifying the same in the proclamation. Even, therefore, where the purchaser knew of the lien over the property, he would be entitled, in the absence of any notification to the contrary, to assume that the entire property free of any incumbrance has been intended to be sold, and where he has had no knowledge of any lien over the property, no duty is imposed on him by law to search the register for the purpose of ascertaining the existence of any lien over the property. **RAM-CHANDRA VITHURAM v. JAIRAM**, 22 B. 686. [R., 2 N.L.R. 106, 11 O.C. 206.]

(195)—*Mortgage-debt paid at mortgagors' request by third person—Endorsement of payment on mortgage deed—Deposit of deed with third person—Creation of equitable mortgage by deposit in favour of such person.*—At the request of the mortgagor, plaintiff, a third person, paid to the mortgagee, the principal sum of the mortgage, the mortgagor himself having paid over the interest. After endorsing such payment on the mortgage-deed, the mortgagee by the mortgagor's directions handed the endorsed deed together with another document of title to the plaintiff. A new mortgage—an equitable mortgage by deposit of title-deeds—was held to have been created in favour of the plaintiff. But, whatever rights such deposit gave to the plaintiff as against the mortgagor, it could give him none as against the defendant and, as there was no contract or privity between the defendant and the plaintiff, the latter could enforce no right directly as against the defendant. His remedy was against the mortgagor. The lower Court's order to the plaintiff to pay the defendant's costs was therefore right, but the lower Court was wrong in having held that, under the circumstances, plaintiff was entitled to get an assignment of the mortgage executed to him by the defendant. **KHUSHAL v. PUNAMCHAND**, 22 B. 164.

(196)—*Mortgagee's lien—Money-decree—Kistbundi—Former decree.*—Where a party, having a lien on the judgment-debtor's property as well as a money-decree enters into a *kistbundi* (or arrangement for payment by instalments) giving up her right to execute the decree, the original debt is not extinguished, nor is the lien done away with. **RAMCHURN LALL v. KOONDUN KOOMAREE**, 14 B.L.R. 423, note—11 W.R. 481. [R., 14 B.L.R. 408=23 W.R. 187.]

(197)—*Mortgage bond—Lien of mortgagee.*—Where a form of mortgage or charge created by a bond does not vest any estates in the mortgagee, but only established a lien incident to the money-debt, such lien continues when the debt passes into a judgment-debt, and when the judgment-debt is assigned to another by sale of the decree. **SYUD NADIR HOSSEIN v. PEAROO THOVILDARINEE**, 14 B. L. R.

Mortgage—continued.—14.—**Miscellaneous**—continued.

425, Note. [Diss., 10 C. 567; Applied., 5 C. 928 = 6 C. L. R. 370; R., 22 W. R. 98, 14 B. L. R. 408=23 W. R. 187, 1 A. 240, 14 C. 464.]

(198)—*Mortgage of undivided share in joint property by one co-sharer—Subsequent partition suit by other co sharer—Mortgagee no party to suit—Fraud—Suit for recovery of mortgage-debt—Rights of mortgagee.—Allotment of mortgaged property to co-sharer other than mortgagor—Rights of such co-sharer—Re-opening of partition.*—Where an undivided share in joint property has been mortgaged by a co-sharer without the knowledge of the other co-sharers, and, owing to fraud on the part of the co-sharer-mortgagor and the mortgagee, the latter was not made a party to a subsequent suit for partition brought by the other co-sharers, held that, in a suit for recovering the mortgage debt, the mortgagee could proceed only against that portion of the joint property which has been allotted to the co-sharer-mortgagor at the partition. [Appl., 8 M. L. T. 133=20 M. L. J. 394; R., 2 L. B. R. 167, 18 L. R. 187, 33 M. 429=7 M. L. T. 143=20 M. L. J. 330=5 Ind. Cas. 92.] W, one of four brothers, W, X, Y, Z, who owned certain property in common and who, for convenience sake were enjoying separate portions of the property, without any formal partition,—mortgaged two plots of land which were in his possession to the first defendant. The other three co-sharers had no knowledge of the mortgage. The two plots of land in the possession of W having been allotted to X and Y in the two suits for partition which they brought for division of their shares in the joint property and to which the mortgagee was no party, X and Y went to take possession, when they were obstructed by the mortgagee.—In the present suit for possession brought by X and Y against the mortgagee (first defendant) and the heirs of W (defendants 2 to 9), it having been found that the mortgagee defendant had held back his claim fraudulently and in collusion with the other defendants, the Court ordered that the partition which had been effected between the plaintiffs and the ancestor (W) of the defendants 2 to 9 should be re-opened, allotted the encumbered portion of the joint property to the share of defendants 2 to 9, and, in place thereof, assigned lands of similar value to the plaintiffs. **LAKSHMAN v. GOPAL**, 23 B. 385.

(199)—*Mortgage—Sale of mortgaged property by mortgagee under power of sale—Oral promise by mortgagee to postpone sale—Admissibility of evidence in respect of—Indian Evidence Act (I of 1872), s. 92, proviso 4—Extension of time for performance of promise—Indian Contract, Act IX of 1872, s. 63.*—The first defendant (mortgagee) sold the mortgaged property to the second defendant under the power of sale contained in the mortgage deed. The plaintiff mortgagor sued for a declaration that the sale was void and for redemption, contending that, on the day before the sale

Mortgage—continued.**—14.—Miscellaneous—continued.**

took place, the first defendant orally agreed to give him four days' time within which to pay off the mortgage debt and to postpone the sale, and that the second defendant had notice of this agreement prior to his purchase. *Held* that oral evidence of this agreement was admissible, because it did not fall within proviso 4 of s. 92 of the Evidence Act (1 of 1872), as being an agreement to modify any of the terms of the mortgage. But, it was merely an agreement by the mortgagee to forbear for a period of four days from the exercise of the power of sale contained in the mortgage. The mortgage-deed in the above case was executed on 28-12-1895 and the debt was re-payable on 28-12-1896. The sale took place on 12-5-1897. The mortgagee's promise to postpone the sale for four days, no doubt, involved a forbearance of the exercise of the power of sale, and a consequent extension for the same period of the mortgagor's right to redeem. But it was not an extension of the time for the performance of the mortgagor's promise to pay the mortgage-debt as fixed in the deed in the sense in which the expression "time for performance of the promise" is used in s. 63 of the Contract Act. The time for performance in that sense never ceased to be 28-12-1896. The time for performance of the contract must not be confounded with the time within which, notwithstanding default in performance, the mortgagor in default might still redeem. So, the mortgagee's agreement to postpone sale was not an extension of the time for performance of the mortgagor's promise to him, but an agreement to refrain from exercising for a stated period the right of sale arising from non-performance. That being so, s. 63 of the Contract Act did not apply. **TRIMBUK GAN-GADHAR RANADE v. BAGWANDAS MULCH-AND, 23 B. 348.**

(200)—*Prior san-mortgage without registration—Decree on subsequent unregistered mortgage by one of the owners—Purchaser at sale in execution of decree—Sales of mortgaged property in execution of decree on mortgage and of money decree—Distinction between interests conveyed.*—H and his sons B and C executed a san-mortgage in favour of the plaintiff in 1885. This mortgage was not registered. In 1886, C alone mortgaged the same property under an unregistered deed. Defendant was a Court purchaser of the property in execution of a decree obtained under the mortgage against C, and he held a registered sale-certificate. The present suit was brought by the plaintiff to have his san-mortgage realized by the sale of the mortgaged property. Defendant pleaded that, as against the plaintiff's unregistered san-mortgage, his registered certificate of sale was entitled to priority. *Held*, that the defendant purchased at the Court-sale the right, title and interest of the judgment-debtor subject to existing equities against the property sold, and plaintiff's prior mortgage, though unregistered, was a valid charge. The defendant, as purchaser, knew

Mortgage—continued.**—14.—Miscellaneous—continued.**

that he was purchasing under an unregistered mortgage and therefore subject to unregistered incumbrances of prior date. The root of his title was the subsequent unregistered mortgage and he could therefore claim no better position than the mortgagee under whose mortgage he purchased. The registration of the defendant's certificate of sale cannot give it priority over the plaintiff's mortgage. The scope of the estate which the Court by its certificate had actually conveyed to the defendant could not be enlarged by the mere registration of the Court's conveyance. The following distinction has been held to obtain between a decree for the sale of mortgaged property obtained by a mortgagee upon his mortgage and a decree for the sale of such property under a money decree, *viz.*, that notwithstanding the form of the words used in the proclamation of sale in the former case, the respective interests both of the mortgagee and the mortgagor (*i.e.*, both of the plaintiff and the defendant) pass to the purchaser while, in the latter case, the interest of the defendant alone passes. It was by reason of the above distinction that the defendant in this case had to be regarded as having taken the interest of C's mortgagee as well as that of C in the property as it existed at the date of the mortgage, *i.e.*, subject to all valid incumbrances existing at that date. **MAGANLAL v. SHAKRA GIRDHAR, 22 B. 945. [R., 28 B. 153, 6 Bom. L.R. 1013, 1 N.L.R. 125, 12 O.C. 45=2 Ind. Cas. 57.]**

(201)—*Mortgagor, omission of, to plead failure of consideration—Effect—Subsequent suit for possession.*—The omission by a mortgagor to plead in the foreclosure suit non-receipt of the whole of the consideration money would debar him from setting up that plea in a second suit for possession. **AFZUL KHAN v. CHYTUN ROY, W.R. 1864, 206.**

(202)—*"Ubhayapattam" mortgage, meaning of—Clog on redemption—Covenant to renew mortgage perpetually—Transfer of Property Act, s. 98, Application of, to anomalous mortgage made before the passing of the Act.*—An "Ubhayapattam" is equivalent to a *kanom* mortgage. A covenant to renew perpetually is a clog on the mortgagor's right to redeem and is inoperative, if it is entered into simultaneously with the mortgage. Where an anomalous mortgage was created prior to the Act, the question of its redemption has to be determined with reference to the law in force prior to that Act. It was observed that it was unnecessary to express any opinion as to the effect of s. 98, Transfer of Property Act, on similar covenants in anomalous mortgages executed after the passing of the Act. According to the rules of equity, which formed the basis of the course of decisions prior to the Act, but subsequent to 1858, any agreement entered into at the time of mortgage, having the effect of clogging the right of redemption, was inoperative. **NEELAKANDAN NAMBU-DRIPAD, alias MURTHI KHANDAN v. ANANTHA KRISHNA IYER, 16 M.L.J. 462=1 M.L.T. 426=30 M. 61.**

Mortgage—continued.**—14.—Miscellaneous—continued.**

(203)—*Mortgage—Mortgagee's right to make improvements—Further appeal—Rule IV framed under s. 9, Suits Valuation Act, 1887.*—Plaintiff sued for a declaration that the mortgagee was not entitled to improve the house mortgaged and that he be enjoined not to prevent the plaintiff from doing so. *Held*, that the mortgagee, whose mortgage had 17 years to run, was entitled to improve the mortgaged property if he did not claim the cost of improvements from the mortgagor. *Held*, further, that the suit comes under Rule IV of the rules framed under s. 9, Suits Valuation Act, 1887, and that a further appeal lies. **LAKHU v. SUNDAR DAS, P.L.R. 1900, 135.**

(204)—*Mortgage—Purchase of mortgagor's rights—Houses erected on land by purchaser—Mortgagee's lien not extended.*—Where the purchaser of the mortgagor's interest in the mortgaged land, took possession of the land under his purchase, and there being in the original agreement between the mortgagor and mortgagee nothing to prevent him, built houses upon the land, the mortgagee's lien could not, upon any principle of equity, extend to such houses, especially where, as in the present case, the mortgagee, though he knew that the houses were being built on the mortgaged land, offered no objection at the time. **MUHAMMAD NAWAZ v. UTTAM SINGH, 94 P.R. 1881.**

(205)—*Mortgage—Interest—Mortgagor bound to pay interest up to the date of payment—Mortgagee's right to compensation for repairs and improvements.*—*Held*, that upon redemption of the property mortgaged by him the mortgagor must pay interest agreed by him, due up to the date of payment of principal and interest, independently of the provisions of the Limitation Act, which only affect the right of the plaintiff suing for it. *Held* also, that the mortgagor being bound to pay for ordinary repairs, and not having performed them, the mortgagee was entitled to make a reasonable charge for them on redemption, but he was not entitled to claim for alterations or improvements made by him without having obtained written permission from the mortgagor. **MUSSAMMAT BHAGWANTI v. MELA MAL, 33 P.L.R. 1903.**

(206)—*Mortgage of Niawadari rights—Custom—Gandapur Tract, D.I. Khan District.*—In the Gandapur Tract of the D. I. Khan District, a *niawadari* mortgagee may, by custom, acquire rights in the lands held *niawadari* by him, which are not extinguished by the redemption of the mortgage under which he holds. The mortgagors are entitled to redeem the *niawadari* mortgage, but such redemption does not give them any rights to immediate physical possession of any land held in cultivating possession by tenants, whether those tenants are the *niawadars*, whose mortgage is redeemed or others. **MUHAMMAD HASSAN KHAN v. MUHAMMAD GUL KHAN, 93 P.L.R. 1901=40 P.R. 1901. (24 P.R. 1871, F.)**

Mortgage—continued.**—14.—Miscellaneous—continued.**

(207)—*Mortgage—Payment of debt—Persons claiming under mortgagee, rights of.*—Where a mortgagee allowed certain persons to occupy the property mortgaged to him (a house) and the mortgagors paid off the mortgage and sued to recover possession from the occupiers, *held* that the latter were bound to vacate as the right of the person under whom they came into possession had expired. **BULDEO v. MOHUR SINGH, 18 P.R. 1866.**

(208)—*Act VIII of 1871, s. 17—Agreement to mortgage—Agreement not to alienate—Agreement not registered, how far valid.*—Defendant, having taken a loan from the plaintiff, promised in writing to mortgage his land to the plaintiff, on the death of the defendant's father and also promised not to sell or mortgage the land. The agreement was not registered. *Held* that, so far as the agreement was one to mortgage, it did not require to be registered. The other part of the agreement, by which the defendant bound himself not to alienate the land until plaintiff's debt was paid off, was of a nature which required registration, inasmuch as it purported to limit in future defendant's rights and interests both vested and contingent in the land, of the value of more than Rs. 100, and therefore, under cl. 2, s. 17, of Act VIII of 1871, registration thereof was necessary. **JAMEYAT RAI v. SULTANA, 57 P.R. 1875.**

(209)—Where a mortgagor, having obtained a decree for possession of mortgaged property, on condition of depositing a certain sum in the Court, applies for execution, and, suing to recover wasilat, obtains a decree, his later proceedings are *bona fide*. Where the High Court in appeal simply confirms the decree of the Court below. **TUFUZZUL HOSSEIN KHAN v. BAHADOOR SINGH, 11 W.R. 203=7 B.L.R. 406, Note.**

Mortgage by Government ward without Court's sanction—Validity of—*See C.P. ACT XVII OF 1885, s. 23, 17 C.P.L.R. 13.*

Tender of patta by mortgagees of parts of a Zamindari whether to be joint or several—*See MAD. ACT VIII OF 1865, 16 M.L.J. 6.*

Rent Act—Sale of land for arrears—Rights of mortgagee—*See MAD. ACT VIII OF 1865, 5 M. 371.*

See MAD. ACT VIII OF 1865, 10 M. 266.

See U. P. ACT XII OF 1881, s. 8, 7 A. 586, F.B.=A. W. N. 1885, 134.

See CERTIFICATE OF ADMINISTRATION—ISSUE OF CERTIFICATE, 12 M. 255.

Principal and interest payable on default—Suit for interest alone on default—Second suit for principal and subsequent interest—Maintainability—Suit to recover principal and interest due under a mortgage-bond—*See CIV. PRO. CODE, 1908, s. 11, O. II, r. 2, 18 M. 257.*

Mortgage—continued.—14.—**Miscellaneous**—continued.

See CIV. PRO. CODE, 1908, s. 11, O. II, r. 2, L.B.R. 1893—1900, 14.

Decree on—Decree against mortgagor's representative, execution of—Contention that mortgage-property did not belong to mortgagor, maintainability of—See CIV. PRO. CODE, 1908, s. 47, cl. (c), 32 C. 265.

Letting by mortgagee to mortgagor—Rent in lieu of interest—Charge—Prior incumbrance—See CIV. PRO. CODE, 1908, s. 73, 9 M. 57.

Suit by usufructuary mortgagee for mortgage-money not a bar to subsequent suit by him for possession of mortgaged property—See CIV. PRO. CODE, 1908, O. II, r. 2, 15 M.L.J. 374.

See CIV. PRO. CODE, 1908, O. XXI, r. 2, 11 M. 469.

Suit by vendee or mortgagee to establish right to attached property—See CIV. PRO. CODE, 1908, O. XXI, r. 63, L.B.R. 1893—1900, 333.

See CIV. PRO. CODE, 1908, O. XXI, r. 89, 22 M. 286.

See CIV. PRO. CODE, 1908, O. XXI, rr. 97, 99, 103, s. 47, 17 A. 222, F.B. = A.W.N. 1895, 64.

Discharge of—Amount—Claim to contribution—See CONTRIBUTION, SUITS FOR—PAYMENT OF JOINT DEBT BY ONE DEBTOR, 2 A. 807.

Discharge by payment as one of two joint-mortgagees—See DEBTOR AND CREDITOR, 20 M. 461 = 7 M.L.J. 269.

See DECLARATORY DECREE, SUIT FOR—REVERSIONERS, 8 A. 70.

See DECREE—ALTERATION OR AMENDMENT OF DECREE, 2 A. 649.

Decree for redemption—Construction—Civ. Pro. Code, 1908, s. 2 (12), O. XX, r. 12—See DECREE—DECREE, CONSTRUCTION OF, 9 M.L.J. 334.

Document purporting to be absolute sale—Counter-deed by vendee agreeing to re-transfer to vendor on payment of debt—Mortgage and not sale—See DEED—CONSTRUCTION OF DEEDS, 23 M. 114.

Contract of—Letter embodying terms of equitable mortgage—See DEPOSIT OF TITLE-DEEDS, 13 C. 322.

See EJECTMENT, SUIT FOR, 3 Agra Rev. 8.

Decree—Suit by decree-holder against purchaser for value of standing crops—See EMBLEMENTS DOCTRINE OF, 13 M. 15.

See ESTOPPEL—ESTOPPEL BY CONDUCT, Marsh 569.

See EVIDENCE—MISCELLANEOUS DOCUMENTS, L.B.R. 1893—1900, 212.

Mortgage—continued.—14.—**Miscellaneous**—continued.

Mortgage—Contemporaneous oral agreement—See EVIDENCE—PAROL EVIDENCE, 7 M. 19.

Court attaching property, competency of, to inquire into—Lien of value beyond its jurisdiction—Pendency of insolvency proceeding against judgment-debtor, effect of, on execution—See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 6 B. 584.

Hindu law — Decree against undivided brother—Mortgage of family property—See EXECUTION OF DECREE—MODE OF EXECUTION, 10 M. 316.

Transfer of Property Act, s. 43—Mortgage by Muhammadan woman and her eldest son of entire estate—Suit on mortgage—Exoneration of other children—Subsequent death of one of them—Increase in the share of mortgagors—Liability of such increased share to mortgage-debt—See EXECUTION OF DECREE—MODE OF EXECUTION, 18 M. 492.

See FRAUD—FRAUD, ELEMENTS OF AND PROOF OF, 1 A. 303.

Of property by guardian without obtaining sanction—See GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 10 C.L.R. 547.

See GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 22 M. 289 = 9 M.L.J. 64.

See HINDU LAW—ALIENATION, 5 B.H.C. A.C. 217.

By managing member, not being father—See HINDU LAW—JOINT FAMILY, 7 B. 91.

See HINDU LAW—JOINT FAMILY, 2 M. 339, 5 M. 133, 5 M. 193, 8 M. 388.

See HINDU LAW—PARTITION, 15 M. 234.

Mortgage by head of mutt subsequent to excommunication—Whether binding on successor—See HINDU LAW—RELIGIOUS ENDOWMENT, 18 M. 359.

See HINDU LAW—USURY, 22 B. 86.

See HINDU LAW—WIDOW, 2 A. 141.

See INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 22 M. 339.

Mortgaged property situate in different districts—Suit in the Court of one district—Subsequent suit in the other Court—Splitting up cause of action—See JURISDICTION—SUITS FOR LAND, 7 C. 739 = 10 C.L.R. 263.

See LAND SUIT, 64 P.R. 1902.

Lease of mortgaged property by usufructuary mortgagee to mortgagor—Hypothecation of same property as security for rent—Suit for rent in Revenue Court—Suit for enforcing of lien in Civil Court—Civ. Pro. Code, 1877, s. 43—See LEASE—GENERAL, 4 A. 180 = A.W.N. 1882, 47.

See LEASE—ZURIPESHGI LEASE, 2 Agra 122.

Mortgage—continued.**—14.—Miscellaneous—continued.**

Lessor describing as mortgagee—Representations to be made good—*See* LEASE—MISCELLANEOUS, 27 C. 1004, P.C. = 27 I.A. 103 = 4 C. W.N. 565.

Suit by mortgagee for possession of the mortgaged property—Instalment, default in payment of—Cause of action, recurring—*See* LIMITATION—GENERAL, 8 O.C. 286.

Suit on—Acknowledgment or part-payment by mortgagor—Effect on previous purchaser of a portion of the mortgaged property—*See* LIMITATION ACT, 1908, ss. 19, 20, 21, cl. 2, 9 C.W.N. 868 = 32 C. 1077.

Receipt of rent not payment of interest—*See* LIMITATION ACT, 1908, s. 20, 2 M. 165.

Lease—Payment of rent, effect of—*See* LIMITATION ACT, 1908, s. 20, 3 M. 57.

Unregistered mortgage—Receipt of profits—*See* LIMITATION ACT, 1908, s. 20, 7 M. 539.

Adverse possession—Receipt of rent for over 12 years—*See* LIMITATION ACT, 1908, s. 28, 7 M. 26.

Suit for compensation for breach of an implied contract between mortgagor and mortgagee—Limitation—*See* LIMITATION ACT, 1908, arts. 97, 115, 116, 120, 8 O.C. 166.

Instalment bond hypothecating land as security—Power of sale given to creditor on default at payment—Suit to recover the debt by sale of hypotheca—Limitation Act, art. 147—Personal remedy against mortgagor—*See* LIMITATION ACT, 1908, art. 147, 14 B. 377.

Mortgagor and mortgagee, agreement between, allowing mortgagee to remain in possession for fixed term after period for redemption—Suit for possession of property brought by heirs of mortgagor—Limitation—*See* LIMITATION ACT, 1908, art. 148, 6 B. 674.

See LIMITATION ACT, 1908, art. 148, 2 M. 226.

Mahomedan Law—Ancestral debt—Purchase of estate in execution—Mortgage by heir—Notice of debt—*See* MAHOMEDAN LAW—DEBTS, 8 C. 20 = 10 C.L.R. 225.

See MALABAR LAW—JOINT FAMILY, 14 M. 38.

Mortgage by gosha ladies—Absence of proof that contents were explained to them—*See* PARDANASHIN WOMAN, 18 M. 257.

Parties to a suit—*See* PARTIES TO SUITS—GENERAL, 10 M. 160.

Adverse possession against mortgagee not adverse possession against mortgagor—*See* POSSESSION—ADVERSE POSSESSION, A. W. N. 1905, 4 = 27 A. 395.

See POSSESSION—ADVERSE POSSESSION, 2 P. R. 1866.

See POSSESSION—MISCELLANEOUS, 6 O. C. 110.

Mortgage—continued.**—14.—Miscellaneous—continued.**

By unauthorised person—Subsequent ratification, when effective—*See* PRINCIPAL AND AGENT—RATIFICATION OF AGENT'S ACT, 6 B. 463.

Unregistered receipt, proof of payment recited in—Admissibility of receipt—Extinction of mortgage-right—*See* REGISTRATION, 23 M. 92 = 9 M.L.J. 124.

See REGISTRATION ACT, 1866, s. 53, 1 A. 236, F.B.

Registered—Priority—*See* REGISTRATION ACT, 1908, 3 M. 73.

Registration not necessary for an endorsement on a mortgage-bond releasing a specified portion of mortgaged property—*See* REGISTRATION ACT, 1908, s. 17, 27 A. 305 = A.W.N. 1904, 266 = 1 A.L.J. 693.

Agreement to sell property to mortgagee, in writing not registered—Subsequent purchase with notice of agreement—*See* REGISTRATION ACT, 1908, s. 17, 12 M. 505.

Unpaid consideration-money, or damages, suit for—*See* REGISTRATION ACT, 1908, ss. 17, 47, 29 B. 46.

See REGISTRATION ACT, 1908, ss. 17, 49, 3 A. 422.

Unregistered, bond containing also a personal undertaking—*See* REGISTRATION ACT, 1908, s. 49, L.B.R. 1893—1900, 124.

Registered-deed—Notice of previous valid unregistered mortgage, effect of—*See* REGISTRATION ACT, 1908, s. 50, 16 M. 148, F.B. = 3 M.L.J. 54.

See REGISTRATION ACT, 1908, s. 50, 2 B. H.C. 209, 12 B.H.C. 241, 6 B. 515.

Revival of—after satisfaction by conveyance when permissible—*See* RES JUDICATA—GENERAL, 1 C.L.J. 337.

Specific performance—Unpaid balance of—*See* SPECIFIC PERFORMANCE, 2 M. 79.

Contract to lend money on—Specific performance not enforceable—Damages, suit for—*See* SPECIFIC RELIEF ACT, 1877, s. 21 (a), 8 O.C. 5.

Mistake—Unilateral—Rectification, suit for, not maintainable—*See* SPECIFIC RELIEF ACT, 1877, s. 31, 8 O.C. 1.

See STAMP ACT, 1879, s. 3, cl. 13, 11 M. 39, F.B.

Definition of—For purposes of Stamp Duty—*See* STAMP ACT, 1879, ss. 3 (13), 5 (13), and arts. 29 and 44, 27 C. 587 = 4 C.W.N. 524.

See STAMP ACT, 1879, sch. I, arts. 5 (c), 44 (a), 7 M. 209, F.B.

See STAMP ACT, 1879, sch. I, arts. 13, 44 (a), 23 M. 207.

Property sold subject to—Stamp—*See* STAMP ACT, 1879, sch. I, art. 16, 5 M. 18, F.B.

Mortgage—concluded.

—14.—Miscellaneous—concluded.

See STAMP ACT, 1879, sch. I, art. 44 (b), 8 M. 104, F.B.

Receipt—Endorsement of payment on mortgage bond—See STAMP ACT, 1879, sch. II, art. 15 (a), 10 M. 64, F.B.

Mortgage in favour of managing member of joint Hindu family—Suit on mortgage by person claiming by right of survivorship—Necessity for succession certificate—See SUCCESSION CERTIFICATE ACT, 1889, s. 4, 22 M. 380.

Attachment of property mortgaged in 1879—See TRANSFER OF PROPERTY ACT, 1882, ss. 2, 67, 99, 10 M. 129.

Suit upon—Money-decree in, effect of—See TRANSFER OF PROPERTY ACT, 1882, s. 52, 9 C.W.N. 225, P.C. = 32 C. 198 = 2 A.L.J. 190.

Assignment of mortgage for less amount—Right of assignee to lien for larger amount—See TRANSFER OF PROPERTY ACT, 1882, s. 135, 22 M. 301.

Jurisdiction—Madras Civil Courts Act, ss. 12, 14—Court-fees Act, s. 7 cl. 9—Value of improvements not secured—See VALUATION OF SUITS, 5 M. 284, F.B.

Vatan property—by holder of life-interest in—Reg. XVI of 1827—Descent of interest to mortgagor's son, effect of, on mortgage—See VATAN, 6 B. 211.

Mortgagees' and Trustees' Powers.

See ACT XXVIII OF 1866.

Mortgagor.

See MORTGAGE.

Suit for account—between agriculturist, mortgagor and mortgagee—Subsequent suit for possession whether maintainable—See BOM. ACT, XVII OF 1879, 7 B. 377.

Mortgagor's right to deduct amount of costs payable to him under decree from mortgage-debt payable by him—See CIV. PRO. CODE, 1908, s. 35. O. XX, r. 6 (3), 17 B. 32.

Decree against mortgagor enforcing lien—Subsequent suit against purchaser to enforce decree—Civ. Pro. Code, 1877, s. 43—See CIV. PRO. CODE, 1908, O. II, r. 2, 4 A. 257 = A. W.N. 1882, 7.

Suit by—to recover possession—Limitation—Reg. II of 1802—See LIMITATION—GENERAL, 2 M.H.C. 382.

Suit to recover profits from the mortgagee—See LIMITATION ACT, 1908, art. 109, 1 Bom. L.R. 858.

Mortgagor is a tenant-at-will of the mortgagee, but not of the purchaser from him—See PRESIDENCY SMALL CAUSES COURTS ACT, 1882, s. 41, 3 Bom. L.R. 456 = 26 B. 82.

Mosque.

See MAHOMEDAN LAW—MOSQUE.

See MAHOMEDAN LAW—WAKF.

“Trustee, Manager or Superintendent of a—”—See ACT XX OF 1863, ss. 14, 18, 8 C. 32 = 9 C.L.R. 433.

Suit by managers of mosque for trespass in respect of property of mosque—See CIV. PRO. CODE, 1908, ss. 92, 93, A.W.N. 1892, 9.

See CUSTOMS — PUNJAB — MISCELLANEOUS, 19 P.R. 1904.

Lands granted for support of—Attachability and alienability—See INAM, 7 M.L.T. 349 = 5 Ind. Cas. 455.

Mahomedan Law—Custom—Public worship in mosque—Injunction restraining the defendants from interrupting religious ceremonies in a musjid—Interest of Inam or mutwali to be protected—See MAHOMEDAN LAW—CUSTOM, 18 C. 448, P.C. = 18 I.A. 59.

Mahomedan Law—Public mosque—Right to say “amin”—Injunction—See MAHOMEDAN LAW—MISCELLANEOUS, 13 A. 419, F.B.

See MAHOMEDAN LAW—MISCELLANEOUS, 1 C.W.N. 76.

See MUTWALI, 81 P.R. 1869.

Suit to recover land belonging to mosque, trustee alone entitled to maintain—Suit not maintainable by individual worshipper—See PARTIES TO SUITS—SUITS BY REPRESENTATIVES OF CLASS, 23 M. 99.

See PARTIES TO SUITS—SUITS BY REPRESENTATIVES OF CLASS, 7 A. 178, F.B. = A.W.N. 1884, 325.

See RELIGIOUS INSTITUTIONS, 35 P.R. 1871.

Public mosque—Rights of worshippers to sue mutwalis or Superintendents—See RIGHT OF SUIT—PUBLIC WORSHIP SUITS, RIGHTS TO, 3 A. 636 = A.W.N. 1881, 34.

Services to be performed at a, suit to recover land from the produce of which the expenses of the service are to be met—See SPECIFIC RELIEF ACT, 1877, s. 42, 1 Bom. L.R. 649 = 24 B. 170.

Suit for removal of trustee of, and for injunction—Right to possession of lands attached to—See TRUST, 8 Ind. Cas. 525.

Yaumia allowance to mosque—See YAUMIA, 11 M. 283.

Motap.

(1) *Motap, custom of.*—The custom of motap exists among the Chudasama Garasias of the village of Kharad in the Dhandhuka Taluka. MALUBHAI v. SURSANGJI, 7 Bom. L.R. 821 = 30 B. 220.

(2) *Motap, custom of.*—Among the Jhala Garasias of Limri in Kathiawar, there exists a custom of motap. PRITHISINGJI v. UMED-SINGJI, 6 Bom. L.R. 98.

Mother.

(1)—*Mother's act as guardian.*—A mother can bind her sons, acting in good faith, as their guardian. **MAKBUL ALI v. SRIMATI MASNAD BIBI, 3 B.L.R. A.C. 54 = 11 W.R. 396.**

Certificate to mother of infant son—See ACT XL OF 1858, A.W.N. 1881, 14.

Application by mother of illegitimate child to have the child removed from the custody of the father and placed under her custody—Mother being a prostitute—See ACT IX OF 1861, A.W.N. 1887, 239.

Appointed as administratrix of minor—Death of minor—Jurisdiction of District Court—Mother when bound to render accounts—See BOM. ACT XX of 1864, ss. 6, 19, 8 B. 14.

Illegitimate infant, mother when disentitled to custody of—See GUARDIAN—GENERAL, 12 M. 67.

Suit by—on behalf of minor son for recovery of minor's share from manager—Malversation—Guardian—Relief by Court—See GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 3 M. H.C. 69.

Evidence as to age—Horoscope—Mother's testimony—See HOROSCOPE, 13 C. 189.

Mahomedan Law—Mother, if guardian of minor son—Right of mother to bind minor's estate by mortgage or otherwise—See MAHOMEDAN LAW—GUARDIANSHIP, 29 C. 473 = 6 C.W.N. 667.

See MAHOMEDEN LAW -- MARRIAGE, 51 P.R. 1888.

Mourusi Holding.

(1)—*Mourusi holding, jointly acquired and cultivated—Survivorship.*—An occupancy holding was acquired by two out of four brothers, and not by the common ancestor, the father. The two brothers, and their sons after them continued to cultivate jointly. On the death of the only son of one of the brothers, the sons of two brothers who had taken no part in the acquisition claimed to participate in the share of their deceased cousin. It was held that such share passed by survivorship to the sons of the brother who was the original joint tenant, and that the plaintiffs had no right to succeed. *Held* also that the "hereditary tenant," that is, the body of co-sharers, was not dead so as to open out a succession, and that neither the landlord nor any collateral heirs of the deceased had any foundation for claiming the interest in the holding enjoyed by the deceased. **PREM SINGH v. BHAGWANA, 4 P.R. 1880.** [*F.*, 9 P.R. 1891, Rev.; *R.*, 77 P.R. 1883, 86 P.R. 1883, 109 P.R. 1894, 6 P.R. 1902, Rev. = 11 P.L.R. 1903, 100 P.R. 1908, 23 P.L.R. 1910.]

(2)—*Garden planted by Mourasi tenant on his holding—Proprietor claiming share in produce of garden—Custom.*—The plaintiffs, proprietors of mouza Butala, in the district of Umballa, sued defendants, hereditary cultivators in that village, claiming the value of half the produce

Mourusi Holding—concluded.

of a mango garden planted by the defendants in their mourasi holding. *Held* that there was no custom proved by which a hereditary tenant, paying rent in cash, who plants a garden in his holding, becomes liable, in the absence of an agreement to that effect, to share the produce with the proprietors. **MASSANIA v. LABI BUKSH, 14 P.R. 1880.**

Moveable Property.

(1)—*Standing crops—Limitation Act—Definitions in Registration Acts.*—Standing crops are not moveable property within the meaning of the Limitation Act. (8 B.L.R. 509, 510, 24 W. R. 394, *F.*; 3 C. 331, *R.*) The definitions in the Registration Acts are expressly given for the purposes of those Acts and ought not to govern the decision of questions raised under other Acts. **PANDAH GAZI v. JENNUDDI, 4 C. 665 = 2 C.L.R. 526.**

(2)—*Growing crops if.*—Growing crops come within the category of immoveable property, notwithstanding that, for the purpose of Registration Act, they have been dealt with as though they constituted moveable property. **GOPAL CHANDRA BISWAS v. RAMJAN SIRDAR, 5 B.L.R. 194 = 13 W.R. 275.** [*R.*, 22 C. 877.]

(3)—*Limitation Act, XIV of 1859, s. 1, cl. 2—Suit for damages—Crops damaged by defendant—Limitation.*—Cl. 2, s. 1, Act XIV of 1859, applied to suits for damages where crops had been cut and stored by plaintiff and then damaged by defendant. **MUST. MANNOO BEBEE v. JHANDAR KHAN, 3 Agra 389.**

(4)—*Fruit growing upon trees—Whether moveable or immoveable property—Act XI of 1865 (Mofussil Small Cause Courts), s. 6—Registration Act, 1877, s. 3.*—Fruit growing upon trees is moveable property, and a suit for damages for the wrongful taking of such fruit is one of a nature cognizable by a Small Cause Court. *In the matter of the petition of NASIR KHAN v. KARAMAT KHAN, 3 A. 168.* [*Cons.*, 11 M. 193; *R.*, 5 A. 561, *F. B.*]

(5)—*Rent if.*—For the purposes of Acts VIII and X of 1859, rent comes within the terms "property" and "moveable property." **MAHESCHANDRA CHATTAPADHYA v. GURUPRASAD ROY, 5 B.L.R. 155 = 13 W.R. 401.** (1 B.L.R. A. C. 177, *D.*)

(6)—*Act XXIII of 1861, s. 27—Stone sugar mill—Moveable property.*—A stone sugar mill is moveable, or personal, as contradistinguished from immoveable property. **HURMUNGAL SINGH v. ATHUL SINGH, 4 N.W.P. 15.**

(7)—*Act XI of 1865, ss. 6, 9—Huts—"Personal property."*—Huts are not moveable property within the meaning of s. 19 of the Small Cause Court's Act, and cannot be seized in execution. **RAJ CHANDRA BOSE v. DHARMO CHANDRA BOSE, 8 B.L.R. 510, note = 10 W.R. 416.** [*F.*, 4 C. 665 = 2 C.L.R. 526; *Appr.*, 8 B.L.R. 508, *F.B.* = 17 W.R. 309; *D.*, 14 B.L.R. O.C. 201.]

Moveable Property—continued.

(8)—*Act XI of 1865, s. 19—Hut.*—Huts are not moveable property within the meaning of s. 19, Act XI of 1865. *NATTU MIAH v. NAND RANI*, 8 B.L.R. 508, F.B. = 17 W.R. 309. [F., 4 C. 665 = 2 C.L.R. 526; *Appr.*, 20 W.R. 8; R., 4 C. 946 = 4 C.L.R. 460; D., 14 B.L.R. O.C. 201.]

(9)—*Hypothecation without possession—Subsequent hypothecation with possession—Priority.*—A prior hypothecation of moveable property is not postponed to a subsequent hypothecation with possession. *PEMA GAOLIV. GANPAT RAO GOPALGHATATEY*, 2 C.P.L.R. 108.

(10)—*Hypothecation of moveables—Law applicable—Registration—Notice—Tr. P. Act, ss. 53, 86, 88—Contract Act, s. 108—Applicability.*—The Indian Contract Act and the Transfer of Property Act do not recognize the non-possessory hypothecation of moveables. The rights and remedies of the parties to such a contract depend in every case upon the legal stipulations going to make up that contract, subject to the principles of justice, equity and good conscience. There can be no foreclosure decree, as the term is understood in Indian law, in respect of moveables. (13 C. 262, R.) If a subsequent transferee of moveable property has notice, at the time of his acceptance of the transfer, that such property is already hypothecated to a particular person for a lawful debt, he must be held bound by such hypothecation to the same extent as his transferor. Such notice must be actual notice. The transferee is not put upon inquiry of any kind if there are no circumstances going to raise a reasonable presumption that the transferor in possession of the property has no right to make the proposed transfer, or that the property is already subject to some liability. A prior hypothecation of moveable property without possession is not postponed to a subsequent transfer of such property by the person in possession thereof, if the subsequent transferee has actual notice of such hypothecation at the time of the transfer being made to him. Registration does not operate as notice of such hypothecation. *NANHUJI v. CHIMNA*, 7 N.L.R. 72 = 10 Ind. Cas. 869. (2 C.P.L.R. 108, 13 C.P.L.R. 43, 10 A. 133, F.)

(11)—*Owner in possession—Creation of lien on property—Subsequent sale thereof—Passing of title to purchaser.*—A good title to moveable property in the possession of the owner can be conveyed, notwithstanding he has created a lien on the property. *RAMANNA SADASHEO GANDLI v. RAMJI*, 2 C.P.L.R. 109, note.

(12)—*Suit for recovery of specific moveables—Refusal of defendant to produce—Valuation put by plaintiff accepted.*—The plaintiff sued for the recovery of certain specific moveable property, which he valued at Rs. 1,360, and produced evidence to show that this was the value. The defendant refused to accept the plaintiff's valuation, but would not produce the articles, which, he did not deny, were in his possession.

Moveable Property—continued.

Held that, under such circumstances, the valuation made by the plaintiff ought to be accepted by the Court. *ANAND CHANDRA v. DHANRUP MAL*, A.W.N. 1907, 227.

(13)—*Rule against perpetuities—Applicability to moveable property.*—The rule against perpetuities is not confined to immovable property. It equally applies to moveable property. *COWASJI N. POCHKHANAWALLA v. R. D. SETNA*, 20 B. 511. (*Hoare v. Osborne*, L. R. 1 Eq. 585; *Cooper v. Laroche*, 17 Ch. D. 368 at p. 372, R.) [R., 33 B. 122 = 10 Bom. L.R. 417 = 1 Ind. Cas. 834.]

If includes money—*See ACCOUNTS—SUIT FOR ACCOUNTS*, 7 C.L.J. 279 = 12 C.W.N. 820 = 35 C. 298.

Standing timber is, under s. 3, Indian Registration Act—S. 3, cl. 25 and s. 4 of the General Clauses Act—*See BEN ACT VIII OF 1885*, ss. 144, 184, 193, sch. III, art. 2, 7 C.L.J. 152.

Debt secured by mortgage of immovable property not moveable property—*See ATTACHMENT—SUBJECTS OF ATTACHMENT*, 9 C. 511 = 12 C.L.R. 445.

Standing timber—Trees for cutting and converting into charcoal—Whether—*See CIV. PRO. CODE, 1908, O. II, r. 2*, 13 Bom. L.R. 874.

Conditional sale of—Bond—Effect of non-payment of debt within time limited—*See CONDITIONAL SALE*, A.W.N. 1907, 93 = 4 A. L.J. 340.

If includes money—Limitation Act, art. 145—*See DEPOSIT IN COURT*, 6 C.L.J. 535.

See EXECUTION OF DECREE—MODE OF EXECUTION, 5 B.L.R. App. 27 = 13 W.R. 339.

See HINDU LAW—ANCESTRAL PROPERTY, 4 N.W.P. 63.

Deposit of—Suit for recovery of the thing deposited—Limitation—*See LIMITATION ACT, 1908*, arts. 49, 145, 5 Ind. Cas. 1 = 33 M. 56 = 7 M.L.T. 282 = 20 M.L.T. 41.

See LIMITATION ACT, 1908, art. 89, 24 A. 27 = 28 I.A. 227, P.C. = 3 Bom. L.R. 576 = 8 Sar. 142.

See MAHOMEDAN LAW—WAKF, 24 A. 190 = A.W.N. 1902, 1.

Mortgage of moveable property—Prior registered mortgage—Subsequent mortgage with possession—Priority—*See MORTGAGE—GENERAL*, 5 L.B.R. 8 = 2 Ind. Cas. 351.

Mortgage of—Delivery of possession of moveable property to mortgagee—*See MORTGAGE—GENERAL*, 6 O.C. 230.

Hypothecation of moveables not accompanied by possession—Mortgage of chattels—Validity—*See MORTGAGE—MISCELLANEOUS*, 9 C.W. N. 14.

Moveable Property—concluded.

Trees—See REGISTRATION ACT, 1866, 3 Agra, 157.

Hereditary office—Dues incidental to—Nature of dues, whether moveable or immoveable property under Act XX of 1866—See REGISTRATION ACT 1908, s. 17, 18 B. 92.

See REGISTRATION ACT, 1908, s. 17, 10 A. 20=A.W.N. 1887, 270.

Suit for recovery of immoveable property and also—Leave of Court—See REMAND, A.W.N. 1887, 266.

Cognizability of suit for enforcement of lien on moveable property by Court of Small Causes—See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 10 C.P.L.R. 80.

Huts—Moveable or personal property—See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 2 B.L.R., A.C. 77=10 W.R. 416.

Small Cause Court—Suit to recover thatch—Moveable property—Question of title—See SMALL CAUSE COURT, MOFUSSIL JURISDICTION OF—GENERAL, 7 B.L.R., App. 41=15 W.R. 499.

Mortgage of fruit of growing plantain trees—Mortgage of moveable property—Small Cause nature—Second appeal—See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 11 M.L.J. 343.

See STANDING CROPS, 22 C. 877.

Fraudulent transfer of, validity of—See TRANSFER OF PROPERTY ACT, 1882, s. 53, 16 M.L.J. 427=1 M.L.T. 351=30 M. 6.

Muafi.

(1)—*Resumption of muafi on muafidar's death—Subsequent settlement on his heirs—Their rights—Right of tenants who are joint owners of the holding, as against the tenant—Acquisition of occupancy right—Punjab Tenancy Act, 1887, s. 5 (1) (b).*—Where after the death of a muafidar, the muafi is resumed and is settled with his heirs, the ex-muafidar's heirs are entitled to receive the rent from the land and are liable to pay the land revenue assessed upon it. They can exercise the rights of landlords over the tenants who actually cultivate the land. Unless the cultivators can show that they have acquired a right of occupancy in the land, they must be liable to ejectment at the will of the ex-muafidar's heirs, with whom the settlement is made. The mere facts that the land is land owned in common by the whole village, and that some members of the proprietary body are the cultivators of the land do not give those cultivators right of occupancy under s. 5 (1) (b) of the Punjab Tenancy Act. KARTAR SINGH v. PURAN, 3 P.R. 1908, Rev.=5 P.W.R. 1908, Rev.=180 P.L.R. 1908.

(2)—*Suit to recover land from person holding it in virtue of his office as a la-lambardar—Plea that muafi has been resumed—Jurisdiction of Civil or Revenue Court—Punjab Tenancy Act, XIV of 1887, s. 77 (3) (m).*—In a suit to recover

Muafi—concluded.

possession, as proprietor, of certain land, which the defendant pleaded to be holding as *ala lambardar*, the issue is whether the plea of enjoyment of the income arising from the land as emoluments of the office of *ala lambardar* is valid, or, in other words, whether the *Muafi* had or had not been resumed and therefore the suit is cognisable only by the Revenue Court under s. 77 (m). BULAKA SINGH v. NIHAL SINGH, 28 P.R. 1895.

See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 13 P.R. 1896, Rev.

Muafidar.

See MUAFIDAR.

Muchilika.

See ACKNOWLEDGMENT, 8 M.L.J. 219.

Clause in—Prohibiting alienation—Construction—See CONTRACT—CONSTRUCTION OF CONTRACTS, 6 M.H.C. 248.

Civ. Pro. Code, 1882, s. 53—Suit for enforcing execution of—Amendment of plaint by addition of prayer for declaration—See DECLARATORY DECREE—SUIT FOR—SUITS CONCERNING DOCUMENTS, 12 M. 481.

Suit to enforce exchange of Patta and—See JURISDICTION OF CIVIL COURTS, 14 M. 441, F.B.=1 M.L.J. 661.

Muchalka by tenant—Undertaking to pay rent—Acknowledgment—See LIMITATION ACT, 1908, s. 19, 22 M. 32.

Decree ordering execution of muchalka and costs—Application for execution of muchalka—Application for realization of costs of prior execution proceedings—Step-in-aid of execution—See LIMITATION ACT, 1908, ART. 182—STEP IN AID OF EXECUTION, 24 M. 672.

Muddata Kriyam.

See MORTGAGE—CONSTRUCTION OF MORTGAGE DEEDS, 7 M.H.C. 6.

Mofussil Small Cause Courts, References by.

See ACT X OF 1867.

Muhtarafa.

Or trade-tax—See MAD. REG. XXV OF 1802, s. 4, 9 M. 14, F.B.

Muhunt.

See MOHUNT.

Mujawar.

Woman's right to office of—See MAHOME-DAN LAW—WAKF, 3 M. 95.

Position of—See RELIGIOUS ENDOWMENT, 49 P.L.R. 1911=6 P.R. 1911=9 Ind. Cas. 680.

Mukadam.

¶ See ST. 11 AVD 12 VIC., C. 21, s. 60, 5 B. 1.

Mukararidar.

See MOKURARIDAR.

Mukarrari Istemrari.

See MOKARRARI ISTEMRARI.

Mukhi.

Custom as to the appointment of—See CUSTOM, 4 Bom. L.R. 264.

Mukhtars and Revenue Agents, Pleaders Act.

See ACT XX OF 1865.

Muktear.

See LEGAL PRACTITIONERS—MUKTEAR.

See MOOKTEAR.

Mulgainidar.

Not liable to pay increased rent on enhanced assessment and local cess—See LAND TENURE—IN KANARA, 4 B. 478, Note, P.J. 1879, 294.

Mulgeni-holding.

See LANDLORD AND TENANT—ABANDONMENT OF TENURE, ETC., 15 M. 67=2 M.L.J. 13.

Mulgeni Kabuliyat.

See ENHANCEMENT OF RENT—ENHANCEMENT, RIGHT OF, 3 B. 154.

Mulgeni Lease.

(1)—*Mulgeni lease—No provision for re-entry on alienation contrary to terms of lease—Validity of alienation—Rights of mulgar.*—In the absence of any clause for re-entry in the event of alienation by the mulgenidar contrary to the terms of the lease, the mulgar cannot treat the alienation as void and recover possession from the alienee. NARAYAN DASAPA v. ALI SAIBA, 18 B. 603. [F., 21 B. 195; Cons., 26 M. 157=12 M.L.J. 189.]

(2)—*Mulgeni lease—Payment of rent in kind—Assessment payable by Mulgar—Increase in assessment—Mulgar liable to pay the increase—Interest over arrears of rent payable in kind—Interest Act (XXXII of 1839)—Contract Act (IX of 1872), s. 73—Unliquidated damages.*—Under the terms of a *Mulgeni* lease, executed on the 25th September, 1869, the *Mulgenidar* (tenant) agreed to pay the *Mulgar* (lessor) rent of five and a quarter khandies of rice every year, and the latter to pay the Government assessment of Rs. 6-14-6. It was also agreed that rent settled should not be reduced or enhanced. At the revised survey settlement the assessment was increased to Rs. 16-12-0. The *Mulgar* then having sued the tenant for the arrears of rent for six years preceding the suit, with interest, the tenant claimed refund of the increased assessment which he paid and for which the *Mulgar* was liable: *Held*, (1) that the amount of assessment Rs. 6-14-6, mentioned in the lease as being payable by the *Mulgar*, must be deemed to refer to the assessment as it then existed, irrespective of the question of its reduction or enhancement thereafter: that, therefore, the *Mulgar* remained liable to pay the enhanced assessment; (2) that, as the rent was payable in kind, the arrears of rent were not such a debt as was contemplated by the Interest Act, 1839, which required that there must be a debt or sum certain at the time when the promise was made to bring it within the operation of the Act; and there was no debt certain at that time

Mulgeni Lease—concluded.

because the market value of rice then need not have necessarily been the same as the market value at the time of the breach of the contract; (3) that neither was interest recoverable under s. 73, Contract Act, 1872, as damages for breach of the contract to pay rent: since a suit to recover the money value of the rent in kind was a suit to recover unliquidated damages which were measured by the market value of the goods deliverable under the contract on the day they ought to have been but were not delivered, and interest could not run upon unliquidated damages. NARAYAN RAMCHANDRA BHATTA v. MANAGER NAGAPPA, 12 Bom. L.R. 831=8 Ind. Cas. 411=34 B. 506.

(3)—*Landlord and tenant—Mulgeni lease—Enhancement of assessment—Who should pay enhanced assessment.*—In a *mulgeni* lease, the *pattadar* is liable to pay any enhancement in Government revenue, and he cannot claim proportionate contribution from the tenants. BASU KUMTHY v. VENKAMMA HEGADTHI, 9 Ind. Cas. 268=9 M.L.T. 335. (20 M.L.J. 640, 8 M.L.T. 173, M.W.N. 1910, 333, 7 Ind. Cas. 321, F.)

(4)—*Landlord and tenant—Mulgeni tenure—Sudden enhancement of Government assessment—Liability of tenant to contribute rateably to the increase—Madras Revenue Recovery Act (II of 1864).*—Where Government assessment on land let under *mulgeni*-tenure is suddenly increased, the landlord alone should bear the whole increase under the provisions of the Madras Revenue Recovery Act, and the tenant cannot be called on to contribute rateably towards the increase. VENKATARAMANA AITHALA v. NAGAPPAYA, 8 Ind. Cas. 428. (20 M.L.J. 640, F.B., 8 M.L.T. 173, 7 Ind. Cas. 321, F.)

Mulgar—Mulgenidar—Liability to pay enhanced rent—See MAD. ACT II OF 1864, ss. 1, 35, 8 M.L.T. 173=20 M.L.J. 640=7 Ind. Cas. 321=M.W.N. 1910, 333.

See LANDLORD AND TENANT—FORFEITURE, 6 M. 327, 17 M. 218=3 M.L.J. 287.

Alienation—Stipulation in lease against attachment and sale, validity of—Condition against alienation—Right to re-enter—See LEASE—CONSTRUCTION OF LEASE, 7 B. 256.

See LEASE—MISCELLANEOUS, 2 Bom. L.R. 119.

Mulgeni Tenant.

Not liable to pay increased assessment—See LANDLORD AND TENANT—TENANTS' LIABILITY FOR RENT, 5 M.L.T. 200.

Mulki Papers.

Evidentiary value of—See TITLE, 16 C.W. N. 683.

Mul-raiyat

Rights of—in the Sonthal Pergannas, when transferable—Whether whole or portion of such right transferable—See SONTAL PERGANNAS, 2 C.L.J. 77=32 C. 1014.

Multifariousness.

See MISJOINDER.

(1)—*Misjoinder*.—It is illegal to join different causes of action in one suit against different parties, where each of these parties has a distinct and separate interest (e.g., a joint action, for price of timber, against persons who purchased, each one pair of timber from plaintiff separately from the other, is illegal.) *BAROO SIRCAR v. MASSIM MUNDUL*, 21 W.R. 206.

(2)—*Separate causes of action against several defendants—Single suit whether maintainable*.—It is the duty of the Courts to reject plaints when brought against several defendants for causes of action which have accrued against each of them separately, and in respect of which they are not jointly concerned. In the present case, the several defendants had no common interest in the land to the south of the boundary line which the plaintiff disputed, and it by no means followed that, because the line might have gone too much to the north in that part where the plaintiff's estate abutted upon the estate of one of the defendants to the south, it was also too much to the north in those parts where the plaintiff's estate abutted on those of the other defendants. Although it cannot be laid down as an inflexible rule that all the defendants in a suit must have a joint interest in all the matters of the suit, yet the causes of action against the several defendants ought not to be, as they were in this case, wholly distinct and unconnected with each other. *BABOO MOTEE LAL v. RANEE, THE WIFE OF MAHARAJ BHOOP SINGH*, 8 W.R. 64=2 Ind. Jur. N.S. 245. [R., 11 W.R. 543, 11 W.R. 397, 9 C.P.L.R. 125; D., 11 W.R. 273.]

(3)—*Multifariousness—Objection—Joinder of causes of action—Permission to withdraw—Procedure*.—It is too late for defendants to object with effect to a suit on the ground of multifariousness, after it has been fully tried and decided on the merits; but the objection is one which a defendant has a right to raise on the settlement of issues, or on a motion to take the plaint off the file. (8 W. R. 61, R.) [F., 20 W.R. 147.] Where there has been a misjoinder of causes of action against different persons, and the proper stamp fee on the plaint having been paid, plaintiff prays for leave to withdraw his suit against all except one defendant, the Court may perhaps permit the suit to proceed against such defendant or defendants alone, but it cannot exercise that option for plaintiffs, who insist on their right to proceed against all the defendants. *MUNSHI MANIRUDDIN AHMED v. BABOO RAM CHUND*, 2 B.L.R., A.C., 341=11 W.R. 273. [F., 20 W. R. 147.]

(4)—*Misjoinder of causes of action—Combined causes of action—Jurisdiction*.—Where a suit is brought for the recovery of a sum contracted to be paid, and for cancellation of a *kistbunder* alleged to have been executed, under duress, also for a sum of Rs. 200 deposited on account of that *kistbunder*, the suit is not bad

Multifariousness—continued.

for misjoinder of causes of action. Combined causes of action may be brought in the Court which has jurisdiction to the full amount of such combined causes of action. *KINNOO MONEE DEBIA v. SHOHORAM SIRCAR*, 3 W. R. 127. [F., 7 W. R. 409.]

(5)—*One suit to set aside several transactions entered into by guardian with different persons—Misjoinder of causes of action—Objection not taken by parties—Dismissal of suit*.—A guardian of a Hindu minor alienated the minor's property by mortgage and sale to different persons. A single suit was brought to set aside such alienations nine in number, and no relief was sought against the guardian. The suit was remanded by the High Court on account of the Sub-Judge not having properly framed the issues. Held that, as each of these alienations in fact constituted a separate cause of action, and inasmuch as they are supported by different defendants, they should have formed the subject of several suits, and that it was not necessary at that stage of the case in regular appeal to the High Court, to direct that the whole or any portion of the suit should be dismissed by reason of misjoinder, when no objection had been raised by the parties themselves. *MATA PERSHAD v. MUSST. BHUGMANEE*, 1 N.W.P. 128.

(6)—*Act VIII of 1859, s. 9—Suit to set aside sale-deeds—Misjoinder of causes of action—Order of Court to file separate plaints, effect of*.—D, the husband of the plaintiff, conveyed to her all his immovable property by a deed of gift after squandering away all his moveable property. As he continued to live at an extravagant rate, he became deeply involved and in order to clear off his debts, there were executed by him and one B, who professed to act as general attorney for the plaintiff, a succession of sales and mortgages, which resulted in the total dissipation of all the property comprised in the deed of gift. Consequently the plaintiff instituted a suit against the defendants and several other persons, claiming to invalidate the conveyances and sales, of which some had been confirmed by decrees, or had been made in execution of decree, and which related to land situated in two different zillabs. The Court of first instance, at the first hearing, passed an order, purporting to be one under s. 9, Civ. Pro. Code, for the trial of the several causes of action (alleged by the plaintiff) separately, and further directed the plaintiff to file separate plaints. On appeal, the High Court, though holding that the plaint as originally framed should have been rejected on the ground of misjoinder, nevertheless proceeded to dispose of the appeals as the parties did not object, and as the result of the order of the Court of first instance file separate plaints might be regarded as the institution of new suits. They accordingly dismissed the suits relating to the property in a district outside the jurisdiction of the Court of first instance, and in those suits in which, by reason of the value being less than Rs. 5,000, the appeal lay to the

Multifariousness—continued.

District Judge, they returned the appeals to the appellants for presentation in the proper Court. *Held* that the direction of the Court of first instance, was not within the scope of s. 9, Civ. Pro. Code, as that section does not require the plaintiff to file separate plaints, but provides for the separate trials of the several causes of action contained in the one plaint filed on the institution of the suit. **MUSSUMAT RUTTA BEBEE v. DUMREE LAL, 2 N.W.P. 153.**

(7)—*Each alienation by guardian, a distinct cause of action—Single suit not maintainable to set aside several alienations.*—In this case the High Court remarked, with regard to the suit generally, that the plaint had been framed in a manner greatly calculated to embarrass the defendants. Each alienation by the plaintiff's guardians constituted the root of a distinct cause of action, and the first Court ought not to have entertained a suit which combined several of them in one plaint. **LOOLOO SINGH v. RAJENDRA LAHA, 8 W.R. 364.**

(8)—*Property in hands of several defendants under different alienations—Suit to recover—Distinct cause of action.*—The property in dispute, in this case, was claimed by the plaintiff as having originally belonged to her husband and then to her son; she alleged that it had passed into the hands of the different defendants by several acts of wrongful alienation to them effected at different times. The first Court was of opinion that the causes of action sued upon were several and distinct as against the several defendants, but, nevertheless, tried the case, as a whole and gave a determination on the merits in favour of the defendants. On appeal by the plaintiff, the Principal Sudder Ameen ruled that, under the circumstances of the case there was no ground for the plaintiff bringing separate suits. *Held* that the Principal Sudder Ameen was entirely wrong in his conclusion, and that he should have given effect to the objection which was made before him, and tried the case as one made up of so many separate suits against so many different defendants. **GOLAM MUSTAFA KHAN v. SHEO SUNDAREE BURMONEE, 10 W.R. 187. [R., 15 W.R. 304; D., 11 W.R. 397.]**

(9)—*Several Hindu widows, joint suit by, on dispossession—Purchaser defendants, distinct acts of taking possession by—Suit bad on account of multiplicity.*—Three out of the five sons of a Hindu having died one after another, ever since their deaths, plaintiffs their widows, were holding possession of the respective shares of their husbands in co-parcenary with the co-sharer-defendants, the other two surviving sons. These co-sharer defendants created debts in collusion with the other defendants and the latter purchased the property at auction and dispossessed the plaintiffs of their shares therein. Plaintiffs accordingly sued jointly to recover possession of the said shares of their husbands. The Principal Sudder Ameen found that the husbands of the first and third plaintiffs both died before their father. It followed from such

Multifariousness—continued.

finding that the ladies never had any right in the property in question, and also that, though the second plaintiff's right to a share appeared to have been made out still, as she too had chosen to sue jointly with the other two plaintiffs to obtain 3-5ths of the property, as of joint right, she was not entitled in this suit to recover 1-3rd on another, namely, her several right. The taking possession of the property by the purchaser defendants was not one act but three distinct acts of three persons without concert with each other. The suit was thus in reality three suits against so many different defendants, and the lower Court ought to have sustained the defendant's objection that the suit was bad on the ground of multiplicity and should have insisted on the plaintiff's making election of a cause of action and of a defendant upon which and against whom they would proceed. **HURRO MONEE DOSSEA v. ONOOKOOL CHUNDER MOOKERJEE, 8 W.R. 461. [R., 7 B. 289; D., 16 B. 608.]**

(10)—*Sales to different Vendees on different dates, single suit not maintainable to set aside—Misjoinder.*—Admitting the validity of certain objections presented by the defendants under s. 348 of Act VIII of 1859, one of which was "that this suit being brought for cancelment of sale transactions of different dates in favour of different vendees, is multifarious and consequently liable to dismissal," the High Court confirmed the decree by which the lower Court had dismissed the suit on the merits, but, declared expressly that the High Court proceeded on the ground that there had been misjoinder and not on the merits. **BANEE KRISHUN v. KOONDUN LAL, 2 N.W.P. 221. [R., 16 A. 279=A.W.N. 1894, 82.]**

(11)—*Joinder of causes of action—Claim against different portions of property.*—Where the plaintiff claims to recover possession of two distinct portions of a property from which he has been dispossessed at different periods and under different circumstances, and claims them under the same title and from the same party, there is no impropriety in the two claims being joined in one suit. **JANOKEE CHOWDHURANEE v. DWAR-KANAATH CHOWDHRY, 1 Hay 555.**

(12)—*Alienations by deceased member of undivided family—One suit against all the alienees.*—A suit brought against a number of alienees of a deceased member of an undivided family, for the recovery of family property illegally alienated by him, is not bad for multifariousness. It is most desirable that the whole of the alienations should be at once before the Court called upon to decide the question in order to secure the soundness of the particular decision and perhaps the avoidance of discordant decisions in different cases upon facts very nearly the same. **VASUDEVA SHANBHAGA v. KULEADI NARNAPAI, 7 M. H. C. 290. [Diss., 6 C. W. N. 585; F., 11 M. 106, 12 M. 234, 15 M. 19; R., 16 A. 279, 13 C. P. L. R. 9, 25 M. 736, 6 O. C. 379, 1 P. R. 1905=83 P. L. R. 1905, 9 O. C. 339, 11 Bom. L. R. 34=33 B. 293].**

Multifariousness—continued.

(13)—*Suit to recover estate held by several persons under several titles—Misjoinder.*—A suit to recover an estate in the possession of several persons, who hold in differedt portions by virtue of several transactions, should be dismissed for misjoinder. **TEWAREE RAGHONATH SAHAI v. SYED MAHOMED NAZEER, 4 N.W.P. 108.**

(14)—*Suit by auction-purchaser for possession—Misjoinder of parties.*—In a suit for possession by the auction-purchaser of a talook, many of the former proprietors were added as parties who were themselves the cultivators of the soil, holding separate possession of specific portions of land, and having their houses on the land. *Held* that separate suits must have been brought against persons claiming separate portions of land. The whole community cannot be sued for all the lands in the village. **RAM CHUNDER PAUL v. OMORA CHURN DEB, 16 W.R. 155.**

(15)—*Misjoinder of parties and causes of action—Test—Effect.*—Plaintiff obtained a decree in a previous suit, establishing his title as proprietor of a number of villages constituting one talooqua. Now he sues for mesne profits a number of persons who were severally in possession of the several estates constituting the talooqua. *Held* that the suit was bad for misjoinder and must be dismissed. In considering a plea of misjoinder in a suit of this nature it is not the plaintiff's title which must be regarded but rather the wrongs alleged as the causes of action. If the alleged wrongs be distinct and separable committed by several persons and proceeding from no combination or conspiracy of such persons, the wrong-doers must respectively be sued separately in respect of their own misfeasance, and they cannot be sued collectively in respect of wrongs to which they have been neither directly nor indirectly parties. Nor is the similarity of the claim any ground for joining in one suit claims which, though similar, are several and distinct against several persons. Nor is the convenience of their trial by one Court. **KOONDUN LAL v. RAE HIMMUT SINGH, 3 N.W.P. 86. [R., 16 A. 279.]**

(16)—*Misjoinder—Suit to set aside alienations made during minority—Purchasers, all of them joined in one suit.*—A suit by a person against all the purchasers of his estate, in portions, at different times from his father's widows during his minority, to recover the whole estate on the ground that the alienations are not binding on him, is not bad on the ground of misjoinder of causes of action. The plaintiff claims his share of the family property. The plaintiff's cause of action, the right, is his relation to the family to which the property appertains, and on this right if established, and if he is not otherwise barred from recovering, he will be entitled to that share wherever found. The fact that various persons during his minority have affected to purchase parcels of the property, does not destroy the unity of his ground of action. It will lie upon those who purchased, upon the

Multifariousness—continued.

establishment of his right, to show that the sales which they set up are binding upon him. **SAMI CHETTI v. AMMANI ACHY, 7 M. H. C. 260. [R., 6 O.C. 379, 9 O.C. 339, 33 B. 293 = 11 Bom. L.R. 34.]**

(17)—*Cause of action—Multifariousness.*—The suit was for a declaration that certain properties were liable for the amounts of certain decrees. The plaintiff alleged that the properties were those of his judgment-debtor, which had passed intact to the admitted representative of the judgment-debtor, the principal defendant in the suit. The other defendants were nothing better than so many men of straw fraudulently set up by the principal defendant as ostensible purchasers. *Held* that, if the plaintiff could prove his allegation, it could not be said that he had joined several causes of action against different parties in one suit, for, in reality, he had but one cause of action against one party, the principal defendant. Even if this were otherwise, the plaintiff could not be non-suited on account of the multifariousness of his suit. **MR J. P. WISE v. GUREEB HOOSEIN, CHOWDHRY 13 W.R. 271.**

(18)—*Misjoinder of causes of action—Appellate Court, competency of, to try misjoined suits separately.*—In this case the first Court held that there was no misjoinder, as the suit was one for possession against both defendants who opposed plaintiff's possession, and thus also opposed plaintiff's title by purchase; further, that the defendants set up one and the same description of title (*viz.*, putnee leases) against plaintiff and that, consequently, plaintiff had a common cause of action against both defendants. The first appellate Court, however, held that each of the two defendants had separate putnee leases of separate dates each lease conveying to each defendant a separate and distinct putnee right not common to the other, defendant, who, on his part, had his own distinct right under another putnee lease, that thus the defence of each defendant on his title might be entirely different, and that, therefore, plaintiff could not join both defendants in one action. The Judge further observed that he could not make separate trials in the case, on appeal, and dismissed the plaintiff's whole case as against both defendants. The High Court *held* that, even if there had been a misjoinder of parties, the Judge need not, on that account, have dismissed the suit. He was in error in supposing that he had not the same authority in appeal as Courts of original jurisdiction have. He could have separated the misjoined suits and tried them separately. The powers conferred on the Appellate Court by s. 39 of Act XXIII of 1861 are comprehensive enough to include such action on the Judge's part. **SHOROP CHUNDER PAUL v. MOTHOR MOHUN PAUL CHOWDHRY, 4 W.R. 109. [D., 12 W.R. 11.]**

(19)—*Procedure—Misjoinder—Multifariousness—Issue.*—Where a talookdar brought a suit against the zemindar and the several purchasers to set aside the sales to them respectively of five putnee talooks sold for arrears of

Multifariousness—continued.

rent due separately upon each, and the defendants at the earliest possible time put in a plea of misjoinder, the Judge not only framed an issue upon it, but other issues upon the question of fact involved in the suit, and, after taking the evidence upon the different issues, dismissed the suit upon the ground of misjoinder: *Held* that the Judge was right in having done so. **IMRITNATH JHA v. ROY DHUNPAT SING BAHADUR**, 9 B.L.R. 241 = 18 W.R. 288. [R., 7 B. 289.]

(20)—*Suit for possession—Dispossession—Cause of action.*—In a suit to recover possession on the ground of dispossession by all the defendants in consequence of certain (Act X) decisions, *held* that there is but one cause of action, and that the fact that the defendants each claim to hold portions of the property under different titles cannot make the suit bad for misjoinder. **MUSSAMUT ACKJOO BIBEE v. LALLAH RAMCHUNDER LALL SAHAI**, 23 W.R. 400.

(21)—*Suit for declaration that lands were wakf—Defendants holding under distinct titles.*—In a suit instituted for a declaration of the Court, under s. 15 of Act VIII of 1859, that certain lands and premises in Calcutta were wakf lands, under a certain towliatnamah executed by the ancestor of the plaintiff, the authenticity of which was admitted, and that the defendants who were in possession might be restrained by injunction from recovering the rents of, or intermeddling with, the said lands or premises, and that it might be referred to the Court in chambers to appoint a proper person to act as mutwalli under the said towliatnamah, and that such mutwali, when so appointed, might be declared entitled to the said lands and premises, the causes of action were alleged to have arisen at various times within the last twelve years, and were distinct as to the several defendants who held by different titles. On objection having been taken to the frame of the suit, the Court held that it was informal, as there was a joinder in one suit of several distinct causes of action, and no grounds were disclosed for relief in a suit in equity, and that the proceeding should have been by way of ejectment against each of the defendants. The suit was accordingly dismissed. If the defendants in such a suit be intruders and strangers, there is no common cause against them, and they must be turned out by action of ejectment against each separately. **MUZHUR HOSSAIN v. DINOBUNDHO SEN**, *Bourke*, O.C. 8 = Cor. 94.

(22)—*Fabrication of document—Ouster—Misjoinder of causes of action.*—Where the plaintiff sued for possession, alleging that the defendants had fraudulently combined to avail themselves of a fabricated jamabundee paper as evidence for supporting their *mokurraree* claims, and had thus ousted him (plaintiff) from the full enjoyment of his *milkyut* right, *held* that there was only one cause of action

Multifariousness—continued.

and that the suit was not bad for multifariousness. **GUJADHAR PERSHAD NARAIN SINGH v. SAHEB ROY**, 19 W.R. 203. [*Expl.*, 13 C. 147.]

(23)—*Landlord and tenant—Suit for khas possession by landlord—Plea of mokurruree title—Jamabandi papers relied on by defendant impeached by plaintiff—No proof as to forgery—Right to obtain declaration denying defendant's right to hold land at fixed rent.*—Plaintiff sued to recover from the defendants possession of certain land, which was occupied by them and to which they set up a mokurruree title upon the footing of some Jamabundee papers. The plaintiff said that these papers were fabricated and had been fraudulently made use of by the defendants with the knowledge that they were forged for the purpose of supporting their alleged mokurruree title. On this ground, he asked to have these papers declared forgeries and to recover possession of the land. He however failed to prove either that the papers were fabricated or that the defendants made use of them knowing their character as such. Having failed in this, he however asked for a declaration that the defendants had no right to occupy the land, which was the subject of the suit, at a fixed rent. *Held* that the plaintiff was not entitled to have a declaration of this kind for two reasons; firstly, a declaration of this kind could rightly be asked for only in a separate suit against each separate occupant of the land; secondly, the plaintiff having chosen to prove a specific fraud against the defendants and having made his cause of action entirely dependent upon that, he could not be allowed at the trial to succeed upon a matter which was entirely collateral to the fraud, and in the face of a finding that no fraud had been established. **SAHEB ROY v. GUJADHAR PERSHAD NARAIN SINGH**, 22 W.R. 221.

(24)—*Misjoinder of parties—Rent suit—Suit on engagement by different defendants.*—Plaintiff sued to recover rent on engagements entered into separately with the different defendants. The Court passed a decree making each of the defendants liable for the whole sum claimed in the suit. *Held*, that there had been misjoinder of defendants which had affected the decision. *Held*, also that, if the decree had been passed making each of the defendants liable in proportion to the amount of rent which he had engaged to pay, the High Court would not have interfered with the decision. **MOHUNT JAMONA DOSS v. BABOO POOKHUR SINGH**, 22 W.R. 133.

(25)—*Co-defendants jointly charged with costs—One defendant compelled to pay whole costs—Suit for contribution instituted—Plea of misjoinder.*—In a former suit brought against the present plaintiff and defendants which was bad for misjoinder of causes of action, the defendants were charged with costs relating to causes of action with which they had no concern. Plaintiff who was one of those defendants having been compelled to pay the whole of the costs in the said suit, instituted the

Multifariousness—continued.

present suit to recover the balance from his co-defendants in the former suit after deducting his own proper share. On appeal by the plaintiff who was dissatisfied with the decree of the lower Court the respondents appeared and objected that the suit was bad for misjoinder and the High Court accepted the objection and gave effect to it, observing that it was for the interest of all parties that the share that each party to the suit was equitably bound to contribute in respect of the costs paid by the plaintiff can be better ascertained and any defences which he may make can be properly considered in a separate suit and that the combination of the claims against several contributors in one suit is a misjoinder of causes of action. **BENI RAM v. HIDAYAT HOSSEIN, 7 N.W.P. 82.**

(26)—*Cause of action—Misjoinder.*—Where one of two decrees was based on an ikrar signed by a person not involved in the other, and lower Court held, in a suit for recovery of money in satisfaction of both decrees, that the cause of action in each was distinct, held by the High Court that a common cause of action was found in the joint liability of the parties. **MAHOMED MIRZA v. KHAJAH ABDOOL KAREEM, 25 W.R. 41.**

(27)—*Usufructuary mortgage—Suit for possession of mortgaged property by redemption pending suit to establish title by purchase of equity of redemption—Different causes of action.*—S the father of the defendants held as usufructuary mortgagee a ten biswas share of a certain village. Half of his share was recovered and held by the plaintiff as proprietor. The remaining half, $\frac{2}{3}$ of which had originally belonged to D and $\frac{1}{3}$ to H, was in the possession of the defendants. The plaintiff sued for possession of this half with mesne profits on the allegation that the mortgage had been redeemed by the usufruct, and that he had acquired the rights of D and H, the one by auction-purchase in 1848, and the other in 1873 by purchase from the sons of H, respectively. The defendants pleaded that they held those lands as proprietors, having purchased the rights of D and H in 1847 and 1851 respectively. They further pleaded that as the plaintiff's suit against H's sons in respect of the sale by them was pending, the claim for possession in respect of that portion could not be maintained in the suit and also that, as the rights of D and H had been acquired under separate sales, the plaintiff could not join these claims in one suit. The plaintiff replied that, assuming the claim to H's share could not be maintained on the basis of the alleged sale to him, he was nevertheless entitled to its possession in virtue of his right to D's share, both shares having been jointly mortgaged. The High Court, in remanding the case to the lower Appellate Court, held that, as the defendants had failed to establish the sale of D's share to S (their father), the plaintiff was entitled to have an account taken of the mesne profits, which, on taking the accounts, might be found to have

Multifariousness—continued.

accrued within six years before suit; that the plaintiff was entitled to call upon the Court in the same suit to determine his claim to the possession of H's share and to any surplus mesne profits which might be found due in respect of that share on taking the accounts. The pendency of a suit to establish his purchase did not deprive him of the right to sue to recover possession from the mortgagees, although it might be necessary to determine incidentally in the suit the question at issue in the other suit, and that, assuming the plaintiff to have established his right to D's share but failed to prove the purchase of H's share, he could not, in the same suit, obtain possession of that share on the ground that it was mortgaged jointly with shares they already held, and with the share of D, for, according to his own averment, the mortgage-debt had been redeemed and there was no longer any common liability which they were required to discharge. **MOHUN LALL v. JHUMMUN LALL, 6 N.W.P. 246.**

(28)—*Separate causes of action of several plaintiffs—Irregular joinder of, in one suit—Prayer for single relief—Specific direction in decree.*—The plaint permitted to be filed in the first Court contained two separate causes of action on the part of two distinct plaintiffs, and the two plaintiffs purported to sue together as if they were joint plaintiffs seeking a remedy upon one cause of action. The plaint, notwithstanding that it was double in its nature, contained but one prayer, viz., for the delivery up of nekasi papers. Without passing any specific decree, the first Court simply passed an order that the claim be allowed. Held that to allow such a plaint to be filed was not merely a technical irregularity, but an incorrect proceeding liable to lead to the committing of injustice to the defendant. Held, also that it was not sufficient for the lower Court to have merely passed such a vague order, but that it should have passed a decree amounting to a specific order upon the defendant to deliver up the papers. **RAM COOMAR SIRCAR v. KALEE KOOMAR DUTT, 10 W.R. 279.**

(29)—*Distinct causes of action against different defendants—Single suit not maintainable—Misjoinder of causes of action.*—Plaintiff, the prayer of a hoondi, instituted this suit to recover the amount of the same making four persons defendants—the drawer of the hoondi, the acceptor of the hoondi, his own endorsee of the hoondi, i.e., the person to whom he had endorsed it, but who afterwards re-conveyed it to him, and finally a person whom he alleged to be the person of whom the drawer was the agent. The High Court remarked that the combination of four such distinct suits in one and the same suit ought not to have been allowed by either of the lower Courts. **HABEEL BEPAREE v. CHOALMUN MAH, 10 W.R. 263.**

(30)—*Suit dismissed on ground of multifariousness—Interference by High Court.*—The High Court would generally refuse to interfere

Multifariousness—continued.

in special appeal with an order of lower Court dismissing a suit on ground of multifariousness. **LOKE NATH SIRCAR v. MODHOO SOODUN SHAHA**, 25 W.R. 69.

(31)—*Pre-emption—Misjoinder of causes of action—Misjoinder of parties—Irregularity not affecting merits or jurisdiction—Civ. Pro. Code, 1877, ss. 45, 578.*—In a suit for pre-emption against a number of defendants, it was sought to impeach two different sales, each of which gave a distinct and separate cause of action against different defendants; there was therefore misjoinder both of parties and of causes of action. The Court of first instance in which no objection was raised, gave a decree for the plaintiff, which was reversed by the District Judge on the ground of such misjoinder. *Held* that the District Judge was wrong, as the defect was not shown to have affected either the merits of the case or the jurisdiction of the Court (s. 578, Civ. Pro. Code). *Held* also that there would be no misjoinder where two different sales to the same person are sought to be impeached in one suit. **KALIAN SINGH v. GUR DAYAL**, 4 A. 163. [R., 2 A.L.J. 91, 2 C.L.J. 602; *Not F.*, 6 A.L.J. 926.]

(32)—*Suit for specific performance and possession—Subsequent purchaser—Misjoinder.*—The cause of action in a suit for specific performance of contract to sell land and for possession of land, concerns both the vendor and the subsequent vendee, and a suit against both is not bad for misjoinder of parties or causes of action. **KRISHNASAMI v. SUNDARAPPAYYAR**, 18 M. 415 = 5 M.L.J. 164. [R., 11 Bom. L.R. 545.]

(33)—*Suit for declaration that mortgage-decree affects property comprised in mortgage, in which others have since become interested severally.*—Where, in a suit, by the mortgagee of properties for a declaration that his mortgage-decree affected some of such properties, against the mortgagor and other persons, who had become interested in separate portions of such property severally, at sales in execution of other mortgage-decrees in respect of it, *held* that, as the plaintiff sued in respect of a single transaction affecting several items of property upon a single contract as between himself and his mortgagor, and as the plaintiff was compelled to sue by reason of the fact that, subsequent to the execution of his mortgage, several other persons had become interested in different portions of the property, which, as a whole, was the subject of his mortgage-bonds, the suit was not bad for multifariousness. **BUNGSEE SINGH v. SOODIST LALL**, 7 C. 739 = 10 C.L.R. 263.

(34)—*Frame of suit—Joinder of defendants and joinder of causes of action—Civ. Pro. Code, 1882, s. 28.*—Where, in a suit for rent alternatively against the tenant and his previous landlord, (the vendor of the plaintiff) upon an allegation by the tenant that the rent for the year in question had been paid to the previous landlord, the Court found that the tenant had in fact paid the rent in good faith, *held*, the

Multifariousness—continued.

Court ought to give a decree against such previous landlord, the frame of the suit being unobjectionable under s. 28 of the Civ. Pro. Code. **MADAN MOHUN LAL v. HOLLOWAY**, 12 C. 555. [F., 31 B. 516 = 9 Bom. L. R. 482, 20 C. 285; R., 29 M. 50 = 16 M.L.J. 39, 31 M. 252 = 18 M.L.J. 238 = 5 M.L.T. 282, 6 C.L.J. 190.]

(35)—*Suit for possession with alternative relief for rent—Misjoinder of parties and causes of action—Procedure*—A suit for possession against several defendants, with a claim, in the alternative, for arrears of rent, was properly framed and not bad for misjoinder of parties and causes of action, even where it appeared that the claim for possession was sustainable only against some of the defendants, and that a portion of the claim for rent was directed against some defendants, the other portion being directed against all the defendants. Having regard to the provisions of ss. 31 and 45 of the Civ. Pro. Code (1877) even when distinct causes of action are improperly joined, the Court, instead of dismissing the suit, should proceed to separate them and try them separately. **JANOKINATH MOOKERJEE v. RAMRUNJUN CHUCKERBUTTY**, 4 C. 949. [R., 4 M.L.J. 288 = 19 M. 211, L.B.R. 1872-1892, 355, 31 B. 516 = 9 Bom. L.R. 482.]

(36)—*Parties—Multifariousness.*—The plaintiffs who were the purchasers at an auction sale for arrears of rent were resisted by the defendants when taking possession. They sued one of the defendants only at first, as he claimed a particular portion of the lands under the tenure. The suit was eventually dismissed on the ground that all the persons who were claimants of any part of the lands ought to have been joined as defendants. Then the plaintiffs brought the present suit against all the defendants. To this suit the latter set up various and distinct defences. The Subordinate Judge dismissed the suit for multifariousness. *Held* that there was no multifariousness as the plaintiffs' claim was to recover possession against persons who were alleged to be joint trespassers. **SHEIKH OMUR ALI v. SHEIKH WEYLAYET ALI**, 4 C. L.R. 455. [F., 13 C. 147.]

(37)—*Multifariousness—Civ. Pro. Code, 1882, s. 28 (= O. 1, r. 3, present Code)—Plaint rejected for multifariousness—Remand—Appeal—Civ. Pro. Code, ss. 54, 562, 588.*—Where the plaintiff claimed the ownership of the properties in suit through her late husband, and alleged that her rights had been infringed at different times and by different sets of defendants, and it was found that the latter did not act in concert and did not combine together to dispossess the plaintiff, *held* that there were separate causes of action against separate sets of defendants, and the trial could not proceed as upon a single cause of action, and a definite provision of law cannot be evaded on the ground of convenience. [R., 9 O.C. 339.] Where the first Court rejected the plaint on the ground of misjoinder of causes of action and of defendants, and the lower Appellate Court upon appeal set aside the order and remanded the

Multifariousness—continued.

case for decision on the merits, an appeal lay to the High Court under s. 588 against that order as an order under s. 562. Civ. Pro. Code, **RAM PRASAD v. S.M. SACHI DASSI**, 6 C.W.N. 585. [Diss., 120 P.R. 1907.]

(38)—*Misjoinder of causes of action—Multifarious suit—Civ. Pro. Code, 1877, ss. 28, 45—By the Full Bench, Mahmood, J., dissenting.*—Where several distinct causes of action are alleged against distinct sets of defendants who are not jointly liable in respect of each and all of such causes of action, a suit against all the defendants jointly is bad in law, and the plaint is liable to be rejected. **NARSINGH DAS v. MANGAL DUBEY**, 5 A. 163, F.B. = A.W.N. 1882, 202. [F., A.W.N. 1883, 230, 4 L.B.R. 183; Expl., 11 A. 33; R., 6 A. 106, 13 C. 147, 16 A. 279, 29 P.R. 1894, 9 C.P.L.R. 125, 13 C. P.L.R. 9, 3 L.B.R. 191, 11 Bom.L.R. 499.]

(39)—*Suit for pre-emption—Misjoinder—Civ. Pro. Code, s. 45*—A single suit to enforce a right of pre-emption in respect of two separate sales by two owners, though made in favour of the same purchaser, is bad for misjoinder of defendants as well as of causes of action, and is liable to be dismissed on that ground. **BHAGWATI PRASAD GIR v. BINDESHRI GIR** 6 A. 106 = A.W.N. 1883, 229. [R., 9 C.P.L.R. 125, 6 A.L.J. 926, 11 Bom. L.R. 499.]

(40)—*Misjoinder of parties and causes of action—Relief asked common to the defendants joined—Practice—Civ. Pro. Code, 1882, s. 28.*—The plaintiff owned a godown in Bombay. He agreed with Messrs. Khimji Visbham (defendants Nos. 1—6) to let the godown from 1st May 1906 for a fixed term of 12 months. At the date of the agreement, the godown was in the occupation of Messrs. Nensy Khairaz & Co. (defendants Nos. 7, 8). The plaintiff sued the two sets of defendants to recover from either the one or the other set a sum of money for rent of his godown. Messrs. Khimji Visbham alleged that they did not get possession of the premises in terms of the agreement, that they obtained possession of only one compartment out of three on the 22nd May 1906, in consequence of which they had to hire other premises. The second set of defendants, Messrs. Nensy Khairaz & Co. contended that there was an oral agreement with the plaintiff that they should occupy the godown till the end of May 1906, that they gave up possession of a portion of the godown before the 22nd May 1906, and on the 22nd May 1906 they gave up possession of the remaining portion to the plaintiff and the first set of defendants, Messrs. Khimji Visbham & Co. It was objected to this suit that it was bad by reason of misjoinder of parties and causes of action:—*Held*, disallowing the objection, that the subject matter in respect of which the plaintiff sought relief against both sets of defendants was rent of his godown. It was the same matter as regards both sets of defendants and both sets of defendants were interested in the adjudication of questions involved in the suit and there were

Multifariousness—continued.

many questions of fact which were common to the case of both sets of defendants. The object of s. 28 of the Civil Procedure Code is to avoid multiplicity of suits if it could be done without embarrassment to any of the defendants. The general principle governing the joinder of defendants would seem to be that there must be a cause of action in which all the defendants are more or less interested although the relief asked against them may vary but that separate causes of action against separate defendants quite unconnected and not involving any common question of law or fact cannot safely be joined in one action. **MAVJI v. KUVIRJI**, 9 Bom L. R. 482 = 31 B. 516. [R., 11 Bom. L.R. 499, 18 M.L.J. 238 = 31 M. 252.]

(41)—*Practice—Misjoinder of parties—Misjoinder of causes of action—Plaint, amendment of, in appeal*—Plaintiffs and first defendant are members of a joint Hindu family. The second defendant was given in adoption to a different family and the third defendant is the adopted son of the second defendant. Plaintiffs alleged that there was a partition of their family properties except certain portions, and that their family was entitled to a half share in the trade carried on by the second defendant. The plaintiff prayed for partition among themselves of the properties which still remained undivided and also for the dissolution of the trading partnership of which the second defendant was a member. *Held, per Sankaran Nair, J.* that (a) there was no misjoinder of parties, because there is no provision of law that precludes the plaintiffs from making defendants, 2 and 3, parties to the suit, to make any declaration of the rights of members of plaintiff's family binding on them. (b) but that there was no misjoinder of causes of action, because the dissolution of the trading partnership was unnecessary for the partition of a family property, and the questions that arise for determination in a suit for dissolution of partnership are entirely different from these arising in a partition suit and (c) that in appeal, the plaint might be allowed to be amended by withdrawing the claim for partition and converting the suit into one for dissolution of partnership. *Held, per Pinhey, J.*, that the suit is bad for misjoinder of parties and causes of action and that the defect was one that cannot be cured, because it was one affecting jurisdiction, and not a mere irregularity. **PULAVARTY VENKANNA v. JUPUDY SARAYYA**, 5 M.L.T. 117 = 19 M.L.J. 102. (23 B. 597, Appl.)

(42)—*Multifariousness—Plaintiffs deriving title from different sources—Real cause of action, common to all.*—A suit by the plaintiffs who derive their titles from different sources, e.g., some by inheritance, some by purchase, but who between them are entitled to a sixteen anna share of the property, against the defendants who were keeping them out of possession of the property, for ejectment, is not bad for multifariousness, though they stated in the plaint that their cause of action was a

Multifariousness—concluded.

certain order made in criminal proceedings, which applied to some only of the plaintiffs, the real cause of action being found from other allegations in the plaint to be common to all of them. *GIRIJANATH v. SURENDRANATH*, 16 C.L.J. 1=16 Ind. Cas. 84. (22 C. 833, 16 B. 119, R.)

See ACT XX OF 1863, 7 M.H.C. 123.

See CAUSE OF ACTION, 5 B.H.C. A.C., 30.

See CIV. PRO. CODE, 1908, ss. 16, 17, A.W.N. 1908, 235=5 A.L.J. 647=4 M.L.T. 392.

See CIV. PRO. CODE, 1908, O. I, r. 9, O. II, rr. 4, 5, 24 A. 358=A.W.N. 1902, 85.

See CIV. PRO. CODE, 1908, O. I, r. 10 (4), O. II, rr. 2, 4, 5, 24 A. 553=A.W.N. 1902, 170.

See CIV. PRO. CODE, 1908, O. II, r. 2, 3 Bom. L.R. 799.

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 13 C. 147.

See DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS, 3 W.R. 102.

Declaratory suit against Karnavan and his alienees, not bad as multifarious — See DECLARATORY DECREE, SUIT FOR—WHEN DECLARATORY SUITS LIE, 12 M. 234.

See FRAUD—PLEADINGS AS TO FRAUD, 26 C. 891=3 C.W.N. 670.

See HINDU LAW—ALIENATION, 8 W.R. 15.

Joinder of causes of action—Parties with separate interest—See JOINDER OF CAUSES OF ACTION, 9 C.P.L.R. 125.

Misjoinder of causes of action and parties, See LIMITATION ACT, 1908, s. 14, 23 C. 821.

See MALABAR LAW—JOINT FAMILY, 15 M. 19.

See PARTIES TO SUIT—GENERAL, 1 M. 333.

See POSSESSION—MISCELLANEOUS, 4 C. W.N. 297.

See REVIEW—PRACTICE AND PROCEDURE, 18 W.R. 464.

Municipal Bye-laws.

See CRIM. PRO. CODE, 1882, s. 555, A.W. N. 1891, 81.

Municipal Commissioner.

Encroachment on public road—Powers of—See BOM. ACT III OF 1872, s. 195, 12 B. 474.

Discretion of—Civil Courts will not interfere with the—See BOM. ACT III OF 1888, ss. 231, 234, 1 Bom. L.R. 754.

Discretion of, as to the removal of dangerous structures—See BOM. ACT. III OF 1888, s. 354 10 Bom. L.R. 821=33 B. 334.

Dismissal of elected Municipal Commissioner—Suit for damages—See MAD. ACT III OF 1871, s. 9, 7 M. 466, F.B.

Sanction to prosecute—Notice—Municipal Commissioner—See SANCTION TO PROSECUTE, A.W.N. 1892, 31.

Municipal Committee.

(1)—*Suit against Municipal Committee upon title to land—Limitation—Act IV of 1873, s. 19*—A suit founded upon title to land and brought to question an alleged proprietary right in a Municipal Committee is not within the meaning of s. 19 of Act IV of 1873. *THE PRESIDENT, MUNICIPAL COMMITTEE, DELHI v. HARNA MALL*, 10 P.R. 1877. [Appl., 53 P.R. 1883, 79 P.R. 1884.]

(2)—*Act IV of 1873, s. 19—Suit against Municipal Committee—Limitation.*—It was contended for the plaintiff in this case that Act IV of 1873 had no application to the suit which was one founded on a contract and plaintiff was therefore not bound to bring his suit against the defendant Municipal Committee within three months from the accrual of the cause of action. It was held, however, that the defendant acted or purported to act under the provisions of s. 11 of Act IV of 1873 and the provisions of s. 19 of the Act were clearly applicable. The contention that the suit was one founded on a contract was held to be untenable; for, there was no legal contract—a contract in writing as required by s. 18 of the Act—consequently, the suit could not be alleged to be founded on a contract. S. 19 of the Act has been framed in order that all questions between persons and Municipal Committees regarding matters in which the Committees acted under the provisions of the Act could be disposed of without delay and, that being so, the present suit should have been lodged in accordance with the provisions of the section within three months of the accrual of the plaintiff's right to sue. *TIKKU SUDH v. PRESIDENT, MUNICIPAL COMMITTEE OF SIMLA*, 58 P.R. 1875.

See NUISANCE, 106 P.R. 1888.

Municipal Courts, Jurisdiction of.

See ACT OF STATE.

(1)—*Resumption by Government of Jaidad tenure—Suit by representatives of prantee—Jurisdiction of Municipal Courts—Arms and ammunition, claim to.*—Maharajah Scindia granted a Jaghire to a Begum S, on a jaidad tenure, i.e., upon a grant of a certain district and the revenues thereof, on condition of the grantee keeping up a military force to be employed in the service of Scindia, whenever called upon. The whole administration of the Jaghire including the exercise of Civil and Criminal jurisdiction therein, vested in the grantee, who exercised a sort of delegated Sovereign authority. On Scindia's authority being ceded to the East India Company, the grantee of the jaidad tenure entered into a treaty with the Company, under which she was to hold the tenure under the Company during her life-time. As long as she was alive, British law and jurisdiction were excluded from her dominions. After her death, the Regulation Law, was introduced therein by order of the Governor-General, under Act XVII of 1836. Since the death of the Begum, the Government, acting in the Political Department, resumed the Jaghire and seized the

Municipal Courts, Jurisdiction of—concl'd.

arms and ammunition of the Begum. The representatives in interest of the Begum claimed in this suit the Jaghire and to hold the same free from the payment of any revenue to Government. They also claimed, in another suit the arms and ammunition seized by the Government. The defence was that the suits were not maintainable in the Civil Courts on the ground that the resumption and seizure were acts of State. *Held* that the resumption was not an act of State, because it was not the seizure by arbitrary power, of territories which, up to that time, had belonged to another Sovereign State. On the contrary, it was the resumption of lands previously held under the Government under a particular tenure, upon the alleged determination of that tenure; the possession being taken under colour of a legal title, which was a title, in the Sovereign Power, to resume and retain or to assess to the public revenue all lands previously held rent-free. If, by continuance of the tenure or other causes, a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects, would *prima facie* be cognizable by the Municipal Courts of India. (1 M.I.A. 476, D.) *Held*, upon the evidence, that the plaintiffs failed to establish their title to claim the lands in this suit. It appearing in evidence that the Begum had purchased the arms and ammunition and there appearing nothing to disprove her title thereto, a decree was given in favour of the plaintiffs for the value thereof with interest. FORRESTER v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, P.R. 1872, P.C. 1=12 B.L.R. 120=18 W.R. 349=Sup. Vol., I.A., 10=3 Sar. 1. [R., 6 Bom. L.R. 131; D., 12 B.L.R. 167, P.C.=18 W.R. 389.]

Municipal Funds.

Expenditure of, for unauthorised purposes—Rate-payer entitled to injunction against Municipality—See SPECIFIC RELIEF ACT, 1877, s. 56, cl. (k), 22 B. 646.

Municipal Act, Bombay.

See BOM. ACT II OF 1865.

See BOM. ACT III OF 1872.

Municipal, City of Bombay.

See BOM. ACT III OF 1888.

Municipal Act, Bombay District.

See BOM. ACT VI OF 1873.

See BOM. ACT III OF 1901.

Municipal Bombay District Amendment Act.

See BOM. ACT II OF 1884.

Municipal Act, Burma.

See BUR. ACT XVII OF 1884.

See BUR. ACT III OF 1898.

Municipal Act, Calcutta.

See BEN. ACT VI OF 1863.

See BEN. ACT III OF 1899.

Municipal Consolidation, Calcutta.

See BEN. ACT IV OF 1876.

See BEN. ACT II OF 1888.

Municipality, Calcutta (amending Ben. Act IV of 1876).

See BEN. ACT V OF 1884.

Municipal Act, Bengal.

See BEN. ACT V OF 1876.

See BEN. ACT III OF 1884.

Municipal Amendment Act, Bengal.

See BEN. ACT IV OF 1894.

Municipal Improvement, District.

See BEN. ACT III OF 1864.

Municipal, Central Provinces.

See C. P. ACT XVIII OF 1889.

See C. P. ACT XVI OF 1903.

Municipal Act, City of Madras.

See MAD. ACT V OF 1878.

See MAD. ACT I OF 1884.

See MAD. ACT III OF 1904.

Municipal Act, Madras.

See MAD. ACT IX OF 1867.

Municipalities, Madras District.

See MAD. ACT IV OF 1884.

Municipality, Punjab.

See PUN. ACT IV OF 1873.

See PUN. ACT XIII OF 1884.

See PUN. ACT XX OF 1891.

Municipalities, United Provinces.

See U.P. ACT XV OF 1873.

See U.P. ACT XV OF 1883.

See U.P. ACT I OF 1900.

Municipalities (Amending Acts, XV of 1873 and XV of 1883).

See U.P. ACT I OF 1895.

Municipality.

(1)—*Municipal tax—District Municipalities Act (IV of 1884), ss. 49, 50, 53, 101—Wrongful assessment—Suit to recover money illegally levied—Small Cause Court—Jurisdiction.*—When profession tax has once been paid in one Municipality and subsequently for the same period the tax is collected under protest a second time by another Municipality, the taxpayer is entitled to sue the latter Municipality for a refund of the money wrongfully collected from him. The suit will lie in the Civil Courts, and if the amount is within the pecuniary limits of a Small Cause Court, such a suit will lie in the Small Cause Court. TUTICORIN MUNICIPALITY v. SOUTH INDIAN RAILWAY, 13 M. 78. [R., 24 M. 205; D., 19 M. 10.]

(2)—*Madras District Municipalities Act, IV of 1884—Amending Act III of 1897, s. 3 cl 27—Legislature vesting street in Municipa' Council, effect of—Limitation Act, XV of 1877*

Municipality—continued.

sch. II, art. 146 (a), effect of.—When the legislature has vested a street in a Municipal Council such vesting does not transfer to the Municipal authority the right of the owner in the site or soil over which the street exists. It does not own the soil from the centre of the earth *usque ad coelum* it has the exclusive right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street and it has also a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers. [R., 14 M.L.J. 37, F.B.=27 M. 386, 6 A.L.J. 539 =5 M.L.T. 391; Cited., 30 M. 185 P.C=4 A.L.J. 333=11 C.W.N. 585=5 C.L.J. 506=17 M.L.J. 240=9 Bom. L.R. 663=2 M.L.T. 204.] The new art. 146 (a) of the Limitation Act, cannot reasonably be restricted to streets or roads formed by the Municipality on lands belonging to or acquired by it in proprietary right—*Per Bashyam Aiyar, J. S. SUNDRAM AIYAR v. THE MUNICIPAL COUNCIL OF MADURA AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 25 M. 635=12 M.L.J. 37.* [R., 14 M.L.J. 37, F.B.=27 M. 386, 10 C.L.J. 613=2 Ind. Cas. 512.]

(3)—*Act III of 1864, B.C., s. 73, expenses of clearance of jungle recoverable under, by Municipal Commissioners.*—The Commissioners of a Municipality sued the defendant under s. 73 of Bengal Act III of 1864 for recovering expenses incurred by them in clearing certain jungle which the defendant, in spite of notice to him to clear, failed to do so. Defendant pleaded that he was not liable, as the notice required to be served under s. 73 had not been served upon him by the Commissioners. The Small Cause Judge submitted for the High Court's consideration the question whether the notices issued were legal or not, stating, as his own opinion, that the Commissioners had no authority in law to delegate to their subordinates the power of deciding what jungle was insalubrious and what not and the power to thereon issue the necessary notices. He was also of opinion that the Commissioners, before issuing the notice, were found in each case to satisfy themselves that the particular premises served under the notice were, by reason of thick or noxious vegetation in a state injurious to the salubrity of the town, and holding that, because they neglected to do so, the notices issued were illegal, dismissed the case subject to confirmation by the High Court. The High Court was of opinion that Municipal Commissioners were not bound to go to each particular spot of land personally and individually to ascertain by evidence, or upon their own view, whether the jungle growing there was injurious to the health of the inhabitants or not. They had to ascertain in the best way they could, with the assistance of their officers, whether there was any jungle growing in the town which was noxious and injurious to health, and, if so, to have it removed; if they were obliged to clear

Municipality—continued.

away the jungle on the defendant's land in consequence of his non-compliance with the notice served upon him, he would be liable to pay the costs incurred in doing so. **LORD H. ULICK BROWNE v. WOOMESH CHUNDER ROY, 7 W.R. 213.**

(4)—*Beng Act III of 1864, s. 77—Declaration by Municipal Commissioners of a road as public road—Suit against Commissioners regarding ownership of road—Notice of action.*—Where the Municipal Commissioners acting under Bengal Act III of 1864 declared a road as a public road, it was necessary for the plaintiff before instituting a suit to restrain the commissioners from interfering with his rights in the road, to give a month's notice of action under s. 77 of the Act, and a notice, objecting to the decision of the Commissioners and asking them to re-consider their order, was not sufficient. **ABHOYANATH BOSE v. THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF THE MUNICIPAL COMMITTEE OF KRISNAGHUR, 7 W.R. 92.**

(5)—*Act III of 1864 (B.C.)—Suit against Municipality to recover possession—Cause of action.*—Plaintiffs, as proprietors of a share of a certain Zemindary, sued the Chairman of the Howrah Municipal Committee to recover possession of certain land on the allegation that the defendants had ousted them by stacking stones thereon and that the cause of action arose when the Commissioners refused to remove the stones, referring the plaintiffs to their legal remedy, if so advised. The defendants' case was that the land had all along been in possession of Government, till Act III of 1864 (B.C.) was extended to Howrah, that the Municipal Commissioners had since then held the lands, that the plaintiffs were barred under s. 87 of the said Act and that the suit was barred by limitation. *Held (by Bayley, J.)* that the cause of action must not be taken to be the refusal of the Municipal Commissioners to remove the stones which they made in their letter which was simply one in reply to plaintiffs' attorney in the ordinary course of business, and that the Municipal Commissioners properly acted under the law and that they were entitled to the application of s. 87 of the Act. *Held, (by Phear, J.)* that if the plaintiffs were strictly suing the defendants for damages consequent on the wrong done by them in the reasonable belief that they were exercising the powers conferred upon them by Act III of 1864 (B.C.) the defendants would be entitled to invoke the protection provided by s. 87 of the Act, and that this section did not apply where the plaintiffs sued to recover possession of property kept away from them by the defendants. **POORNO CHUNDER ROY v. BALFOUR, 9 W.R. 535.** [F., 1 A. 269; Appr., 12 B.H.C. 250; R., 13 W.R. 461, 2 O.C. 732, 22 B. 289, F.B., 2 Bom. L.R. 857=25 B. 142, 3 A.L.J. 341=A.W.N. 1906, 107=28 A. 600.]

(6)—*Municipal Act (III of 1864), B.C., s. 81—Notice for house-tax—Service of demand—Mistake of amount in notice of demand.*—A service

Municipality—continued.

of notice under any of the sections of Act III of 1864 (B.C.) preceding s. 81 of the said Act, may, under the latter section, be served either upon the person to whom the notice is addressed, or by leaving it with some servant of the family. The mistake of a few rupees in a notice, caused by an obvious error in the addition of the various items, is not a sufficient ground for impeaching or affecting the demand, where the directions of the act have been substantially complied with, as s. 48 of Act III of 1864 protects the Municipal Commissioners against any mistakes in the amount of assessment due, where the directions of the Act have been substantially complied with. **GOPEE KISHEN GOSSAIN v. W. H. RYLAND, 9 W.R. 562.**

(7)—*Municipal Act (III of 1864), B.C.—Excavation of tank—Permission for—Discretion of Chairman of Municipality.*—Where the Chairman of the Municipality of Howrah, acting in the *bona fide* exercise of the discretion vested in him under s. 19 of the Bye-laws of the Howrah Municipality framed under the Bengal Municipal Act (III of 1864), refuses permission for the excavation of a tank, held that the Civil Courts had no power to interfere. **BHYRUB CHUNDER BANERJEE v. MR. G.E. MAKGILL, 17 W.R. 215.**

(8)—*Ben. Act III of 1864—Municipal Commissioners—Their servants—Responsibility.*—Municipal Commissioners under Act III (B.C.) of 1864 and their servants incur no personal responsibility for what they do so long as they act in the line of their duty. But if they do or order to be done, that which is not within the scope of their authority, or if they are guilty of negligence or misconduct in doing that which they are empowered to do, then they render themselves personally liable to an action. There is no special law extending to members of municipalities which protects them so long as they act *bona fide*. **SOONDAR LALL v. N. B. BAILLIE, 24 W.R. 287. [F., Rat. Un. Cr. 309.]**

(9)—*Act II of 1865 (Bombay)—Act XV of 1867 (Bombay)—Owner—Occupier—Municipal land tax—Liability of Railway Company to pay—Principle of rating in Bombay.*—The true mode of construction of enactments is, if it be reasonably possible, to give to a word the same construction throughout the enactment, unless there be something in the context repugnant to that construction. In s. 2 of Act II of 1865 (Bom.), there is nothing in the context to render it imperative upon the Court to hold that the term "owner" necessarily includes a lessee. The definition of owner in that section is perhaps not a very happy one, but the Legislature itself, by ss. 47 and 48, has greatly aided that definition, and showed that the rent spoken of in s. 2 means rent receivable, or which might be receivable, under an original letting, and not a subletting, otherwise, indeed, every temporary occupier who sublets would become an owner and liable to be rated in that capacity—a result which it would not be reasonable to hold as within the intention of the Legislature

Municipality—continued.

without some more clear declaration of it than can be discovered in the Act. [*R.*, 34 B. 618 = 12 Bom. L.R. 34 = 5 Ind. Cas. 621.] Where the Government had made over, to a Railway Company, free from all charges and for a number of years, the land required for the Company's Railway, the Government and not the Railway Company constitute the "owners" of such land within the scope of the Bombay Municipal Act, but the latter admittedly liable as "occupier" could be rated as such by the Municipality in respect of their not earnings from the portion of the Railway line within its jurisdiction. In Bombay "the principle upon which the Railway Company is liable to be rated as occupiers is to take the gross earnings of the portion of the line which is within the City (Island) of Bombay, and to make therefrom the following deductions:—1. The expenses of working that portion of the line. 2. The repairs of rolling stock, etc., used on that portion of the line. 3. An allowance for renewal of it. 4. An allowance for a compensation fund. 5. Interest upon the capital necessary for working that portion of the line. 6. Tenant's profit on that capital. "But the income tax is not a proper deduction." "If an allowance be made for depreciation of rolling stock, the fact of such an allowance having been made should be taken into consideration in fixing the rate of tenant's profits." **THE JUSTICES OF THE PEACE FOR THE CITY OF BOMBAY v. THE GREAT INDIAN PENINSULAR RAILWAY COMPANY, 9 B.H.C. 217.**

(10)—*Suit in ejectment against Municipality—Act II of 1884 (Bombay District Municipal Act amendment Act), s. 48—Act VI of 1873 (Bombay District Municipal Act), s. 86—Construction.*—The expression "in the case of any such action for damages," as used in s. 48 of Act II of 1884 (Bombay District Municipal Amendment Act) shows clearly that it was contemplated that there might be actions of another description to which the provisions in the former paragraph would be applicable. In other words, there is no reason for concluding, upon the language of the corresponding section of the former Act, (*i.e.*, s. 86 of the Bombay District Municipal Act, VI of 1873) that the section only contemplates "suits to recover monetary compensation for a wrongful Act." A suit in ejectment, not being a suit brought to recover damages "for an act done or intended to be done," was excluded under s. 86 of Act VI of 1873, but "being an action for an act done," that act being the dispossession by the Municipality, with a view to being restored to possession, falls under the provisions of para 1 of s. 48 of the Bombay District Municipal Act Amendment Act (II of 1884). **NAGUSHA v. MUNICIPALITY OF SHOLAPUR, 18 B. 19. [Overruled, 22 B. 289. F.B.; R., 19 B. 407, 19 M. L. J. 333 = 32 M. 371 = 4 M.L.T. 209; Cons., 25 B. 142, 22 B. 283.]**

(11)—*Land acquisition—Jurisdiction—Civil Court—Land Acquisition Act (I of 1894), s. 6.*—A Civil Court has no jurisdiction to entertain a suit for an injunction to restrain a Dis-

Municipality—continued.

trict Municipality from acquiring through the medium of Government, under the Land Acquisition Act, 1894, a piece of land for the purpose of widening a street-way. **SHASTRI RAMCHANDRA v. AHMEDABAD MUNICIPALITY**, 2 Bom. L.R. 395 = 24 B. 600.

(12)—*House-tax—Valuation—Civil Court—Jurisdiction.*—A Civil Court has no power to interfere in the matter of valuation of houses made by a Municipality. **MORAR v. BORSAD TOWN MUNICIPALITY**, 2 Bom. L.R. 417 = 24 B. 607.

(13)—*Civil Court—Jurisdiction.*—Where, in the assessment of a house-tax by a Municipality no breach of the prescribed rules has been committed, the Civil Courts, in the absence of any proof of *mala fides*, perversity or manifest error, cannot interfere on the mere suggestion that the valuation is too high. Civil Courts have jurisdiction to interfere in cases where the plaintiff's complaint is not merely that the valuation, for the purposes of assessing house-tax, is wrong; but that it has been arrived at in contravention of the rules which are by law applicable. **KASANDAS v. ANKLESHWAR MUNICIPALITY**, 3 Bom. L.R. 882 = 26 B. 294.

(14)—*Street—Public street—Private street—Sweeping and lighting the street.*—The mere facts that Municipal sweepers are employed in sweeping a street, and that the Municipality keeps up lamps in that street, are not sufficient by themselves to establish that the street is a public one. **THE ANKLESHWAR MUNICIPALITY v. RIKHAVCHAND**, 2 Bom. L.R. 1076 = 25 B. 315.

(15)—*Water-connection — Rules framed by the Municipality—Construction of the rules.*—The plaintiff, the owner of a house in Surat, took in 1898 a water connection from the main pipe laid by the defendant Municipality. Under the rules, he was chargeable with one rupee a month for the water supplied to him and the condition was that his house was not to be inhabited by more than three families. The defendant Municipality made a new set of rules in 1905, under which they called upon the plaintiff to take a separate water connection for each of the families living in his house; and they threatened to cut off the connection in case of non-compliance. The plaintiffs brought this suit to restrain the Municipality from so doing: *Held*, that under the rules so long as the plaintiff occupied a house not inhabited by more than three families, he was entitled to the water supply. **THE SURAT CITY MUNICIPALITY v. TYABALI DAUDBHAI**, 10 Bom. L.R. 622 = 32 B. 460.

(16)—*Grant of land for burial purposes—Use of land as burial ground prohibited by Municipality—Right of grantee—Suit for possession of burial ground.*—Where a suit for joint possession of a certain plot of ground, together with trees thereon, was dismissed on the ground that by an order of the Municipality the plot had ceased to be a burial ground and the plaintiff therefore had no right or interest therein, *held* that the Court was wrong in dis-

Municipality—continued.

missing the suit, as the land might be used for purposes other than those prohibited by the Municipality. **MEHAR BAKSH v. MUHAMMAD BAKSH**, A.W.N. 1883, 3.

(17)—*Suit against Municipal Board for declaratory decree to be entered in list of candidates for election as members of Board—Allegation of mala fides against revising tribunal—Maintainability of suit against Board.*—Plaintiff sued for a declaratory decree against the Municipal Board in its corporate capacity, to the effect that he was entitled to be entered in the list of candidates for election as members of the Board and for damages. His allegation was that the revising tribunal, on account of their partiality to a rival candidate, passed an order *mala fide*, striking off the plaintiff's name from the list of candidates for membership. *Held* that, whether the plaintiff had a right of suit or not in a Civil Court, the Municipal Board in its corporate capacity cannot be made answerable for the misconduct and wrongful acts of the revising authority in preparing the lists, and that the suit, if it can be instituted at all, should have been brought against the revising authority. **ABDUR RAHIM v. THE MUNICIPAL BOARD OF KOIL**, 22 A. 143 = A.W.N. 1900, 4.

(18)—*Municipal Act, Construction of—Statutory powers of—How to be exercised—Abuse of power—Effect—Central Provinces Municipal Act—Power of Committee, President or Vice-President—S. 66—Power to impose conditions on owners of lands to ensure safety, s. 67—'Projection lawfully in existence,' meaning of—Power to remove Compensation—Notice under ss. 66 (5) and 153 (3)—S. 88—Re-building a building what is—Discretion exercised by Municipal Committee when can be interfered with by Civil Courts.*—A public body like a Municipal Committee invested with statutory powers must take care not to exceed or abuse their powers. They must rigidly keep within the limits of the authority committed to them. If they act beyond their powers, they have to make compensation to the person sustaining damage by reason of their unlawful proceedings. An Act like a Municipal Act, which touches the private rights of individuals, must be most carefully construed "without unwarrantable severity on the one hand or unjustifiable lenity on the other" (27 B. 221, R.) Any action to be taken or order to be passed or notice to be issued in the exercise of powers conferred by the Central Provinces Municipal Act, 1903, must be taken, passed or issued, respectively, by the Committee, by means of a resolution passed at a meeting convened and conducted under ss. 15 to 19 inclusive. But, in cases of emergency, the President, or, in his absence or during the vacancy of his office, a Vice-President, may direct the execution of any work or the doing of any Act which the Committees are empowered to execute or do, and the immediate execution or doing of which is, in his opinion, necessary for the service or safety of the public; under s. 66, no power is given to a Committee absolutely to deprive owners of the legitimate use of their lands, but

Municipality—continued.

the Committee can only impose conditions to ensure the safety and sanitation of the building and suitability of its structural appearance relatively to neighbouring buildings, and also to conserve the health, safety or convenience of the public, or of persons dwelling in the vicinity. Under s. 67, a Committee cannot require any projection or structure over any public drain to be removed, if the projection or structure has been lawfully in existence at the date of the commencement of the Act, without making reasonable compensation for damage caused by such removal. (23 B. 248, R.) But power of removal of projections without compensation is limited to cases of altogether new structures, and does not extend to structures taking exactly the place of pre-existing structures. (25 C. 160; 21 M. 4; R.) Any projection, in the absence of any rule declaring it a public or common nuisance under the former Act, and in the absence of any action by way of civil proceedings for its removal by the Committee, must be held to be lawfully in existence. Before a Committee can acquire a power to pull down a building erected or re-erected in violation of the provisions of s. 66, it must give a notice to remove under sub-s. (5), and also a second notice under s. 153 (3) if the first notice is not complied with. The exercise of its discretion by an authority like a Municipal body, in respect of a matter within its jurisdiction, when that discretion has been honestly and *bona fide* exercised, cannot be controlled by an action in Court. But if the discretion is capriciously or perversely exercised, and injury results to the plaintiff, he may then have a cause of action, and not till then. (25 M. 118, 26 C. 811, 22 B. 230, R.) Where a *chapri* was in existence for 20 years, and plaintiff took down the roof and the posts, and, after fixing new posts, put back the roof in its old place, *held*, the renewal of the old posts, and then to put back the roof in its old position can scarcely be called rebuilding a building. RAMDULARAY v. CHHINDWARA MUNICIPALITY, 6 N.L.R. 53=6 Ind. Cas. 431. (28 A. 199, 18 B. 547, R.)

(19)—*Octroi duty on Government stores, rules regarding levy of—Non-compliance with rules by importer—Refund not claimable—Practice of previous Octroi contractors.*—The stores, on which duty had been paid by the plaintiffs who were contractors to the Military Works Department, were imported by them without declaring as required by the rules that the stores were for the use of Government. Plaintiffs having thus failed to comply with the terms of the rule regarding the levy of Octroi on Government stores passing a Municipal barrier, *held* that, in the absence of any special agreement between them and the Octroi contractors, the plaintiffs were not entitled to the refund of the duty paid by them. Also, the practice followed in previous years by other octroi contractors could not be treated as binding on the defendants. CHUHAR SINGH v. GOKAL CHAND, 97 P.R. 1882.

(20)—*Municipal Law—Act of State—Private property—State property—Jurisdiction of*

Municipality—continued.

Municipal tribunal.—Where the Government submitted itself to the jurisdiction of the Municipal tribunal if the property in dispute should be held to be the property of the sovereign in respect of whose dominion the Government exercised an act of State, the tribunal would be deprived of its jurisdiction over the property if it finds that the property was the public or State property of such sovereign. GHULAM MUHAMMAD NAIAMUT KHAN v. DALE, 1 M.H.C. 281.

(21)—*Act XXVI of 1850—Rule of Municipal Committee to forfeiture of land left unbuilt, ultra vires.*—The rule passed by the Municipal Committee in this case to the effect that land, not built upon within two years, should be forfeited—involving as it did a power in the Commissioners to compel forfeiture for any omission to so build upon any piece of land within the town or its suburbs within the Municipality—was not a rule within the powers conferred by Act XXVI of 1850 passed with the object of enabling improvements to be made in towns and also limiting the penalty for any breach of any rule under the Act to Rs. 50. POWELL v. JEHANGEER AND CO, 36 P.R. 1869.

(22)—*Act XXVI of 1850—By-law XIV—Not ultra vires.*—By s. 6, Act XXVI of 1850, the Municipal Commissioners were given authority to prepare rules for effectually accomplishing the purposes for which they were appointed. One of the objects for which the rules must provide was the definition and prohibition of nuisances within the town or suburb. By-law XIV, the legality of which was in question, provided that the Commissioners might cause the removal of an obstruction after a specified term had passed. *Held* that as the by-law certainly gave the Commissioners the power of carrying into effect the purpose for which they were appointed, it was not *ultra vires* of the Commissioners, nor was it beyond the power of the Government to sanction. BEHAREE LALL v. MUNICIPAL COMMITTEE, DELHI, 39 P.R. 1870.

(23)—*Suit against Municipal Committee—Notice of one month—Act XV of 1867, s. 16.*—Where a plaintiff sued in effect to force the Municipal Committee to fulfil the terms of a contract which contract might be fairly held to be a thing done under Act XV of 1867, *held* he ought to have sued and acted in accordance with s. 16 of Act XV of 1867, which requires that plaintiff must give a month's notice in writing stating the cause of suit and the suit must have been brought within 3 months from the accrual of the cause of action. CHAND MULL v. PRESIDENT OF AMRITSAR MUNICIPAL COMMITTEE, 59 P.R. 1872. [R., 58 P.R. 1875.]

(24)—*Octroi, illegal levying of, on through goods—Suit for refund against Municipality—Government—Certificate and sanction, absence of—Member of Municipal Committee—Express notice, necessity of.*—According to the rules framed by the Government on the 20th December 1870 and 23rd May 1874, sanction to the levy of octroi on through goods by a Municipality, was not at all accorded unless it was certified

Municipality—continued.

to the satisfaction of the Local Government that adequate arrangements had been made by means of bonded warehouses, drawbacks, or otherwise for separating "through" goods. When a Municipality has not obtained such sanction of the Government upon its certificate that it had a bonded warehouse system, it has no authority to levy octroi upon "through" goods or goods in transit. Though a person is a member of a Municipal Committee, he is still entitled to insist on the necessity of express notice of the bonded warehouse rules of the Municipality, as such fact does not dispense with proof of such notice. **AHMED BUKSH v. PRESIDENT, MUNICIPAL COMMITTEE, PESHAWAR, 31 P.R. 1876.**

(25)—*Municipal bye-law declaring erecting of cornice a nuisance—Civil Courts bound to take as conclusive.*—Plaintiff in this case sued to enforce her right to maintain a chujja or cornice which she had been previously directed by the Municipality to demolish. The Municipality had under the bye-laws declared such chujja as coming within the category of nuisances, that the Civil Courts are bound to treat as conclusive a Municipal bye-law that a chujja is a nuisance when erected without the sanction of the Municipality. **MUSSAMMAT SUBHANI v. PRESIDENT, MUNICIPAL COMMITTEE OF DELHI, 8 P.R. 1875.**

This circular states that the Instructions contained in C.O. No. 2 of December 1873, will thenceforward apply only to cases where land is taken up for a Company or Municipality. **Rev. Cir. No. 1, 23 W.R. Rev. Cir. p. 39.**

Public highways—Powers of—*See BEN. ACT III OF 1864, 2 C. 425.*

See BEN. ACT IV OF 1876, s. 11 or 12, 19 C. 195, Note.

Contractor employed by Government and licensed by Calcutta Municipality Obstruction in public way—Liability of Corporation for breach of statutory duty—Liability of Secretary of State—*See BEN. ACT IV OF 1876, ss. 189, 191, 213, 252, 10 C. 445.*

See BEN. ACT II OF 1888, ss. 14, 24, 31, 19 C. 192.

Corporation bound by Act of servants—*See BEN. ACT II OF 1888, ss. 247, 250, 427, 30 C. 317=7 C.W.N. 329.*

Collector appointed president of municipality—Acts done in official capacity—Subordinate Judge—Jurisdiction—*Bom. Act VI of 1873—See BOM. ACT XIV OF 1869, s. 32, 1 B. 628.*

See BOM. ACT VI OF 1873, ss. 3, 17, 6 B. 696.

See BOM. ACT VI OF 1873, s. 7, 3 B. 146.

Permission as to specified area—Building erected beyond such area—Discretion of—To order demolition of building—*See BOM. ACT VI OF 1873, s. 33, 21 B. 187=P.J. 1895, 375.*

Requiring documentary proof of title—*See BOM. ACT VI OF 1873, s. 33, cl. 1, 19 B. 27.*

Municipality—continued.

See BOM. ACT VI OF 1873, ss. 42 (1), 48, 75, 19 B. 212.

Notice to—not confined to actions for damages—*See BOM. ACT VI OF 1873, s. 86, 8 B. 421.*

Suit for injunction to restrain—From removing building—Notice of action not necessary under s. 48 of *Bom. Act II of 1884*—Action under s. 33 of *Act VI of 1873*—Discretion of municipality—Jurisdiction of Civil Courts—*See BOM. ACT II OF 1884, s. 48, 22 B. 230=P.J. 1896, 296.*

Municipal elections—Jurisdiction of Chief Judge of Small Cause Court—*See BOM. ACT III OF 1888, ss. 33, 34, 12 Bom. L.R. 737=34 B. 659.*

Municipal Corporation acting *bona fide*—Imperative duty and permitted act—Courts, how far can interfere with acts of a corporation—*See BOM. ACT III OF 1901, s. 54, 1 S.L.R. 228.*

Liability for non-feasance—*See C.P. ACT, XVIII of 1889, s. 39, 11 C.P.L.R. 35.*

Levy of tax by—*See MAD. ACT III OF 1871, ss. 38, 61, 7 M.H.C. 249.*

District Court situated outside municipality—Pleader practising in it—Profession tax—*See MAD. ACT IV OF 1884, 18 M. 183.*

Suit for declaration of title against a—Parties—*See MAD. ACT IV OF 1884, s. 169, 15 M. 292.*

Liability of District Forest Officer to be assessed by Municipal Council—*See MAD. ACT IV OF 1884, sch. A, 25 M. 747.*

Municipal Law to be strictly construed—Notices must state facts correctly and give sound reasons—*See PUN. ACT XX OF 1891, ss. 92, 95, 130 P.L.R. 1911.*

Bye-laws passed by municipality—Presumption—Validity—*See U.P. ACT XV OF 1883, s. 55, 19 A. 493.*

Suit against Municipal Board, must be brought in the corporate name of the Board not in the name of the Chairman—*See U.P. ACT I OF 1900, s. 17, A.W.N. 1908, 165.*

Liability of a Municipality for damages arising from non-repair of roads—*See CORPORATION, 6 Bom. L.R. 75=28 B. 340.*

See CRIM. PRO. CODE, 1882, s. 555, A.W.N. 1891, 81.

Municipal Register of Deaths—*See EVIDENCE ACT, 1872, ss. 35, 74, 80, 90, 59 P.R. 1901.*

Powers of High Court over—*See HIGH COURT—JURISDICTION OF—CALCUTTA, 17 C. 329.*

Alienees from, of land acquired under Land Acquisition Act—Alienee's right to exemption from ordinary assessment—*See INAM, 11 M.L. T. 207.*

Municipality—continued.

Injunction against—See INJUNCTION—SPECIAL CASES, 21 A. 348=A.W.N. 1899, 97.

Injunction to prevent future collections by—Until water is supplied—See INJUNCTION—SPECIAL CASES, 3 M. 201.

See INJUNCTION—SPECIAL CASES, A.W. N. 1883, 249.

Jurisdiction to interfere with actions of Municipal Board—See JURISDICTION OF CIVIL COURTS, 12 O.C. 191 (B)=3 Ind. Cas. 516.

Municipal Tax—Jurisdiction of Civil Courts—See JURISDICTION OF CIVIL COURTS, 2 M. 37.

See JURISDICTION OF CIVIL COURTS, 19 W.R. 309, 1 C. 409, 24 C. 107, 26 C. 811=3 C.W.N. 508.

Lands within a—Acquisition—Valuation—See LAND ACQUISITION, 11 C.L.J. 408=6 Ind. Cas. 543.

Permanent lessee under—Exemption from payment of rates—Contract—Onus of proof—See LEASE—GENERAL, 13 Ind. Cas. 183.

Suit against Municipal Committee in the name of wrong officer—Substitution of proper officer—Act XV of 1873 (N.W.P. and Oudh Municipalities Act), ss. 40 and 43—See LIMITATION ACT, 1908, s. 22, 2 A. 296.

Suits for damages against—See LIMITATION ACT, 1908, art. 39, 6 B. 580.

See LIMITATION ACT, 1903, art. 149, 19 M. 154.

Exercise of statutory powers—Negligence—Damage—Vis major—See NEGLIGENCE, 13 Bom. L.R. 1138.

Liability of a Municipality for negligent digging of a trench—See NEGLIGENCE, 4 Bom. L.R. 914.

Liability of—to carry off refuse-liquid from a factory by *kutchra* drain—See NUISANCE, 9 C. W.N. 612=32 C. 697.

See NUISANCE, 78 P.R. 1901.

Town, meaning of—Interpretation—Urban land included within the limits of a—See PRE-EMPTION—MISCELLANEOUS, 7 O.C. 74.

Public high way—Diversion of road—Rights of adjoining land holders—Grant by—of abandoned road—See PUBLIC WAY, 7 A. 362=A. W.N. 1885, 56.

See RES JUDICATA—JUDGMENT ON PRELIMINARY POINTS, EFFECT OF, 5 B.L.R. App. 50=13 W.R. 461.

Assessing house-tax illegally, power of High Court to interfere under s. 622 of the Civ. Pro. Code—See REVISION—GENERAL, 7 Bom. L.R. 288.

Election for a councillorship—Suit against the Municipality for declaration and injunction,

Municipality—concluded.

because the Receiving officer had refused to accept the plaintiff's nomination paper—See SPECIFIC RELIEF ACT 1877, ss. 42, 45, 8 Bom.8L.R. 209=30 B. 409.

Municipal funds, expenditure of, for unauthorised purposes—Ratepayer entitled to injunction against Municipality—See SPECIFIC RELIEF ACT, 1877, s. 56, cl. (k), 22 B. 646.

Copy of order passed on application to Municipal Board—Certificate as true copy endorsed by Secretary—See STAMP ACT, 1879, sch. I, art. 22, 19 A. 293, F.B.=A.W.N. 1897, 61.

Receipt granted by—for tax paid exceeding Rupees twenty stamp duty—See STAMP ACT, 1879, sch. I, art. 52, 12 B. 103.

Municipal Limits.

See SMALL CAUSE COURT MOFUSSIL—JURISDICTION OF—GENERAL, 125 P.R. 1881.

Municipal Officer.

Suit against—Notice—See U.P. ACT I OF 1900, s. 49, 8 A.L.J. 509.

Municipal Orders.

Civil Court's power to interfere with—See JURISDICTION OF CIVIL COURTS, 58 P. R. 1907.

Municipal Secretary.

See LIMITATION ACT, 1908, arts. 2, 28, 26 A. 482=1 A.L.J. 195=A.W.N. 1904, 95.

Municipal Tax.

Conditions for legal imposition of—See BOM. ACT VI OF 1873, s. 21, 21 B. 630.

Apportionment of—See MAD. ACT IV OF 1884—DISTRICT MUNICIPALITIES, s. 66, 17 M.L.J. 306=30 M. 423.

Mortgage—Suit to recover mortgage-debt by sale of mortgaged property—Property sold to realize Municipal taxes—Personal claim—Limitation Act, 1877, seconds schedule, arts. 97 and 116—See MORTGAGE—SALE OF MOTGAGED PROPERTY, P.L.R. 1900, p. 201.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 23 C. 835, 9 M. 110.

Municipal Tribunal, Jurisdiction of.

See ACT OF STATE.

(1)—Municipal law—Act of State—Private property—State property—Jurisdiction of Municipal tribunal.—Where the Government submitted itself to the jurisdiction of the Municipal tribunal if the property in dispute should be held to be the property of the sovereign in respect of whose dominion the Government exercised an act of State, the tribunal would be deprived of its jurisdiction over the property if it finds that the property was the public or State property of such sovereign. GHULAM MUHAMMAD NAIAMUT KHAN v. DALE, 1 M.H.C. 285.

Munsarim.

(1)—*Duty of—Insufficiently stamped plaint—Incorrect valuation—Court-fees.*—The duty of a Munsarim would be fulfilled if, on an examination of the statement in the plaint as to the value, he finds the value is calculated at five times the revenue of the land given in the plaint; it is not incumbent on him to examine and ascertain whether the revenue so stated is or is not the correct amount of revenue on the property. *CHHATERPAT v. JAGRAM*, 2 A.L.J. 55 = A.W.N. 1905, 12 = 27 A. 411. (23 A. 423, F.) [*Diss.*, 123 P. R. 1907 = 82 P.W.R. 1907 = 3 M.L.T. 63, 29 A. 749 = 4 A.L.J. 636 = A.W.N. 1907, 253; R., A.W.N. 1906, 21 = 23 A. 310 = 3 A.L.J. 838.]

Warrant of attachment not signed by Judge but by—Irregularity—Invalidity of sale—Civ. Pro. Code, 1859, s. 222—See SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 7 A. 506, P.C.

Munsiff.

See JURISDICTION OF MUNSIFF'S COURT.

(1)—*District Munsif, Small Cause Court Judge—Madras Act IV of 1863—Act XI of 1865.*—A District Munsif, is a Small Cause Court Judge under Madras Act IV of 1863 within Act XI of 1865. *WUMADI RAJAH HARAJAI KUMARA VENKATA PERUMALRAJ BAHADUR, ZEMINDAR OF KARVATINUGGAR v. KANNI-APPAH*, 4 M.H.C. 149.

(2)—*District Munsiff, not competent to transfer Small Cause suit to regular side.*—A District Munsiff is not, of his own accord, or on the representation of the parties, competent to transfer a Small Cause suit to the regular side of the Court, even though it appears that the ends of justice will be better met by such transfer. *BODI RAMAYYA v. PERMA JANAKIRAMUDU*, 5 M.H.C. 172.

(3)—*Illegal order of Munsif—Order not appealable—Civil Court hearing appeal from order and reversing it—High Court—Act XXIII of 1861, 35.*—Where, in execution of a decree, a District Munsiff passed an illegal order at the instance of the auction-purchaser, and the order was one from which no appeal lay to the Civil Court but the Civil Court entertained an appeal from the order and reversed it, the High Court, under s. 35 of Act XXIII of 1861, set aside the order of the Civil Judge, but to guard against the order of the District Munsif being enforced, annulled it under the discretion given by the section. *SUBRAYA GOUNDEN v. VENKATAGIRI AIYER*, 6 M.H.C. 22. [R., 6 M.H.C. 360.]

(4)—*District Munsiff—Institution of voluntary enquiries.*—The petitioner having omitted to deposit the requisite fees for serving notice upon the respondent in proper time, his special appeal was dismissed. Subsequently he appeared before the Court and prayed for restoration of the appeal on the ground that his omission to pay the fees was due to his illness at the time. Thereupon the Court

Munsiff—continued.

intimated to him that if he produced a medical certificate to prove his illness, proper orders would be passed. As the Court was not inclined to rely on the certificate produced by the petitioner, the appeal was ordered to be struck off. Then the petitioner went to the District Munsiff to prove that he was actually ill, and, accompanied by an attested copy of the Munsiff's proceeding applied to the special appellate Court for restoration of the appeal. *Held*, after restoring the appeal, that it was not proper of the Munsiff to have instituted voluntary enquiries of the kind. He could do so only under the direction of the superior authorities. *In the matter of the petition of KULNO KHOND KAR*, 7 W.R. 47.

(5)—*Act XI of 1865, s. 9—Suit against Government—Jurisdiction—Small Causes Court.*—*Held* that a Munsif had jurisdiction in a suit against the Government which suit would be cognisable by a Small Cause Court but for s. 9, Act XI of 1865. *KAMALOODDEEN SHAIKH v. THE COLLECTOR OF MIDNAPORE*, 11 W.R. 233.

(6)—*Suit less than Rs. 1,000 in value—Act XVI of 1868, s. 14—Jurisdiction of Munsifs.*—A suit, the subject-matter of which was valued at less than Rs. 1,000 instituted one day after Act XVI of 1868 was passed, could be entertained by the local Munsif under s. 14 of the Act and not by the Sudder Munsif of the District. *BUNGSHEE BUDDEN DEY v. TARINEE CHURN ROY*, 14 W.R. 375. [R., 23 W.R. 89.]

(7)—*Jurisdiction—Award relating to rent—Enforcement—Munsif acting without Jurisdiction—Appeal.*—An application for the enforcement of an award made by arbitrators under s. 327 of Act VIII of 1859 on a claim for the determination of the rent, cannot be entertained by a Munsiff. When a Munsif acts without jurisdiction, the question may be the subject of an appeal to the appellate Court of the District. *ALTAF HOSSEIN v. GRISH CHUNDER ROY*, 15 W.R. 556.

(8)—*Civ. Pro. Code, Act VIII of 1859, s. 6—Court specially invested with Small Cause jurisdiction—Regular Small Cause Court—Suit for value within former Court—Jurisdiction—Acts XI of 1865 and VI of 1871.*—Where a munsiff was specially invested by the Local Government, under Act VI of 1871 with the jurisdiction of a Small Cause Court up to the amount of Rs. 50, the Munsiff had not concurrent but exclusive jurisdiction with a regular Court of Small Causes established in the same place under Act XI of 1865 with power to take cognizance of suits up to Rs. 500. By the operation of s. 6 of Act VIII of 1859, a suit of a Small Cause nature below Rs. 50 should be instituted in the Court of the Munsiff and not in the regular Small Cause Court. *DWARKANATH DUTT v. BHATHU HAWOLDAR AND CHUNDOO VISTEE v. SODAGUR VISTEE*, 22 W.R. 457. [F., 12 B. 169.]

(9)—*Suits regarding minors—Jurisdiction.*—As respects suits regarding minors, munsifs

Munsiff—continued.

have no jurisdiction. They are cognizable by the principal Civil Courts of the district. **KRISTO CHUNDER ACHARJEE v. KASHEE THAKURANEE, 23 W.R. 340.**

(10)—*Sudder Munsif succeeding Sudder Ameen—Subsisting attachment—Jurisdiction.*—Jurisdiction of Sudder Munsiff succeeding a Sudder Ameen in relation to a subsisting attachment. **SREENATH BANERJEE v. PURRUM SOOKH CHUNDER, 25 W. R. 105.**

This circular deals with titles for Munsiffs, **Civ. Cir. No. 11, 24 W. R. Rules and Orders of the H.C. p. 12.**

This circular deals with charges and travelling expenses of Munsiffs employed as Commissioners under Act VIII of 1859, ss. 180 and 181, **Civ. Cir. No. 15 of 13th April 1872, 17 W.R. H. C. Rules and Orders. 13.**

This Circular states that District Judges are to entertain Establishments for Additional Munsiffs. **Civ. Cir. Memo. No. 2, dated, 24th January 1872, 17 W.R. H.C. Rule and Or. 1.**

This circular draws attention to Circular Order No. 128 of 1858, requiring a report of a new Moonsiff taking charge of his office. **Civ. Cir. Memo. No. 11, 24 W. R. Rules and Ors. of the H.C. p. 9.**

This circular calls for information in tabular form regarding Moonsiff's chowkees in Assam and Chota Nagpore. **Cir. No. 27, dated 11th September 1867, 8 W. R. Civ. Cir. Ors. p. 6.**

This circular deals with Moonsiffs' Punkahs and Punkah-pullers. **Cir. No. 42 dated the 2nd October 1866, 6 W. R. Civ. Cir. Order, p. 10.**

Appointment by District Judge of a person to act as Moonsiff to be shown in Pay Abstract, and to be reported to Accountant-General and to the High Court. **Civ. Cir. Memo. No. 13, 20 W. R. Rules and Ors. of the H.C., p. 7.**

This circular circulates letter from Accountant-General, Bengal, and requests Judges to report to that officer every case of appointment by them of an officiating Moonsiff. **Civ. Cir. Memo. No. 16, 20 W. R. Rules and Ors. of the H.C., p. 23.**

This circular lays down new rule regarding the inspection of Moonsiff's Courts. **Civ. Cir. No. 9, 20 W. R. Rules and Ors. of the H.C. p. 1.**

This circular requests Judges to report for the sanction of the High Court, all cases in which a Sherishtadar is placed in charge of the current duties of a Moonsiff's Court. **Civ. Cir. Memo. No. 4, dated 5th August 1871, 16 W. R. Civ. Cir. 7.**

This circular asks Judges to inform the Court when they consider it advisable that a Moonsiff should be invested with jurisdiction of a Court of Small Causes up to the amount of fifty rupees. **Civ. Cir. No. 24, dated 12th August 1871, 16 W. R. Civ. Cir. 8.**

See **APPEAL TO PRIVY COUNCIL—CASES WHERE APPEAL LIES OR NOT, 13 M.L.A. 343.**

Munsiff—concluded.

Court of—In N.W.P. a Court of higher grade than a Small Cause Court—See **CIV. PRO. CODE, 1908 s. 63, 16 A. 11, F.B.=A. W.N. 1893, 211.**

See **EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 7 M. 397.**

See **LIMITATION ACT, (1908), s. 29 (1) (b), 9 M. 118.**

Disobedience of order of Munsiff—Professional misconduct—Jurisdiction of Munsiff—See **PENAL CODE, 1860, s. 174, 7 C.W.N. 797.**

See **PUBLIC SERVANT, 4 B.H.C. A.C. 93.**

Village Munsiff—Power to transfer suits—See **MAD. REG. IV OF 1816, 8 M. 500.**

Decree of Village Munsiff—Sale of immovable property in execution—See **MAD. REG. IV OF 1816, s. 30, 7 M. 220.**

Erroneous dismissal of suit by Small Cause Court—Suit cannot be instituted in Munsiff's Court—See **RIGHT OF SUIT—GENERAL, 3 M.H.C. 86.**

Claims falling within Small Cause jurisdiction of—Joinder in one suit in Small Cause Court—See **SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 4 M.H.C. 334.**

Suit to recover two sums of money, one for money lent and the other for goods sold and delivered—Total claim cognizable by Small Cause Court—Claim in each case cognizable by District Munsif on Small Cause side—Jurisdiction of Small Cause Court—See **SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 5 M.H.C. 287.**

See **SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 4 B.H.C. A. C. 173.**

Small Cause decree of—Subordinate Judge—Transfer to Munsiff's Court and execution—Sale—Certificate not filed—Validity of sale—See **SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—PRACTICE AND PROCEDURE, 7 M. 592.**

Small Cause decree of Subordinate Judge—Transfer to Munsiff's Court—Execution against immovable property—Execution by Munsif—See **SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—PRACTICE AND PROCEDURE OF, 8 M. 8.**

See **WITNESS—EXAMINATION OF WITNESSES, 1 B.L.R. S. N. 20 (c).**

Murder.

(1)—*Murder of person by one who would be his heir, effect of.*—The point whether a Hindu who has murdered a person is prevented by the murderer from succeeding to his estate is one left untouched by the Hindu Law; but it is a rule of universal application that no one should derive an advantage from that which

Murder—concluded.

deserves punishment. The effect of the murder is not to exclude the murderer from the inheritance so as to prevent the very vesting in him thereof but merely to disentitle him to any beneficial interest in the inheritance. Such beneficial interest will vest in those who would be entitled to the inheritance if the murderer were out of the way. *VEDANAYAGA MUDALIAR v. VEDAMMAL*, 27 M. 591. [R., 32 B. 275 = 10 Bom. L.R. 149.]

Whether, disqualifies murderer from succeeding to the estate of the murdered person—See *HINDU LAW—INHERITANCE*, 18 M.L.J. 70 = 31 M. 100 = 2 M.L.T. 533.

By the husband is not a disqualification to inherit in the case of a wife who succeeds in her own right—See *HINDU LAW—INHERITANCE*, 10 Bom. L.R. 149 = 32 B. 275.

Committed with the object of succeeding to the victim's property—Exclusion of murderer and his descendants from succeeding to such property—See *INHERITANCE*, 41 P.R. 1906 = 95 P.L.R. 1906.

Murli.

Right of, to succeed to her father's estate—See *HINDU LAW—INHERITANCE*, 9 Bom. L. R. 774 = 31 B. 495.

Murray's Dictionary.

See *MAD. ACT IV OF 1884*, s. 63, cl. 3, 12 M.L.J. 393 = 25 M. 627.

Murshidabad.

See *BEN. ACT XV OF 1891*.

Mushaa, Doctrine of.

See *MAHOMEDAN LAW—GIFT*.

Musical Festival.

Right to hold—See *EASEMENT*, 36 C. 615 = 13 C.W.N. 1002 = 1 Ind. Cas. 108.

Mustaghraq.

Mortgage—Construction of document—"Arth" "—" "Rehan"—Power of sale in default not expressly given—See *MORTGAGE—FORM OF MORTGAGES*, 13 A. 28 = A.W.N. (1890) 216.

Mustagir.

Rights of, in the Santhal Pergannas—See *SANTHAL PERGANNAS*, 2 C.L.J. 77 = 32 C. 1014.

Mutation of Names.

(1)—*Adoption among Pathans—Gift to adopted son—Validity—Mutation of names—Possession.*—According to the custom followed by Daudzai Pathans of Kaithal, an adoption of a brother's son does not in itself confer any rights of inheritance, though the adopter is at liberty to make the adopted son his heir by making a gift of the property in his favour. A defined share of an estate can be the subject of a valid gift, and mutation of names in the donee's favour is equivalent to giving him possession, though the donor manages the estate on the donee's behalf. *SIRMAST KHAN v. FAIZAL HASAN KHAN*, 99 P.R. 1880.

Mutation of Names in Revenue register of holdings.

(1)—*Mutation of names in Revenue register of holdings—Altering prayer of plaint—Suit for declaratory decree.*—Where the original plaint contained a prayer for mutation of names and the Court of first instance allowed him to substitute a prayer for possession for a prayer for mutation of names, held, that although a suit for mutation of names in a Revenue Register of holdings cannot lie, the Court may allow the prayer of the plaint in such a suit to be altered to a prayer for possession. *MAUNG THA CHU v. MAUNG PO KAU*, 2 L.B.R. 243. (2 L.B.R. 4, R.)

(2)—*Mutation of names in the Revenue registers—Suit for—Jurisdiction of Civil Court.*—There is no right of suit for the mutation of names in the Revenue registers, and a Civil Court has no jurisdiction to make a decree ordering mutation of names in such registers. This is a matter which is to be regulated entirely by the Revenue authorities. *MAUNG BA v. MAUNG MO*, 1 L.B.R. 124. [F., 2 L.B. R. 3, 4.]

(3)—*Mutation of names—What it shows—P.L.R. Act.*—According to the ancient tradition of the Revenue system of N.W. India and under the present Punjab Land Revenue Act of 1887, the mutation of names (*dakhil kharij*) is only the registering of actual existing possession and is in no way an adjudication as to rights. *MIAN KHAN v. ALAM KHAN AND MEHAR KHAN*, 1 P.R. 1891 Rev.

Mutation of names in Revenue register—Suit for declaratory decree—Consequential relief—See *DECLARATORY DECREE, SUIT FOR—WHEN DECLARATORY SUITS LIE*, 2 L.B.R. 3.

Though not valid transfer is good evidence thereof—See *HINDU LAW—ANCESTRAL PROPERTY*, 76 P.R. 1898.

Whether evidence of possession.—See *RIGHT OF OCCUPANCY—GENERAL*, 9 Ind. Cas. 456.

Entry of mutation of names and transfer of occupancy right.—See *THUGYI'S REVENUE REGISTER*, No. IX, L.B.R. 1893—1900, 178.

Mutation Proceedings.

(1)—*Presumption—Burden of proof.*—Held, that, in this case, the mutation in favour of the defendant was surrounded by suspicious circumstances and that he had failed to prove that he was legitimate son of his father. *KADIR BUKHASH v. AZIZ MUHAMMAD*, 200 P.L.R. 1908.

(2)—*Transfer declared void by law.*—A Revenue Court may properly refuse mutation in a case of transfer which is *prima facie* void. *MOMANDA v. FARID*, 177 P.L.R. 1901 = 14 P. R. 1901.

(3)—*Decree for possession—Cl. 2, s. 24, Reg. XLVIII of 1793—Mutation of names—Civil Court precept—Duty of Collector to obey.*—Where a copy of a decree for possession is sent to a Collector in pursuance of cl. 2, s. 24,

Mutation Proceedings—concluded.

Regulation XLVIII of 1793, he must decide whether the mutation of names ought to take place. But where the Civil Court issues a precept requiring the Collector to register a certain name, he is bound to obey. *NAUNHEE KOONWAR v. KUSTOOREE KOONWAR*, 13 W. R. 141.

Evidentiary value of—See *CO-SHARERS—GENERAL*, 126 P.W.R. 1911.

Construction of—whether they embody a recognition of an existing right or creation of new one, must be deduced from circumstances. See *CUSTOMS—PUNJAB—ALIENATION*, 65 P. W.R. 1907.

Mutation *puttah* referring to old *puttah* creating permanent interest—Purpose of reference being to show proportionate rent—*Puttah* is confirmatory—See *EJECTMENT, SUIT FOR*, 8 C.L.J. 513.

Effect of—See *ESTOPPEL—MISCELLANEOUS*, 11 Bom. L.R. 69, P.C. = 13 C.W.N. 274 = 6 A.L.J. 100 = 9 C.L.J. 151 = 5 M.L.T. 167 = 31 A. 73 = 19 M.L.J. 123 = 12 O.C. 288 = 1 Ind. Cas. 166.

See *JURISDICTION OF REVENUE COURTS*, 118 P.L.R. 1902.

Assertion of proprietary right by mortgagee after invalid foreclosure proceedings, coupled with mutation in revenue records in his favour, whether amounts to adverse possession—See *MORTGAGE—FORECLOSURE*, 90 P.L.R. 1908 = 6 P.R. 1908 = 113 P.W.R. 1908.

See *RIGHT OF OCCUPANCY—TRANSFER OF RIGHT*, 44 P.L.R. 1903.

Whether mutation of names or transfer of possession will confer title, where law requires registered deed. See *TRANSFER OF PROPERTY ACT*, 1882, s. 6 (a), 11 O.C. 301.

Mutiny.

Notes lost or plundered in—See *LIMITATION ACT*, 1908, s. 18, 1 Agra 213.

See *POSSESSION—EVIDENCE OF POSSESSION AND TITLE*, 4 B.L.R., App., 21.

Mutiny Act, 1857.

(1)—*Act of State—Seizure of property during Mutiny of 1857—Subsequent restoration—Subsequent seizure—Validity of—Restoration by Agent of Government—How far effective—Ratification of the Act by Government—Effect of Act IX of 1859.*—The plaintiff, a Mahomedan British subject, resided in Delhi during the Mutiny of 1857, and was expelled in common with all the residents of that city in September, 1857. The immoveable property of the plaintiff was seized and held under military occupation until 11th January, 1858, when the management of the city was transferred to the Civil authorities. On the 27th September, 1857, Mr. Egerton, Collector of Delhi, recorded a proceeding to the effect that, by a general order, the houses of the Mahomedans in the city of Delhi had been attached and the Kotwal had been instructed

Mutiny Act, 1857—continued.

to seal up each house. The plaintiff then went to Sonapat. There he was arrested and taken before the Magistrate of Panipat who ordered his release on his giving security for his appearance. Afterwards, his name having been entered in a list of the rebels of Delhi, he was tried before the Special Commission, which, under Acts XI, XIV and XVI of 1857, held Courts at Delhi in July, 1858. On giving security for his appearance, he was set at liberty. On a petition by the plaintiff, Mr. Egerton, the Deputy Commissioner, ordered that the name of the plaintiff should be struck off the list of rebels. In December, 1858, the plaintiff presented a petition to the Commissioner of Delhi praying for the restoration of his houses in the city of Delhi and for a ticket permitting him to reside in the city. A copy of this petition was sent to the Deputy Commissioner for report. A report was submitted, but no order was passed on it. Up to this time plaintiff's endeavours to obtain the release of his household property had been unsuccessful, and the property had remained in the possession of Government from the date of the fall of Delhi. Then the Queen's Proclamation was issued extending clemency to all offenders except those who had been convicted of having directly taken part in the murder of British subjects, and, in Letter No. 848, dated 29th December, 1859, the Governor-General wrote to the Lieutenant-Governor that the attachment upon the houses of the Mahomedan residents in the city of Delhi might be removed. On the 24th January, 1860, the Kotwal of Delhi, wrote to the Deputy Commissioner to the effect that the plaintiff was applying for the release of his property with reference to the 'general order of release.' The Deputy Commissioner passed an order on this petition on the 9th March, 1860, that the plaintiff should be informed through the Kotwal that he could not take advantage of the general order of release and that it could not affect his property. On the 11th March, 1860, the plaintiff petitioned the Deputy Commissioner that he had been cleared of all complicity in the rebellion and prayed that a ticket of release of his property might be given him under the general order of Government. This was referred to the Kotwal who reported that he was entitled to get back his property. On 27th March, 1860, Mr. Plowden, the Officiating Deputy Commissioner, passed an order that the applicant's property should be released. The Kotwal put him in possession of the property. The plaintiff then petitioned the Punjab Government for permission to travel where he pleased in the exercise of his profession as a Hakim. On the 8th June 1861, the Punjab Government granted him the permission sought. On 18th July, 1861, however, Mr. Cooper, Deputy Commissioner of Delhi, sent a memo that the order of 27th March, 1861, required re-consideration. The Commissioner forwarded this to the Judicial Commissioner who, in a letter dated 29th July, 1861, replied that the release of the property was void on account of the non-competency of the party to be released. On

Mutiny Act, 1857—continued.

receipt of this letter, the Deputy Commissioner was instructed to attach the property and explain the order to the parties concerned. On the 15th August, 1861, the plaintiff petitioned the Punjab Government against the re-attachment of his property. The Government declined to interfere with the order of the Judicial Commissioner. Petitions by the plaintiff to the Government of India and the Secretary of State proved equally unsuccessful. Hence the present suit for possession and mesne profits. *Held* that, although the plaintiff might have had no right to maintain a suit against the Government before possession was actually made over to him in 1860, yet, after that possession he was entitled to be maintained in it until dispossessed in due course of law. The Government must show itself to have been in a position rightly to take the immoveables back from the plaintiff in 1861 by reason of the strength of its own legal title to them. The act of War or State in reference to the immoveables of Delhi in 1857-58 would not give the Government a valid title unless they could show that the act of restoration was altogether inoperative and a perfect nullity. As it was clear from the first occupation of the town, the Deputy Commissioner *ex officio* exercised no little control over the questions relating to property and its disposal, and as the general attachments of 1857 and 1858 were both effected by the order of the Deputy Commissioner and the orders of the Governor-General in Council issued in December, 1859, to the effect that the time had come for restoration in certain cases, were sent to the same officer for his information by the Commissioner to whom the Letter No. 848 was sent directly by the Secretary to the Government, and as, when the general order had been thus issued by the Governor-General in Council, there being no organised department to which it was issued, the Deputy Commissioner was as much authorised to carry it out as the Commissioner, the act of Mr. Plowden in restoring the property to the plaintiff was not without legal operation when viewed from the point of view of a third party—one of the public—claiming a right to insist upon the act as binding against the Government. Even if Mr. Plowden did exceed his authority, the Government acquiesced in his act as it was not possible that the transfer of the property by the Deputy Commissioner of Delhi should have remained unknown to the Government for the space of a year, and as, to a certain extent, the plaintiff brought home to the Government actual notice of the restoration of his property in 1860. At all events, the neglect on the part of Government to inform itself of the mode in which the Delhi immoveables were being dealt with in 1860 and 1861 could afford no excuse for the absence of the repudiation of Mr. Plowden's act of restoration within a reasonable time. Therefore the effect on the plaintiff's rights of the order of restoration and of the counter-order and of the actual possession enjoyed by the plaintiff between the

Mutiny Act, 1857—continued.

dates of the two orders was to entitle him to succeed unless he was barred by Act IX of 1859. But that enactment contemplated property actually remaining under seizure in the hands of the Government, whereas in this case, the plaintiff, as soon as he recovered possession of his property, was so placed that it would have been useless, if not impossible for him, to have taken proceedings to have his title declared. Thus plaintiff was entitled to a decree with costs. He would also be entitled to mesne profits for 6 years previous to the date the suit was lodged and to the date he might obtain possession under the decree. (*Per Melville, J., dissenting*): The original act of seizure of 1857 was an act of State and the Court had no jurisdiction to question the validity of that act of seizure. Though there was no express order for the confiscation of the plaintiff's property, the confiscation was not the less complete. The repeated refusals of the Deputy Commissioner to restore the property indicated clearly the intention to retain the property as confiscated to Government. The letter of the Government of India No. 848 could not be held to have a higher force than the Queen's amnesty, and as the latter had no retrospective effect, neither had the former. The Deputy Commissioner was not entrusted by the letter No. 848 with authority to release at his pleasure and without reference to Government, property which had been declared to be confiscated, whether such confiscation had been formally adjudicated or whether it had been declared by executive orders passed by his predecessor. Mr. Plowden, then, was not acting within the scope of his authority, and the Government could not be bound by his act, nor could it be held that his act was ratified by the Government. The plaintiff could not have contested in a Civil action the original confiscation of 1857-58, and the mere accident of the irregular and unwarranted restoration of 1860 could not be held to invest the plaintiff with the title of which he had been previously deprived. The title of the Government was therefore valid as against the plaintiff. **HAKIM SAADUDDIN v. SECRETARY OF STATE FOR INDIA IN COUNCIL, 12 P.R. 1874.**

(2)—*Mutiny Act, s. 99—Cognizability of suit against Military officer not affected by provisions of s. 17, Civ. Pro. Code.*—The defendant who was a Military officer on duty at Dehra Dun was sued for money due on a promissory note executed by him at Mian Mir. The Judge refused to receive the plaint, on the ground that although the cause of action had arisen at Mian Mir, and the amount was within the pecuniary limits of the jurisdiction of his Court, he was debarred from hearing the suit by the provisions of s. 99 of the Mutiny Act, as the defendant was doing duty at Dehra Dun and could only be sued there. The Chief Court was also of opinion that the Small Cause Court had no jurisdiction to try the suit. The provisions of the Mutiny Act were in no way affected by the new Civ. Pro. Code. If the defendant was

Mutiny Act, 1857—concluded.

residing within the local jurisdiction of a Small Cause Court, that Court alone would have jurisdiction to try the suit against him. If he was not so residing within the local jurisdiction of any Small Cause Court, the suit would be cognizable only by a Court of Requests. The Court of Small Causes at Mian Mir within which the defendant did not reside, at the time of the institution of the suit in that Court, had therefore no jurisdiction to try the suit. **JAMSETJI'S SONS v. LIEUT.-COL. MACTURK, 33 P.R. 1879.** [Overruled, 111 P.R. 1887; R., 48 P.R. 1893.]

(3)—S. 99—See **SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 8 P.R. 1880, 9 W.R. 112.**

Mutt.

See **HINDU LAW — RELIGIOUS ENDOWMENT.**

See **RELIGIOUS ENDOWMENTS.**

(1)—*Guru—Property given for maintenance of math.*—Property given for the maintenance of a math is as a general rule inalienable in the absence of special circumstances: but such property can be lost by the operation of the statute of a limitation. **DATTAGIRI v. DATTATRAYA, 4 Bom. L.R. 743=27 B. 363.**

(2)—*Capacity to hold property.*—A math, like an idol, is, in Hindu Law, a judicial persona capable of acquiring, holding and vindicating legal right, though of necessity it can only act in relation to those rights through the medium of some human agency. When the property is vested in the math, then litigation in respect of it has ordinarily to be conducted by, and in the name of, the manager, not because the legal property is in the manager, but because it is the established practice that the suit should be brought in that form. A person in whose name a suit is thus brought has in relation to that suit a distinct capacity: he is therein a stranger to himself in his personal and private capacity in a Court of Law. In connection with the property of a math there are two distinct classes of suits: those in which the manager seeks to enforce his private and personal rights and those in which he seeks to vindicate the rights of the math. The rights of the math cannot ordinarily be prejudiced by the result of a suit of the former class. **BABAJIRAO v. LUXMANDAS, 5 Bom. L.R. 932=28 B. 215.**

(3)—*Trustee of a mutt—Right to appoint successors left to his discretion from his disciples—Appointment by will—Right to revoke—Cancellation of appointment.*—A trustee of a mutt deriving his right to appoint his successors under a document, which gives him the choice from the line of disciples, has also, when he makes such appointment by will, a right to revoke the same, so as to cancel the appointment at first made. **SELLAPPASWAMY v. MANIKKASWAMY, 2 M.W.N. 1911, 359=11 Ind. Cas. 336.**

(4)—*Mutt—Binding character of debt—Onus.*—In the case of a mutt, the onus is upon the

Mutt—continued.

creditor to show that the money was borrowed for necessary purposes. Where a debt by a Pandara Sannadhi was treated as binding by the successor, that is sufficient to raise the presumption that it is binding on his successor and the onus is on him to prove that it is not so. **GNANA SAMMANDHA PANDARA SANNADHI v. SABAPATHI PILLAI, M.W.N. 1913, 106.**

(5)—*Mutt property—Disciple in management of the mutt and its properties—Lease in perpetuity—Right to sue to eject the lessee.*—The right of the trustee of a mutt to create a perpetual lease of the mutt properties is restricted only to cases in which there enters at least some element of necessity. A disciple attached to the mutt and in possession of the property in suit and managing the affairs of the temple is entitled to maintain a suit to eject a tenant claiming under a perpetual lease. **KASHI CHETTY v. SRIMATHU DEVASIKOMONY NATARAJA DIKSHITAR, M.W.N. 1913, 181.**

Matam Service Inam—See ACT XXIII OF 1871, 5 M. 302.

Allotment of shares in name of head of—Payment of calls by successor—Right of successor to apply for rectification of share register—Evidence Act I of 1872, s. 115—Estoppel by conduct—See ACT VI OF 1882, s. 58, 26 M. 79=12 M.L.J. 439.

Head of—Suit against him by lay disciples or worshippers—Position of head of—See CIV. PRO. CODE, 1908, ss. 92, 93, 6 M.L.T. 193=3 Ind. Cas. 255.

Suit by disciples of a—to eject its head as trespasser—See DECLARATORY DECREE, SUIT FOR—ENDOWMENTS, 16 M. 31.

Patrika issued by head of—Stating that a certain sect are not entitled to perform vedic rites—See DEFAMATION, 6 M.L.J. 58.

Adoption by religious celebrate of Mutt—Natural father whether could enter into compromise on behalf of adoptee—See HINDU LAW—ADOPTION, 9 B. 365.

Precept that Byragi can acquire no property—Counsel of perfection—Presumption as to ownership of property held and money paid by head of a mutt—See HINDU LAW—INTERPRETATION, 26 M. 79=12 M.L.J. 439.

Definition of—See HINDU LAW—PARTITION, 6 M.L.T. 319=20 M.L.J. 108=4 Ind. Cas. 76.

Land appertaining to—Sale of Miras malki by Manager of math—Rights of Vendee—Adverse possession—Claim for recovering rent—See LIMITATION ACT, 1908, s. 28, 18 B. 507.

Alienation by the guru of a math, limitation to set aside—See LIMITATION ACT, 1908, art. 134, 4 Bom. L.R. 743=27 B. 363.

Property, limitation to set aside alienation of—See LIMITATION ACT, 1908, art. 134, 5 Bom. L.R. 241=27 B. 373.

Mutt—concluded.

Head of—Adjudged lunatic, appointment of guardian for property of—See LUNATIC, 21 M. 402.

Mortgage of Math property—Validity of mortgage—See MORTGAGE—GENERAL, 15 C. W.N. 838, P.C.

Mutual Accounts.

See ACCOUNTS.

See LIMITATION ACT, 1908, arts. 57, 85, A. W.N. 1893, 34.

Mutual Assurance Company.

Mutual Assurance Company—Taxations—See MAD. ACT I OF 1884, sch. A, 11 M. 238.

Mutual Benefit Society.

Mutual Benefit Society—Alteration of rules by majority of subscribers—See SOCIETY, 7 C. 1=8 C.L.R. 577.

Mutual Credits.

Meaning of—See ST. 11 AND 12 VIC., C. 21, s. 39, 19 C. 146.

Mutuality.

Specific performance—Minor—Doctrine of mutuality—Hindu Law—See HINDU LAW—GUARDIANSHIP, 18 M. 415=5 M.L.J. 164.

Mutwali.

See MAHOMEDAN LAW—WAKF.

(1)—*Sujadanusheen—Mutwallee—Respective duties of.*—The general rule of Mahomedan law is that the *sujadanusheen* has charge of the spiritual affairs of the endowment, and is not entrusted with its temporal affairs; the *Mutwallee's* office is entirely distinct; the latter officer is liable to account and is not necessary where there is but one person interested in the property attached to the shrine. *HOSSEIN SHAH v. ZAHOR SHAH*, 67 P.R. 1868.

(2)—*Mootawallee holding office, right of worshippers in mosque to restrain acts of—Mootawallee, if competent to determine by himself whether particular act is or is not for benefit of mosque.*—Plaintiffs, the worshippers at a certain mosque, alleged that the defendant, the *mootawallee* of the mosque, had encroached upon the boundaries of the mosque, and prayed for the removal of the defendant from his office. The Chief Court held that the proper remedy was not his removal from the trust. It was quite consistent that the *mootawallee* should continue in the trust while the worshippers might have the right to restrain him by an order of Court from doing a particular act. The powers of *mootawallee* are very considerable and he has the right to decide what, in his opinion, is beneficial for the mosque, and, that some of the worshippers took a different view from him could not make any difference. *WULLEE OOLA v. KURREEM BUKSH*, 81 P.R. 1869. [R., 75 P.R. 1884]

(3)—*Mahomedan Law—Wakf—Sajjadanasheen and Mutwalli*—Respective status and positions of Sajjadanasheen and Mutwalli, explained, discussed and distinguished. THE SECRETARY

Mutwali—concluded.

OF STATE FOR INDIA IN COUNCIL v. MOHI-
UDDIN AHMAD, 27 C. 674. [R., 6 Bom.L.R. 1058, 6 A.L.J. 632.]

Trust for religious and charitable purposes—Civ. Pro. Code, 1882, s. 539—Act XX of 1863—See PARTIES TO SUITS—SUITS BY REPRESENTATIVES OF CLASS, 11 C. 33.

Whether infant can be appointed—See RELIGIOUS ENDOWMENTS, 8 C.L.J. 196.

Public mosque—Rights of worshippers to sue mutwalis or Superintendents—See RIGHT OF SUIT—PUBLIC WORSHIP, SUITS CONCERNING RIGHTS TO, 3 A 636=A.W.N. 1881, 34.

Suit against Muttuwallis for a declaration that the alienations made by them is invalid and that the *wakf* property should be restored to its original trust—See SPECIFIC RELIEF ACT, 1877, s. 42, 1 Bom. L. R. 649=24 B. 170.

Nadi Bharati.

Nadi Bharati, whether accretion—See ALLUVION—CHANGE IN COURSE OF RIVERS, 3 B.L.R., App., 116.

Nagar Vissa Sect.

See HINDU LAW—MARRIAGE, 2 B. 9.

Naib Nazir.

Arrest in execution of decree—Practice—Delegation by Nazir to peon—Civ. Pro. Code, s. 343—Endorsement of particulars of arrest by—See ARREST, 6 A. 385=A.W.N. 1884, 133.

Naikins.

Mortgage of property for immoral purpose—Validity—Custom among—dancing girls, in Nasik—See DANCING GIRLS, 13 B. 150.

Adoption of daughter among, whether valid—Suit for partition by alleged adoptive daughter not maintainable—Usage of class, how far to be given effect to, by Courts of law—See HINDU LAW—ADOPTION, 4 B. 545.

Nala.

See BOM. ACT VII OF 1879, s. 8, 5 Bom. L.R. 790=28 B. 105.

Nambudri Brahmins.

(1)—*Numbudri Brahmins—Hindu Law—Custom.*—Nambudri Brahmins are governed by Hindu Law except so far as it has been modified by special custom adopted by them since their settlement in Malabar. *AGINTHRATHAN v. ITTICHERI*, 1 M.L.J. 303.

(2)—*Nambudris—Succession to self-acquisition—Quaere.*—Whether by custom among Nambudris the self-acquisition of a person passes on his death to his own immediate heirs rather than to his illom. *CHUMNAUTHA ATTEKUNNETHA LAKSHMI AMMA v. PALAKUZHU THUPPAN NAMBURRI*, 25 M. 662. [R., 6 M.L.T. 106, F.B.=32 M. 351=19 M. L.J. 350=2 Ind. Cas. 183.]

Nambudri Brahmins—Their personal law—See HINDU LAW—CUSTOM, 11 M. 157.

Right of junior member to marry—Custom—Burden of proof—See HINDU LAW—MARRIAGE, 14 M.L.J. 214.

Nambudri Illam.

See HINDU LAW—ADOPTION, 11 M. 157.

Relation of the widow—Not bandhu of last holder — Not heir — See HINDU LAW — INHERITANCE, 11 M. 157.

Nambudri Widow.

Power of Nambudri widow to alienate property—See HINDU LAW—WIDOW, 11 M. 157.

Name.

Use of another's name — Allegation of damages—Right of suit—See BOM. REG. II OF 1827, s. 11, 12 Bom. L.R. 358=6 Ind. Cas. 519=34 B. 455.

Nanakshahi Gaddi.

Grant made in favour of, by a Mahomedan Ruler for charitable purposes—Legality Position and powers of the Mahant of the—See CIV. PRO. CODE, 1908, ss. 92, 93, 11 Ind. Cas. 166.

Nankar.

(1)—*Cash Nankar an under proprietary right—Equitable charge on the Zamindari rights.*—Held, that cash Nankar granted in lieu of the surrender of Zemindar's right is an under-proprietary right, and that it is in equity charged on the Zemindari rights so surrendered. RAJA RUDR PRATAB SAHI v. SHEO CHARAN, 1 O.C. 153, B. [R., 12 O. C. 124.]

(2)—*Whether heritable estate.*—Held, that nankar is a heritable estate. FATEH BAHADUR SINGH v. SHEOMBAR SINGH, 1 O.C. 157.

What it connotes—See U.P. ACT XXII OF 1886, s. 140, 12 O.C. 124=2 Ind. Cas. 297.

See PRE-EMPTION — CONSTRUCTION OF WAJIB-UL-ARZ, A.W.N. 1881, 9.

Suit for nankar allowance—Small Cause Court—Jurisdiction—See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, A W.N. 1894, 113.

Narvadari Land.

See BOM. ACT V OF 1862, 1 B. 225.

Narva Tenure.

Inam grant of Narva village—Introduction of Revenue Survey by Inamdar—Agreement by narvadars to pay assessment—Suit maintainable by inamdar against narvadars for rent as agreed on survey—See LANDLORD AND TENANT—MISCELLANEOUS, 8 B. 347.

Narva Village.

Inam grant of — Introduction of Revenue survey by inamdar—Agreement by narvadars to pay assessment—Suit maintainable by inamdar against narvadars for rent as agreed on survey—See LANDLORD AND TENANT—MISCELLANEOUS, 8 B. 347.

Narvadari and Bhagdari Tenures.

See BOM. ACT V OF 1862.

Naslan bad naslan.

See DEED—CONSTRUCTION OF DEEDS, 14 C. 296, P.C.=14 I.A. 7.

Nationality.

(1)—*Nationality of person how determined* — Birth on the soil and not citizenship by descent determines nationality. E. CHRISTIEN v. P. J. DELANNEY, 26 C. 931=3 C.W.N. 614.

Native.

Claims of European assistants and native establishment and workmen of insolvent firm—See ST. 11 AND 12 VIC., C. 21, s. 42, 6 B. L.R., App., 144.

Native Camp Followers.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 2 B.L.R., S.N., 7=10 W.R. 386.

Native Chief.

Suit for redemption—Mortgaged land sold for arrears of Revenue by—Rights of purchaser against mortgagor and mortgagee — Revenue Jurisdiction Act X of 1876—Bombay Land Revenue Code (Act V of 1879)—See JURISDICTION OF CIVIL COURTS, 17 B. 681.

Native Christians.

See CONVERSION.

See CONVERTS.

(1)—*Succession Act, 1865 — Succession to estate of intestate Native Christian.*—Native Christian families are not at liberty to adhere to the Hindu law of succession, since the passing of the Indian Succession Act. Hindus are not capable of inheriting the property of a Christian under that Act. In a competition between the Hindu father and brother of a deceased native Christian convert who dies intestate, the father is, under s. 35 of the Succession Act, entitled to the whole estate. ADMINISTRATOR-GENERAL OF MADRAS v. ANANDA CHARU, 9 M. 466. [R., P.L.R. 1900, p. 25], 31 C. 11.]

(2)—*Indian Succession Act—Applicability to Native Christians previously following Hindu law.*—Co-parcenership and the right of survivorship are incidents peculiar to Hindu law, which law, as far as it affected Native Christians, was repealed by the Succession Act. This Act, however, did not take away any vested rights. The Hindu rule of survivorship does not obtain in the families of Native Christians, who were living in undivided co-parcenership at the time of the passing of the Act, and who have not since effected a partition. TELLIS v. SALDANHA, 10 M. 69. [Dissappr., 31 B. 25=8 Bom. L.R. 770; R., P. L.R. 1900 at p. 269, 4 O.C. 89, 31 C. 11, P.C., 5 M.L.T. 49=19 M.L.J. 94, M.W.N. 1912, 386, 32 C. 527=1 C.L.J. 167, 32 M. 191.]

(3)—*Converts to Christianity before the operation of the Indian Succession Act—Succession Act, s. 331—Convert's course of conduct shows the law by which he is to be governed.*—Where the lower Court dismissed the suit of the plaintiff, a Native Christian, on the ground that as the Indian Succession Act was not applicable to the case, since the succession opened long before its enactment, the law

Native Christians—concluded.

applicable to the parties was the law by which their family was governed before its conversion to Christianity, and that it was not shown to what caste or religion the family belonged before conversion. *Held*, (1) that the law prior to conversion was a point on which it might not be necessary to give any evidence at all, because the convert might by his course of conduct after conversion show by what law he intended to be governed. The Judge ought to have taken evidence and considered the will made by the plaintiff's father, the language, wording and nature of which could not be ignored. (2) The law applicable to the succession of any individual depended on his personal status, which again mainly depended on his religion. In every case, for the purpose of determining the *status personalis*, regard was to be had to the mode of life and habits of the individual, and to the usages of the class or family to which he belonged. (3) If no specific rule could be ascertained to be applicable to the case, then the Judges administering justice were to act "according to justice, equity and good conscience." *Per* RANADE, J.—The convert's course of conduct after conversion by attaching himself to a class which has a personal law of its own, or by personally observing such usage or custom, must determine the question of what law he has preferred to attach himself to. *HASTINGS v. GONSALVES*, 1 Bom. L.R. 53=23 B. 539.

(4)—*Family living jointly—Presumption—Senior member cannot have status of manager of joint Hindu family—No authority to bind other members—Agency—Indian Succession Act (X of 1865).*—The senior member of a native Christian family governed by the Indian Succession Act cannot have the status of the managing member of a joint Hindu family even if all members of the family live together and the senior manages the affairs of the family. A Native Christian cannot borrow on the credit of others living with him so as to bind their estate, without authority or agency. Such an agency cannot be implied by the mere fact of his acting for other member. *APPAJU UDAYAN alias SAVARIMUTHU UDAYAN v. SUSAI UDAYAN*, 15 M.L.J. 235.

Petition for dissolution of marriage — See ACT IV OF 1869, s. 2, 18 C. 252.

See ACT IV OF 1869, s. 2, 14 M. 382.

Joint tenancy—Gift by a. to three children—Nature of estate taken—See GIFT, 7 M.L.T. 379=6 Ind. Cas. 7=20 M.L.J. 377=M.W.N. 1910, 74=34 M. 80.

See INHERITANCE, 5 B.L.R. 1, P.C.=13 W.R. P.C. 41=13 M.I.A. 277.

See SUCCESSION ACT, 1865, 2 M. 209.

See SUCCESSION ACT, 1865, ss. 2, 331, 19 B. 783.

See SUCCESSION ACT, 1865, s. 331, 7 M.H. C. 121.

Native Converts' Marriage Dissolution Act.

See ACT XXI OF 1866.

Native Labourers, Emigration of, Act.

See ACT XIII OF 1864.

Native Labourers, Transport of, Act.

See BEN. ACT III OF 1863.

See BEN. ACT VI OF 1865.

Native Law Officers Act.

See ACT XI OF 1864.

See BOM. ACT IV OF 1864.

Native Laws.

(1)—*Law administered by British Courts when parties are natives.*—It cannot be said that when this country was brought under English rule, the English law became the territorial law of the country. Such was not the case even as regards what may be called Indo-English law, i.e., that modified form of English law which is usually administered in Indian Courts, when it is at all administered. In fact, in all matters of inheritance and of contract used in the widest sense of the terms, it was the native laws and usages that were administered by the British Courts in India in suits between natives, the general Mahomedan law being administered as the personal law of the Mahomedans, and the general Hindu Law as the personal law of the Hindus. This privilege of the natives to have their own personal laws administered to them, was recognized by Statute 21, George III, C. 70, s. 17; and although the section only provided against specific mischiefs which had arisen in the exercise of the Supreme Court's jurisdiction, yet it must be interpreted not as exhausting by enumeration the classes of rights which it specifically guards, but rather as recognizing the larger general principles on which these rights stand, by forbidding any such encroachments on them for the future as actual experience had in the past shown to be possible. This rule is also in accordance with the general principle that the private law of a community is not to be affected by a change of rulers, although there may be points to which, while it comes into contact with the public law, it has to yield. But the establishment of a Court to administer the law "according to justice and right" does not of itself imply any change in the law to be thus administered. Therefore, amongst Hindus, within the Island of Bombay, all private relations must in their whole range be taken to rest still on the basis of the Hindu law, except where the public law or the direct commands of the legislature have abolished or modified it. *In re KAHANDAS NARRANDAS*, 5 B. 154.

Native Passenger Ships Act.

See ACT XXI OF 1858.

See ACT VIII OF 1876.

Native Prince.

Kingdom of Ava if territory of Native prince or State—See CIV. PRO. CODE, 1908, O. XXVI, rr. 5, 7, 2 B.L.R., A.C., 73=10 W.R. 385.

Native State.

See EXECUTION OF DECREE—NATIVE STATES, DECREES OF COURTS OF.

See FOREIGN COURTS, JUDGMENTS OF.

(1)—*Courts in Kathiawar and Rajkot, whether British Courts.*—The Civil Courts in many of the States of Kathiawar, including the State of Rajkot, are purely Native Courts entirely independent of the Courts of British India, over which neither the Government of India nor the Government of Bombay assumes to exercise any control except indeed as an act of State. GHAMSHAMLAL v. BHANSALI, 5 B. 249.

(2)—*Commission of enquiry re imputation against Native State—Appeal.*—When a commission is appointed by the Viceroy for the information of his own mind, in order that he may not act in his political and sovereign character otherwise than in accordance with the dictates of justice and equity, it is not a Court, and even if it were, no appeal lies from it to His Majesty in Council. *In re* PETITION OF MAHARAJAH MADHAVE SINGH, 1 A.L.J. 691, P.C. = 32 C. 1 = 31 I.A. 239 = 8 C. W.N. 841 = 5 Bom. L.R. 763 = 8 Sar. 731.

(3)—*Location of British troops in—Power of Cantonment authorities as to grant or user of land—Treaty, absence of—Power restricted to military purposes—Land belongs to State—Parsi Tower of Silence, grant of land for—Control of Cantonment authorities.*—The Hyderabad Subsidiary Force which had its headquarters in the Secunderabad cantonment, was a force in the employment of the East India Company and commanded by the Company's officers, but maintained, by agreement, in Hyderabad territory for the protection of the Nizam. There never was in existence any treaty prescribing the limits of the powers of the Nizam's officers on the one hand, and the military commander commanding the Hyderabad Subsidiary Force on the other, with respect to the management, control, and disposition of the cantonment and the land comprised in it. When the Nizam's Government admitted a British force within its territory, and allotted to it Secunderabad cantonment as its head-quarters, it no doubt, by necessary implication, conveyed to the military authorities all powers of jurisdiction, control and management incident to maintaining the efficiency and the discipline of the troops, the peace and good order and convenient use of the cantonment. But it would be going long way beyond this to hold that the officer commanding the troops was empowered to alienate, in perpetuity, land forming part of the cantonment and undoubtedly Hyderabad territory for a purpose wholly unconnected with military requirements. The appellants, who were members of the Parsi community, claimed that the founders of the Parsi Tower of Silence, which stands on a portion of certain land, situated in the Secunderabad cantonment, were in their lifetime owners of the land in question, and that the property had devolved upon themselves as descendants, and representative in

Native State - continued.

title, of the original founders. The respondents, who were also members of the Parsi community, contended that the land in question had been granted to the whole Parsi community for a public purpose, and to enure for the benefit of the community generally for all time by the cantonment authority. The most important document relied upon by the appellants was issued by an Officer of the Hyderabad State and purporting to express a transaction, by which the State had assented to the grant of the land in question to the founders, and directed possession of it to be delivered to them. Another document in evidence also obtained on behalf of the founders, through their agent, purported to be issued by the authority of the Brigadier commanding the Hyderabad Subsidiary Force and to certify that the Parsis of Secunderabad had permission to enclose the land in question, which was given for a tower to be built on it. *Held*—That the considerations set out above must be borne in mind in estimating the effect of the two documents; that the first, emanating from the State, purported to deal with and enforce, a grant of the land to the founders by name and the delivery of possession to them; that the second document, emanating from the cantonment authorities, did not deal with title or possession, but gave permission to use the land, already conveyed, for the particular purpose of a Tower of Silence, and to enclose the land, which were matters obviously within the discretion of the commanding officer, and that the effect of the two documents, was to show a good title in the founders, and not in the Parsi community. PESTONJI JIVANJI v. SHAPURJI EDULJI CHINOY, 12 C.W.N. 465, P.C. = 35 C. 478 = 35 I.A. 79 = 3 M.L.T. 339 = 4 N.L.R. 65 = 14 Bur. L.R. 102 = 18 M.L.J. 199 = 10 Bom. L.R. 287 = 7 C.L.J. 401.

European British subjects resident in Native State, suit for divorce arising between, within Jurisdiction of High Court, Bombay—Petition in India against wife—Indian Divorce Act, IV of 1869—Suit for restitution of conjugal rights instituted in England by wife—See ACT IV OF 1869, s. 2, 10 B. 422.

Government Political Agent in Native State of minor Chief, whether could sue for property in British territory—Political Agent not certificated guardian under Minors' Act XX of 1864—Civ. Pro. Code, 1882, s. 37, cl. (c)—Recognised agent—See BOM. ACT XX OF 1864, 11 B. 53.

Appeal from Governor-General's agent in Bhopal to Privy Council, whether allowable—See ARBITRATION—MISCELLANEOUS, 12 C. W.N. 585, P.C. = 7 C.L.J. 520 = 138 P.L.R. 1908 = 10 Bom. L.R. 581 = 18 M.L.J. 266 = 99 P.W.R. 1908 = 14 BUR. L. R. 146 = 4 M.L.T. 25 = 80 P.R. 1908 = 35 C. 648 = 35 I.A. 83.

Kingdom of Ava if territory of Native Prince or State—See CIV. PRO. CODE, 1908, O. XXVI, rr. 5, 7, 2 B.L.R., A.C., 73 = 10 W. R. 385.

Native State—concluded.

European British subjects residing in, jurisdiction of the High Court over—See **HIGH COURT, JURISDICTION OF—BOMBAY**, 5 Bom. L.R. 869.

Tipperah Raj—Succession to the zemindari—Jurisdiction of British Court—See **JURISDICTION—GENERAL**, 12 C.W.N. 777=8 C.L.J. 1=4 M.L.T. 27=35 C. 777.

Contract made in—Suit in British Court—Return of plaint for presentation in Court in—See **JURISDICTION—GENERAL**, 9 Ind. Cas. 824.

Rent accrued due under lease of lands in Native State—Lessee resident in British India—Suit for arrears—British Indian Court—Jurisdiction—See **JURISDICTION—CAUSES OF JURISDICTION**, 19 A. 450=A.W.N. 1897, 98.

Mortgaged property situated out of Jurisdiction—Suit on Mortgage—Maintainability—Civ. Pro. Code, 1882, s. 16 (c), (d)—See **JURISDICTION—SUITS FOR LAND**, 17 B. 570.

See **PROBATE AND ADMINISTRATION ACT**, 1881, s. 3, 21 C. 911.

Testator subject to Baroda State—Will executed at Baroda—Disposition of immoveable—property in British India—Jurisdiction of Court in British India—See **PROBATE AND ADMINISTRATION ACT**, 1881, ss. 56, 57, 20 B. 607.

Res judicata—“A Court of jurisdiction competent to try such subsequent suit” meaning and scope of expression—judgment of Native Court, how far can be relied on by British Indian Courts—See **RES JUDICATA—COMPETENCY OF COURT**, 13 B. 224.

Judgment of British Court—Suit on, in native territory—Cession of territory to British Government pending suit—Act XVII of 1886, s. 8—See **RES JUDICATA—MISCELLANEOUS**, 10 A. 517=A.W.N. 1888, 183.

Judgments of Courts of Native States, suits not maintainable in British Courts on—See **RIGHT OF SUIT—DECREE**, 8 B. 593.

Relation of British India with—How ascertained—See **SOVEREIGN POWERS**, 10 C. W.N. 361=8 Bom. L. R. 129, P.C.=3 A.L.J. 250=33 C. 219=3 C.L.J. 395=16 M.L.J. 115=1 M.L.T. 115.

Natra.

Pat and—Marriages—Chhor Chithi—Inheritance—See **HINDU LAW—MARRIAGE**, 1 B. 97.

Nattamaigar.

Revenue Court—Jurisdiction—See **JURISDICTION OF CIVIL COURTS**, 12 M. 41.

Natural Rights.

(1)—*Injunction*—Right to let the water run off from land on a higher level into that on a lower level.—The owner of a higher land is entitled to let the water run off into the lower land by whatever means nature intended that it should, and his right is infringed by any means which prevent the water

Natural Rights—concluded.

so doing, whether it be the damming of stream or the holding up of the promiscuous spill. **MAHOMED HOOSEIN v. MANSOOKLAL**, 8 Ind. Cas. 456. (1 M. 335, F.; 2 C.L.R. 141, 12 C. 323, 11 M. 16, R.)

(2)—*Easement*—Rain-water flowing in undefined water-course—Natural right of adjacent owner to obstruct—Damages—Water, right of.—Where rain water falling on plaintiff's land flowed over land of the adjoining owner, held that this was a natural right and the adjacent owner cannot claim damages for any inconvenience caused to him; but it is equally a natural right of the adjacent owner to build up to the edge of his land, so as to obstruct the flow of surface water from adjoining land, or he may erect a dam upon his own land, which has the effect of obstructing the flow of the neighbour's surface drainage water over his land. **SANGANA REDDIAR v. PERUMAL REDDIAR**, 7 M.L.T. 164=5 Ind. Cas. 921. (29 M. 539, F.)

Of an owner of land—Right to protect against water flowing from a highway into his land—See **MAD. ACT IV OF 1884**, ss. 3, 4, 21, 27, 261, 1 M.L.T. 333=16 M.L.J. 582=29 M. 539.

Water flowing to neighbour's land—No defined channel—Right of owner to collect water on his land—See **LIMITATION ACT**, 1908, s. 5, 12 Ind. Cas. 28.

Natural Stream.

See **BOM. ACT VII OF 1879**, s. 8, 5 Bom. L. R. 790=28 B. 105.

Rights of upper riparian owners—Natural right—See **EASEMENT**, 18 M. 320=4 M.L.J. 248.

Navigable River.

See **ALLUVION**.

See **FISHERY**.

Exclusive fishery rights in tidal navigable rivers—Grant by the Crown. See **FISHERY**, 11 C. 434, F.B.

Jalkar or right of fishing in—River changing its course—See **FISHERY**, 17 C. 963.

See **FISHERY**, 22 C. 252, 11 C.L.R. 9.

Navigation.

Not carrying lights—Collision—See **SHIP**, 31 C. 36.

Nawab Nazim's Debts Act.

See **ACT XVII OF 1873**.

Nawab of Carnatic Act.

See **MAD. ACT XXX OF 1858**.

Nawab of Surat.

(1)—*Act XVIII of 1848—Sanction—Reg. IV of 1827—Act VIII of 1859.*—The permission of the Government in 1858 to the Agent for the Governor of Bombay at Surat to pay certain money of the widow of the late Nawab of Surat to whomsoever a certificate of heirship to her might be granted by the Civil Court, will not

Nawab of Surat—concluded.

authorise under Act XVIII of 1848, the institution against her grand-daughters of a general civil suit under Regulation IV of 1827, or Act VIII of 1859. Nor does permission given in 1871 to institute a suit authorize the continuation of a suit instituted in 1869. **MIR AJMUD-DIN KHAN v. ZIA-UN-NISSA BEGAM, 12 B.H. C. 156.**

Suit against Nawab of Surat—Sanction of Government not obtained before suit filed—Validity of suit—Meaning of expression "Sue forth"—See BOM. ACT XVIII OF 1848, s. 1, **12 B. 496.**

Nawab of Surat Act.

See BOM. ACT XVIII OF 1848.

Nawab of Tank.

(1)—*Nawab of Tank—Punjab Ruling Chiefs—Succession—Primogeniture—Settlement of lands by British—Effect—Election—Grant by the Chief to second son for maintenance—Transfer by Government on the death of the Chief, to his second son, of a portion of cash allowance allowed to the late Chief.*—The country known as Tank proper belonged to the chief for the time being, who was both ruler and proprietor. Succession devolved upon the direct son of the Chief, the members of his family being entitled to maintenance only. At the introduction of British rule in 1849 in the Punjab, the settlement of the country was made under which the occupiers of the soil were recognised as the proprietors of their respective lands. At that time the proprietary title of N was recognised by seven villages by virtue of his Chiefship. After N's death, there was a claim for a half-share in the villages under an allegation of custom in the family, by his younger son from the grandson of the deceased, who was appointed successor to the Chiefship. *Held*, that the effect of the settlement in 1849 was not to create a fresh estate subject to the ordinary law of inheritance, but to continue to the Chief for the time being, as it were *jure coronae*, the proprietorship of the villages which had been founded by his ancestors, and the succession to which had therefore been regulated by the custom of the family. [*R.*, 47 P.R. 1908=77 P.W.R. 1908]. Where on the death of the Chief, the Government while conferring the chiefship on the late Chief's eldest son's son, transferred a portion of the cash allowance allowed to the late Chief to the late Chief's second son to whom a grant of a village for maintenance had already been made by the late Chief, *held*, that the second son need not be required to elect which he would take as between the two allowances, the same having arisen from different sources independent of each other. **MAHAMMAD AFZAL KHAN v. GHULAM KASIM KHAN, 30 C. 843, P.C.=67 P.R. 1903=112 P.L.R. 1903=8 C.W.N. 81=5 Bom. L.R. 486=30 I.A. 190=8 Sar. 455.**

Nazir.

(1)—*Plaint—Small Cause Court—Nazir if authorized to receive plaints.*—A Nazir of a

Nazir—continued.

Court of Small Causes is not authorised to receive plaints. **RAJ CHUNDER GOPE v. JOOGAL GOPE, 18 W.R. 172.**

(2)—*Bengal Act V of 1863—Liability of Collectorate Nazir—Property attached in execution of decree—Failure to redeliver property on order for its release.*—A Collectorate Nazir is not personally liable for loss accruing on account of property attached under a warrant directed to him, not being re-delivered on an order for its release, if such an order has been duly entrusted by him, for execution to a peon of the establishment. Bengal Act V of 1863 has altered the relation which formerly existed between the Nazir and the peons of the Revenue Courts, and put them in the position of paid servants of Government. **KALEE KOOMAR CHATTERJEE v. SIDHESSUR MUNDUL, 11 B.L.R. 256=19 W.R. 335. [D., 4 B. 65.]**

This circular deals with salaries of Nazirs of Zillah Judge's Courts. **Cir. No. 4, dated the 31st March, 1865, 2 W.R. Civ. Cir. Order, p. 2.**

This circular deals with salaries of Nazirs of Civil and Revenue Courts and shows how they are to be exhibited in the Quarterly Returns. **Cir. No. 5, dated the 28th Feb., 1866, 5 W.R. Civ. Cir. Orders, p. 2.**

This circular calls for rolls showing particulars regarding Nazirs of the Judge's Courts. **Cir. No. 33, dated the 29th November, 1867, 8 W.R. Civ. Cir. Orders, p. 12.**

This circular calls for information regarding remuneration of Nazirs when conducting sales in execution of decrees. **Civ. Cir. Memo. No. 3, dated 26th April, 1871, 15 W.R. Civ. Cir. 15.**

This circular fixes the limits of the pay of Naib Nazirs and the increments in the pay of Nazirs. **Civ. Cir. Memo. No. 5, 23 W.R. Rules and Orders of the H.C., p. 9.**

Sale of arms in execution of decree by Nazir of Court—Sale by public servant in discharge of his duty—See ACT XI OF 1878, s. 1, cl. (b), 9 B. 518.

Arrest in execution of decree—Practice—Delegation by—to peon—Civ. Pro. Code, s. 343—Endorsement of particulars of arrest by Naib Nazir—See **ARREST, 6 A., 385=A.W.N., 1884, 133.**

See **EXECUTION OF DECREE—MODE OF EXECUTION, 5 B.L.R. App. 27=13 W.R. 339.**

Suit against minor—Appointment of Nazir as guardian *ad litem*—Court's power to order deposit of fees by plaintiff for enabling—to communicate with natural guardian—See **GUARDIAN—APPOINTMENT OF GUARDIANS, 12 B. 553.**

The Court is not compelled to retain a Nazir as a guardian of the property, where the interest of the minor is imperilled—See **GUARDIAN—APPOINTMENT OF GUARDIANS, 6 Bom. L.R. 544=28 B. 626.**

Appointed guardian of minor's estate—Officer of Government—See **GUARDIAN—APPOINTMENT OF GUARDIANS, 4 B. 638.**

Nazir—concluded.

Of Court as administrator of minor's estate under Act XX of 1864, suit against, maintainable only in District Court—See GUARDIAN—APPOINTMENT OF GUARDIANS, 4 B. 642, Note 2.

Appointed guardian *ad litem*, jurisdiction of Court to proceed with suit—See GUARDIAN—APPOINTMENT OF GUARDIANS, 4 B. 643, Note.

Nazir appointed as guardian—Order of the Court refusing remuneration to Nazir as guardian, on the ground of his incompetence is not appealable—See GUARDIANS AND WARDS ACT, 1890, s. 22, 1 Bom. L.R. 547=24 B. 95.

See MAHOMEDAN LAW—WAKF, 18 B. 401.

See SALE—SALE IN EXECUTION OF DECREE, SETTING ASIDE SALES, 2 N.W.P. 142.

Omission of Nazir to re-arrest judgment-debtor released—Liable to plaintiff in damages for negligence—Civ. Pro. Code, Act VIII of 1859, s. 28, time for payment of batta for maintenance of debtor in jail—See SUBSISTENCE MONEY, 4 B. 65.

Court's power, if service cannot be effected in time—Summonses, application for—Nazir's duty—See SUMMONS, 2 O.C. 34.

See SURETY—LIABILITY OF SURETY, 9 B.L.R. App. 26=18 W.R. 259.

Nazrana.

Payment by tenant of—under threat of ejectment—Suit for compensation by tenant—Maintainability of suit—Rent Court, jurisdiction of, to entertain suit—See U.P. ACT XXII OF 1886, ss. 17, 108, cl. (9), 8 O.C. 200.

Recovery of—See LEASE—GENERAL, 6 A. L.J. 555=2 Ind. Cas. 261.

See RENT, SUIT FOR, 2 Agra 378.

Nazul Land.

Encroachment—Unauthorized user by encroacher—Right of encroacher to restrain others—See ENCROACHMENT, A.W.N. 1888, 255.

In Oudh, suit for possession of—Burden of proof—Lord Canning's proclamation of 15th March 1858, effect of—Power-of-attorney signed by Deputy Collector for Deputy Commissioner, presumption as to—See POSSESSION—SUITS FOR POSSESSION, 7 O.C. 65.

Or Government land held revenue free, whether constitutes a mahal with rest of the village—See PRE-EMPTION—GENERAL, 10 O.C. 257.

See RESUMPTION, RIGHT OF—GENERAL, 6 P.R. 1868.

Necessaries.

(1)—*Indian Majority Act* (IX of 1875), s. 3—*Minor-Guardian appointed under the Guardians and Wards Act* (VIII of 1890), death of, if affects age of majority—*Necessaries, what are—Questions of mixed fact and law—Position of person supplying necessaries.*—If a guardian has been validly appointed or declared under

Necessaries—continued.

the Guardians and Wards Act, the minority of the Ward does not cease till he attains the age of 21 years, and it is immaterial whether the guardian dies or is removed or otherwise ceases to act (31 B. 590, D.; 11 A.W.N. 118, 13 B. 285, *Not Appr.*; 17 C. 944, *Expl.*; 12 C. 612, 3 A. 598, 21 B. 281, *Rel. on.*) The question as to what are necessaries is a mixed question of fact and law. The word "necessaries" is not confined in its strict sense to such articles as are necessary to support life, but extends to articles fit to maintain the particular person in the state, degree and station of life in which he is. (3 W.R. 217, 6 A. 417, R.) The infant's need of things may sometimes depend upon the peculiar circumstances, under which they are purchased and the use to which they are put. Thus articles, which, under ordinary circumstances, may not be deemed necessaries, may be so regarded when purchased for the infant's wedding. A person cannot recover, when he has supplied an infant with an article of which at the moment the latter was not in actual need, though the article might be otherwise suitable to his means and requirements, *e.g.*, when he was already plentifully supplied with such articles. A person, who takes upon himself to supply necessaries to an infant, assumes for the purpose the business of a guardian, which he is bound to execute as a prudent guardian. He should as such make himself acquainted with his necessities and circumstances. The mere fact that an infant has a father, mother or guardian, does not prevent his being bound to pay for what was actually necessary for him when furnished, when neither his parents nor his guardian did anything towards his care or support. JOYRAM MARWARI v. MAHADEB SAHOY, 13 C.W.N. 643=36 C. 768=1 Ind. Cas. 724.

(2)—*Goods supplied—Necessaries—Liability—Property in possession of heirs—Hindu law.*—This was a claim brought by a cloth merchant for goods supplied to the late S against the son and widow of S. The lower appellate Court dismissed the plaintiff's claim on the grounds that S was incapable through drunkenness of managing his affairs when the goods were supplied and that all the articles were articles of luxury and there was no proof that any one single item in the account was ordered by S or purchased with his knowledge and consent. *Held on appeal* that, although S was a great drunkard, there were intervals during which he was sufficiently in the possession of his faculties to admit of his attending to business and to family affairs, that plaintiff had been in the habit of supplying goods to S and his family and the goods now charged for were delivered by the plaintiff generally in the presence of S, who on one occasion at least acknowledged that he owed money to the plaintiff. There was no article adapted to the mere personal gratification of S apart from his position as head of the family, and it was therefore held that all the property left by S including ancestral immoveable property must be liable

Necessaries—concluded.

for the sum decreed in the suit. *HURNARAIN v. ARUR SINGH*, 44 P.R. 1872. [R., 93 P.R. 1888.]

Suit by Burmese wife for—and past maintenance—Law applicable—Burma Court Act XVII of 1875, s. 4—See *BUDDHIST LAW—MAINTENANCE*, 10 C. 777, P.C. = 11 I.A. 109.

Goods supplied on order of person entitled to portion of estate—Estate whether bound—See *CONTRACT—GENERAL*, 17 M.L.J. 484.

Debts contracted for pilgrimage expenses, if for—See *GUARDIAN—DUTIES AND POWERS OF GUARDIAN*, 20 B. 61.

See *GUARDIAN—DUTIES AND POWERS OF GUARDIAN*, 20 B. 61.

See *LEGAL PRACTITIONERS—PLEADER—REMUNERATION*, 17 M. 306.

Bond executed by minor for—Defence in criminal proceedings—Minor's contract for—See *MINOR—CONTRACTS BY MINORS*, 21 C. 872.

See *MINOR—SUITS BY AND AGAINST MINORS*, 17 M. 257.

Necessity.

Is a question of fact—Interference in revision—See *CUSTOMS—PUNJAB—ALIENATION*, 67 P.W.R. 1910 = 6 Ind. Cas. 986.

In easements—See *EASEMENTS ACT*, 1882, s. 13, cls. (a), (b), (c), (d), 3 Bom. L.R. 601.

Can be dispensed with in the proof of prescriptive enjoyment by local custom—See *EASEMENTS ACT*, 1882, ss. 15, expl. 1, 16, 17, 18, 2 Bom. L.R. 454.

Legal necessity depends on facts of each case—See *HINDU LAW—REVERSIONERS*, 8 C.L.J. 458 = 13 C.W.N. 201 = 4 Ind. Cas. 513.

Neg.

Nature of—Whether recoverable—Additions to actual rent under denomination of abwabs, nature of—Agreement to pay the same, effect of—See *ABWABS*, 17 C. 726, F.B.

Negligence.

(1)—*Injury to neighbour's land—Trenches in one's own land—Rain-water percolating—Damages.*—Before a person can be held liable in damages for injury caused to his neighbour's land by water either flowing from the former's land to the latter's or percolating from the one into the other, it must be shown that the water was brought or collected on his land by him voluntarily for his own purposes in a non-natural user of it. Otherwise, he is not liable. *MOHOLAL v. BAI JIVKORE*, 6 Bom. L.R. 529 = 28 B. 472.

(2)—*Allowing water to flood another's land.*—A Municipality constructed a dam in a creek but by allowing a ditch which was connected with the creek and which drained away rain-water to be filled up with rubbish of the town and the sluices at the dam to be choked up

Negligence—continued.

with weeds, silt, and such other things, the rain-water collected in the creek was carried away and flooded the plaintiff's property. *Held*, that the Municipality was liable for the misfeasance since it turned their works by their negligence into a nuisance. *RAJENDRA LAL MANEK LAL v. SURAT CITY MUNICIPALITY*, 10 Bom. L.R. 498 = 33 B. 393.

(3)—*Minors—Negligence in bringing water upon the premises—House consisting of several floors let out to different tenants—Water brought upon the top floor for the use of those occupying the floor—Leakage of water into the lower floors.*—A minor is liable to an action in tort, but where negligence is an essential ingredient of the action, it must be proved that the negligence complained of was the negligence of the minor. Where a person constructs a house and accumulates water in a reservoir for its purposes, he subjects himself to the principle of *Rylands v. Fletcher*, negligence or no negligence, if the water escapes on to his neighbour's property. As between him and his neighbour he has brought the water to his land for his own purposes and he must keep it in at his peril. But where the house consists of floors one above the other some of which are let to occupiers, the rest being occupied by the owner himself as between those who occupy the house it must be taken as a place of habitation in the case of which the accumulation of water is a necessity and for a natural purpose. Water is brought there by the owner as a natural adjunct, so to say, to the house and each occupier takes the premises he occupies as it is, with all its risks. The mere fact that a particular occupier does not use that water is immaterial, because the water is there in the natural and ordinary mode of enjoying the house. To such a case the doctrine of *Rylands v. Fletcher* does not apply. *BOMANJI v. MAHOMED ALI*, 7 Bom. L.R. 713.

(4)—*Negligence—Master and servant—Death of child—Contributory negligence—Damages—Deduction for maintenance of child—Funeral expenses—Act XIII of 1855.*—A man-hole was opened for the purpose of inserting a flushing door in a sewer in a lane in Bombay. The sewer was vested in the Municipality of Bombay and was under the control of the Municipal Commissioner by virtue of ss. 220 and 289 of the Bombay Municipal Act of 1888. When such man-holes are opened it is the duty of the Municipal Commissioner under s. 321 of that Act to have them properly fenced and guarded. The hole in question, was at first properly fenced; at 4-30 P.M. on a certain day, the superintendent in charge of the work gave orders to cease work and close the man-hole for the night. Immediately afterwards the plaintiff's unmarried daughter, eleven years old, fell into the man-hole and was found dead. Plaintiff sued for damages. The deceased child's mother who was seated about four yards from the man-hole selling cucumbers admitted that before the accident occurred, she knew the fence was down and the hole open. Various

Negligence—continued.

contentions were put forward. *Held* (a) that s. 321 (b) of the Municipal Act imposed on the Commissioner the statutory duty of having "all places, where the street is opened, fenced and guarded," and his default in taking this precaution made him liable in damages for the consequences of his negligence; and whatever instructions may have been given to the employees of the Municipality, such liability remains unaffected (*Grey v. Pullen*, 34 L.J.Q.B. 265; *Limpus v. London General Omnibus Co.*, 1 H. and C. 526, R.); (b) that, although the mother of the child might have been guilty of negligence, which contributed to the accident, yet, if the defendants could, by the exercise of ordinary care and diligence, have avoided the mischief which happened, her negligence would not excuse them. (*Tuff v. Warman*, 5 C. B. (N. S.) 573; *Radlye v. London and N.W.Ry. Co.*, L.R. 1 App. C 758, R.). As regards damages, in cases of this nature, distinct evidence of the loss sustained or benefit expected is not necessary. But the jury may look at all the circumstances of the case, and especially at the position of the parents and the age of the child and call in aid their own experience in arriving at their conclusions. Where damages are allowed, a reasonable sum should be deducted on account of maintenance of the child for such a period as the deceased might reasonably have been expected to live with her parents. In an action under Act XIII of 1855, no sum can be awarded in respect of funeral expenses, whether for the mere removal and disposal of the body or for the outlay for ceremonial or obsequial purposes. *NARAYEN JETHA v. THE MUNICIPAL COMMISSIONER AND THE MUNICIPAL CORPORATION OF BOMBAY*, 16 B. 254. [F., 2 C.W.N. 609.]

(5)—*Contractor's negligence — Responsibility of employer.*—An employer is responsible for the negligence of the contractor. *KEOUGH v. PRESIDENT, MUNICIPAL COMMITTEE, LAHORE*, 108 P.R. 1883.

(6)—*Hire of boats—Damage—Liability of bailee.*—A contracted with B for the hire of certain cargo boats. While being towed by a steamer which A had chartered according to agreement, the boats sustained great damage by reason of gross negligence on the part of C, whom A had placed in charge. *Held* that A must be held responsible to B for the negligence of C. *GREES CHUNDER BONNERJEE v. COLLINS*, 2 Hydr 79.

(7)—*Action for damage caused—Negligence—Authorized act—Railway Company.*—Negligence causing damage gives a cause of action, but, unless there be negligence, there is no action for damage caused by acts within the scope of the express or necessarily implied authority conferred by the law. In a suit by a Railway Company against K for damages sustained by the Company by reason of injuries caused to one of their lines of Railways by the bursting of tanks belonging to K, where no negligence on the part of K was alleged in the plaint, and

Negligence—continued.

where it was found (1) that the tanks were existing before living memory, (2) that they were breached by an extraordinary flood, (3) that they were tanks constructed in the ordinary manner with the escapements sufficient for all ordinary floods, and were such as are universally employed, (4) that these tanks were absolutely necessary to human existence, so far as it depended upon agriculture, and (5) that the Railway was constructed with a full knowledge of their existence, *held* that the Company were not entitled to damage. *THE MADRAS RAILWAY COMPANY v. THE ZAMINDAR OF KARVATINAGUR*, 6 M.H.C. 180. [Affirmed on appeal, 1 I.A. 364, P.C. = 14 B.L.R. 209.]

(8)—*Railway Company — Overshooting of station—Station not properly lighted—Injuries sustained in alighting—Suit for damages—Negligence.*—The plaintiff was travelling in a first class carriage of the defendant Railway Company with two gentlemen, S and J. On the train stopping at the station, S and J got out, opening the door of the carriage for themselves. The plaintiff proceeded to follow them. He was in the act of putting his foot to the ground when J called to him to take care as the train was moving. At the same time almost his foot touched the ground and he felt that the train was moving back. In the darkness he could not see the platform distinctly, and being afraid to alight, he tried to stop himself and to recover his position on the step of the carriage. In attempting to recover himself, he stepped and fell between the platform and the train and in consequence his leg was broken and he received other serious injuries. *Held*, that the Railway Company was guilty of negligence in not keeping the station properly lighted, in allowing the train to overshoot the station, and in not warning the plaintiff against alighting, that the injuries sustained by the plaintiff were caused by such negligence, and that the plaintiff did not, by his own want of care, contribute to the accident. *WOODHOUSE v. THE CALCUTTA AND SOUTH EASTERN RAILWAY COMPANY*, 9 W.R. 73.

(9)—*Railway Company—Doors of a carriage, shut or unfastened—Passenger injured in shutting them—Injury—Liability of the Company.*—Leaving a door of a carriage open or unfastened amounts to negligence on the part of a Railway Company for the consequences of which the Company is liable to the passengers. If any inconvenience or danger is caused by the negligence of a Railway Company, a passenger may lawfully attempt to get rid of such inconvenience or danger, provided in doing so he runs no obvious risk, disproportionate to the inconvenience or danger, and is not himself guilty of any negligence, and that if in such attempt he is injured, the Company is liable in damages. *BROMLEY v. G. I. P. RAILWAY CO.*, 1 Bom. L.R. 254 = 24 B. 1.

(10)—*Railway Company—Trains overshooting the platform—Injury to passenger—Damages.*—In determining the question as to whether there has been negligence or not on the part of

Negligence—continued.

the Railway Company, the Court must have regard to all the circumstances of the case. No general hard and fast rule can be laid down. All the facts of the case have to be taken into consideration. The mere overshooting of the train beyond the platform is not in itself negligence. The mere fact that the station is not sufficiently lighted is not in itself negligence. There must be something more in order to entitle the plaintiff to claim damages on the ground of the negligence of the Railway Company. **KESSOWJEE v. G.I.P. RAILWAY CO., 6 Bom. L.R. 673.**

(11)—*Railway Company—Trains overshooting the platform—Invitation to alight.*—In order to establish negligence arising from invitation to alight, against a Railway Company, it is not sufficient to prove that the carriage in which the plaintiff was travelling did overshoot the level portion of the platform and was drawn up alongside the slope, and that the plaintiff's injuries were received by a shock or fall on alighting and not by a fall after he had alighted. But the plaintiff must go further and show that the situation in which he was placed by the invitation to alight at the particular spot exposed him to danger which was not visible and apparent, or that he was invited to alight in an unsafe and improper place. Mere overshooting, even with an invitation to alight, is not necessarily or by itself negligence; to constitute negligence there must be on the part of the Railway Company, some further act or omission which exposes the passenger to a danger not visible and apparent, in other words such a danger as a passenger of ordinary caution could not reasonably be expected to avoid. **G.I.P. RAILWAY CO. v. KESSOWJI, 7 Bom. L.R. 119,** on appeal to Privy Council, see **9 Bom. L.R. 671.**

(12)—*Municipality—Digging of trench—Rainfall excessive—Act of God—Damage—Proximate cause of damage.*—In the middle of June, 1900, the defendant Municipality excavated a trench for a pipe drain in a public lane. This trench remained open till the first of July, 1900. From 24th June to 1st July, 1900, there was a very heavy fall of rain. The rain-water collected in the trench and by percolation or saturation, caused, on the 1st July, 1900, a landslip and collapse of the plaintiff's houses which were close by the trench. Plaintiffs sued the defendant Municipality to recover damages, alleging that the Municipality was negligent in digging the drain in the month of June when a heavy rainfall might be expected and leaving the trench open for many days so as to permit rain water to get into it and to percolate through or to saturate the sub-soil and thus to cause a landslip and to undermine the foundation of the plaintiffs' houses. The defendant contended that the damage was due not to the drain but to the heavy rain which fell for some days prior to the 1st July, 1900, and to the giving way of the retaining wall of an adjacent tank, from which water, mud and silt was removed only on the 30th June,

Negligence—continued.

1900: *Held*, (1) that it would not reasonably be said that the removal of the water from the tank was alone, without anything else, sufficient to produce the accident; nor could it be contended that the rainfall could of itself have produced the land slip; that, therefore, the trench contributed materially to the accident; (2) that even if the removal of water from the tank be a contributory cause of the damage, the Municipality would not be relieved of its liability unless such removal was the whole cause and the drain had nothing whatever to do with it; (3) that the heavy rainfall by the end of June is nothing very extraordinary for Bombay; and hence, it could not be regarded as an act of God, which would absolve the defendant from his liability; (4) that whether there was percolation or saturation the drain was the chief cause of the damage to the plaintiffs' houses; this percolation or saturation was due to the trench which the defendant had dug and to the negligence of the contractors in digging and keeping it open for several days: the defendant, was, therefore, liable to make good the damage. **VITHALDAS v. MUNICIPAL COMMISSIONER OF BOMBAY, 4 Bom. L.R. 914.**

(13)—*Vis major—Neglect to provide for ordinary contingencies—Injunction—Practice—Vis major*, to afford a defence, must be the proximate cause, the *causa causans*, and not merely a *causa sine qua non* of the damage complained of. Neglect to provide for conditions not exceptional may involve liability although *vis major* or exceptional conditions be also established. Where the damage caused was due to the insufficiency of precautions taken by the defendant, in constructing bridges and embankments in a creek for carrying a duct line, to cope with conditions which might reasonably have been anticipated, the defendant is liable. The mere fact that *vis major* co-existed or rather followed on the negligence is no adequate defence. Before an act of God may be admitted as an excuse the defendant must himself have done all that he was bound to do. **MUNICIPAL CORPORATION OF BOMBAY v. VASUDEO, 6 Bom. L.R. 899.**

(14)—*Negligence—Exercise of statutory powers—Damage—Extraordinary fall of rain—Vis major—Municipality—Reclamation of old tank site—District Municipal Act (Bom. Act III of 1901), ss. 50, 54.*—The Municipality of Hubli, a body corporate under s. 50 of the Bombay District Municipalities Act, 1901, took steps in 1904 to provide a Municipal cotton market in Hubli. They selected for the purpose the site of a large and ancient tank which had largely silted up, and the southern boundary of which was an embankment. A smaller tank was formed in the south-east corner of the area, whence the water would discharge eastwards over the old weir which it was proposed to deepen so as to allow of the passage of a large body of water. The part of the southern embankment which was not useful to the new tank was removed and utilised to fill in the area marked out for

Negligence—continued.

the market. The plaintiffs occupied a ginning factory immediately to the south of the area or the old tank and adjoining the new market, and used it for the purpose of storing ginned and unginned cotton, cotton-seeds and cotton-bales. It was at a lower level than either the market or the bed of the old tank the water of which was prevented from flooding the factory by the southern dam. The reclamation caused no trouble during the monsoons of 1905 and 1906. On the 7th June, 1907, however, there was a sudden and extraordinarily heavy fall of rain which practically over-flooded the whole of the Municipal area and washed away or damaged a quantity of cotton in the factory. The plaintiffs instituted an action against the Municipality to recover damages, alleging negligence on their part in carrying out the reclamation works. The defendants denied the plaintiff's allegation and contended that the damage complained of was due to the extraordinary and excessively heavy rainfall on the 7th June, 1907, and that no precaution on their part could have averted the damage:—*Held*, that the suit was not maintainable. The onus of proof of negligence lay on the party alleging it and if neglect in the execution of their statutory powers and duties was not brought home to the Municipality, a suit against them must fail as being unsustainable in law, however great the damage the plaintiffs might have suffered from the extraordinary flooding uncontrolled by the old tank dam. (27 L.J. Ex. 25, 1872, L.R. 3 Q.B. 42, *F.*) *Per Rao, J.*—The damage was mainly, if not wholly, attributable to the extraordinary fall of rain. It was an occurrence in the nature of a *viz major*, for which the defendants were not responsible. **THE MUNICIPALITY OF HUBLI v. RALLI BROTHERS, 13 Bom. L.R. 1138**

(15)—*Gross negligence—Liability of heir.*—The liability of a lambardar to account for profits unrealized owing to his gross negligence or misconduct, being a personal one, such claim cannot be pursued against his heirs unless it is shown that in consequence of that negligence any assets came to the hands of such heirs. It is immaterial whether the suit is brought against the lambardar himself personally or against the heirs, in the first instance, after his death. **BIR NARAIN v. GIRDHAR LAL, 20 A. 74, Note. (A.W.N. 1886, 32, F.) [R., 20 A. 73.]**

(16)—*Vendor and purchaser—Setting aside of sale—Possession with vendee—Accident to property before delivery by vendee—Liability for damages.*—A and B were partners in a cotton press. B sold the press for Rs. 35,000 to X who was put into possession on his paying the earnest money (Rs. 5,000). A thereupon instituted a suit for dissolution of partnership against B (making X also a party to the suit), and prayed for the issue of an injunction restraining X from working the press and for the appointment of a receiver. The Court refused to grant the injunction and appoint a receiver, but ordered X to pay the balance of purchase-money (Rs. 30,000) so that it may be in the Court's

Negligence—continued.

deposit till the disposal of the suit. The suit coming on for hearing, it was *held* that the plaintiff was entitled to set aside the sale to X, the same having been made to him without authority. The decree further directed that X should be repaid Rs. 30,000, that, on such payment, X should forthwith give over possession of the press to the plaintiff and B (his vendor). X thought of preferring an appeal, but before he handed over possession, a fire broke out which caused much damage to the press. The press was afterwards handed over to the plaintiff in its damaged condition. The plaintiff thereupon filed the present suit against X to recover from him Rs. 50,000 as damages for the injury caused to the press by the breaking out of fire. He also alleged that the working of the press by the defendant after the passing of the decree in the suit for dissolution of partnership was a trespass, and that the defendant was liable to make good the loss caused to the press, although the breaking out of fire was not due to the defendant's negligence. *Held* that the maxim *volenti non fit injuria* applied to the circumstances of the case. The defendant was a trespasser in having kept possession of the press until the decree in the suit for dissolution of partnership, but he was not such subsequently to the passing of the decree, because the press was worked by him with the plaintiff's consent. The suit was dismissed, no negligence having been proved against the defendant. **JAMSETJI BURJORJI BAHADURJI v. EBRAHIM VYDINA, 13 B. 183.**

(17)—*Burden of proof.*—When the facts are equally consistent with the presence or absence of negligence, plaintiff cannot recover damages; defendant is not bound to show that there was no negligence. **KOEGLER v. YULE, 5 B.L.R. 401 = 14 W.R. O.C. 43.**

Negligence of a Railway Company in allowing rain-water to flow for four miles by the sides of their railway line through gutters made up of the continuous burrow-pits and then allowing it to discharge itself on to the lands of the plaintiff—*See ACT IX OF 1890, ss. 7 (a), 10 and 11, 2 Bom. L.R. 357.*

See ACT IX OF 1890, s. 77, 6 P.R. 1897.

See BEN. ACT VI OF 1863, ss. 226, 263, 8 B.L.R. 265.

See BOM. ACT III OF 1888, s. 527, 17 B. 307.

Suit by co-sharer against lambardar for his share of the rent collected by the latter in excess of Jamabandi amounts—Gross—need not be proved—*See U.P. ACT XII OF 1881, s. 209, A.W.N. 1887, 298.*

Administration to estate of deceased—Taking out of letters of administration—Neglect of administration—Loss to estate—Compromise of claim by administrator—Suit by creditor to set aside compromise—Liability of administrator—*Act X of 1865, ss. 278, 280, 328—See ADMINISTRATION, 17 B. 637.*

Negligence—continued.

Exemptive clause in Bill of lading—Effect—Shipping—Negligence of servants of ship—Period of loading—Fitness of the ship—See BILL OF LADING, 13 B. 571.

Of carriers—Damages done to goods, after removal from ship's tackle—See CARRIERS, 1 M.L.T. 387 = 16 M.L.J. 573 = 30 M. 79.

Goods of a dangerous nature, duty of persons sending—Notice—Act XVIII of 1854, s. 15—Negligence—Act XIII of 1855—Suit for compensation for destruction of life—See CARRIERS, 1 A. 60, F.B.

Liability of common carriers for—See CARRIERS, 28 M. 400.

See CARRIERS, 2 C.W.N. 609.

Gross negligence of next friend in suit instituted on behalf of minor—See CIV. PRO. CODE, 1908, O. II, r. 2, O. IX, rr. 8, 9, 22 C. 8.

Lambardar and co-sharer—Gross negligence—Lambardar's heir not liable—Decree—See CO-SHARERS—GENERAL, 20 A. 73 = A.W.N. 1897, 197.

Premature closing of Government channel by revenue officer—Negligence and no malice—Loss to Government raiyat—Liability of revenue officer—See DAMAGES—DAMAGES, SUITS 24 M. 36 = 10 M.L.J. 249.

Personal injuries from fall in unfenced pit dug in path, suit for damages for—Test of negligence—Liability of property, lessee and contractor—See DAMAGES—DAMAGES, SUITS FOR, 11 B. 329.

Lease executed by guardian on behalf of minor—Suit by minors to set aside lease executed by their guardian—Negligence, what amounts to, in the guardian of a minor—Compensation—See GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 2 O.C. 233.

Lambardar's liability for co-sharers' share in the profit not collected through his gross negligence or misconduct—See LAMBARDAR, 1 O.C. 183.

Damage by fire—Negligence—Notice of defect—See LANDLORD AND TENANT—DAMAGE TO LEASED PREMISES, 3 B.L.R. A.C. 277 = 12 W.R. 145.

Liability for—See LEGAL PRACTITIONERS—ATTORNEY AND CLIENT, 1 Hyde 134.

Delay of party through negligence or carelessness—See LIMITATION ACT, 1908, s. 12, 12 A. 79 = A.W.N. 1890, 25.

Auditor of the Company—Damages for misfeasance or neglect, when officer can be held liable for—See LIMITATION ACT, 1908, art. 36, 18 A. 12 = A.W.N. 1895, 136.

Damages—Action for—and malicious prosecution—Nature of proof required—See MALICIOUS PROSECUTION, 2 M.H.C. 158.

Negligence—concluded.

Of driver of buggy, proprietor liable in damages for—Relationship of master and servant—Liability of master—See MASTER AND SERVANT, 7 B. 119.

Payment of debt to representative of deceased person—Discharge—Right of executors of the deceased to ignore such payment—Notice of claim—Duty of executors—Effect of—See PAYMENT, 72 P.R. 1903.

Gratuitous agent, liability of, for gross—See PRINCIPAL AND AGENT—DUTIES AND LIABILITIES OF AGENTS, 2 M.H.C. 449.

See PRINCIPAL AND AGENT—DUTIES AND LIABILITIES OF AGENTS, 11 C.L.R. 547.

Death from accident caused by negligence of fellow servant—Company's liability—See RAILWAY COMPANY, 1 A.L.J. 653.

See RAILWAY COMPANY, Bourke O.C. 39 = 14 B.L.R. 1.

Receiver's failure to collect amount—Right of party aggrieved to sue—Receiver—Leave of Court—See RECEIVER, 26 M. 492.

Bona fide litigation by karnavan in representative capacity—Gross negligence in conduct of case—Non-production of necessary documents—No fraud or collusion—Operation of decision as *res judicata* on junior members—See RES JUDICATA—PARTIES, 13 M.L.J. 68.

Liability of Secretary of State for damages occasioned by—Of Government servants—Negligence which would render ordinary employer liable—See SECRETARY OF STATE, Bourke O.C. 166 = 5 B.H.C. App. 1.

Execution of decree for rent due—Third person's property unintentionally sold in execution—Third person suing decree-holder for damages—Decree-holder not liable as for negligence, but for conversion—No contributory negligence, where action not based on negligence—See TORT, 129 P.R. 1908.

Rule of speed limit in navigable channels—Contributory—Bad light—See TORT, 8 Ind. Cas. 611.

Proof of—See TORT, U.B.R. 1897—1901, Vol. II, 570.

See TORT, 14 M.L.J. 466.

Mortgage—Notice—Whether failure to obtain title-deeds will be gross negligence, under s. 78, Transfer of Property Act—See TRANSFER OF PROPERTY ACT, s. 78, 4 M.L.T. 217.

Prior mortgagee postponement of, for gross—See TRANSFER OF PROPERTY ACT, 1882, s. 78, 2 C.W.N. 750.

See ZAMINDAR, 14 B.L.R. 209, P.C. = 22 W.R. 279 = 1 I.A. 364.

Negotiable Instruments.

- 1.—GENERAL.
- 2.—BILL OF EXCHANGE.
- 3.—CHEQUE.
- 4.—HUNDIS.
 - I.—GENERAL.
 - II.—ACCEPTANCE OF HUNDIS.
 - III.—ENDORSEMENT OF HUNDIS.
 - IV.—LIABILITY ON HUNDIS.
 - V.—NOTICE OF DISHONOUR OF HUNDIS.
 - VI.—PRESENTATION OF HUNDIS.
 - VII.—MISCELLANEOUS.
- 5.—PROMISSORY NOTES.
 - I.—GENERAL.
 - II.—ASSIGNMENT.
 - III.—CONSIDERATION.
 - IV.—FORM.
 - V.—MISCELLANEOUS.

See BURDEN OF PROOF—NEGOTIABLE INSTRUMENTS.

See CIV. PRO. CODE, 1908, O. XXXVII, rr. 1—7.

See JURISDICTION—CAUSES OF JURISDICTION.

See NEGOTIABLE INSTRUMENTS ACT.

See NEGOTIABLE INSTRUMENTS, SUMMARY PROCEDURE ON.

—1.—General.

(1)—*Hundis—Analogy between hundi and bill of exchange—Application of English law.*—Where the analogy between native hundis and English bills of exchange is complete, the English law is to be applied. **SUMBOONATH GHOSE v. JUDDOONATH CHATTERJEE**, 2 **Hyde** 259.

(2)—*Negotiable security—Debt—Payment of.*—The giving of a negotiable security by a debtor to his creditor operates as a conditional payment only and not as a satisfaction of the debt unless the parties agree so to treat it. And the presumption ordinarily is that the effect of giving or taking a bill or note is that the debt is conditionally paid. **CULLIANJI v. RAGHAWJEE**, 6 **Bom. L.R.** 879 = 30 **B.** 27.

(3)—*Right of holder to give title to—Negligence does not affect the title of a person taking a negotiable instrument in good faith—Good faith, meaning of—Estoppel affecting the holder of negotiable instrument.*—The holder of a negotiable instrument has power to give title to any person honestly acquiring it, and it is the very essence of a negotiable instrument that the person in possession of it may be treated as having authority to deal with it, be he agent or otherwise, unless something is known to the contrary. Mere negligence does not invalidate the title of a person taking a negotiable instrument in good faith and for value. If there be anything which excites suspicion that there is something

Negotiable Instruments—continued.

—1.—General—continued.

wrong in the transaction, the taker of the instrument is not acting in good faith if he shut his eyes to the facts presented to him and puts the suspicions aside without further inquiry. If the holder of negotiable instruments give them to another with authority to that other to raise money upon them for his own purposes, he is estopped from setting up his right to the negotiable instruments adversely to those who have lent money on the security of the instruments and the faith of the authority of the owner. **RAGHAVJI v. NARANDAS**, 8 **Bom. L.R.** 921.

(4)—*Presumption as to payments by—Payment of interest on amounts secured by—Instalment payments of debt when allowable.*—Though the general effect of giving and taking a bill or a note is that the payment by the instrument is conditional, there is nothing to prevent its being given and taken as absolute payment, if the parties so intend. It is a question of fact what the intention of the parties was. Where cheques or bills are eventually honored, the payment then made relates back to the time when the document was delivered (26 **M.** 526, 30 **B.** 27, 28 **A.** 54, 3 **M.I.A.** 422, **P.C.**, **R.**) In such case, interest on the amount paid runs from date of the delivery of the document. Under s. 210, **Civ. Pro. Code**, the Court may grant an instalment decree only on sufficient reasons shown. Mere inability to pay, or the fact of being hard pressed, is, by itself, no sufficient reason for not requiring prompt payment (2 **A.** 129, **R.**). Where a defendant shows *bona fides*, by offering to pay a fair proportion of his debt, a reasonable time may properly be granted to enable him to pay the residue. **MOHOMAD AKBAR KHAN v. R. B. KASTURCHAND DAGA**, 2 **N.L.R.** 179.

(5)—*Negligence of party taking negotiable instrument—Defective title.*—The rule laid down in the case of **Gill v. Cubit** (3 **B. & C.** 466) and **Down v. Halling** (4 **B. & C.** 330)—that the negligence of a party taking a negotiable instrument fixes him with the defective title of the party passing it—observed upon, and those cases overruled. **THE BANK OF BENGAL v. MACLEOD**, 5 **M.I.A.** 1.

(6)—*Promissory note, What is—*A promissory note does not lose its character as such merely because it contains a promise to pay at a certain place. **DEVA RATNA v. FAKIR ADAM**, 4 **Bom. L.R.** 428.

(7)—*Issue of, in discharge or satisfaction of pre-existing debt—Effect—Acceptance as novation—Extinguishment of debt—Substituted contract—Failure of—Debtor's default—Old cause of action—Revivor—Remedy under the new contract—Alternative prayer under old contract—Joinder of—Validity—Civ. Pro. Code, 1882, s. 45.*—Where a negotiable instrument is issued in satisfaction or discharge of a debt due, it operates *prima facie* only as a conditional payment, not extinguishing the debt, but only

Negotiable Instruments—continued.**—1.—General—concluded.**

suspending the original remedy. If the debtor can prove that it has been accepted as a complete novation of the original liability—and of such proof, the *onus* is on him—it will afford, while it stands, a complete defence to an action by the creditor upon the original debt. But whether the acceptance of the bill or other instrument be conditional pending payment, or in absolute novation of the old contract, there can be no doubt of the creditor's right to revive the latter, if, for any reason for which the debtor is responsible, the substituted contract fails. (26 M. 526, 29 M. 111, 5 C. 215, 11 A. 13, 4 A. 330, 18 M. 126, 3 C. 314, R.) A claim on the original contract, made in the alternative to a claim against the same defendants for the same debt on a substituted contract which has failed, cannot be held to be other than a perfectly proper and convenient joinder of the kind allowed by s. 45, Civ. Pro. Code, 1882. **NATHU SA v. PHULCHAND SA, 8 N.L.R. 7.**

(8)—*Dishonoured bill—Plaintiff taking it up and paying it—Plaintiff's right to sue.*—After a bill was dishonoured, the plaintiff, who had endorsed it over, was called upon to take it up, and he did take it up. He had given it as conditional payment to his endorsee, and on its being dishonoured he paid the endorsee, and got back the bill. *Held* that, under such circumstances, the plaintiff had a clear right to sue. **ALAGAPPA CHETTY v. KARUPPAYYA PILLAI, 3 M.L.T. 239, (30 M. 441, F.)**

See **ACKNOWLEDGMENT, 5 B.L.R. 619.**

What is a—Mate's receipt whether a—See **CARRIERS, 9 Ind. Cas. 465.**

See **CIV. PRO. CODE, 1908, O. XXI, rr. 46, 58, 59, 60, 61, 27 M. 67, F.B.**

A bill or note may be on account of company although not expressly mentioned—As between third parties and the Company not necessarily so—See **COMPANY—ARTICLES OF ASSOCIATION AND LIABILITY OF SHARE-HOLDERS, 3 B. 439.**

Bill, etc. drawn by Directors of Company in favour of third parties when Company liable on—See **COMPANY—POWERS AND LIABILITIES OF DIRECTORS, 4 B. 275.**

Power to draw, by a partner in a trading firm—See **PARTNERSHIP — PARTNERSHIP WHAT CONSTITUTES, 9 Bom. L.R. 274.**

See **SIGNATURE, L.B.R. 1893—1900, 412.**

—2.—Bill of Exchange.

(1)—*Bill of exchange, one of the parties to, a native of India—Applicability of English law—Holder of Bill of Exchange, rights of—Notice of dishonour—Liability of maker.*—The strict English law regarding bills of exchange is not applicable to transactions in which one of the parties is a native of India, and the circumstances do not show that they were dealing with reference to the English mercantile custom. [F., 12 C.L.R. 333.] In order to entitle

Negotiable Instruments—continued.**—2.—Bill of Exchange—continued.**

him to sue the maker, the holder of a bill of exchange must give notice of dishonour or non-payment within such reasonable time as shall enable the maker to protect himself. If the maker, for want of notice, has been subject either to injury or to material risk of injury, he is no longer liable. **MR. T. W. PIGUE v. GOLAB RAM, 1 W.R. 75. [F., 12 C.L.R. 333; R., 7 B.L.R. 431, 3 B.L.R. 198.]**

(2)—*Hundis or bills of exchange, extent of liability of drawers of—Absence of notice of dishonour, effect of.*—In this suit to recover the value of a hundi drawn by the defendants, they urged on second appeal from the decree passed against them, that the hundi, not having been accepted by the drawee, was not a negotiable instrument and that in any case they, the drawers, were not liable, as they had no notice of the dishonour. The first objection was held to be untenable. A bill of exchange is not the less valid, because it has not been accepted by the drawee. It depends on the will and pleasure of the payee to carry the bill to the drawee for acceptance; and the mere neglect of the payee to present it for acceptance cannot affect the drawer's liability should the bill happen to be eventually dishonoured. The High Court, however, allowed the second of the above objections. The holder of a bill, to be entitled to sue the maker, must give him notice of dishonour or non-payment within such reasonable time as will enable him to protect himself; and, in the present case, it was an admitted point, that no such notice reached the drawers, and the omission to give notice was held to be fatal to the action against the drawers, the present defendants. **JEETUN LALL v. SHEO CHURN, 2 W.R. 214. [F., 12 C.L.R. 333.]**

(3)—*Bill of exchange—Notice of dishonour.*—According to Muhammadan Law notice of dishonour is not necessary in order to render the drawer of the bill liable to the holder of a hundi. **GOPINATH v. ABBAS HOSSEIN, 7 B.L.R. 434, Note. [R., 7 B.L.R. 434.]**

(4)—*Negotiable instrument—Dishonour—Notice—Laches.*—Ordinarily, notice of dishonour of a bill drawn in India and payable in England should be posted by the very next mail which leaves England after dishonour. If five or six mails are allowed to go out without the despatch of such notice, then the person whose duty it is to give notice is unquestionably guilty of unreasonable delay. **THE UNCOVENANTED SERVICE BANK, LTD. v. FREDERICK DUFFIN, 3 N.W.P.H.C. 99.**

(5)—*Evidence of dishonour and of presentment—Noting on bill.*—The mere noting on the bill, even if it disclose the name of the notary in full, is not evidence of the presentment or of the dishonouring of the bill. **BOMBAY CITY BANK v. MOONJEE HURRIDOSS, Bourke O. C. 274.**

(6)—*Hoondie—Notice of dishonour.*—A promise to pay, indorsed upon a hoondie, after it

Negotiable Instruments—continued.**—2.—Bill of Exchange—continued.**

has been dishonoured, although not amounting to a waiver of notice, is the very best evidence, if supported by other evidence, that the endorser has received notice of dishonour; and his promise to pay evinces a consciousness and knowledge on his part that the other party has a right to call upon him to pay the bills. **SYAD ALI v. GOPAL DASS, 13 W.R. 420.**

(7)—*Bill of exchange, action against indorser and acceptors of—Notice of dishonor.*—A suit was brought in the Patna District against the indorser and acceptors of a bill of exchange, after a part payment by the acceptors. No objection was raised as to the misjoinder of defendants, and the Judge omitted to find whether the indorser had received notice of dishonor or not. *Held* that the case must be remanded to ascertain, (i) whether notice had been given within reasonable time, and if not, whether (the strict rule of mercantile law of England not being applicable to transactions in bills and *hundis* as amongst natives of this country), the indorser had been injured or exposed to material risk of injury; and (ii) whether, by the usage of merchants at Patna, a part payment by the acceptors and receipt by the plaintiff discharged the indorser from liability. **GOPAL DAS v. SHEIKH SYAD ALI, 3 B.L.R. A.C. 198. (1 W.R. 75, R.) [R., 7 B.L.R. 431.]**

(8)—*Bill of exchange endorsed to one party—Dishonour—Re-endorsement to drawer, if a condition necessary to drawer suing the acceptor.*—J drew a bill of exchange to his order and S accepted the bill. J endorsed the bill to C. & Co. When the bill was presented for payment, it was dishonoured and duly protested for non-payment. Then C & Co., debited J's account with the amount of the bill and returned the bill to J without re-endorsing it. In a suit by J, to recover the amount of the bill from S, the acceptor, objection was taken that, as C. & Co. did not re-endorse it to J, J had no right to sue. *Held*, that, even in the absence of a re-endorsement to J, he was entitled to sue the acceptor, who has failed to carry out the agreement he entered into under the terms of the bill. **JAMES & CO. v. SCOTT, 36 C. 291=1 Ind. Cas. 972.**

(9)—*Ss. 30, 37, Act XXVI of 1881 (Negotiable Instruments), scope of—Drawer's liability before dishonour.*—By s. 30 of the Negotiable Instruments Act, the drawer of a bill of exchange is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to or received by the drawer as provided by the Act. The drawer only undertakes to pay the amount of the bill, in case of dishonour either by non-acceptance or non-payment. There is no demand or debt until dishonour and the dishonour is not the natural result of the drawing, [R., 20 B. 133.] S. 37 of the Negotiable Instruments Act provides that the drawer of a bill of exchange is liable thereon as principal debtor

Negotiable Instruments—continued.**—2.—Bill of Exchange—continued.**

and that other parties thereto are liable thereon as sureties for the drawer. This only refers to their respective liabilities, and is enacted for the purpose of only distinguishing those liabilities. It does not give any new right of action. It must be read with s. 30 of the Act, which provides for the liability of a drawer, who has no liability until dishonour. **A. B. MILLER v. THE NATIONAL BANK OF INDIA, 19 C. 146.**

(10)—*Bill of Exchange—Drawer and acceptor, liability of—Accommodation acceptor—Ss. 132, 139 of the Contract Act—Evidence Act, s. 92—Subsequent substantial consideration—Principal and surety—Deed for the benefit of the creditor—Effect on surety's position.*—The liability undertaken by the drawer and the acceptor of a bill of exchange is in no sense a joint liability; but they contract severally in different ways and subject to different conditions. Neither the provisions of s. 132 of the Contract Act nor those of s. 92 of the Evidence Act preclude the acceptor of a bill from proving that he never received any consideration for the bill but that he accepted it only for accommodating the drawer or some other party. [D., 8 C.W.N. 101; R., 13 M. 172.] An acceptor of bills, who, though, in the first inception of the bills, he may have put his name to them only for the drawer's accommodation, has since received such a substantial consideration for them as to be no longer in the position of a mere surety, would not be entitled, as against persons, who have honestly advanced money in good faith upon the security of the bills, to the equitable rights of a surety. The fact that a certain creditor assented to and executed a trust-deed, whereby the debtor conveyed all his properties to the Official Trustee for the benefit of his creditors, though it would, under English Law, be sufficient to discharge a surety, would not, under the provisions of s. 139 of the Contract Act, so operate as the trust-deed, instead of impairing the surety's "eventual remedies" against his principal, tended to improve them most materially. **POGOSE v. THE BANK OF BENGAL, 3 C. 174. [D., 13 M. 172.]**

(11)—*Bill of Exchange—Decree obtained by drawee against acceptor—Drawer, liability of.*—The drawer of a bill of exchange is not exonerated from liability, by the mere fact of a decree being obtained by the drawee against the acceptor, but not satisfied. **MR. T. M. FIGUE v. RAM JUSHUNT, 1 W.R. 95. [D., 17 W.R. 442.]**

(12)—*Bill of Exchange—Endorsement of—Dishonour by drawee—Liability of endorser.*—Every endorser of a bill of exchange is in the nature of a new drawer and is liable to every succeeding holder in default of acceptance or payment by the drawee; and an endorser's liability is not absolved by the fact of the drawee not having been impleaded. **JUMNA DASS v. MEHUR SINGH, 1 Agra 182.**

(13)—*Forged indorsement—Endorsee—Holder in due course.*—An endorsee under a forged

Negotiable Instruments—continued.**—2.—Bill of Exchange**—continued.

endorsement which is legally no endorsement, cannot be held to be a 'holder in due course.' **GOBINDA v. MAYA DAS, 28 P.R. 1884.**

(14)—*Drawer and acceptor of a bill of exchange.*—The holder of a bill of exchange can join the drawer and acceptor thereof as co-defendants in the same suit. **FESTONJEE EDULJEE GURDUR v. MIRZA MAHOMED ALLY, 3 C. 541.**

(15)—*Endorser's right to security on payment to holder*—Rule applicable to the endorser of a bill of exchange is also applicable to the endorser of a pro-note.—It is a rule of equity, that if the endorser of a bill of exchange pays the holder of it, he is entitled to the benefit of all securities given by the acceptor, which the holder has in his hands at the time of the payment and upon which he has no claim except for the bill itself. The same rule is applicable to the endorser of a pro-note. **AGA AHMED ISPAHANI v. JUDITH EMNA CRISP, 19 C 242, P.C. = 19 I.A. 24 = 6 Sar. 109. (6 I.A. 1, R.)**

(16)—*Foreign bill of exchange payable after sight—Acceptance—Time—Reversal of finding of jury—Question of fact.*—A foreign Bill of Exchange, payable after sight, must be presented for acceptance; and although there is no limited time defined by Statute for presentment, and no usage of trade to fix the time, yet such bill must be presented within a reasonable time. What constitutes a reasonable time is a mixed question of law and fact for the determination of the Court and the jury. A Bill of Exchange was drawn at Calcutta on the 16th of February, 1848, by L.R. and Co. on D. and Co. at Hong Kong, payable sixty days after sight, and endorsed by L.R. and Co. to M. or order. M., in consequence of the depressed state of the money market at Calcutta, and the unsaleableness of Bills on China at that time at Calcutta, kept the Bill for five months and nine days, and then sold it to R. M., who did not present it for acceptance at Hong Kong till the 24th of October in that year, when D. and Co. refused to accept it. *Held*, that the presentation of the bill for acceptance was not made within a reasonable time, and that L.R. and Co., the drawers, were discharged. That the want of presentment was not executed by reason of the drawers continuing solvent from the date of the bill to the presentment, or that no actual damage was caused them by the delay. This Court will not reverse the finding of a jury or of a Court that sits as a jury upon a question of fact, unless perfectly satisfied that they were wrong, as, from their knowledge of the local circumstances and the character and appearance of the witnesses, they are better able to form a correct opinion than the appellate tribunal. **RAMCHURN MULLICK v. LUTCHMEECHUND RADAKISSEN, 9 Moo. P.C. 46 = 2 C.L.R. Eng. 1664.**

(17)—*Indorsee of bill of exchange, suit against acceptor by—Proceeds of sale by indorsee of goods*

Negotiable Instruments—continued.**—2.—Bill of Exchange**—continued.

consigned by drawer—Indorsee accountable to acceptor.—In this suit by the plaintiff Bank, as indorsees of certain bills of exchange drawn on and accepted by the defendant, the latter was held to be liable to the Bank for the amount sought to be recovered from him, except in so far as he might be entitled to credit for the net sums realised by the plaintiffs by the sale of certain goods entrusted to them as a collateral security for the moneys advanced by them to the drawer. The plaintiff Bank had no right to a double realisation on its own account, nor could it retain the proceeds of the said sale on behalf of the drawer, who, at the time of negotiating his bills, had realised the whole of what he was entitled to. **THE AGRA BANK, LTD. v. ABDUL RAHIMAN ISAC, 6 B. 1.**

(18)—*Letter of credit—Change of the bill from document against payment to documents against acceptance—Change made without the consent of the drawer—Drawee refusing to pay—Liability of drawer.*—The plaintiff purchased a bill of exchange drawn by the defendant on the firm of Schmolze Richman & Co. of London in terms of a letter of credit issued by the latter at the instance of T. Smart & Co. of London. The bill of exchange was accompanied by bills of lading and invoice of the consignment and was sent to the plaintiff's office at London. It was marked D. P., i.e., documents to be delivered against payment of the bill. The drawees refused to accept the same, on the ground that the terms of the letter of credit was D. A., i.e., documents against acceptance. The plaintiffs, with the consent of the agent T. Smart & Co. of London subsequently changed the bill into D. A., which was then accepted by the drawees. The bill fell due on the 13th February 1901, when the drawees having failed in the meanwhile refused payment. The plaintiffs then brought a suit to recover the amount of the bill of exchange from the defendant. *Held*, that the common intention of the parties was that the bill should be treated as D.P., and the alteration made in London without the consent and confirmation of defendant made it impossible for the plaintiff to recover. **MESHA v. NATIONAL BANK OF INDIA, 5 Bom. L.R. 524.**

(19)—*Bill of Exchange—Cheque taken in lieu of—Discharge of bill—Notice of dishonour.*—The mere taking of a cheque which is subsequently dishonoured, after having been presented in due course of business, does not operate as payment of the bill. To operate as a discharge, the cheque must be taken and accepted in full satisfaction of the bill. The contract on a bill of exchange between endorser and endorsee is, that if the acceptor does not pay, the endorser will pay. The rule that want of notice of dishonour discharges is a matter of comparatively recent practice in the English law. Among Hindus the rule is that want of notice will not discharge unless the party to be rendered liable

Negotiable Instruments—continued.**—2.—Bill of Exchange—continued.**

has been prejudiced. *SOMARIMULL v. BHAIRO DAS JOHURY*, 7 B.L.R. 431. [R., 12 C.L.R. 333.]

(20)—*Post-dated cheque—Bill of Exchange—Insufficient stamp—Admissibility in evidence.*—Where a cheque bearing a stamp of one anna was found to have been post dated by 17 days, and it was contended that it was really a bill of exchange payable 17 days after date and as such inadmissible in evidence as insufficiently stamped, *held*, that it was admissible in a suit to recover the amount of the cheque on its being dishonoured. *RAMAN CHETTY v. MAHOMED GHOUSE*, 16 C. 432. [R., 6 Bom. L.R. 699.]

(21)—*Negotiable instrument—Bill of Exchange by way of discharge of debt—Conditional discharge, presumption of—Execution of formal receipt—Endorsement on back of pro-note—Effect.*—A bill of exchange or hundi given for a debt operates only as a conditional discharge of the debt (26 M. 526, *Rel. on*), although it might be proved that, in any particular case, it was taken unconditionally in satisfaction of a debt. The execution of a formal receipt for the amount carried by a bill of exchange is not sufficient to rebut the presumption of the discharge being only conditional. Nor does the endorsement of receipt on a pro-note stand on a higher footing. *PALANIAPPA CHETTY v. ARUNACHELLAM CHETTY*, 21 M.L.J. 432 = 9 M.L.T. 482.

(22)—*Rights of remitter of bills for sale for a specific purpose—Misapplication of proceeds of sale by Agent.*—Where bills of exchange are remitted for sale, and the proceeds directed to be applied to a specific purpose, the property in the bills remains in the remitter until the purpose for which they were remitted is satisfied. And, where the money realized by the sale was wrongfully applied by the agent, it was held by the Judicial Committee (affirming the judgment of the Court at Calcutta) that the remitter was entitled to recover the value of the bills in *assumpsit*, upon an *indebitatus* count, from the purchaser of them who had notice of the purpose for which they were remitted, and the misapplication of the proceeds by the agent. *MUTTYLOLL SEEL v. DENT*, 5 M.I.A. 328.

(23)—*Bill of exchange not drawn expressly as by agent—Pleas open to drawer—Want of notice of dishonour, effect of.*—This action was brought against the defendant, as the drawer of some bills of exchange, against a Company. One of the defences was that the defendant was merely the agent of that Company in drawing the bills and was therefore not liable, and the Court *held* that when a man draws a bill and it does not appear on the face of it that he drew it as agent, he could not set up the defence that he drew the bill as an agent.

Negotiable Instruments—continued.**—2.—Bill of Exchange—continued.**

The further question was whether the defendant was discharged from the liability to pay the bills on the two grounds of defence set up by him, namely, 1st, that the plaintiff had discharged the acceptors (the Company) and 2ndly, that no notice of dishonour had been given to the defendant. It appeared that the goods on the faith of which the bills had been accepted were subsequently attached as the goods of the defendant for a debt due from him, and, on the sale of the goods, such debt of the defendant was discharged to the extent of the value of the goods realized. After the goods had thus been sold in payment of the debt due by the defendant, he could not have sued the Company against which the bill had been drawn and no damage accrued to him by not having had notice of dishonour or by the arrangement by which the Company were discharged, and the lower Court was therefore correct in having decreed the plaintiff's action and in having ordered payment of all costs by the defendant. *MR. T. M. PIGUE v. RAM KISHEN*, 2 W.R. 301. [F., 12 C.L.R. 333.]

(24)—*Managing agent, authority of—Liability of principal—Indorser and acceptor.*—Where a certain banking company, who were the managing agents of the defendant company and authorised to "draw, accept, endorse and negotiate all such cheques, promissory notes, &c., as should be necessary for enabling them to carry on the business of the company," drew a bill of exchange upon themselves as managing agents of the defendant company (which was accepted) and endorsed it to the plaintiff's bank, but the amount was drawn out by personal cheques without reference to the defendant company, *held* that the defendant company were not liable as acceptors, there being no proof of the money having been applied for the purposes of the company. *THE ORIENTAL BANK CORPORATION v. THE BAREE TEA CO. LTD.*, 9 C. 880 = 13 C.L.R. 412.

(25)—*Bill of Exchange—Transferability—Rights of transferee—Suit on—Cause of action—Limitation.*—A bill of exchange is transferable and the assignee or endorsee thereof may sue in his own name. The cause of action with respect to a bill of exchange accrues when the bill becomes payable and the acceptor refuses to pay. So, a suit to recover the amount due under a bill of exchange, brought more than 6 years after the due date of the bill, was held to be time-barred. *MOHENDRO LALL BOSE v. JADHUB KISSEN SINGH*, 14 W.R. O.C. 5 = Bourke, O.C. 157.

Drawn by Directors—Liability of Company—See COMPANY—ROWERS AND LIABILITIES OF DIRECTORS, 5 B. 92.

See DECREE—DECREE, FORM OF, 16 C. 804.

Negotiable Instruments—continued.**—2.—Bill of Exchange**—concluded.

See EVIDENCE—PAROL EVIDENCE, 2 A. 598.

See INTEREST—SPECIAL CASES, 2 C.L.R. 349.

See JURISDICTION—CAUSES OF JURISDICTION, 2 Agra 123.

Drawee substituting another in his stead—Acceptance by such other whether binds him—See NEGOTIABLE INSTRUMENTS ACT OF 1881, ss. 5, 7, 33, 88, 71 P.R. 1909 = 107 P.L.R. 1909 = 110 P.W.R. 1909 = 2 Ind. Cas. 804.

Holder and acceptor—Accommodation acceptor—Contract to treat the acceptor as surety—See NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 32, 37, 13 O.C. 206 = 7 Ind. Cas. 727.

Drawer's right to sue on, with assignment to him—Failure of consideration—See NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 32, 45, 2 Sind. L.R. 53.

Nattukottai Chetty's way of signing and drawing bills—Consideration of question whether signature in bill is that of the principal or agent—Construction.—See NEGOTIABLE INSTRUMENTS ACT, 1881, s. 80, 4 M.L.T. 309.

Notarial protest—Evidence of dishonour—Hundi—Bill of Exchange—See NEGOTIABLE INSTRUMENTS, SUMMARY PROCEDURE ON, 1 Ind. Jur. N.S. 247.

See PRIVY COUNCIL, PRACTICE OF—COSTS, 5 W.R. 33, P.C. = 1 M.I.A. 351.

Bill of exchange payable otherwise than on demand—See STAMP ACT, 1879, s. 3, art. 11, 8 C. 721 = 11 C.L.R. 310.

First of exchange, payable on demand, stamped with one anna stamp—Whether second of exchange should be stamped also—See STAMP ACT, 1899, ss. 2 (2) and (3), 67, sch. I, art. 13, 4 L.B.R. 320, F.B.

—3.—Cheque.

(1)—*Order directing servant to make payment to payee, not a cheque transferable by payee to third party.*—An order purporting to direct a servant to pay, at an uncertain time, a certain sum of money to the payee, on account of advance, is not a cheque; and, the mere fact that the party to whom the payee transferred it believed it to be a cheque, or that it was so represented to him, could not give such party a right of action against the drawer of the order. Also, such a document cannot amount to evidence of a debt so that the transferee might contend that, by the sale to him, he acquired the interest in the debt due by the writer of the order to the payee. SMALL CAUSE COURT REFERENCE, 2 N.W.P. 335.

Negotiable Instruments—continued.**—3.—Cheque**—concluded.

(2)—*Cheque, payment on forged—Discharge of banker—Principle.*—It is only on the principle of negligence imputable to the customer that a banker can make the customer liable, if payment had been made on a forged cheque. JAGDINDRA NATH ROY v. CHANDRA NATH PODDAR, 31 C. 242.

A person employed to receive money is not bound to receive a Cheque, but if he so accepts it, it amounts to payment.—See TENDER, 4 C. 572.

—4.—Hundis.**I.—GENERAL.****II.—ACCEPTANCE OF HUNDIS.****III.—ENDORSEMENT OF HUNDIS.****IV.—LIABILITY ON HUNDIS.****V.—NOTICE OF DISHONOUR OF HUNDIS.****VI.—PRESENTATION OF HUNDIS.****VII.—MISCELLANEOUS.****——I.—GENERAL.**

(1)—*Law applicable to—Application of English law—Analogy between hundi and bill of exchange.*—Where the analogy between native hundi and English bills of exchange is complete, the English law is to be applied. SUMBOONATH GHOSE v. JODDONATH CHATTERJEE, 2 Hyde 259.

(2)—*Hundi—Dishonour—Notice—Right of purchaser to sue indorser alone.*—A purchaser of a hundi on its being dishonoured is bound to present the same for payment within a reasonable time and give reasonable notice of dishonour, i.e., within the time within which it is ordinarily given according to the custom of the merchants and bankers of the district, not the immediate notice required by English law in cases of bills of exchange. The purchaser may sue his endorser alone and it is not absolutely necessary to implead the acceptor and drawer in the same suit. He does not lose his right of suit against the drawer and acceptor, if he does not sue them at once, as long as he sues within the time allowed by the law of limitation. GOPAL DASS v. SEETA RAM, 3 Agra 268.

(3 & 4) — *Hundi—Dishonour—Notice—Applicability of English Law.*—Although strict rules of English Law are not applicable to hundi transactions in this country, still, on a refusal by the acceptor to accept a hundi or to pay after acceptance, it is necessary that some notice of dishonour should be given to the immediate endorser or drawer within a reasonable time. TULSHI SAHU v. NURSINGRAM, 12 C.L.R. 333. (1 W.R. 75, 2 W.R. 214, 6 W.R. 201, 17 W.R. 442, 7 B.L.R. 431, 3 C. 339, F.)

Negotiable Instruments—continued.**—4.—Hundis—continued.****——I.—GENERAL—continued.**

(5)—*Native hoondies—Notice of dishonour—English rule of prompt notice by return of post, if applicable.*—The English law of prompt notice "by return of post" is inapplicable to cases of native *Hoondies* drawn by natives upon natives, and endorsed by natives. In the case of such *Hoondies*, however, before holding the endorser or drawer responsible for the consideration of a *Hoondie* dishonoured by the drawee, some reasonable notice is essentially necessary to be given to the party who may be asked to pay. *RADHA GOBIND SHAHA v. CHUNDER-NATH DOSS SHAHA*, 6 W.R. 301. See *SUMBOONANTH GHOSE v. JUDDUNATH CHATTERJEE*, Cor. 88.

(6)—*Hundis—Dishonour—Notice—Applicability of English Law.*—In a suit to recover the balance due on a *hundi* brought by the drawee against the drawers upon the insolvency of the acceptor, there was evidence, not only that the drawers were merely the ordinary *gomashtas* of the acceptor, but also that they had no interest whatever in the bill when drawn; that by local custom they were not liable for the defections of their principal; that the money when procured on the *hundi* was applied solely to the purposes of the acceptor; that the drawees received part-payment of the *hundi* from him and gave him time to pay the remainder; and that the notice of dishonour was not sent to the drawer till ten months afterwards. Held that the drawers were not liable. Although strict rules of English law are not applicable to *hundi* transactions in this country, still, on a refusal by the acceptor to accept a *hundi* or to pay after acceptance, it is necessary that some notice of dishonor should be given to the immediate endorser or drawer within a reasonable time. *HARI MOHAN BYSACK v. KRISHNA MOHAN BYSACK*, 9 B.L.R. App. 1=17 W.R. 442. [F., 14 C.L.R. 333.]

(7)—*Hundi—Notice of dishonour—Consideration, want of—Onus of proof.*—In a suit against the indorser of a *hundi*, absence of formal written notice of dishonour is not a sufficient defence, unless it is also shown that, by the absence of such notice, the defendant has been prejudiced. Where, in a suit by the indorsee of a *hundi* against his immediate indorser, the defendant pleads want of consideration, the onus is on him to prove his plea. *GOVINDRAM MARWARI v. MANTORA SAHOO*, 1 C.L.R. 429.

(8)—*Hundi—Option of holder.*—The holder of a *hundi*, or in other words, of a bill or note, is not bound, in the event of its dishonour, to sue all the parties liable to him under it, but he may, at his option, select his defendant or defendants, as he may judge best, for recovery of the money. *BASANT RAM v. KOLAHAL*, 1 A. 392.

(9)—*Hundi—Hundi payable at fixed date—Dishonour by non-acceptance—Cause of action for suit against drawer.*—In the case of a *hundi*

Negotiable Instruments—continued.**—4.—Hundis—continued.****——I.—GENERAL—continued.**

payable on a fixed date, dishonour by non-acceptance constitutes now, as it has always done, part of the cause of action in a suit against the drawer. Although the English law does not require presentment for acceptance of a bill payable after a fixed date to be made by the holder before such fixed date arrives, still it was not only allowable but was strongly advisable to do so. And the Negotiable Instruments Act XXVI of 1881 has made no alteration in this respect. *RAM RAVJI JAMBHEKAR v. PRAHLADDAS SUBKARN*, 20 B. 133.

(10)—*Money lent, suit for—Acceptance of hundi for the loan—Hundi dishonoured and unpaid—Suit on the original loan—Maintainability.*—A sued B for the recovery of a sum of money lent and repayable on a certain date. B also gave a *hundi* for the sum. A brought a suit on the *hundi*, which failed by reason of defect in the stamp. A brought the present suit on the original loan for recovery of the sum lent, costs, etc. Held that the plaintiff's claim to recover his loan is not barred by his acceptance of a *hundi*, payment of which was refused. *GOKULDAS v. PARMANAND*, 6 N.L.R. 125=8 Ind. Cas. 281. (23 C. 851, 28 A. 298, 24 B. 360, F.; 7 C. 256, Cons.; 8 C. 721, 26 A. 178, Diss.; 29 M. 111, R.)

(11)—*Hundi—Dishonour—Surrender—Fresh opening of account—Right to sue on surrendered hundi.*—Two *hundis* were drawn by the defendant and transferred to the plaintiff and were dishonoured. The plaintiff then surrendered the *hundis* to the defendant and charged his amount as the opening debt in a new account in which subsequent entries were made. Under such circumstances, the plaintiff was held not entitled to sue on the surrendered *hundis*. *BIRJ LAL v. ARJAN DAS*, A.W.N. 1883, 135.

(12)—*Shahjog hundi.*—A *Shahjog hundi*, unlike a *hundi* payable to bearer, is payable only to a respectable person. *LALLA MAL v. KESHO DAS*, 26 A. 493=A.W.N. 1904, 100=1 A.L.J. 254. (5 C.W.N. 313, R.)

(13)—*Hundi (shajoog)—Special endorsement and special acceptance—Rights of bearer.*—In considering the right to a *hundi*, the Court is as much bound to put a reasonable construction upon the words of an endorsement or an acceptance as upon any other part of the document. When a *hundi-maker* or rightful owner of a *hundi* payable in terms to the *shajoog*, endorses it as sold or sent to A, he obviously means to pass the right of dealing with the *hundi* to A alone. It may well be that, according to Hindu customary law, A can transfer his right to a third person B by word of mouth or mere delivery, notwithstanding that the special endorsement to himself is in writing. The term "*shajoog*" should be subordinate to the directions of the successive owners and should mean "the right men to be paid" according to the tenor of the document which must

Negotiable Instruments—continued.

—4.—Hundis—continued.

——I.—GENERAL—continued.

include both the endorsement and acceptance. There is no rule of Hindu law, customary or otherwise, which would have the effect of making the word "*shajoo*" mean payable to bearer, quite independently of the endorsement. There is no principle of mercantile expediency, having the force of law or otherwise, which would be served by the Court disregarding the direction of the endorser and treating a specially endorsed and specially accepted *hundi* as if it were an English negotiable instrument made payable to bearer, and, as such, part of the currency of the country. **THAKUR DAS v. FUTTEH MULL**, 7 B.L.R. 275 = 16 W.R.O.C. 3. [R., 18 B. 570, 5 C.W.N. 313.]

(14)—*Hundi—Suit to recover—Forged endorsement—Shajoo* *hundi*.—The plaintiffs being holders of a *hundi*, sent the same to their *koti* in Calcutta without endorsement. The *hundi* was lost or stolen in the way, and came into the defendants' hands as endorsees, the endorsement of the plaintiffs having been forged. The defendants without notice of the forgery, paid full consideration for the *hundi*. *Held*, on appeal, reversing the decision of the lower Court, that the plaintiffs were not entitled to recover the *hundi* from the defendants. [D., 18 B. 570; R., 5 C.W.N. 313.] A *hundi* payable to "*shajoo*" would pass by delivery merely, without regard to the authenticity or otherwise of any special endorsement which might be upon it. **GOURSIMULL v. DHAN-SUK DAS**, 7 B.L.R. 289, Note. [R., 5 C.W.N. 313.]

(15)—*Shajoo* *hundi*—Endorsement and transmission to drawee for payment—Theft in transmission—Drawee making payment to wrong person—Rights of owner of *hundi*—Liability of drawee.—A, residing at Sholapur, bought the *plaint* *hundi*, which was drawn upon B (who was residing at Bombay), endorsed it to R and transmitted the same to the latter by post. The *hundi* having been stolen in the course of transmission by T, the latter, obliterating the name of R and substituting his name on the *hundi*, presented it for payment to the drawee B at Bombay. The amount due under the *hundi* was paid to T, without the drawee making any inquiries in respect of the respectability or position of T. Thereupon, the present suit was brought by A, the owner of the *hundi*, against B, the drawee, for recovering its value of the *hundi* from the latter. *Held*, (1) that the defendant had been guilty of conversion of the *hundi* and was liable to the plaintiff (the lawful owner thereof) in trover; (2) that the defendant was liable to refund to the plaintiffs the amount of the *hundi*; (3) that the *hundi* being payable by endorsement to T, the defendant was not discharged by such payment; (4) that the *hundi* continued to be a *shajoo* *hundi* after being endorsed to a particular person. **GANESDAS RAMNARAYAN v. LACHMINARAYAN**, 18 B. 570. [F., 9 C.W.N. 841; R., 5 C.W.N. 313.]

Negotiable Instruments—continued.

—4.—Hundis—continued.

——I.—GENERAL—continued.

(16)—*Hundi payable "to a respectable person"*—Negotiability.—A number of *hundis* drawn by H on himself were accepted by him in the following terms.—"*Hundi* accepted by H in favour of S." They were all made payable to "a respectable person." S transferred the *hundis* by endorsement to B who brought this suit against H. *Held* that the phrase "a respectable person" meant the same thing as the phrase, "the bearer" and that they were perfectly good and negotiable instruments. The plaintiff's suit must therefore be decreed. **BALMUKAND LAL v. THE COLLECTOR OF JAUNPUR**, A.W.N. 1884, 3.

(17)—Necessity for endorsement—*Hundi* given for particular purpose—*Hundi* payable to order.—A party, who receives a *hundi* for a particular purpose, must apply the same accordingly, and neither he nor any third party knowing the facts can, by afterwards receiving the amount, detain the same from the principal. *Quære*—Whether a *hundi* made payable to "order" is according to Hindu law and the custom of native merchants, negotiable without a written endorsement by the payee. **RAJROOPRAM v. BUUDOC**, 1 Ind. Jur. O.S. 93 = 1 Hyde 155.

(18)—Right of suit—Dishonoured *hoondie*—Suit by endorser without re-endorsement.—Where the plaintiff purchased from the defendant's firm a *hoondie* in his favour which was payable by the firm of the defendant at Benares and sold the *hoondie* to two persons to whom it was endorsed by him, and the defendant's firm at Benares having refused to accept or pay the *hoondie* on presentation, it was returned to the plaintiff by the said purchasers and there was no formal re-endorsement in favour of the plaintiff by the said purchasers, *held*, in a suit by the plaintiff against the defendant for the value paid by him, that the plaintiff had a right to sue if it was established that the *hoondie* was returned to him by the purchasers. **BYJNATH SAHOO v. RACHARAM**, 5 W.R. 86.

(19)—*Hundi*—Consideration—Burden of proof—Revision under s. 70 (a) of Act XVIII of 1884.—*Held*, that, where a man executes a *Hundi*, he must pay the money or must prove that no consideration passed. This law may at times secure decrees for money to plaintiffs who never paid the *quid pro quo*, but this is immaterial. The Legislature, in the interest of the business community generally, has adopted a policy, and, in pursuance of that policy, the *onus* in such cases is laid upon the person who promises to pay upon a negotiable instrument. A person is not bound to keep careful proof of matter which the law says he need not prove. *Held*, also, that a finding of fact by wrongly throwing burden of proof on a party can be questioned in revision under s. 70 (a) of Act XVIII of 1884. **KISHEN CHAND v. JAMNA DAS**, 25 P.W.R. 1910 = 24 P.L.R. 1910 = 5 Ind. Cas. 891.

Negotiable Instruments—continued.

—4.—Hundis—continued.

—I.—GENERAL—continued.

(20)—Hundi—*Liability of each endorser to subsequent endorsees—Liability of acceptor—Local custom making last endorser liable to last endorsee.*—Under ordinary circumstances, the failure of the last endorsee to present a *hundi* for payment at the proper mercantile time for doing so, would have absolved all the antecedent parties thereto, with the exception of the acceptor. But the law which, according to English principles, would otherwise be applicable, would be subject to the local mercantile usage that might be proved to exist. In this case, a local custom was proved to exist by which, altogether independent of the question whether a *hundi* had been presented to the acceptor for payment or not, the last endorser remained liable to his endorsee, should the instrument remain unpaid. Such a custom should be taken as imported into the contract entered into between the parties when the endorsement took place. **HARLAL v. THULSHI DAS, A.W. N. 1882, 35.**

(21)—*Suit against endorser of Hundi—Loss of hundi in transit—Loss not ascertained by plaintiffs with due diligence—Drawer's insolvency before notice of loss—Defendant not liable to plaintiffs for amount of hundi.*—Plaintiffs sued the defendant who had endorsed to them a *hundi* drawn on a Delhi Firm on the 4th August, 1878, by one Firm in Cawnpur in favour of another Firm there, to receive the amount of the *hundi* with interest. The bill was payable after 21 days, and on the 14th of August, during the currency of the above term, it was endorsed by the defendant to the plaintiffs. On the following day, plaintiffs forwarded it by bearing letter to a correspondent at Bhawani in payment of an account. Their correspondent forwarded his accounts eleven months afterwards and plaintiffs then discovered that the bill had not been credited to them, and inferred that it had been lost in transit. In September 1879, when nearly 13 months had elapsed, they called upon the defendant to get them a duplicate or to re-pay the amount of the *hundi*. The defendant communicated with his immediate endorsers in order to procure a duplicate. The endorsers to the defendant replied that they had communicated with the payees from whom they had received the *hundi*, but they replied that the term of the *hundi* was 21 days, and 14 months had elapsed and no previous notice of loss or nonpayment had been received, and the drawer of the bill had become bankrupt 4 months ago and therefore no duplicate could be obtained. The Court of first instance decreed the plaintiff's claim in full. On appeal, the Commissioner reversed the decree holding that there was no such evidence of the loss of the bill as would satisfy the parties liable upon it that, if they paid without its being produced, they might not have to pay a second time, and that the plaintiffs' gross carelessness and supineness deprived them of any right to redress in a Court of law. On

Negotiable Instruments—continued.

—4.—Hundis—continued.

—I.—GENERAL—continued.

further appeal, plaintiffs urged that the loss of the *hundi* was satisfactorily proved, that the defendant could be protected against any future liability upon it by requiring the plaintiffs to give him a guarantee indemnifying him against such liability, and that there was no laches on the plaintiffs' part, as they did not become aware of the loss of the *hundi* until they settled accounts with their correspondent at Bhawani. **Held**, that, assuming the loss of the *hundi* to be proved, the defendant had done all that, under the circumstances, he was bound to do, and was not liable to the plaintiffs for the amount of the *hundi*, which could not be recovered because the plaintiffs did not use due diligence in ascertaining that their correspondent had received it, and because the drawer became insolvent before the loss was brought to notice. **HAIT RAM v. GANPAT, 159 P. R. 1882.**

(22)—*Stolen—Payment by drawee to a wrong person—Conversion—Measure of damages.*—A drawee of a *hundi* negligently paying to a wrong person is liable for conversion and the measure of damages payable to the lawful owner is the full amount of the *hundi*. **RAI BAHABUR SAHU LALTA PERSAUD v. CHARLES CAMPBELL MCLEOD, 9 C.W.N. 841. (18 B. 570, F.)**

(23)—*Suit by endorsee against acceptor—Notice not to discount, effect of—Bona fide holder for valuable consideration.* To an action by the endorsee against the acceptor of a *hundi*, the defence was a certain verbal contract between acceptor and payee, of which the plaintiff had notice; and that by the custom of shroffs the defendant was exonerated by such notice. **Held** that it is the custom of shroffs to make enquiries of the acceptors of *hundies* before discounting them, and that a mere notice by the acceptor not to discount does not affect his liability to a person who takes a *hundi bona fide* and for valuable consideration after such notice. **KHOSAL CHUND v. LUCHMEE CHUND, Bourke O.C. 151.**

(24)—*Suit by holder of hundi—Presentment of hundi at bank to acceptor's authorized agent—Validity of presentment under local usage—Negotiable Instruments Act (XXVI of 1881), ss. 70, 71.*—Suit by the holders and indorsees of a *hundi*. The defendant, who was the payee and the indorser, pleaded that the presentment of the *hundi*, for payment, at the bank, to the authorized agent of the acceptor, was not a legally sufficient and valid presentment and that the suit must therefore fail. The lower Court had found (1) that the *hundi* was presented for payment to the authorized agent of the acceptor at the Bank on the due date; (2) that the said agent refused payment and informed the Bank that the acceptor would not pay that *hundi* and (3), that the usage or custom in the locality was to present the *hundis* for payment at the Bank and for acceptors of *hundis*

Negotiable Instruments—continued.**—4.—Hundis—continued.****——I.—GENERAL—continued.**

to call the Bank on the due date to effect settlement. On the question being referred for the opinion of the High Court, whether under the above circumstances, and with reference to the proviso as to local usage in s. 1 of the Act, the presentment of the *hundi* in this case satisfied the requirements of the Act, the question was answered in the affirmative. The local usage or custom found to prevail in the locality did not exclude the usual presumption which accords with the law as laid down in s. 75 of the Negotiable Instruments Act, that what a person can himself do he can do by an authorized agent, and the presentment of the *hundi* to such an agent of the acceptor was a good and valid presentment. **IMPERIAL BANK OF PERSIA v. FATTECHAND, 21 B. 294.**

(25)—*Hundi—Suit before maturity—Insolvency of drawer and drawee.*—The declared insolvency of the drawer and drawee of a *hundi* justified the holder in suing before the *hundi* matured. **ASA RAM v. DEBI PRASAD, A.W. N. 1881, 21.**

(26)—*Assignment of hundi—Bills of Exchange Act, V of 1866.*—A *Hundi*, which contains a direction on sufficient consideration to the drawee and accepted by him, is within the terms of the Bills of Exchange Act, and such a document is assignable without any regular form of endorsement, if sufficient cause appears in the handwriting of an endorser to indicate an intention to assign it. **EAST INDIA BANK v. VULLIE GOOWANY, 1 Ind. Jur. N.S. 247.**

(27)—*Hundi accepted for accommodation—Transfer for value—Liability of person accommodated to drawee.*—A person, who accepts, for accommodation, a *hundi* drawn upon him, is entitled to recover, from the drawer, the amount he had had to pay to a transferee of the *hundi* for value, but not from persons, who merely cashed the *hundi* at his hands at the request of a holder for value. **NAND RAM v. SITLA PRASAD, 5 A. 484 = A.W.N. 1883, 62.**

(28)—*Payment of debt by means of hundi—Payment whether absolute—Liability of debtor thereafter.*—Where a note or a bill is given in payment of a debt, it is a question of fact whether the parties intended the same as an absolute or conditional payment, and the presumption as to the effect of giving and taking a note or bill is that the debt is conditionally paid. In this case, the fact that a comparatively high rate of discount at $2\frac{1}{2}$ per cent. was allowed to plaintiff taken with the other circumstances, was held to prove that plaintiff had accepted the *hundis* given to him as absolute payment and was consequently held not entitled to sue upon the original debt. **JAMBU CHETTY v. PALANIAPPA CHETTIAR, 26 M. 826 = 13 M.L.J. 252. [R., 30 B. 27 = 6 Bom. L.R. 879.]**

Negotiable Instruments—continued.**—4.—Hundis—continued.****——I.—GENERAL—continued.**

(29)—*Indorsement to agent and banker for collection—Credit in agent's accounts—Holder for value—Dishonour of Hundi by drawee—Usage of shroffs—Consideration—Indorsement.*—An agent and banker to whom a *hundi* is sent with the indorsement 'sent by A to B for recovery on my (A's) account' and who gets it accepted and credits the sender with the amount in his accounts, becomes a holder for value, the indorsement being no more restrictive than the usual "do the best for me" in English bills. Under the circumstances mentioned above, although the *hundi* is dishonoured by the drawee at the due date, the agent is entitled, according to the practice followed by *shroffs*, to treat his constituent as still entitled to credit for the *hundi*, and himself as holder for value. A *hundi* drawn in favour of A by B and delivered to him, though not presented for acceptance or payment, forms a sufficient consideration for A's indorsing another *hundi* to B. **MULCHAND JOHARI MAL v. SUGANCHAND SHIVDAS, 1 B. 23.**

(30)—*Hundis sent to agents for realization, property in.*—Suits to recover possession of two *hundis* for Rs. 2,500 each, or their value and damages for their detention and for an injunction restraining the defendant from negotiating or otherwise alienating them. The *hundis* were drawn by two up-country firms upon firms in Calcutta, and were made payable to the plaintiffs 61 days after date. The plaintiffs sent them without endorsement to their Calcutta agents S.R., with instructions to procure their acceptance, and to realise them at due date. S.R. had previously to this accepted *hundis* to the value of Rs. 12,000 drawn upon them by a branch house of the plaintiffs' firm; and the plaintiffs had at different times sent them *hundis* amounting in value to Rs. 11,400, the two *hundis*, the subject of the present suit being among the number, with instructions to realise them and apply the proceeds towards payment of the Rs. 12,000. Of the *hundis* so sent for realization, S.R. had realized Rs. 6,400, and they had paid Rs. 7,000 out of the Rs. 12,000 for which they had given their acceptances, when they stopped payment, and the plaintiffs thereupon became liable to the holders of the remaining acceptances. The two *hundis* sued upon had not then matured and remained unpaid in the hands of S.R. After the bills became due, a meeting was held at S.R.'s place of business, which a number of the creditors and neighbours of the firm attended; and in compliance with a resolution come to at that meeting, S.R.'s *gomasta* endorsed the two *hundis* over to the defendant, who undertook to hold them for the benefit of the Calcutta creditors of S.R. The plaintiffs demanded the two *hundis* from the defendant, but the latter declined to give them up on the ground that he had received them from a committee of creditors, without whose authority he

Negotiable Instruments—continued.—4.—**Hundis**—continued.

——I.—GENERAL—continued.

could not part with them. *Held* that the *hundis* having been sent to S.R. for the special purpose of enabling them to meet their acceptances for Rs. 12,000, remained the property of the plaintiffs, subject to a lien of S.R. for Rs. 600. **HAZARI MULL NAHATTA v. SOBAGH MULL DUDDHA**, 9 B.L.R. 1.

(31)—*Hundi*—Act I of 1879, s. 10 cl. (b).—A *hundi*, for a sum of Rs. 380, payable otherwise than on demand, cannot be stamped with an adhesive stamp. The words "drawn or made out of British India" in cl. (b) of s. 10 of the Stamp Act of 1879, apply to the entire clause. **DEVAJI v. RAMAKRISHNAIAH**, 2 M. 173.

(32)—*Bond — Delivery — Hundi*.—Delivery of a bond is a condition precedent of its validity; but failure of delivery may throw a claimant on other documentary evidence, such as *hundis* against which the bond was given. **SOHUN CHOWDHRY v. MADHO LALL**, 25 W.R. 527.

See ACCOUNTS—SUIT FOR ACCOUNTS, 3 N.W.P. 323.

Operation suspended until dishonor of *Hundi*—Effect on nature of instrument—See BOND, 20 B. 791.

Agreement out of Court giving time to judgment-debtor—*Hundi* given as consideration, not enforceable by decree-holder—See CIV. PRO. CODE, 1882, s. 257-A, 18 A. 435=A.W.N. 1896, 130.

See CONTRACT ACT, 1872, ss. 78, 95, 27 M. 540.

See CUSTOM, 7 B.L.R. 682=15 W.R. 501.

Transfer of forged *Hundi*—Fraudulent endorsement—See ESTOPPEL—ESTOPPEL BY CONDUCT, 5 A. 302=A.W.N. 1883, 50.

Suit on improperly stamped *hundi*—See EVIDENCE—SECONDARY EVIDENCE, 5 M. 166.

See FRAUD—EFFECT OF FRAUD, 24 C. 533.

See HINDU LAW—CONTRACT, 6 B. H.C.O. C. 24.

See JURISDICTION—CAUSES OF JURISDICTION, 1 B. 23, 22 C. 451, 5 C.L.R. 268, 7 B. L.R. 102=16 W.R. O.C. 16, 3 N.W.P. 343, 132 P.R. 1883.

See LIMITATION ACT, 1908, s. 14 and art. 80, 19 P.R. 1888.

Mere transfer of—does not amount to a loan of money unless and until money is actually realised thereon—See LIMITATION ACT, 1908, Art. 58, A.W.N. 1905, 181=2 A.L.J. 579=28 A. 54.

Son working with father in a common business signing a *hundi* on behalf of the latter, ability of—See NEGOTIABLE INSTRUMENTS ACT, 1881, s. 28, 2 S.L.R. 11.

Negotiable Instruments—continued.—4.—**Hundis**—continued.

——I.—GENERAL—concluded.

Negotiable Instruments Act—Applicability to *hundis*—See NEGOTIABLE INSTRUMENTS ACT, 1881, s. 30, 20 B. 488.

Payable at sight—Liability of drawer where holder agrees to arrangement with acceptor for payment—Notice of dishonour, omission to give—Discharge of drawer—Negotiable Instruments Act, ss. 30, 39 and 86—See NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 30, 39 and 86, 12 C.W.N. 644=8 C.L.J. 163.

Notarial protest—Evidence of dishonour—*Hundis*—Bill of Exchange—See NEGOTIABLE INSTRUMENTS, SUMMARY PROCEDURE ON, 1 Ind. Jur. N. S. 247.

Hundi—Right to sue drawer when arises—Parties to suit—See PARTIES TO SUITS—GENERAL, 3 B. 182.

See PARTIES TO SUITS—GENERAL, Agra, 268.

How far provisions of Negotiable Instruments Act applicable to *hundis* written in oriental language—Presentment of, for payment with, in reasonable time—Effect of failure—Discharge—"Reasonable time," what is—See PLEADINGS, 6 N.L.R. 33=5 Ind. Cas. 745.

Gambling debt of principal paid by agent—Right of agent to recover sums actually paid—*Hundi* drawn by principal—Consideration—See PRINCIPAL AND AGENT—GENERAL, 60 P.W.R. 1912.

Hundi—Accommodation acceptor—His liability—Surety—Contract Act, s. 128—See PRINCIPAL AND SURETY—SURETY, RIGHTS AND LIABILITIES OF, 4 C.L.R. 145.

See PRIVY COUNCIL, PRACTICE OF—COSTS, 5 W.R. 33, P.C.=1 M. I.A. 351.

Suit on—Interest—Costs—See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 25, 113 P.L.R. 1911.

See RES JUDICATA, JUDGMENTS ON PRELIMINARY POINTS, EFFECT OF, 72 P.R. 1885.

See RIGHT OF SUIT—MISCELLANEOUS, 148 P.R. 1883.

See STAMP ACT, 1879, ss. 10, 11, A.W.N. 1885, 317.

See STAMP ACT, 1879, ss. 11, 16, 19 B. 635.

See STAMP ACT, 1879, s. 34, 18 B. 369, 21 P.R. 1891.

Unstamped *hundi*—Admission on appeal—Objection in second appeal disallowed—See STAMP ACT, 1879, s. 34, cl. 3, 5 M. 220.

Adhesive stamps not properly cancelled—Inadmissible in evidence—Proof of debt *aliunde*—See STAMP ACT, 1899, ss. 12, and 35, 18 P.R. 1912.

Agreement—Unstamped *hundi*—Admissibility—See STAMP DUTY, 5 M.H.C. 391.

Negotiable Instruments—continued.—4.—**Hundis**—continued.

—II.—ACCEPTANCE OF HUNDIS.

(1)—*Acceptance of hundi, communication of, to drawer or previous holder, binding on acceptor.*—A communication of the acceptance of a hundi made to the drawer or previous holder, binds the acceptor as a communication of it to the present holder thereof, because the acceptance enures as well for their benefit as for that of the actual holder, and the primary contract is between the drawer and the acceptor. **PRAGDAS THAKURDAS v. DOWLATRAM NANURAM, 11 B. 257.**

(2)—*Hundi — Negotiation — Endorsement — Genuineness—Delivery.*—A hundi may pass at any rate prior to acceptance, by delivery without endorsement. The acceptor or drawer would not look to the genuineness of a note brought to him by a man of known respectability. **DHUNSOOK DOSS v. GOORSAYE MULL, 16 W.R. O.C. 10, Note.**

—III.—ENDORSEMENT OF HUNDIS.

(1)—*Hundi—Endorsee for collection—Endorsee failing to make collections—Remedy of endorsee.*—An endorsee of a hundi for collection who has not received the amount of the hundi, cannot be sued by the endorser for such amount; but he is bound, when he has not paid any money under it, to cancel the endorsement and redeliver the hundi to the endorser. **GYANEE RAM v. PALEE RAM, 2 N.W.P. 73.**

(2)—*Hundi, suit on — Execution denied—Endorsement admitted—Issues—Procedure of Court.*—Where plaintiff sued on a hundi as endorsee thereof from the 2nd defendant, in whose favour it was drawn by the 1st defendant, and the latter denied execution while the former admitted his endorsement and added that he so endorsed it as surety for the 1st defendant, *held* that the Court should try whether the signatures of the defendants were genuine or not, and that, if it be found that the signatures were genuine, both the defendants would be separately liable to the plaintiffs, and that their two cases must be distinguished and tried separately. **DOOLAR CHAND SAHOO v. MOHABEEN SURUN RAM, 19 W.R. 303.**

(3)—*Hundis payable to depositor.*—A hundi payable to the depositor, is payable to no receipt but that of the drawer or his endorsee; but it may become in fact, a hundi payable to bearer, provided the banker exercises due caution, and pays to a respectable person, as where the drawer and the person to whose receipt the hundi was paid are uterine brothers and members of an undivided Hindu family, the presumption arises that the latter is entitled to act for the former. **VELIET DOSS v. BUNARUSSEE ROY, W.R. 1864, 262.**

(4)—*Shahjogi hundi—Endorsement for realisation, effect of—Suit by endorsee for realisation—Forgery—Payment to wrong person—Negligence—Direct consequence—Defence available*

Negotiable Instruments—continued.—4.—**Hundis**—continued.

—III.—ENDORSEMENT OF HUNDIS—continued.

against endorsee—Not payable to bearer—Effect of endorsement for realisation—Delivery of such hundi—Title.—A hundi payable to Shahjogi (to the respectable holder) was endorsed by the drawer [“hundi sent for realisation by G (drawer) to B of Calcutta (plaintiffs),” and sent by him to the plaintiffs]. The plaintiffs banded the hundi to one S, the plaintiffs’ jemadar, who had been in the habit of taking hundis on their behalf for acceptance and payment to be taken by him to the defendant for acceptance. S took the hundi to the defendant, but subsequently, one R who had no authority from the plaintiffs to receive payment, acting on information either from S or from some other source, represented himself to the defendant as a jemadar of the plaintiffs, wrongfully obtained the hundi from the defendant, forged the plaintiffs’ signature to it and obtained payment. The defendants, before such payment, had made no enquiries as to the position or respectability of R, and paid the hundi on the faith of the forged signature. *Held*, that such endorsement coupled with the delivery of the hundi entitled the plaintiffs to sue for and receive payment of the hundi from the acceptors, though, as between the drawer and the plaintiffs, the latter were mere agents or parties with a defeasible title. Such an endorsement is in the nature of a restrictive endorsement, giving the endorsee the right to receive payment of the hundi, and, if necessary to sue the acceptor for the amount, but not to transfer his rights as endorsee to anybody else. Plaintiffs are entitled to claim the amount of the hundi from the defendants, unless they were guilty of such negligence or carelessness as would estop them from disputing the validity of the payment to R. Even if S colluded with R and fraudulently obtained payment from defendants, there was no negligence on the part of the plaintiffs in entrusting the hundi to S. Even if such an act was negligent the negligence was not so immediately conducive to the payment of the hundi as to estop the plaintiffs from saying that R had no authority from them to receive payment and that the payment had not been made to them. Any defence which would be available to the acceptor against the drawer would be available against the endorsee. A hundi payable shahjogi is only payable to the Shah (the respectable holder), and it is not equivalent to a hundi payable to bearer. (7 B. L. R. 275, R.) [F., A.W.N. 1904, 100=26 A. 493.] A Shahjogi hundi continues to be such even after an endorsement for realization. (18 B. 570, R.) *Quære*:—Whether a shahjogi hundi would not, before acceptance, pass merely by delivery to a respectable holder? **BHUPUTRAM v. HARI PRIO COACH, 5 C.W.N. 313. (7 B.L.R. 275, 7 B.L.R. 289, R.)**

Hundi executed in favour of Manager and made payable to family—Right of manager to

Negotiable Instruments—continued.

—4.—Hundis—continued.

—III.—ENDORSEMENT OF HUNDIS—concluded.

endorse *hundi*—See HINDU LAW—JOINT FAMILY, 12 Ind. Cas. 410.

Endorsement of a *hundi* to creditor in debtor's handwriting—Part payment of principal—See LIMITATION ACT, 1908, s. 20, 19 A. 308=A.W.N. 1897, 48.

—IV.—LIABILITY ON HUNDIS.

(1)—*Drawer—Acceptor and intermediate endorsers—Liability of—Decree against one—Effect—Res judicata*—The drawer, acceptor, and intermediate indorsers are all liable to the holder of a dishonoured *hundi*, but their liability is not joint where it arises out of different contracts. A decree previously obtained in a former suit against any one of them *without* satisfaction, cannot be pleaded as a bar to a subsequent suit against any other of them. ABDOR RUHMAN v. BABOO GUNESH LALL, 23 W.R. 444.

(2)—*Hundi drawn on one's own factory, delivery of, to another—Evidence of indebtedness—Drawer not entitled to claim as item of credit*.—In this suit in which plaintiff sought to have credit for a *hundi* which he gave to the defendant, it appeared that the *hundi* had been drawn on plaintiff's own factory and it was held that the drawing of a *hundi* by the plaintiff on his own factory, and the delivery of it to the defendant, though it may be evidence of the indebtedness to the amount of that *hundi*, was not an item for which the drawer of the *hundi*, i. e., the plaintiff would be entitled to credit. SHIB RAM MUNDUL v. MAKHUN LAL BISWAS, 7 W.R. 179.

(3)—*Cause of action—Acceptance of hundis for loan—Extinguishment of loan—Suit on loan, if maintainable*.—Where certain hundis were given by a borrower to the lender on account of a loan and were discounted and not deposited as security, the transaction operated as an extinguishment of the loan and the creditor could not sue on the original loan, but his remedy was by a suit to enforce payment of the hundis. RAM LAL SIRCAR v. GOPAL DOSS, 7 W.R. 154.

(4)—*Hundi endorsed for collection—Whether endorser entitled to sue upon it without a re-endorsement to him*.—Where a *Hundi* is endorsed over to an Agent for collection who has no property in the same, the endorser is entitled to sue upon it, without any re-endorsement back to him. PONNAYYA v. PALANIAPPA CHETTY AND OTHERS, 7 M.L.T. 271=5 Ind. Cas. 435. (30 M. 441, F.)

(5)—*Indorsement of hundi to arthiyas for collection—Theft of hundi before reaching destination—Right of indorser to sue drawer*.—Where the indorser of a *hundi* indorsed it to his *arthiyas* in another place for collection, and it was stolen before it reached its destination, the former was

Negotiable Instruments—continued.

—4.—Hundis—continued.

—IV.—LIABILITY ON HUNDIS—concl'd.

still the holder and was entitled to institute a suit against the drawer. GANPAT RAO GOPAL GHATATE v. TAR MOHOMED AYAB, 16 C.P.L. R. 184.

See INTEREST—SPECIAL CASES, 4 W.R. 85.

See LIMITATION ACT, 1908, art. 120, 4 W.R. 98.

—V.—NOTICE OF DISHONOUR OF HUNDIS.

See NEGOTIABLE INSTRUMENTS—HUNDIS—GENERAL.

(1)—*Hundis—Notice of dishonour*.—As regards notice of dishonor in connection with *hundi* transactions, the endorsee is bound to give the endorser notice within a reasonable time of his intention to come upon him. The question as to what is reasonable notice, must be settled by local custom, and the prejudice to a party for the want of such notice is to be taken into consideration. ANUNT RAM AGURWALLA v. R. D. NUTHAL, 21 W.R. 62. [Not F., 3 C. 339.]

(2)—*Negotiable instrument—Hundi—Hindu law merchant—Liability of indorser to holder—Notice of dishonour*.—Where a *hundi* has been dishonoured, the holder must give notice of dishonour to the indorsee in order to make him liable. A mere demand of a *peth* is not equivalent to a notice of dishonour. MEGRAJ JAGANNATH v. GOKALDAS MATHURADAS, 7 B.H.C. O.C. 137.

(3)—*Hundi—Notice of dishonor*.—Previous formal written notice of dishonor is not necessary before suit brought, unless it could be shewn that the parties charged have been prejudiced by such omission. GOBIND RAM MARWARY v. MATHOORA SABOOYA, 3 C. 339. [R., 12 C.L.R. 333.]

(4)—*Native hundis—Notice of dishonour—English rule of prompt notice by return of post, if applicable*.—The English law of prompt notice "by return of post" is inapplicable to case of native *hundis* drawn by natives upon natives, and endorsed by natives. In the case of such *hundis*, however, before holding the endorser or drawer responsible for the consideration of a *hundi* dishonoured by the drawee, some reasonable notice is essentially necessary to be given to the party who may be asked to pay. RADHA GOBIND SHAHA v. CHUNDERNATH DOSS SHAHA, 6 W.R. 301.

(5)—*Right of suit—Dishonoured hundi—Suit by endorser without re-endorsement*.—Where the plaintiff purchased from the defendant's firm a *hundi* in his favour which was payable by the firm of the defendant at Benares and sold the *hundi* to two persons to whom it was endorsed by him, and the defendant's firm at Benares having refused to accept or pay the *hundi* on presentation, it was returned to the plaintiff by the said purchasers and there was

Negotiable Instruments—continued.**—4.—Hundis - continued.****——V.—NOTICE OF DISHONOUR OF HUNDIS—concluded.**

no formal re-endorsement in favour of the plaintiff by the said purchasers, *held*, in a suit by the plaintiff against the defendant for the value paid by him, that the plaintiff had a right to sue if it was established that the *hundi* was returned to him by the purchasers. **BYJNATH SAHOO v. RACHARAM, 5 W.R. 86 = 1 Ind. Jur. N.S. 76.**

——VI.—PRESENTATION OF HUNDIS.

See **NEGOTIABLE INSTRUMENTS—HUNDIS—GENERAL.**

(1)—*Hundi payable after sight—Presentation for acceptance within reasonable time, when condition precedent to suit.*—In the case of a *hundi* or bill payable after sight, it is however a condition precedent to a right of action on the bill or *hundi*, that it must have been presented for acceptance within a reasonable time. The reason of the rule is that the longer the delay the greater the risk the drawer runs of the insolvency of the drawee. And therefore, when the drawer has had no assets in the hands of the drawee, the reason of the rule ceases to apply; and the question of presentation within reasonable time is immaterial. **NILKUND ANANTAPA v. MENSHI APURAYA, 10 B. 346.**

——VII.—MISCELLANEOUS.

(1)—*Act XIV of 1859, s. 1, cl. 16, limitation under, applicable to suit by holder of hundi against acceptor—Reg. XX of 1812, s. 5, not applicable to cases of negotiable mercantile securities.*—This suit was instituted by holder of a *hundi* against the acceptor within six years from the date of the acceptance, but more than three years from that time, and was decided by the appellate Court to be barred by limitation under the provisions of cl. 10, s. 1, Act XIV of 1859, under which a limitation of three years was provided for suits on unregistered written agreements or contracts where the law has provided means for the registration of the writings. The Judge held that the *hundi* might have been registered under Reg. XX of 1812, and that, not having been so registered, no suit could be maintained upon it after three years. The High Court, however, *held* on second appeal that the above Regulation was not applicable to hundis, or any other similar mercantile securities negotiable by usage. The three years' limitation was therefore not applicable and the present suit was therefore subject to the limitation of six years under cl. 16 of Act XIV of 1859. **BOISTUB CHURN DOSS v. PREM CHUND MITTER, 4 W.R. 98.**

(2)—*Hundi—Admission by drawer—Payment—Burden of proof.*—In a suit on a *hundi*, if the defendant, admitting the drawing of it for value received, pleads payment to another and produces the receipt endorsed on the *hundi* by that other, which both are denied by the

Negotiable Instruments—continued.**——4.—Hundis—concluded.****——VII.—MISCELLANEOUS—concluded.**

latter, the *onus* of proving the payment, and consequently of the genuineness of the receipt is still on the defendant. The possession of the *hundi*, although forming a circumstance in his favour does not by itself amount to proof of payment so as to shift the *onus probandi* from him to the plaintiff. **ABDUL KARIM v. MANJI HANSRAJ, 1 B. 295.**

Suit by one of two joint endorsees of a *hundi* for a declaration that half the consideration was payable to himself—Allegation of fraud in writing the endorsement made by the other joint endorsee—See **BURDEN OF PROOF—MISCELLANEOUS, A.W.N. 1901, 17.**

——5.—Promissory Notes.**I.—GENERAL.****II.—ASSIGNMENT.****III.—CONSIDERATION.****IV.—FORM.****V.—MISCELLANEOUS.****——I.—GENERAL.**

(1)—*Pro-note—Negotiability.*—A promissory note, not made payable to any other person than the payee, that is, not made payable to "order" or "bearer," is not a "negotiable instrument." **KANHAIYA LAL v. DOMINGO, 1 A. 732.**

(2)—*Pre-existing debt—Consideration.*—A pre-existing debt affords a consideration for a promise to pay it, whether that promise be made in the form of a promissory note or not. **NIRMAL CHAND v. MOHAN LAL, A. W. N. 1885, 213.**

(3)—*Hindu Law—Promissory note—Interest—Consideration—Act XXVIII of 1855.—Per Peacock, C. J.*—By Hindu Law, the maker of a promissory note may show that there was no consideration for it and that on a note for Rs. 1,200 "for value received in cash," no larger sum than that actually received (Rs. 700) can be recovered; and *quære*—whether by Hindu law a promissory note necessarily imports consideration at all? *Quære* (*Per Peacock, C.J.*):—Whether by Hindu Law it is legal to contract for interest at the rate of Rs. 500, for the loan of Rs. 700 for one month. *Quære*, also, whether Act XXVIII of 1855 affects or repeals the Hindu Law as to interest? **RAM LAL MOOKERJEE v. HARAN CHANDRA DHAR, 3 B. L. R. O. C. 130 = 12 W. R. O. C. 9. [Diss., 14 W. R. 308; Appr., 6 N.W.P. 358, F.B.; R., 7 B. H. C. O. C., 19. 9 B.H.C. 83, 3 B. 312, 5 C. 867 = 7 C. L. R. 204; D., 9 C. 825 = 12 C.L.R. 400, 14 C. 781.]**

(4)—*Construction—Promissory note, test of—Document containing an unconditional undertaking to pay and described as a pro-note, is a promissory note.*—Where a document begins by saying that it is a promissory note, and where

Negotiable Instruments—continued.—5.—**Promissory Notes**—continued.——I.—**GENERAL**—continued.

its executant agreed thereby to pay on demand a sum of Rs. 600 for the price of cloths purchased by him from the promisee, *held*, the document is a promissory note. In order to be a promissory note, the instrument must contain in words an unconditional undertaking to pay a sum of money. A mere acknowledgment of receipt of money or of indebtedness, and an admission that the executant was accountable to the other party, will not constitute the document a promissory note. **KARUTHAPPA ROWTHAN v. BAOA MOIDEEN SAHIB**, 2 M.W. N. 1911, 380 = 10 M.L.T. 531. (22 B. 986, R.)

(5)—*Acknowledgment—Stamp*.—An acknowledgment containing an express promise to pay the principal with interest on demand, amounts, to a promissory note and should be stamped as such. **MATHURBHAIR v. DALPAT**, 3 Bom. L.R. 839.

(6)—*Act XXXVI of 1860, sch. A, cl. 4—Instrument in the nature of promissory note—Amount of stamp duty payable*.—An instrument contained the following:—"We bind ourselves to pay with interest to . . . the sum of rupees . . . being the balance of dealings held with your firm and the amount received this day from you in cash on account of stamp." *Held* that the instrument, though not a bond or hundi, was in the nature of a promissory note and came within the description in cl. 4, Sch. A, Act XXXVI of 1860. **HUTUMAN SAHIB v. HUSAIN SAHIB**, 1 M.H.C.R. 152.

(7)—*Promissory note not negotiable—Assignment by separate document—Right of assignee to sue upon the note*.—A non-negotiable promissory note may be assigned by means of a separate document; an endorsement in writing on the note itself is not necessary for the validity of an assignment. The assignee can maintain a suit on the note. A debtor executed a document in favour of the creditor promising to re-pay the amount borrowed to the latter on demand three months after date. There was no provision in the document for payment to the order of the creditor. *Held* that the instrument was a non-negotiable promissory note. **SUGAPPA v. GOVINDAPPA**, 12 M.L.J. 351.

(8)—*Deposit of title-deeds—Collateral security—Promissory note*.—An instrument which runs thus, "On deposit of title-deeds I promise to pay you or order Rs. 160 for value received" is a negotiable instrument. Deposit of title-deeds as a collateral security does not make a promissory note the less a negotiable instrument. **RAMCHANDRA ROW v. SESA AIYANGAR**, 3 M.L.J. 225. (4 Ad. & E., 790, F.)

(9)—*Negotiable Instruments Act (XXVI of 1881), s. 4—Promissory note—Unconditional promise to pay—Specified person—Intention to make promissory-note not necessary*.—Where a document executed by one person to another contains an unconditional promise to pay a certain sum of money to the latter, who is

Negotiable Instruments—continued.—5.—**Promissory Notes**—continued.——I.—**GENERAL**—continued.

sufficiently indicated, the document is a promissory-note, and it is not necessary to show that the maker of the document intended to make a promissory-note. **PARAMASIVAM v. SANKARAYA**, 8 Ind. Cas. 352.

(10)—*Pro-note, liability on—Description of maker in the body of pro-note as manager of temple—Personal liability*.—Where the maker of a pro-note described himself in the body of the document as the honorary manager of a temple: *Held*, that this did not affect his personal liability to pay. **AIYATHURAI AIYAR v. DHARMA SIVA IYER**, 8 Ind. Cas. 843 = 9 M.L.T. 205.

(11)—*Negotiable instrument—Pleading of own fraud*.—*Held*, under the circumstances reported, that blank printed forms of an "on demand" promissory note in the Tamil characters, on the face of which certain Chinese characters had been inscribed, should be read as if such characters filled up the blanks in the printed form; that, if the executor was acting honestly, it must have been his intention to make a promissory note, but that, if such was not his intention, then, he acted fraudulently and is barred from pleading his own fraud. **V.K.K.C. KOTIYAN CHETTY v. AUNG YIN**, L.B.R. 1893—1900, 395.

(12)—*Pro-note—What*.—A document containing a promise to pay money and paddy is not a promissory note for the purpose of the General Stamp Act, 1869, s. 28. **MUTHU v. MUTHAN**, 4 M. 296, F.B.

(13)—*Document containing request to borrow on certain conditions—Promissory Note—Proposal—Contract Act (IX of 1872), s. 4—Stamp duty*.—Where a document contains a request to borrow a certain sum of money on certain conditions, it is not an unconditional undertaking to pay, but constitutes only a proposal under s. 4 of the Indian Contract Act (IX of 1872). Not being a promissory note, it is not liable to stamp duty. **DHONDBHAT NARHAR BHAT v. V. ATMARAM MORESHWAR**, 13 B. 669. [E., 7 M.L.T. 220 = 23 M. 156, 14 M.L.J. 65 = 27 M. 1; D., 16 M. 283.]

(14)—*Promise to pay, essential to constitute promissory note—Implied promise not sufficient*.—Suit to recover money as due under a document, styled a 'khata,' (an account) and stamped with a one-anna stamp. The lower Court was of opinion that the document was a pro-note and refused to admit it because of insufficiency of stamp. The High Court, however, held that, as the document in question did not contain any express promise to pay, it could not be treated as a promissory note but simply as an acknowledgment of liability and was therefore, as such sufficiently stamped with a one-anna stamp. **GOVIND v. BALWANT RAO**, 22 B. 986.

(15)—*Promissory note—Adjustment of previous disputes*.—Where a promissory note is

Negotiable Instruments—continued.—5.—**Promissory Notes**—continued.

——I.—GENERAL—continued

executed by a person to another in adjustment of disputes, and it is found that there were no disputes at the time of the execution of the note, but that the disputes referred to in the note were long before settled by a decree of Court and there was no "*res dubia*" or "*lis incerta*," the note cannot be said to be supported by consideration. **NAMASIVAYA GAUNDAN v. KYLASA GAUNDAN**, 7 M H.C. 200.

(16)—*Promissory note unenforceable, being inequitable.*—Where the pro note contained a false statement as to the consideration, which was far less than the amount expressed therein, interest at a certain rate from the date of the note up to the due date having been deducted by the lender from the sum lent, the defaulting interest being exorbitant, and there being nothing to show that the borrower understood the real nature of the transaction, *held* the note was not one that could be enforced in a Court of Equity. **MACKINTOSH v. HUNT**, 2 C. 202. [D., 4 C. 137=2 C L.R. 433.]

(17)—*Promissory note, assignment of—Negotiable Instruments Act—Endorsement, not the only means of transfer.*—A promissory note may be assigned by the holder just like any other chose in action, and there is no reason why in India an assignee of this particular sort of chose in action should not enjoy the rights which attach to the assignee of a debt and be allowed to sue in his own name. There is nothing in the Negotiable Instruments Act to exclude any other mode of transfer than by endorsement. **RAMACHANDRA RAO v. KUPPUSAMI AIYAR**, 8 M L.J. 262.

(18)—*Negotiable Pro-note, suit on—Chose in action, assignment of—Must be in writing—Transfer of Property Act, ss. 130 and 137.*—In a suit by the plaintiff on a negotiable pro-note, executed in favour of the managing member of his family, it was *held*, (1) that, if the suit was regarded as one of the pronote, the suit must fail, as there was no endorsement in plaintiff's favour (30 M. 88, F) and (2) if the suit be regarded as one by the assignee of the chose in action, then the assignment must be in writing as required by s. 130 of the Transfer of Property Act. (24 M. 654, R.) In the latter case, he could not be regarded as suing on a negotiable instrument, and, therefore, would not come within the exceptions in s. 137 of the Transfer of Property Act. **ARUNACHALA REDDI v. SUBBA REDDI**, 17 M.L.J. 393=3 M.L.T. 7. [Doubted, 8 M.L.T. 449=8 Ind. Cas. 33.]

(19)—*Promissory-note—Transfer of ownership—Want of endorsement—Purchaser in Court auction—Right of purchaser to sue—Vesting order—Civ. Pro. Code (Act V of 1908), O. XXI, rr. 80 and 81.*—In order to effect a transfer of ownership of a negotiable instrument, an endorsement is not in general required by law. A purchaser of a promissory note in Court auction,

Negotiable Instruments—continued.—5.—**Promissory Notes**—continued.

——I.—GENERAL—continued.

who obtained a vesting order before date of his decree, is entitled to a decree in suit on the promissory note, even though there was no endorsement on it. **KUTHALALINGAM PILLAY v. PACKIYAM FERNANDEZ**, 8 Ind. Cas. 17=8 M.L.T. 448. (6 B. 139, R.)

(20)—*Promissory note—Negotiable instrument—Transfer without consideration—Burden of proof—Claim against the estate of the deceased—Uncorroborated evidence of plaintiff.*—The Negotiable Instruments Act applies to Government Promissory Notes. The onus is in the first place on the transferor of a Government security to establish that the transfer of the Promissory Note by him in favour of another was without consideration. When a claim is put forward against the estate of a deceased, the evidence of the plaintiff, though uncorroborated, may be acted upon, but such evidence must be carefully tested and scrutinised. **HIRA LAL CHATTERJEE v. RAJKUMAR MOOKERJEE**, 12 C.L.J. 470=8 Ind. Cas. 796.

(21)—*Negotiable Instruments Act—Payee—Description as agent.*—The description in a promissory note of the payee as agent of another denotes the character in which the note was executed. **VEERAIYAN CHETTIAR v. PONNUSAMI CHETTIAR**, 2 M.W.N. 1911, 340=10 M.L.T. 328. (28 M. 544, Expl.)

(22)—*Extent of agent's authority.*—Where promissory notes made by an agent, acting for himself and for his principal, were secured by the deposit of title deeds of property, belonging to the principal, in the hands of the Bank, which discounted the notes, and the latter were paid at maturity by an endorser, *held*, that the endorser was entitled to a transfer of the deeds to him as security without further assent from the owner on the ground that, as a fact, the agent, acting within the principal's authority had agreed that, in consideration of his paying the amount of the notes to the holder, he should have this security, the Bank assenting. **AGA AHMED ISPAHANI v. JUDITH EMMA CRISP**, 19 C. 242, P.C.=19 I.A. 24=6 Sar. 109.

(23)—*Endorsement on—Intention to effect a transfer.*—When the direction to pay is endorsed upon an instrument, which is not negotiable under s. 13 of the Negotiable Instruments Act, so that both are handed over together to the endorsee, the intention to effect a transfer must be inferred, and the endorsement operates as a valid equitable assignment. **RAMA IYEN v. VENKATACHELLAM PATTAR**, 1 M.L.T. 329=16 M.L.J. 554=30 M. 75. [F., 1 Ind. Cas. 212.]

(24)—*Suit by person other than a payee of a promissory note—Payee being made defendant in the suit, effect of.*—Under the Negotiable Instruments Act, the only person entitled to sue, on a promissory note, is the payee, or the holder. Any person, other than the payee, has

*Negotiable Instruments—continued.**—5.—Promissory Notes—continued.**——I.—GENERAL—continued.*

no right of suit thereon, whether the same is negotiable or not. The fact that the payee named in the note is made one of the defendants in the suit does not alter the principle. *SUBRAMANYA TEVAN v. ARUNACHALA TEVAN*, 18 M.L.J. 186. (28 M. 205, 30 M. 88, F.) [F., 5 M.L.T. 210.]

(25)—*Payable to order—Indorsement and delivery for collection—Rights of holder—Ss. 8, 46, 50, 78, Negotiable Instruments Act.*—In this case a pro note was drawn by R in favour of K. K indorsed it, handed it over to V for collection and then died. V sued R on the note. It was argued on behalf of R that, as the note did not pass for consideration and as V's authority ceased on the death of K, he could not recover the money without a letter of administration or a succession certificate. *Held*, that, by K's indorsement and delivery to V, the property in the note passed to V under ss. 46 and 50 of the Act, and he became the holder of it, and that by s. 78 payment had to be made to him, and that he therefore had the right to sue for the same. *RAMZAN ALI v. VELLASAWMI PILLE*, 5 L.B.R. 198.

(26)—*Death of drawee without endorsing the note in favour of any one—Right of members of Tarwad to sue upon—Negotiable Instruments Act, s. 6.*—A pro-note was executed in favour of X, a member of the Tarwad, who died without endorsing the note in favour of any one. A suit was then brought on it by the members of the Tarwad, on the ground that the money advanced on the note was the money of the Tarwad, and not of X. *Held*, if X were alive, she alone could have sued on the note, and her death cannot give the plaintiffs who were not suing as representatives of X, the right which they had not in her life time. *NEELU AMMAH v. KRISHNA PANIKAR*, 8 M.L.T. 85.

(27)—*Absence of consideration for the making of the note—Rights of a bona fide holder in due course for consideration and without notice of want of consideration.*—Notwithstanding the fact that a promissory note was executed without consideration, a bona fide holder in due course for consideration, and without notice of any want of consideration for the making of the note, is entitled to a decree on the note. *SANTHANA GOPAULASAWMI ODAYAR v. SUNDARASAWMY ODAYAR*, 1 M.L.T. 393.

(28)—*Promissory note—Allocation in partition—Want of endorsement—Right of person to whose share it falls to sue—Transfer of Property Act (IV of 1882), ss. 130, 137—Instruments negotiable by custom—Assignment in writing—Partition list.*—A member of a Hindu co-parcenary, to whose share, on partition, a promissory note executed in favour of the manager of the family, was allotted, can sue on the promissory note, even though there was no endorsement on it. S. 130 of the Transfer of Property Act

*Negotiable Instruments—continued.**—5.—Promissory Notes—continued.**——I.—GENERAL—continued.*

has no application to the case, as the instrument was, by custom, negotiable. Even if an assignment in writing was necessary to create a right of suit, the partition list in the case was sufficient to satisfy the requirements of s. 130 of the Transfer of Property Act. *CHANDANA v. MAJATI*, 8 Ind. Cas. 33=8 M.L.T. 449.

(29)—*Collateral agreement not to sue for a time—Such covenant by distinct letter no bar to suit on the note within the time*—On N executing to W the promissory note sued on, the latter handed over a letter to the former agreeing not to sue for the money due under the pro-note except on the fulfilment of the conditions or the happening of the contingencies specified in the letter. Admittedly, when they were entering into the above arrangement, W did not consent to what was stated in the letter finding a place in the pro note itself. *Held*, N having consented to the agreement being effected by two distinct instruments, it cannot possibly be taken that the intention of the parties was otherwise than to keep the two documents as evidence of two separate contracts, the letter operating only as a collateral covenant not to sue on the pro-note until a specified time. Such a distinct covenant cannot be pleaded in bar to an action on the pro-note or can it suspend the right of action on the same even until the time specified in the letter. *SOMASUNDARAM CHETTIAR v. NARASIMHACHARIAR*, 16 M.L.J. 103=29 M. 212.

(30)—*Promissory note payable to order—Discounted with a bank—Bank returning the note to maker, it not being paid—Subsequent endorsement in blank and delivery to another without striking out first endorsement—Delivery again to plaintiff to enable him to sue upon it—Whether plaintiff was holder in due course—S. 50, Negotiable Instruments Act, 1881.*—A promissory note was given by the defendant to P.S., in connection with some partnership transactions between them, on those transactions being brought to an end. P.S. discounted the note with the Bank of Bengal; when it was not paid, the Bank returned the note to him. He subsequently handed the note to one C.J. to whom he owed money, and wrote his second signature on the back of the note. C.J., handed it to his clerk, the plaintiff, in order that the latter may file a suit on it. In a suit by the plaintiff against the defendant to recover the amount. *Held* that the plaintiff was not a holder in due course of the note and did not become the possessor of it for consideration; the legal title to it was in the Bank of Bengal, since the endorsement to it was an endorsement in full, and there was no endorsement by it to any one else in full or in blank. *Held*, also, that the plaintiff had no right at all to sue upon it, as he did not prove his title to it either (1) by negotiation, for the note was payable to order and was indorsed to order, and that endorsement was not struck out; a note in such

Negotiable Instruments—continued.

—5.—Promissory Notes—continued.

——I.—GENERAL—continued.

condition could only be negotiated by indorsement and delivery by the last indorsee to order. The title by negotiation must be taken to be that shown by what was on the back of the note, and the Bank of Bengal, not having endorsed it, either in full or in blank, the title by negotiation stopped with it, or (2) by assignment, for C. J. handed the note to the plaintiff to enable him to file suit on it and the plaintiff said that he simply filed the case under the instructions of C. J. The note having been discounted with the bank and the indorsement not containing express words restricting or excluding the right of further negotiation, the indorsement was not for collection, as contended. (28 M. 544. R. & Disc.). In order that a right of further negotiation may be restricted or excluded in respect of a promissory note, s. 50 of the Negotiable Instruments Act, 1881, requires that an indorsement must contain express words to that effect. *BABU GORIDUT BOGLA v. EBRAHIM (SOLAIMAN) ESOOF DOOPLEY*, 14 Bur. L. R. 25.

(31)—*Lottery Act V of 1844—Act XXI of 1848—Act V of 1866—Pro-note—Consideration—Plaint—Written statement—Principal and agent.*—In a suit under Act V of 1866, on a promissory note part of the consideration for which was legal and part illegal, held, (*per Couch, C. J.*), that plaintiff could not sue on the note, but that he might amend his plaint, and recover so much of the consideration as was not illegal. The agreeing not to enforce a contract which is void for illegality is an illegal consideration, and the contract is void. Held by *Markby, J.*, that the note was good, inasmuch as the promise contained in it did not spring from, nor was it the creature of, the original illegal agreement, but was a separate agreement. An agent who has sold goods for his principal, and received the price is bound to pay it over to his principal, although the contract of sale is illegal and void. *JOSEPH v. SOLANO*, 9 B. L. R. 441 = 18 W. R. 424. [F., 2 C. 1 = 25 W. R. 425, 22 C. 692, 25 W. R. 425; Appr., 12 B. 422; R., 20 W. R. 6, 18 B. 144.]

(32)—*Negotiable instrument—Pro-note—Subsequent agreement by payee not to sue—Maker whether entitled to set up such agreement—Bar of suit.*—The maker of a pro-note is at liberty to plead that the payee is debarred by a subsequent written agreement from suing on it, until he does a certain thing. *SHAIKH IMAM v. ISHAK ALI*, 7 N. L. R. 39. (29 M. 212, D.)

(33)—*Act IX of 1850, s. 24, Act VIII of 1859, s. 7—Promissory note payable by instalments—Cause of action.*—Where a promissory note is payable by monthly instalments, it is incumbent on the plaintiff, when two or more instalments are due at the time he brings his suit, to sue for them in one action, and he is not at liberty to sue separately for each instalment or for some of them. The plaintiff in this

Negotiable Instruments—continued.

—5.—Promissory Notes—continued.

——I.—GENERAL—continued.

action sued to recover the fifth instalment due on a promissory note; but it appeared that he had, on the 4th October, 1872, sued and recovered a judgment for the fourth instalment only, when he could have sued for the entire amount of the bond which had then fallen due. Held that the judgment which plaintiff recovered on the 4th of October was a bar to the present suit. *MACKINTOSH v. GILL*, 12 B. L. R. 37 = 20 W. R. 358. [F., 8 Bom. L. R. 547, 12 C. 339.]

(34)—*Note payable to bearer on demand—Right to recover—S. 24, Paper Currency Act (1905).*—Where the amount mentioned in the note is by its terms payable to the bearer of it on demand, the note infringes the provisions of s. 24 of the Indian Paper Currency Act of 1905, and it is a contract forbidden by law and consequently the payee could not recover on it. *MAUNG PO THAV. L. D. ATTAIDES*, 5 L. B. R. 191 = 8 Ind. Cas. 962.

(35)—*Negotiable security, when a conditional payment of a debt—When debtor can be sued as though he gave no security.*—The title of a creditor to a bill given on account of a pre-existing debt, and payable at a future day, does not rest on the implied agreement to suspend his remedies. A negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realized. The doctrine is as applicable to one species of negotiable security as to another; to a cheque payable on demand, as to a running bill or a promissory note payable to order to bearer, whether it be the note of a country bank, which circulates as money, or the note of the debtor or of any other person. The security is offered to the creditor and taken by him as money's worth. Until it is proved unproductive, the creditor ought not to be allowed to treat it as a nullity and to sue the debtor as if he had given no security. *EBRAHIM BYMEAH ISMAILJEE v. CHAS COWIE & CO.*, 5 L. B. R. 199 = 8 Ind. Cas. 967.

(36)—*Negotiable instrument—Promissory note executed in the name of benamidar—Suit by real owner against executant and benamidar—Decree against the former—Appeal by the former—Neither appeal nor memo of objection by real owner—Suit dismissed—Legality.*—A executed a promissory note in favour of B who was benamidar for C. C as real owner brought a suit on the pro-note against A and against B who admittedly had received the money. The Munsiff passed a decree against A alone. On appeal by A, the District Judge dismissed the suit. C preferred neither an appeal nor a memo of objections, nor did he ask the Judge to pass a decree against B. Held, on second appeal the suit was rightly dismissed as against both A and B. No case has been cited in which it has been held that the Judge was wrong in

Negotiable Instruments—continued.**—5.—Promissory Notes—continued.****——I.—GENERAL—continued.**

not passing a decree not asked for at all in any manner. *ASUNDI BASANVA v. BAREDDI GOVINDAPPA*, 7 M.L.T. 178=20 M.L.J. 369=5 Ind. Cas. 927.

(37)—*Civ. Pro. Code (Act V of 1908), O. XXXVII—Suit on pro-note—Evidence Act (I of 1872), s. 92—Unconditional agreement—Evidence to vary terms—Object of pro-note.*—In a suit on a promissory-note under Civ. Pro. Code, O. XXXVII, the defendant admitted execution but contended that the note formed part of an account and mutual dealings between him and the plaintiff and other partners: *Held*, that, the contract embodied in the note being an unconditional agreement by the defendant personally and individually to pay to the plaintiff personally and individually, and the genuineness of the note being admitted, it was not open to him to contradict or vary its terms by showing that the contract sued on was a conditional agreement: *Held*, further, that, in summary suits governed by O. XXXVII, Civ. Pro. Code, it was impossible for the Court to go into the partnership account, when all the partners are not impleaded and the accounts have no relevancy to the issues in the case. The object of a pro-note is to show that the particular transaction represented by the note is a separate transaction, and it is intended that the remedies in respect of that transaction, should be separately pursued. *KISHOMAL KIRPOMAL v. VISHINDAS SUKRAMDAS*, 9 Ind. Cas. 299. (30 C. 627, F.)

(38)—*Suit for money lent independent of pro-note—Liability of other partners on a pronote signed by one of the partners.*—Where money is advanced in consideration of a promissory note, a suit for money lent, independently of the note, is not maintainable, if there is no evidence of any intention to create a liability otherwise than under the note. Where a partner of a firm executed a promissory note in consideration of an advance made on account of the joint trade, the other partner who had not signed the note was held not liable, as the promissory note did not purport to have been signed by the partner as partner or on behalf of the firm. *SOMASUNDARAM v. KRISHNAMURTHI*, 17 M.L.J. 126. (7 C. 256 and 10 M. 94, F.; see also 15 M.L.J. 84=29 M. 111 and 28 A. 298.) [F., 9 M.L.T. 120=8 Ind. Cas. 851.]

(39)—*Execution of promissory note not proved—Decree for the sum lent when loan admitted—Onus of payment when defendant admits execution—Cause of action—Suit for money lent.*—A certain sum of money was due to the plaintiff's father from one T, under a mortgage and some decrees for arrears of rent. The defendants settled the amount, on behalf of T with the plaintiff's father, by paying him something in cash and executing a promissory note for Rs. 500, in his favour. The plaintiff sued the defendants for the recovery of money due

Negotiable Instruments—continued.**—5.—Promissory Notes—continued.****——I.—GENERAL—continued.**

on the promissory note. The defendants admitted the execution of a promissory note for Rs. 500 on the same date and in terms identical with the promissory notes set up by the plaintiff but pleaded that the debt had been discharged and the promissory note had been returned to them duly endorsed with a receipt written by plaintiff's father. They, however, denied the genuineness of the promissory note filed with the plaint. The lower Courts found that the endorsement on the back of the promissory note set up by the defendants and the fact of the payment were not proved. *Held*, that the promissory note was the sole cause of action in the suit and the plaintiff had not sued and could not sue on the ground of defendants' liability independently of the promissory note set up by the plaintiff and, having failed to prove the payment, the onus of which lay on them, the plaintiff was entitled to a decree. *SYED HUSAIN v. BABU DURGA CHARAN*, 9 O.C. 315. (23 C. 851, 6 O.C. 16, 5 C.W.N. 56, 7 C. 256, 26 A. 178, R.)

(40)—*Construction of word "than" in—Loan and execution of pro-note contemporaneous—Pro-note unstamped—Suit on original consideration—Maintainability.*—In this case, the promise to pay was to one L, described in the 3rd person by the word “தான்” (than). *Held* that the word was used in the sense of ‘you.’ Where the loan and the execution of the pro-note are contemporaneous and constitute one transaction a suit based on the original consideration would not be maintainable. *CHINNAPPA PILLAI v. MUTHURAMAN CHETTIAR*, 9 M.L.T. 281. (10 M. 94, F.)

(41)—*Promissory note—Material alteration—Signed by some of the apparent makers at different places and times.*—A promissory note ran as follows: “We the undersigned jointly and severally promise to pay, etc.” *Held* that any body, who signed beneath the signatures of the original makers, would, on the face of the note, appear to be also a maker, and such signature would be a material alteration which would render the note void if made without the consent of the parties to the note at the time the alteration was made, unless it was made in order to carry out the common intention of the parties, and that it would make no difference if one of the makers signed it at another time and place. *MA SEIN v. U. V. C. T. CHIDAMBARAM CHETTY*, 9 Ind. Cas. 463. (1 L.B.R. 255, R.)

(42)—*Signing of—Execution—Proof of.*—If for any reason a promissory note is excluded, the person suing on the note is entitled to succeed on proof of the original consideration, unless it appeared that the case is of the exceptional kind where the promissory note is itself the original cause of action (U.B.R. 1892—1896, Vol. II, 303, 462, R.). A man may sign a promissory note by getting some one else to write his name for him. *NGA MYAT THIN v.*

Negotiable Instruments—continued.**—5.—Promissory Notes—continued.****——I.—GENERAL—continued.**

NGA MYE, U.B.R. 1907 (Execution signing), 1. (U.B.R. 1897—1901, Vol. II, 391, R.) [Agreed, U.B.R. 1907, 4th Qr., Execution—Signing, 5.]

(43)—*Promissory note—Decree for money lent on promissory note when its execution not proved—Suit for money lent on promissory note.*—If a plaintiff alleges in his plaint that he lent money to the defendant, for which the defendant executed a promissory note, a decree may be passed for the amount which is proved to have been lent, even if the execution of the promissory note is not proved. Such a suit is not based on the execution of a promissory note, but primarily on the loan of which the promissory note is alleged to be evidence. BACHU LAL v. KANDHAI LAL, 6 O.C. 16. [Rel., 9 O.C. 315.]

(44)—*Debt—Forged pro-note—Suit for recovery of debt.*—Where the suit is one brought by the plaintiffs for a sum of money which, according to the plaint allegations, the defendant borrowed from them, on executing a promissory note in favour of one of the plaintiffs, held that, even if the promissory note be a forgery, the plaintiffs are entitled to a decree for the amount so borrowed, if they could prove the loan by independent evidence. MOTI LAL SAHA v. MONMOHAN GOSSAMI, 5 C.W.N. 56, (23 C. 851, F.) [Rel. on., 6 O.C. 17; R., 9 O.C. 315; D., 3 C.L.J. 363=10 C.W.N. 788=33 C. 812.]

(45)—*Act V of 1866.—Pro-note payable in instalments with a proviso that, in case of default of any instalment, the whole amount would be recoverable. Suit can't be brought under Act on default of any instalment.* REM-FRY v. SHIMINGFORD, 1 C. 130. [R., 30 C. 446=7 C.W.N. 412.]

(46)—*Act I of 1872, ss. 22, 65, 91—Suit on promissory note—Note inadmissible for want of stamp—Admissibility of other evidence.*—Where money is lent on conditions contained in a promissory note executed and given at the time of the loan, and such note is inadmissible in evidence, being insufficiently stamped, the payee is not entitled to set up a case independent of the note. The suit has therefore to be dismissed. PARSOTAM NARAIN v. TALEY SINGH, 26 A. 178=A.W.N. 1903, 178. (7 C. 256, 8 C. 721, F.; 23 C. 851, 4 A. 135, R.) [F., U.B.R. 1907, 3rd Qr., Evidence p. 5; R., 2 Ind. Cas. 516=7 A. L.J. 71; D., 9 O.C. 315.]

(47)—*Promissory note not duly stamped—Stamp penalty not receivable—Suit on note.*—Where a promissory note upon a one anna stamp dated August 1870 provided for the repayment of the amount mentioned in it on or before the 12th July 1871, held in a suit upon the promissory note that it was not receivable in evidence upon payment of the penalty. OHINNA PERUMAL NAICKER v. ANNAMMAL, 7 M.H.C. 361.

Negotiable Instruments—continued.**—5.—Promissory Notes—continued.****——I.—GENERAL—continued.**

(48)—*Cause of action.*—The whole cause of action is an action on a promissory note, when the note was made payable to A who resided in Calcutta and was executed and delivered to him in Calcutta, arose in Calcutta. RAMGOPAL LAL v. RICHARD BALQUIERE, 1 B.L.R. O.C. 35.

(49)—*Act XVI of 1864, s. 16—Act XIV of 1859, s. 1, cl. 10—Promissory note, suit on—Limitation.*—Cl. 10 of s. 1 of the Limitation Act, XIV of 1859, which makes three years the period of limitation for suits brought on certain contracts or obligations "which might have been registered" would apply to a promissory note as an instrument which might have been registered under s. 16 of Act XVI of 1864. PYARI CHAND MITTER v. FRAZER, 6 B.L.R. App. 40=14 W.R. O.C. 51.

(50)—*Negotiable Instrument Act, s. 118—Promissory note—Consideration not proved—Presumption as to consideration—Revision.*—When the parties went into evidence, and the Court discredited the evidence as to the payment of consideration for a promissory note, held, that, in revision, it is not open to rely upon the presumption as regards consideration for a promissory note under s. 118, Negotiable Instruments Act. In re KANNUSAMI PILLAI, 8 M.L.T. 463.

(51)—*Oral contract of guarantee—Contradictory pleadings.*—Plaintiff, the holder of a pro-note, sought to make the defendant, who had not signed it, liable on one of two grounds—one ground being that, at the time when the ostensible maker gave the note, the defendant entered into an oral agreement that he would pay, if the maker failed to pay the amount due under the note; the other being that the maker signed it as the agent of the defendant. Held that the defendant could not be both principal and surety, and that the maxim "*allegans contraria non est audiendus*" applies to such a case. SUBRAMANI CHETTY v. FAKIR KAKA, L.B.R. 1872—1892, 657.

(52)—*Promissory note—Plea of partial discharge—Onus of proof.*—Where a party pleads partial discharge of the promissory note sued upon, the onus is upon him to prove such discharge. VENNAM PITCHAYYA v. GOGI-NENNI RAMAKRISHNAYYA, 9 M.L.T. 314.

(53)—*Promissory note taken from debtor—Discharge of debt.*—Where a pro-note is taken by the creditor from his debtor, there is no discharge of the debt. MADRAS CONSOLIDATED SUGAR AND SPIRIT FACTORIES LTD. v. WILLIAM SISSMORE SHAW, 14 M.L.J. 443.

(54)—*Theft of negotiable instrument—Title of subsequent holder compared with that of the last holder.*—When an instrument, such as a Government pro-note, has been stolen, the person, from whom it was stolen, has a good title to it, not only as against the thief, but as

Negotiable Instruments—continued.**—5.—Promissory Notes—continued.****——I.—GENERAL—continued.**

against any person who subsequently becomes the holder, unless such person can prove that the instrument had become negotiable at the time it was stolen, and that he obtained it *bona fide* for value without notice of the theft. **THE BANK OF BENGAL v. MENDES, 5 C. 654 = 5 C.L.R. 586.**

(55)—*Promissory note—Parties Hindus—Reckoning of period of payment.*—Where the parties to a pro-note were Hindus, the presumption was that they intended to reckon the period of payment according to the Hindu era, and this presumption was not rebutted by the fact that the English as well as the Native date appeared in the document. **BABAJI bin LAKSHMAN v. MARUTI bin RAGHOJI, 7 B.H. C.A.C. 77.**

(56)—*Promissory note—Endorsee for collection—Endorsee if entitled to sue in his own name—Fraud and misrepresentation—Mistake.*—An endorsee for collection of a promissory note is entitled to maintain a suit in his own name to recover the amount due on the note; but he could not deprive the defendant of any defence which he would have been entitled to set up if the action had been brought by the original payee. The defendant would also be at liberty to prove that he had been induced to give a note for a larger sum than was really due, by fraud or misrepresentation on the part of the original payee, though he could not succeed merely upon proof that he was under a mistake as to the amount really due. **T. BRADLEY v. C. S. KIRKPATRICK, 39 P.R. 1880.**

For pleader's fees—Omission to file in Court, effect of—**See ACT XVIII OF 1879, ss. 28, 29, 14 M. 63.**

Accepted by plaintiff in full settlement of his claims against defendant under an indent which contained an arbitration clause—Suit on pro-note dismissed for insufficient stamp—Effect—**See ARBITRATION—MISCELLANEOUS, 9 Ind. Cas. 896.**

Suit on—**See CIV. PRO. CODE, 1908, O. XX, r. 11, 1 L.B.R. 81.**

Khata—How far a Khata amounts to a promissory note—**See CONTRACT ACT, 1872, s. 25, 8 Bom. L.R. 644.**

Debt borrowed by two persons, one major and the other minor—Pro-note executed by minor—Liability of major debtor—Oral contract independently of—**See CONTRACT ACT, 1872, s. 43, 3 Ind. Cas. 403.**

Suit on several pro-notes in favour of same payee—Court-fee—**See COURT FEES ACT, 1870, s. 17, 5 L.B.R. 94, F.B.**

Promissory note—No mention of interest—Subsequent oral agreement to pay interest—**See EVIDENCE—PAROL EVIDENCE, 12 C.L.R. 163.**

Negotiable Instruments—continued.**—5.—Promissory Notes—continued.****——I.—GENERAL—concluded.**

See EVIDENCE—SECONDARY EVIDENCE, 12 B. 443.

See EVIDENCE ACT, 1872, s. 91, U.B.R. 1897—1901, Vol. II, 390, U.B.R. 1897—1901, Vol. II, 391.

Passed by guardian, but not signed as such—Liability of guardian or minor—**See GUARDIAN—MISCELLANEOUS, 2 Ind. Cas. 403.**

See LIMITATION ACT, 1908, art. 120, 6 M. 290.

Attainment of majority and execution of pro-note between application for certificate of administration and issue of certificate—Liability on note—**See MINOR—CONTRACTS BY MINORS, 8 C. 714 = 10 C.L.R. 533.**

See PARTNERSHIP—RIGHTS AND LIABILITIES OF PARTNERS, 62 P. R. 1873.

Summary suit on promissory note—Power to extend time for defendant to apply for leave to defend—**See PRACTICE AND PROCEDURE, 3 C. 539.**

Incomplete gift of Government—Suits by executor of donor to recover notes—Jurisdiction—**See SMALL CAUSE COURTS. PRESIDENCY TOWNS, JURISDICTION OF—GENERAL, 12 B. 573.**

See STAMP ACT, I OF 1879, s. 7, 102 P.R. 1895.

See STAMP ACT, 1899, s. 2 (5) (c), 9 Bom.L. R. 1034.

Sum payable on future date to the "members for the time being" of a specified firm—Instrument not a pro-note—**See STAMP ACT, 1899, ss. 2 and 22, 5 L.B.R. 102, F.B. = 4 Ind. Cas. 293.**

Stamp on—**See STAMP ACT, 1899, art. 39, 4 Bom. L.R. 428, 912.**

Applicability of s. 137, Tr. P. Act, to—**See TRANSFER OF PROPERTY ACT, s. 137, 5 L.E. R. 93 = 4 Ind. Cas. 288.**

——II.—ASSIGNMENT.

(1)—*Promissory note—Benamidar holder of, entitled to sue on.*—The holder and payee of a negotiable instrument ought not to be put to proof as to whether the money advanced was his own. The payee and holder of a promissory note, therefore, is not to be debarred from suing on it, merely by reason of the fact that a third person is really interested in it. **BOJJAMA v. VENKATARAMAYYA, 21 M. 30. [Appr., 30 M. 88 = 16 M.L.J. 508 = 1 M.L.T. 377, F.B.; R., 28 M. 205 = 15 M.L.J. 249, 10 O.C. 263; D., 30 M. 245 = 17 M.L.J. 174.]**

(2)—*Promissory note executed to guardian of minor, suit maintainable by minor on.*—Where in a suit on a promissory note brought on behalf of a minor, the allegation was that the

Negotiable Instruments—continued.**—5.—Promissory Notes—continued.****—II.—ASSIGNMENT—continued.**

note was executed in favour of his mother on account of his estate, *held* that, without any endorsement in plaintiff's favour by his mother, the payee under the note, the plaintiff would be entitled to a decree, he being the real owner of the money due under the note. *GURUMURTI v SIVAYYA*, 21 M. 391. [R., 28 M. 205 = 15 M.L.J. 249, 30 M. 88 = 16 M.L.J. 508 = 1 M.L.T. 377.]

(3)—*Promissory note invalidly endorsed, suit maintainable as for original debt.*—Plaintiffs became assignees of certain promissory notes in the course of their purchase of the assets of a bank in liquidation. On a suit on one of the notes which had not been endorsed over until the bank had been wound up and had ceased to exist, the endorsement having been invalid, plaintiffs were *held* entitled to sue, as for the original debt in respect of which the note had been given, but not under the promissory note as such. *RAMACHANDRA ROW v. VENKATARAMANA AYYAR*, 23 M. 527. (10 M. 96, R.) [Diss., U.B.R. 1907, 3rd Quarter, Evidence, 91 = 14 Bur. L. R. 179.]

(4)—*Promissory note—Failure to present at maturity.*—The maker of a promissory note is not discharged by the holder's failure to present it at the due date. *RAMAKISTNAYYA v. KASSIM*, 13 M. 172. [F., 21 A. 450.]

(5)—*Negotiable Instruments Act, s. 46—Effect of invalid endorsement of a promissory note by payee.*—Although the property in a promissory note payable to order on demand passes by endorsement and delivery, yet when the endorsement has been declared invalid, it must be treated as having been cancelled. The payee of a promissory note is entitled to pay an endorsee when the note is dishonoured, and, striking out the endorsement, to sue the maker for compensation or to re-issue the note. *MARI-MUTHU PILLAI v. KRISHNASAMI CHETTY*, 17 M. 197 = 4 M.L.J. 60. [Appr., 30 M. 441 = 17 M. L. J. 414.]

(6)—*Chapter XXXIX of the Civ. Pro. Code—Suit on promissory note—Collateral agreement.*—A suit may be brought on a promissory note under Chap. XXXIX of the Code of Civil Procedure, notwithstanding a collateral agreement between the parties, when the existence of such agreement is not inconsistent with the absolute promise to pay in the promissory note. *SIMON v. HAKIM MAHOMED SHERIFF*, 19 M. 368.

(7)—*Promissory note—Assignment made without endorsement—Right of assignee to sue.*—A negotiable instrument is negotiable otherwise than by endorsement, and the assignee of a pro-note can sue on the pro-note, though it was not formally endorsed in his favour. *LODD GOVIND DAS v. KARNAM MUNUSAMI PILLAI*, 8 Ind. Cas. 881 = 9 M.L.T. 169. (31 M. 534, 4 M.L.T. 341, Appl.)

Negotiable Instruments—continued.**—5.—Promissory Notes—continued.****—II.—ASSIGNMENT—continued.**

(8)—*Pro-note not endorsed—Assignment—Assignee's right to sue.*—A promissory note was assigned by a document but was not endorsed and delivered. *Held* the assignee had no right to maintain a suit on the pro-note. *PATTAT AMBADI MARAR v. KRISHNAN*, 11 M. 290. [Overruled, 24 M. 654; *Not F.*, 28 M. 541 = 15 M.L.J. 384, 9 O.C. 174; *F.*, 17 M. 461; *R.*, 17 M. 197; *D.*, 7 M.L.J. 231, 8 M.L.J. 262.]

(9)—*Suit on promissory note—Overdue note—Equities between payee, and maker binding on indorsee—Demand of payment—Notice.*—In a suit by the indorsee against the maker of a promissory note payable on demand, it was contended in defence that there were dealings in skins between the payee and the defendant, and an agreement was made between them that the defendant should supply the payee with skins from time to time and that the latter should pay the defendant the sum of Rs. 4,500 to be held by him in deposit as security for re-payment to himself of such monies as might be due to him on account for value of such skins, that the payee did pay him in pursuance of the said arrangement, the said sum of Rs. 4,500 to be held by him in deposit as security as aforesaid, and as an acknowledgment of the receipt of such deposit, the defendant made the promissory note sued on in favour of the payee. The defendant also stated that, after the making of the note, the defendant and the payee had large dealings and that the state of the accounts showed a balance in favour of the defendant; and it was further stated in defence that the plaintiff had notice of these facts. It appeared that the endorsement was made to the plaintiff two years and eleven months after date. *Held* that, though notice to the plaintiff was not proved, the note when endorsed was an overdue note, and that the plaintiff took it subject to the then state of accounts between the payee and the defendant. *Per Innes, J.*—The indorsee of an overdue note takes it subject to all the equities with which it may be incumbered, but not to claims arising out of collateral matters, as a set off. The rule in England has been deduced that before a note on demand can be treated as overdue in the hands of an endorsee, there must be some evidence of a demand. But evidence of a partial discharge is stronger evidence of a note being overdue than demand of payment can be. *Per Kernan, J.*—The agreement in this case was an equity attaching to the note itself, as between the original parties, and not a collateral matter such as a set-off, and any indorsee of this note, taking it when overdue, took it subject to the equities even though he gave full value for it. A demand of payment of a note payable on demand and non-payment make such note thereafter overdue. It has not been held in any case that notice of

Negotiable Instruments—continued.**—5.—Promissory Notes—continued.****—II.—ASSIGNMENT—continued.**

such demand must have been communicated to the indorsee before or at the time of endorsement in order to place him in the position of taking or holding it overdue. **COMMUNDUN MOHIDEEN SAIB v. OREE MEERAH SAIB, 7 M. H. C. 271.** [*F.*, 5 M. 108; *R.*, 6 M.L.T. 237 = 33 M. 34.]

(10)—*Promissory note overdue in the hands of endorsee—Re-indorsement of discharged note—Concurrence of right to receive and the duty to pay note.*—Where payment has been demanded and refused, a promissory note payable on demand may be considered to be overdue in the hands of an endorsee. [*R.*, 19 M.L.J. 509] The re-indorsement of a discharged note does not revive the liability of the maker. (7 M.H.C. 275, *F.*) [*R.*, 19 M.L.J. 509.] Where the endorsee of a note becomes one of a firm which has to discharge the liability under the note, this fact does not operate as a discharge and invalidate a re-indorsement for value of the note. **VAN INGEN v. DHUN LALL, 5 M. 108.** [*R.*, 19 M.L.J. 509.]

(11)—*Negotiable Instrument—Bill of exchange and promissory note—Receipt on—Effect—Money debt—Shares pledged—Power of attorney—Substitution of another promissory note—Original loan, if affected—Lender's lien and power of sale—His rights.*—A receipt on the back of a negotiable instrument, such as a bill of exchange or a promissory note, *prima facie* imports that the bill or note has been paid, but the receipt is capable of being explained; and if it appears that the bill or note has not been paid, and that another bill or note was substituted for it, the Court would not be justified in concluding that the party who gave up the note in that way meant that the debt secured by the note was to be considered to have been paid. *Held* that the right of lien and power of sale by virtue of a power-of-attorney over certain shares pledged as security for the re-payment of a loan which was originally secured by a first promissory note was not lost by the creditor taking subsequently from the debtor a second promissory note in lieu of the first, which was receipted and returned, because the second promissory note must be considered to have been given as security for the same loan, the original debt continuing to subsist and no fresh debt being created. *Held*, further, that the creditor was entitled to exercise his power of selling the securities, and that the debtor was not justified in trying to prevent the former exercising such power by revoking the power-of-attorney. **ALEXANDER STEWART v. THE DELHI AND LONDON BANK, LIMITED, 17 W.R. 201.**

(12)—*Promissory note—Negotiation—Assignment by payee of all his property.*—A promissory note purporting to be payable to the payee or order cannot be negotiated by an assignment of all the payee's property includ-

Negotiable Instruments—continued.**—5.—Promissory Notes—continued.****—II.—ASSIGNMENT—concluded.**

ing the note. **ABBOY CHETTI v. RAMACHANDRA RAU, 17 M. 461.** (11 M. 290, *F.*) [*R.*, 28 M. 544 = 15 M.L.J. 384, 9 O.C. 174; *D.*, 7 M.L.J. 231.]

Suit on, in favour of firm—Parties—Oral assignment of—Validity—See **PARTNERSHIP—GENERAL, 11 M.L.T. 246.**

—III.—CONSIDERATION.

(1)—*Pro-note—Wagering contract—Act XXI of 1848—Bom. Act III of 1865.*—A promissory note, executed for a sum of money which has become due in consequence of a wagering contract, although entered into before Bom. Act III of 1865 came into force, would not be binding in the hands of the original payee, as such contract was, under the provisions of Act XXI of 1848, null and void; nor could it be enforced even by an indorsee of the note against the maker of it, if the indorsee did not give value for it, the burden of proving which would lie on the maker. **TRIKAM DAMODHAR v. LALA AMIRCHAND, 8 B.H.C. A.C. 131.** [*R.*, 22 B. 899, 79 P.R. 1908 = 130 P.W.R. 1908.]

(2)—*Consideration—Unconscionable bargain.*—A person, though addicted to extravagance and debauchery, cannot claim relief on the ground of equity, if he is not a man of weak mental capacity, or not in any bodily or mental distress, or if he is not in such a necessity as to have made him incapable of weighing the consequences of the transaction into which he was entering. Mere inadequacy of consideration will not form a ground of relief, unless the inadequacy was such as may lead to an inference that the party either did not understand what he was about, or was the victim of some imposition. **ALI SHAH v. MIRAN BAKHSH, 60 P.R. 1898.**

(3)—*Promissory note—Consideration—Creditor's forbearance to sue a sufficient consideration.*—Where a pro-note was executed by five persons in consideration of old debts incurred by only three of them, and where, on a suit brought on the pro-note, the other two signatories pleaded denial of receipt of any consideration *held*, that, as the two contesting defendants were closely related to the actual debtors, the creditor's forbearance to sue the latter was a sufficient consideration for their promise. **MG KYA YEIT v. KARUPAN CHETTY, 11 Ind. Cas. 773.**

(4)—*Suit on—Original consideration—Evidence when allowable.*—A person receiving a promissory note in settlement of former transactions can, if, the note bears insufficient stamp on the original consideration. (7 C. 256, *F.*) But if the creditor grants a receipt admitting that prior transactions are completely satisfied by the delivery of the note, the above rule will not apply. **RAHMUTULLA v. GANESH DAS, 82 P.R. 1891.** [*F.*, 7 P.R. 1903 = 28 P.L.R. 1904; *R.*, 42 P.R. 1895.]

Negotiable Instruments—continued.**—5.—Promissory Notes—continued.****—III.—CONSIDERATION—concluded.**

Suit on—Suit by assignee—Assignment not made in fact—Oath as to consideration—Effect—See ACT X OF 1873-- (OATH), 3 M.L.T. 163.

Consideration existing originally and independent of—Maintainability of suit for such consideration otherwise than upon the pro-note itself—See CAUSE OF ACTION, 15 M.L.J. 484 = 29 M. 111.

Plea of failure of consideration when may be raised—See CONSIDERATION, 8 Ind. Cas. 302.

See CONSIDERATION, 7 B.H.C.O.C. 9, 1 Ind. Jur. N.S. 409.

Plea of execution as name lender and consequent want of consideration, whether can prevail—See CONTRACT ACT, 1872, s. 2 (d). 7 M.L.T. 85 = 20 M.L.J. 144 = 5 Ind. Cas. 757.

Pro-note in renewal of prior barred pro-note—No express reference to the prior note—Enforceability—See CONTRACT ACT, 1872, s. 25, cl. (3), 7 M.L.T. 81 = 5 Ind. Cas. 754 = 33 B. 159.

Being the record of the loan transaction—Right to resort to original consideration—Admissibility of oral evidence—See EVIDENCE ACT, 1872, s. 91, U.B.R. 1907, 3rd Quarter, Evidence, 5.

Sale-deed—Execution of pronote for purchase money—Suit on pro-note—Admissibility of contemporaneous oral agreement forming consideration for pro-note—See EVIDENCE ACT, 1872, ss. 91 and 92, 10 M.L.J. 69.

—IV.—FORM.

(1)—*Promissory note—Document in uncertain terms.*—A document whereby one person promises to pay another a fixed sum every month, is so vague and indefinite in its terms that it cannot be regarded as falling within the category of promissory note. CARTER v. THE AGRA SAVINGS BANK, 5 A. 562.

(2)—*Negotiable Instruments Act (XXVI of 1881), s. 4, undertaking to pay, essential to constitute promissory note under.*—Where an unstamped document executed by a debtor contained the words "This sum I am bound to pay you—adding to this sum interest at—I am liable to pay," these words were held not to amount to an "undertaking to pay" within the meaning of s. 4 of the Negotiable Instruments Act. The document was therefore not a promissory note so as to be inadmissible in evidence for want of stamp, but only an acknowledgment of liability to pay. TIRUPATHI GOUNDAN v. RAMA REDDI, 21 M. 49 = 7 M. L.J. 291.

(3)—*Letter requesting loan, whether amounts to promissory note—Attaching of obligation, compliance by addressee, necessary for.*—A letter

Negotiable Instruments—continued.**—5.—Promissory Notes—continued.****—IV.—FORM—continued.**

which was written to the plaintiff by the defendant's husband merely asked for a loan of money from the former, so that it contained no promise made; nor could any obligation have arisen under it unless the addressee had consented to comply with the request and to lend the money. The letter was held not to constitute a promissory note, on the ground that acceptance of the offer made in the letter was necessary before any obligation could be said to arise. NARAYANASAMI MUDALIAR v. LOKAMBAL AMMAL, 23 M. 156, foot-note. [F., 27 M. 1 = 14 M.L.J. 65; R., 23 M. 155.]

(4)—*Promissory notes—Acknowledgments—Admissibility in evidence—Stamp Act (I of 1879), s. 34.*—Where the promisor in two documents, each bearing an one-anna stamp, had undertaken to pay the sums stated due in each before specified dates, held, the documents were promissory notes and not mere acknowledgments, and, not being payable on demand, were not sufficiently stamped, and hence not admissible in evidence under s. 34 of the Stamp Act. MANICK CHUND v. JAMOONA DOSS, 8 C. 645.

(5)—*Contract Act (IX of 1872)—Letter requesting to send money as loan, whether a contract or mere proposal—Promissory note.*—In this suit to recover money lent to defendant by the plaintiff's deceased husband, a letter written by the former to the latter was produced by the plaintiff. The letter contained the following, among other recitals:—"Pay the sum to the bearer of this letter on my account and obtain a receipt from him. This sum I shall repay with interest at 12 per cent. per annum and get back this letter. I request that you will not neglect to pay the amount on the strength of this letter." It was held to be not a mere proposal, but a promissory note, and inadmissible in evidence as being unstamped. CHANNAMMA v. AYYANNA, 16 M. 283. [Overruled, 27 M. 1 = 14 M.L.J. 65; Diss., 23 M. 156 = 7 M.L.J. 220; F., 4 Bom. L.R. 912.]

(6)—*Partnership—Pro-note executed and signed by only one partner—Suit on pro-note—Liability of the partners of executant.*—In the case of a negotiable instrument, the signature of one person in his own name cannot justify, in a suit based on the instrument, a decree against another person, although the debt might have been borrowed for the benefit of both, or although both the persons might have been trading in partnership and the debt was borrowed for the purpose of the partnership. CUTTI AMMU v. RAGGI SETH, 8 Ind. Cas. 851. (17 M.L.J. 126, 30 M. 88, 1 M.L.T. 377, 16 M.L.J. 508, F.B., F.)

(7)—*"Months"—Mode of computing—British Calendar—Native Calendar.*—When a suit is laid on a pro-note bearing a native date and payable in a number of months, the months

Negotiable Instruments—continued.**—5.—Promissory Notes—continued.****——IV.—FORM—concluded.**

ought, for purposes of limitation, to be calculated according to the British Calendar, not according to the native calendar. *GANPATRAV RAMJI v. MANNU MOHANJI*, 5 B.H.C. A.C. 150. [R., 1 B. 295 (301).]

——V.—MISCELLANEOUS.

(1)—*Act IX of 1850, s. 34, Act VIII of 1859, s. 7—Promissory note payable by instalments—Cause of action.*—Where a promissory note is payable by monthly instalments, it is incumbent on the plaintiff, when two or more instalments are due at the time he brings his suit, to sue for them in one action, and he is not at liberty to sue separately for each instalment or for some of them. The plaintiff in this action sued to recover the fifth instalment due on a promissory note; but it appeared that he had, on the 4th October, 1872, sued and recovered a judgment for the fourth instalment only, when he could have sued for the entire amount of the bond which had then fallen due. *Held* that the judgment which plaintiff recovered on the 4th October was a bar to the present suit. *MAC-KINTOSH v. GILL*, 12 B.L.R. 37 = 20 W.R. 358. [F., 8 Bom. L.R. 547; R., 12 C. 339.]

(2)—*Possession by debtor — Presumption.*—Where the instrument of debt and security for its payment are found in the hands of the debtor, *prima facie* the presumption is that the debt has been discharged, but such presumption may be rebutted. *BHOG HONG KONG v. RAMANATHEN CHETTY*, 29 C. 334, P.C. = 29 I. A. 43 = 6 C.W.N. 401 = 4 Bom. L.R. 378 = 8 Sar. 253. [D., 1 N.L.R. 169.]

(3)—*Civ. Pro. Code, 1882, ss. 257-A, 258—Promissory note in adjustment of decree without sanction of Court—Renewal of note—Note whether enforceable.*—In this case, a decree, for Rs. 941 was settled by paying in cash Rs. 600 and by passing a promissory note for Rs. 341 carrying interest at 3 per cent. per mensem. The decree was satisfied and handed over to the defendants and the plaintiff also endorsed the defendants' summons to that effect. The compromise was not sanctioned by the Court. The note for Rs. 341 having been renewed on a subsequent date and a suit having been brought on the new note, it was *held* that the note fell within the purview of s. 257-A of the Civ. Pro. Code, and void and unenforceable. *HEERA NEMA v. PESTONJI*, 22 B. 693, F.B. [Diss., 25 A. 317 = 22 A.W.N. 45, F.B. F; 27 B. 96, 88. P.R. 1904; R., 3 O.C. 168, 9 Bom. L.R. 950, 29 P. R. 1908 = 61 P.L.R. 1907 = 71 P.W.R. 1907, F.B.; D., 25 B. 252, 4 O.C. 284, 9 Bom. L. R. 295.]

See ACT IX OF 1875, s. 3, 8 C. L. R. 419.

Bill payable to bearer on demand—Right to sue on bill—See ACT III OF 1905, ss. 24, 25, 4 S.L.R. 44 = 7 Ind. Cas. 604.

Negotiable Instruments—continued.**—5.—Promissory Notes—continued.****——V.—MISCELLANEOUS—continued.**

Conditional assignment of non-negotiable, by way of security—Assignee's right to sue in his own name—See ASSIGNMENT, 9 P.R. 1907 = 41 P.W.R. 1907 = 25 P.L.R. 1908.

See BURDEN OF PROOF — DOCUMENTS RELATING TO LOANS, ETC., 133 P.L.R. 1901.

See CAUSE OF ACTION, 42 P. R. 1895.

Parties to note agreeing that, on promisor executing bond for the amount due in favour of third party, promisee will cancel note—Validity of such arrangement, irrespective of payment by third party to promisee—Assignment of promissory note without endorsement—See CIV. PRO. CODE, 1908, s. 2, 12 C.W.N. 1102 = 36 C. 493 = 2 Ind. Cas. 553.

Suit on—Discrepancies between the terms of the, and their description in the plaint—Dismissal of suit—Revision—See CIV. PRO. CODE, 1908, s. 115, 9 Ind. Cas. 32 = 9 M.L. T. 268 = 21 M.L.J. 451.

See CIV. PRO. CODE, 1908, O. XXXVII, r. 2, 30 C. 446 = 7 C. W. N. 412.

See COMPANY—POWERS AND LIABILITIES OF DIRECTORS, 1 B. L. R. O. C. 14.

Onus of proving non receipt of consideration and payment of interest—Exorbitant interest, enforceability of—See EQUITABLE MORTGAGE, 53 P.W.R. 1907.

See EQUITABLE MORTGAGE, 14 Bur. L. R. 283.

See EVIDENCE — SECONDARY EVIDENCE, 3 A. 581, F. B. 3 A. 717, 9 A. 351 = A. W. N. 1887, 49. 3 C. 314 = 2 C. L. R. 412, Note, 7 C. 256 = 8 C. L. R. 528, 7 M. 112.

Suit on—Old pro-note returned to debtor—No notice given to him to produce—Admissibility of secondary evidence—Execution and payment of interest proved—Proof of earlier note not necessary—See EVIDENCE ACT, 1872, s. 65, 12 Ind. Cas. 861.

Payable on demand—Contemporaneous agreement in writing for payment by instalments—Admissibility—See EVIDENCE ACT, 1872, s. 92, 12 Ind. Cas. 896.

Absolute contract—Oral agreement to vary the contents of a promissory note—See EVIDENCE ACT, s. 92, Proviso 3, 25 C. 401 = 2 C. W. N. 188.

Hindu law—Promissory note by widow not representing the estate—Liability of the reversioner—See HINDU LAW—ALIENATION, 4 M. 375.

Right of a co-parcener to sue on a, passed to him—See HINDU LAW—JOINT FAMILY, 12 Bom.L.R. 801.

See INTEREST — STIPULATION IN THE NATURE OF PENALTY, 3 A. 260, F.B.

Negotiable Instruments—concluded.—5.—**Promissory Notes**—concluded.—V.—**MISCELLANEOUS**—concluded.

Suit upon pro-note—Purchaser from representatives of deceased executant not a proper party—**Misjoinder**—See **JOINDER OF PARTIES**, 6 M. L.J. 186.

Jurisdiction—Pro-note payable at Madras or Secunderabad—Payment of interest at Madras—See **JURISDICTION—CAUSES OF JURISDICTION**, 24 M. 259.

Suit on pro-note signed outside but delivered at Madras—See **JURISDICTION—CAUSES OF JURISDICTION**, 1 M.H.C. 202.

Jurisdiction—Promissory note made and delivered within jurisdiction—Letters Patent, 1865. cl. 12—See **JURISDICTION—CAUSES OF JURISDICTION**, 1 Ind. Jur. N. S. 233.

See **JURISDICTION—CAUSES OF JURISDICTION**, 1 Ind. Jur. N.S. 61.

To pleader by person other than his clients—Necessity for filing in Court—See **LEGAL PRACTITIONERS—PLEADER—REMUNERATION**, 16 M. 278=2 M.L.J. 247.

See **LETTERS OF ADMINISTRATION**, 17 M. 147.

Person unauthorizedly obtaining renewal of a—is trustee for the rightful owner thereof—See **MISJOINDER OF PARTIES**, 29 M. 87.

Handed to usufructuary mortgagee, dispossessed originally under s. 43, Act I of 1902 (Madras), on being restored to possession after ward's death—Effect of pro-notes not being endorsed—Operation of law—See **MORTGAGE—USUFRUCTUARY**, 4 M.L.T. 341.

Pro-note executed by member of partnership firm, not as agents of partnership—Liability of other partners—See **PARTNERSHIP—GENERAL**, 4 M.L.J. 76.

Cross-suits between parties one on pro-note and the other on accounts in different Courts—All transactions dealt with in suit for account—Question of procedure becoming one of convenience rather than of right—See **PRACTICE AND PROCEDURE**, 30 C. 627.

See **SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL**, 7 N.W.P. 124.

See **STAMP**, 23 A. 851.

See **STAMP**, 2 B.L.R.O.C., 165=12 W.R.A. O.J. 1.

See **STAMP**, 5 B.L.R. 103=14 W.R. O.C. 38.

See **STAMP ACT OF 1862**, Art. I, Sch. A. 6 B.H.C.A.C. 107.

See **STAMP ACT**, 1862, Art. 10, 2 Ind. Jur. N. S. 203.

See **STAMP ACT**, 1869, ss. 39, 40, 3 A. 115.

See **STAMP ACT**, 1879, ss. 10, 11, A.W.N. 1885, 317.

Pro-note made out of British India—See **STAMP ACT**, 1879, s. 18, 8 M.L.J. 182.

Negotiable Instruments Act, 1881.

[REP., IN PT. AND AM., ACT II OF 1885. REP. IN PT., ACT XII OF 1891, A.M., ACT VI OF 1897. DECLARED IN FORCE IN UPPER BURMA (EXCEPT THE SHAN STATES), ACT XIII OF 1898, s. 4]

See **BURDEN OF PROOF—NEGOTIABLE INSTRUMENTS**.

See **NEGOTIABLE INSTRUMENTS**.

(1)—*Persentment of Hundis—Notice of dishonour—Indemnity bond.*—An indemnity bond, given by way of collateral security for some hundis, was sued upon, on the allegation that the hundis were dishonoured. Notice of dishonour was not given in a reasonable time. But, when the money was demanded, the maker of the hundies did not complain of want of notice of dishonour or of non-presentment of the hundis. There was no evidence that any money was due to the maker from the drawee, or that he sustained any damage by reason of the want of notice of dishonour. *Held*, under the circumstances, that the plaintiff was entitled to a decree. **SHANMUGAM v. CHINNASAMI**, 14 M. 470=1 M.L.J. 674.

(2)—*Assignment of pro-note—Assignment back to assignor—Necessity for endorsement—Assignment of note by a firm—Signature of one member of firm—Whether such signature is on behalf of firm—Admission of oral evidence.*—The defendant's firm indorsed several negotiable promissory notes in their favour to one M, who again indorsed them to a Bank. Certain other pro-notes made by the said firm in favour of M, as payable to him or to his order, were also indorsed by M to the same Bank. All the notes happened to be dishonoured and M paid the Bank and obtained a return of the notes but without any re-indorsement by the Bank. Subsequently, on receipt of value paid by the present plaintiff, M assigned his right to the notes over to the plaintiff by means of an assignment deed and this suit brought by the plaintiff for recovery of the amount due in respect of some of the notes, so assigned to him, was dismissed by the lower appellate Court on the ground that, the notes not having been indorsed over to the plaintiff, he could not sue on them. *Held*, reversing the decrees of the lower appellate Court, promissory notes, whether negotiable instruments or not, are nevertheless choses in action and choses in action have been held assignable, in this country, and the rules of general law, that applied to them prior to the Negotiable Instruments Act with respect to their transfer, as choses in action or chattels, do not cease to be applicable to them by the passing of that Act, unless its provisions expressly or impliedly affect those rules. The absence in the Indian Act of certain provisions, saving the rules of common law, similar to those found in the English Bills of Exchange Act, 1882, does not warrant the view that the former Act abolished rules, previously established, even though they are in no way inconsistent with any of its provisions. There is,

Negotiable Instruments Act, 1881—continued.

therefore, no reason to prohibit assignment of negotiable instruments otherwise than by indorsement, as illegal. (11 M. 290, 17 M. 461 declared overruled by 24 M. 654.) *Held*, also, overruling a contention raised on behalf of the defendants that a re indorsement by the Bank back to M, the plaintiff's assignor, was in point of law necessary to re-vest the title in the notes in him, that, when a prior indorser takes up a note on payment to his immediate indorsee and discharges his liability under the contract arising by the indorsement, there is no provision, either in the Negotiable Instruments Act or elsewhere, prescribing the mode in which such taking up of the note is to be established and the possession of the note by the person so taking up is *prima facie* evidence that he is the true and lawful owner thereof and that he has acquired the full title thereto. On a further objection taken, that the notes having been given and the indorsements made by only one member of the firm, *viz.*, the first defendant, in his own name, the other members of the firm are not liable, it was *held*, that the question, whether the first defendant signed only for himself or on behalf of the firm, is one of fact to be decided with reference to the evidence in the case and the reception of parol evidence in such a matter is subject to much the same rules as govern written contracts generally. *MUTHAR SAHIB MARAIKAYAR v. P. M. K. KADIR SAHIB MARAIKAYAR*, 15 M. L.J. 384 = 28 M. 544. [R., 144 P.R. 1906 = 106 P.L.R. 1907, 30 M. 441 = 17 M.L.J. 414, 14 Bur. L.R. 25, 8 Ind. Cas. 881.]

(3)—*Forced endorsements—Endorsee for value and bona fide—Holder in due course.*—If the endorsement on a negotiable instrument is forged, a *bona fide* endorsee for value cannot become a holder in due course of such negotiable instrument. *HUNSRAJ v. RUTTONSEE*, 1 Bom. L.R. 734 = 24 B. 65.

(4)—*Suit by payee on promissory note—Plea, payee not real owner—Re-payment of consideration to real owner—Oral evidence to support plea, admissibility of.*—The suit was to recover the amount due on a promissory note by the payee. The defendant pleaded that the consideration was advanced not by the plaintiff but by a third party on whose account, the note was taken with the name of the plaintiff as payee, and that the amount having been duly re-paid to the party entitled to it, the present suit was fraudulent and unsustainable. *Held Per Subrahmaniam Ayyar, J.*, that it was competent to a defendant to adduce oral evidence, in a suit on a promissory note, to show that the plaintiff in the action was not the true owner if such proof would enable the defendant to establish, consistently with other rules governing the case of negotiable instruments, a defence valid against the true owner. (6 Mad. Jurist. 305, *Appr.*; 28 M. 205, *Doubted.*) *Per Davies, J.*, dissenting, that the defendant was precluded from pleading the *jus tertii* of a person who was

Negotiable Instruments Act, 1881—continued.

not even a party on the record. *SUBBA NARAYANA VATHIAR v. RAMASWAMI AYYAR*, 28 M. 244. [*Reversed*, 16 M.L.J. 508 = 1 M.L. T. 247; R., 28 M. 544 = 15 M.L.J. 884.]

(5)—Ss. 1 and 74—How far provision of the Act applicable to hundis written in oriental language—Meaning of section—Presentment of hundis for payment within reasonable time—Effect of failure—What is "reasonable time." See *PLEADINGS*, 6 N.L.R. 33 = 5 Ind. Cas. 745.

(6)—Ss. 1 and 94—*Applicability of Act to Natives of India—Usage varying provisions of Act—Proof—Notice of dishonour.*—The provisions of the Negotiable Instruments Act, 1881 are applicable to natives of India. Local usage relating to bills and notes in an oriental language is saved by s. 1 of the Act. The party relying upon such usage must allege and establish it by evidence. S. 94 of the Act recognizes that the person to whom notice of dishonour is given should be informed not only that the instrument has been dishonoured, and in what way, but also that he would be held liable thereon. Where a bill is dishonoured, the payee should give a notice of dishonour to the drawer thereof in the manner stated above. In the absence of such notice, the drawer would not be liable in a suit on the bill. *JAMBU CHETTY v. PALANIAPPA CHETTIAR*, 26 M. 526 = 13 M.L.J. 252.

(7)—S. 4—*Admission of document insufficiently stamped—Promissory note—Stamp Act of 1899, s. 2—Evidence—Appeal.*—When a document, bearing a one anna receipt stamp, does not fall within the definition of a promissory note given in s. 4 of the Negotiable Instruments Act (XXVI of 1881) or in s. 2 of the Stamp Act of 1899, but is held to be properly stamped and is admitted in evidence by any Court, that decision cannot be called in question in appeal. *ALLAH RAKHU v. DILDAR ALI*, 4 O.C. 318.

(8)—S. 4—*See CONTRACT ACT, 1872, s. 25, 8 Bom. L.R. 644.*

(9)—S. 4.—*See EVIDENCE ACT, 1872, s. 91, U.B.R. 1907, 3rd Quarter, Evidence, 5.*

(10)—Ss. 4, 5—meaning of "certain" person, *See STAMP ACT 1899, s. (2) and (22)*, 5 L.B.R. 102, F.B. = 4 Ind. Cas. 293.

(11)—Ss. 4, 15—*A non-negotiable instrument whether could be assigned by endorsement—Assignee, whether becomes entitled thereon to sue the maker.*—This was a suit on a pro note, without the words "order" or "bearer" or their equivalent, brought by the plaintiff, to whom the note had been assigned by endorsement thereon. It was pleaded in defence that a document, though a promissory note, was not a negotiable instrument and consequently could not be assigned by endorsement. *Held*, the document not containing the necessary words to render it a negotiable instrument, was not capable of being transferred by mere endorsement, and it was not, therefore, competent for the assignee

Negotiable Instruments Act, 1881—continued.

to maintain a suit upon it. *PARFITT v. CHAIN SUKH*, 144 P.R. 1906=106 P.L.R. 1907. (60 P.R. 1884, 12 P.R. 1894, 10 A. 20, 24 M. 654, 28 M. 544, R.)

(12)—Ss. 4, 26, 27 and 28 — *Joint Hindu family—Promissory note executed by Karta—Family necessity—Liability of other members—Agency.*—Where the karta of a joint undivided Hindu family borrows money on promissory notes, for the purpose of a joint family business or to meet a joint family necessity, the creditor can recover the money from all the members of the joint family, although they were not all parties to the notes. Ss. 26, 27, and 28 of the above Act refer to cases of ordinary agency. *BAISNAB CHANDRA DE v. RAMDHON DHOR*, 11 C.W.N. 139. (23 M. 597, 7 C.W.N. 725, R.)

(13)—Ss. 4, 28 — *Applicability of—See PRINCIPAL AND AGENT—GENERAL*. 5 Ind. Cas. 110 = 14 C.W.N. 414 = 11 C.L.J. 236.

(14)—S. 5—*See CAUSE OF ACTION*, 61 P.R. 1888.

(15)—S. 5—*Instrument purporting to receive money from Bank and specifying name of messenger—Cheque—Receipt—See STAMP ACT*, s. 2, 38 P.L.R. 1912.

(16)—S. 5—*See No. 10, supra*.

(17)—Ss. 5, 7, 33, 88—*Bill of exchange—Drawee substituting a third person in his stead—Acceptance by such third person, whether binds former—Contract Act (IX of 1872), s. 231—Undisclosed principal, rights of.*—The second defendant contracted with first defendant to purchase goods of plaintiff, first defendant acting as plaintiff's agent, though second defendant was not aware of it. The plaintiff drew four drafts on first defendant, who, without the knowledge or authority of plaintiff, substituted second defendant as drawee in his stead, and second defendant accepted the drafts. Second defendant having returned one of the drafts, got possession of the goods covered by it, and, finding the same was not of the stipulated kind, refused to return the other drafts. Decree against both defendants in both the lower Courts. Second appeal by second defendant. *Held*, that, under s. 7 of the Negotiable Instruments Act and, also, s. 6 of the English Bills of Exchange Act, (1882), the drawee of a bill is the person designated in the bill as such, by the drawer, and that he must be named or otherwise indicated in the bill with reasonable certainty. The drawee (if he is not a fictitious person) can either accept or decline to accept the bill, but he cannot of his own motion substitute another person in his place as drawee. Under s. 33 of the Act such third person substituted is not the drawee, and consequently the acceptance of a bill by him does not, in law, bind him. *Held*, also, that second defendant was not estopped from denying his liability, by reason of his having returned one of the drafts, as neither the drawer, the drawee, nor any third person were adversely affected by his conduct, second defendant having immediately

Negotiable Instruments Act, 1881—continued.

repudiated his act. *Held*, that, under s. 231, Contract Act, plaintiff can take advantage of the contract made by first defendant, as his undisclosed principal, subject to any right which second defendant may have against the first defendant. Case remanded for a finding as to the allegations of fraud and misrepresentation by first defendant. *Held*, further, that, assuming there was a contract between plaintiff and the second defendant, plaintiff could sue for the whole amount which second defendant had agreed to pay, and was not bound to sell the undelivered goods, and sue only for the balance, if any, due to him upon the contract. *JAGAN NATH v. THE HEAP AND CO., LTD.*, 71 P.R. 1909=107 P.L.R. 1909=110 P.W.R. 1909=2 Ind. Cas. 804.

(18)—Ss. 6, 8, 17, 30, 32, 78, 85, and 92—*Drawing of bill of exchange—Same person being drawer and drawee—Bill of exchange stolen—Presentation for payment with forged endorsement of name of payee—Payment by drawer—Effect—Ambiguous instrument—Election by holder—Effect*—This was a suit to recover from the New Oriental Bank Corporation, Limited, at Bombay, Rs. 640 under the following circumstances:—One M purchased from the branch of the defendant Bank at Mauritius a bill of exchange drawn by the bank on their Bank at Bombay (the defendant) where it was made payable on demand to the order of the plaintiff. M transferred the same by post to the plaintiff. The bill having been stolen during transit, was presented to Bank by some third person for payment with a forged endorsement thereon of the name of the plaintiff. The defendant company paid the amount due under the bill. The plaintiff, on being informed of these facts, demanded payment of the bill again, declaring that the endorsement thereon was a forged one. The defendant company refused payment. Hence the suit. *Held*, (1) that the instrument in question was an "ambiguous instrument" within the meaning of the expression as used in s. 17 of Act XXVI of 1881, and that the plaintiff elected to treat it as a bill of exchange drawn by the branch firm at Mauritius on the defendant company at Bombay; and (2) that under s. 85 of the Act the defendant company, as drawers, was discharged from liability by payment to the *de facto* holder who presented the bill for payment. Where the holder of an instrument, "ambiguous" within the meaning of the expression as used in s. 17 of the Negotiable Instruments Act, elects to treat it as a bill of exchange, he cannot subsequently elect to treat the same as a promissory note *SULLEMAN HUSSEIN v. THE NEW ORIENTAL BANK CORPORATION, LIMITED*, 15 B. 267.

(19)—S. 7—*See No. 17, supra* and No. 77, *infra*.

(20)—S. 8—*Endorsee—Holder—Benamidar.*—An endorsee of a promissory note, to whom the endorsement has been legally made, followed by delivery to him of the note, is the "holder" of the note within the meaning of s. 8 of the Negotiable Instruments Act, and can maintain

Negotiable Instruments Act, 1881—continued.

a suit on the note, though he is only a benamidar for the real owner of the note. **SARAT CHANDER DUTT v. KEDAR NATH DASS**, 2 C.W.N. 286. [R., 16 M.L.J. 508=1 M.L.T. 377=30 M. 88.]

(21)—S. 8—*Holder in due course—Consideration—Civ. Pro. Code (1908), O. XXI, r. 63—Burden of proof.*—An 'on demand' promissory note was endorsed by the payee to A who stood surety for him with one B. No suit was filed by B. Nor was any payment made as surety prior to the endorsement. *Held*, that A was not a holder in due course, inasmuch as there was no further consideration, and a mere renewal of an undertaking to pay a debt for which he was already liable as surety would be no consideration. In a suit under O. XXI, r. 63, the burden lies on the plaintiff decree-holder to establish his right to attach property, but he is entitled, if he can do so, to prove his case out of the defendant's mouth. **K. P. NAMBIER v. SUNDRABAI**, 14 Ind. Cas. 813.

(22)—S. 8—*See No. 18, supra.*

(23)—Ss. 8, 27, 78—*Suit on a pro-note—Validity of plea that the holder is a mere benamidar not entitled to sue—Undisclosed principals cannot sue or be sued on a negotiable instrument—Law merchant before the Act—Bills of Exchange Act, 1882—Contract Act, 1872.*—S. 78 which provides that "payment—must, in order to discharge the maker, be made to the holder" is imperative and precludes the maker, when sued on the instrument, from pleading discharge by payment to any one but "the holder." The use of the words "entitled in his own name" in the definition of "holder" in s. 8, prevents any one from claiming the rights of a "holder" under the Act, on the ground that the ostensible holder was a mere benamidar. Under s. 27 also, a principal can only be made liable, through his agent, on a negotiable instrument, when the agent acts in the principal's name, i.e., when he signs as agent. An undisclosed principal cannot be sued on a negotiable instrument; because, in the case of such instruments, passing from hand to hand, usage and policy alike require that the real contract should appear on the face of the instrument. The provisions of the Contract Act as to rights and liabilities of undisclosed principals are not intended to alter well-established rules as to negotiable instruments, which continued to be governed by the Law merchant reproduced in the Negotiable Instruments Act. Ss. 2, 7 (1), 23, 59, Bills of Exchange Act are also in accordance with the above view. **SUBBA NARAYANA VATHIYAR v. K. RAMASAWMI IYER**, 1 M.L.T. 377 F.B. =16 M.L.J. 508=30 M. 88. (21 M. 303, 28 M. 205, *Appr.*; 7 M.L.J. 64, 21 M. 391, *Overruled*; 23 M. 597, *Expl.*, 2 C.W.N. 286, R.) [F., 17 M. L.J. 393, 18 M.L.J. 186, 8 Ind. Cas. 851, R., 30 M. 441=17 M.L.J. 414, 8 Ind. Cas. 881; D., 17 M.L.J. 174, 7 M.L.T. 85.]

(24)—Ss. 8, 43 and 78—*Pro-note—Plea of execution as name lender and want of consideration*

Negotiable Instruments Act, 1881—continued.

if allowable. *See CONTRACT ACT, 1872, s. 2 (d), 7 M.L.T. 85=20 M.L.J. 144=5 Ind. Cas. 157.*

(25)—Ss. 8 and 46—*Indorsement for purposes of collection—Return of instrument without collection—Right of indorser to strike out indorsement and to sue—Possession of indorsee.*—An indorser, who indorses a bill to another for purposes of collection, is entitled on the return of the bill without collection, to strike out his indorsement and to make himself the last indorsee, the holder within the meaning of s. 8 of the Act. He is, thereupon, entitled to receive payment and to sue. (28 M. 544; R.) An indorsement for collection does not, as between the indorser and the indorsee, pass the property in the bill to the indorsee, though it puts him in a position to make title for a subsequent holder in due course. An indorsee for collection, after returning the bill to his indorser, does not come within the definition of a holder in s. 8 so as to be entitled to sue. The holder as defined in s. 8 means any person entitled in his own name thereof and to receive or recover the amount due therefor from the parties thereto; that is to say, the person so entitled on the face of the bill. (30 M. 93; R.) The Act contains no provisions as to striking out indorsement, but there can be no doubt that, when a drawer or indorser takes up a bill by paying the holder, he is entitled to maintain a suit on the bill against the parties antecedent to himself and to strike out subsequent parties who, by reason of his payment, have ceased to have any rights or liabilities under the bill. By such a payment he is considered to acquire a fresh cause of action, being subrogated to the holder as regards all parties antecedent to himself. **SUBRAHMANYAN CHETTY v. ALAGAPPA CHETTY**, 17 M.L.J. 414=30 M. 441. (17 M. 197, 28 M. 544, R.) [F., 3 M.L.T. 239, 7 M.L.T. 271.]

(26)—Ss. 8, 46, 50, 78—*Indorsement and delivery for collection—Death of indorser—Right of holder.*—*See NEGOTIABLE INSTRUMENTS PROMISSORY NOTE—GENERAL*, 5 L.B.R. 198.

(27)—Ss. 8 and 54—*Endorsement.*—A promissory note may be indorsed in blank and delivered to any person, the effect of such indorsement and delivery being to convert the pro-note into one payable to bearer. Indorsement and delivery in such a way to a person, in the capacity of agent and attorney of his principal, the principal would be the person entitled to the possession of the promissory note and to recover the amount due thereon from the maker. **NANEK CHUND v. DURANT**, 9 P.R. 1906=19 P.L.R. 1906.

(28)—S. 9—*Forged endorsement—Endorsers a bogus firm—Innocent transferee obtains no title.*—Plaintiffs were the payees of two hundis. They employed a broker to sell them. The broker represented to the plaintiff that the firm of Harsahai Mal Kedar Nath wanted to purchase the hundis, whereupon the plaintiffs

Negotiable Instruments Act, 1881—continued.

endorsed the *hundis*, in favour of Harsahai Mal Kedar Nath. The broker then forged an endorsement from Harsahai Mal Kedar Nath in favour of a firm which had no existence, and then another endorsement, purporting to be from this fictitious firm in favour of another, which too had no existence. The defendants, purchased in good faith and for value these *hundis*—the broker again forging an endorsement from the second fictitious firm in favour of the defendants. Upon the plaintiff's, the payee's, suing for money, *held*, that they were entitled to succeed, even if the defendants were transferees in good faith and for consideration. S. 9 of the Act contemplates a person who is the payee or the indorsee of an instrument. There is a distinction between the case of a *bona fide* purchaser for value, who acquires a defective title to a negotiable instrument and a purchaser, who acquires no title whatever. **JAI NARAIN v. MAHBUB BAKHSI, 3 A.L.J. 203 = A.W.N. 1906, 77 = 28 A. 428.** (24 B. 65, F.)

(29)—Ss. 9, 16—*Endorsement in full, requisites of*.—Where the following words were written on the back of a pro-note:—"I have this day received in cash from you K—Rs. 1,169, made up of Rs. 1,000 being principal due under this note, and of Rs. 169 interest accumulated up to date, and assigned to you this note with power to recover the amount due under it by showing the same," *held*, that the above was an endorsement in full within the meaning of s. 16 of Act XXVI of 1881. Where there is nothing to show that payment of a pro-note (payable on demand) was demanded or that it was overdue before it is endorsed over, it must be taken that the endorsement is made before the pro-note became payable. **SANKARA SUBBAN PATTAR v. MANGALASHERI, 6 M.L.T. 237 = 33 M. 34 = 19 M.L.J. 509 = 3 Ind. Cas. 428.** (7 M.H.C. 271, 5 M. 108, R.)

(30)—Ss. 9, 43 and 46 (3) *Pro-note—Indorsee with knowledge of failure of consideration—No remedy against maker—Not holder in due course—Non-applicability of latter part of s. 43—Transfer of mortgage—Registration, necessary—Duty of transferor to execute conveyance—Transfer of Property Act, s. 55 (d)*.—An indorsee of a pro-note, who takes the indorsement with the knowledge that the consideration for the pro-note had failed and that the payee had no title to negotiate it, is not a 'holder in due course,' as defined in s. 9 of the Negotiable Instruments Act, and has no cause of action as against the maker of the pro-note. The latter part of s. 43 of the Negotiable Instruments Act has no application to such cases at all. (See also s. 46 of the same Act.) The transfer of a mortgage to be effectual requires registration. (29 M. 336, R.) It is the duty of the transferor to execute a 'proper conveyance.' (*Vide* s. 55 (d), Transfer of Property Act. **MUTHIA CHETTI v. KASIVARI SOMASUNDARA, 10 M.L.T. 79.**)

(31)—Ss. 9, 46, 58 and 59—*Government promissory notes bearing forged endorsement*—

Negotiable Instruments Act, 1881—continued.

Burden of proof as to who was holder in due course.—Where a negotiable instrument bears a forged endorsement, no person can claim a title to the instrument, through such endorsement, because a forged endorsement is a nullity and it must be taken as if no such endorsement was on the instrument. (24 B. 65; 32 C. 799; R.) When once the plaintiff establishes that a third party came into possession of a negotiable instrument by means of an offence or fraud, the *onus* of proving that the third party became 'holder in due course' lies on the defendant. **BANKU BEHARI SIKDAR v. SECRETARY OF STATE FOR INDIA IN COUNCIL, 36 C. 235 = 1 Ind. Cas. 929.**

(32)—Ss. 9, 56, 57, 78—*Holder in due course of a promissory note*.—To be a holder in due course, it is necessary that one must have, for consideration, become the payee, or indorsee, before the amount mentioned in the note becomes payable. Where the payee, by an endorsement in correct form, constitutes the plaintiff, in his own name, the holder of the pro-note, the plaintiff must be held to be entitled to the possession of it in his own name, and to recover the amount due thereon, and it is immaterial whether in fact the plaintiff is acting in his own interest or merely as the agent of the payee. **D. BISHEN CHUNDER v. MAUNG PO THWE, U. B. R. 1897—1901, Vol. II, 523.**

(33)—Ss. 9 and 58—*Holder of Government Pro. note, liability of, to real owner of note—Limitation applicable to a suit against holder—See LIMITATION ACT 1908, s. 10, art. 48, 9 C. W.N. 443 = 32 C. 799.*

(34)—S. 10—*Payment in due course*.—Where the drawees of *shahjog* hundi made payment, although the drawer had notified them by a telegram to stop payment until further instructions, payment by them was not a payment in due course within the meaning of s. 10, Negotiable Instruments Act. **LALLA MAL v. KESHO DAS, 26 A. 493 = A.W.N. 1904, 100 = 1 A.L.J. 254.**

(35)—S. 13—*Promissory note—Reference to collateral security*.—Deposit of title-deeds as a collateral security does not make a promissory note the less a negotiable instrument. **RAMACHANDRA v. SETHA, 17 M. 85.**

(36)—Ss. 13, 48—*Pro-note payable on demand to particular person—Transfer otherwise than by endorsement—Validity*.—A pro-note was executed payable on demand to a particular person. The payee transferred the note to the plaintiff by means of a registered transfer-deed. *Held* that, as the pro-note was not payable to a specified person or to bearer or to the order of a specified person, it was not a negotiable instrument. There was, therefore, no objection to its transfer otherwise than by endorsement, and plaintiff was entitled to sue on the note. **UDAYAR PILLAI v. MUTHIA PILLAI, 7 M.L.J. 231.**

(37)—Ss. 14, 46, 48—*Government Promissory note, transfer of interest in*.—In June, 1903, the

Negotiable Instruments Act, 1881—continued.

plaintiff endorsed some Government Promissory Notes of the value of Rs. 20,000 to the Secretary of State for India as security for one B, a Government treasurer. In August 1903, he presented an application to the Deputy Commissioner, in which he stated that he had sold the notes to S, that he would endorse the notes to S when required to do so, that S had purchased the notes subject to the Secretary of State's lien, etc. On the following day, S presented a corresponding petition to the Deputy Commissioner, in which he stated that he had purchased the notes and had a lien on them subject to the Secretary of State's claim. About the same time, the plaintiff, by a letter, requested S to discount certain *hundis* in the name of certain firms and S discounted some of them to the extent of Rs. 9,000. Subsequently, the plaintiff brought a suit for declaration that the notes were not liable to attachment in execution of the decree of the first defendant, Allahabad Bank, against the defendant S. *Held*, that the interest of the plaintiff in the notes was transferred to S, that the transfer was purely of a *chose in action*, to which the Negotiable Instruments Act did not apply, and that the plaintiff's suit was not maintainable. **JAJAN NATH v. THE ALLAHABAD BANK, LD., LUCKNOW, 9 O.C. 174 (B).** (11 M. 290, 17 M. 461, 28 M. 544, 24 M. 657, Note, R.)

(38)—S. 15—See No. 11, *supra*.

(39)—S. 16—See No. 29, *supra*.

(40)—S. 17—See No. 18, *supra*.

(41)—S. 26—See No. 12, *supra*.

(42)—Ss. 26, 27—*Promissory note made by one co-parcener of a joint-family, other undivided members whether liable under Hindu Law.*—The rule of English law, according to which none but those whose signatures appear on a bill of exchange or a negotiable promissory note can be sued thereupon, has no application in India so as to preclude the payee of a promissory note when suing the maker from enforcing his rights against third persons who, according to Hindu Law, may, in respect of family property in their hands, be responsible for debts incurred by him. S. 27 of the Negotiable Instruments Act has no application to a case where a person who is not a party to a promissory note or other similar instrument is sought to be made liable in respect of the money due thereunder, in consequence of an obligation cast on him by his personal law in respect of such debt (*Per Davies J. dissenting*,—Where the name of one person alone appears in a promissory note, and he does not purport to make it on behalf of any one but himself, none but such person named therein as the maker of the note can be held liable to discharge it). **KRISHNA AYYAR v. KRISHNASAMI AYYAR, 23 M. 597.** [R., 28 M. 244, 11 C.W.N. 139, 31 M. 343 = 18 M.L.J. 347 = 4 M.L.T. 195, 2 Ind. Cas. 203, D., 30 M. 88 = 16 M.L.J. 508 = 1 M.L.T. 377]

(43)—S. 27—See Nos. 12, 23, 42, *supra* and No. 113, *infra*.

Negotiable Instruments Act, 1881—continued.

(44)—S. 28—Word, "*Daskat*," meaning of—*Son signing a hundi on behalf of the father*—*Son working with the father in a common business.*—The term, "*Daskat*," means that a person signing a document signed as managing clerk on behalf of the principal, and no personal liability can attach to him from that. Where a son signs a *hundi* on behalf of his father and it is also found that the father and the son have been carrying on the business in apparent unity, *held* that the son is equally liable with the father for the debt. **SILLEMAN DATOO v. ISO MUSO, 2 S.L.R. 11.**

(45)—S. 28—*Pro-note—Executant—Description as agent in the body of document—Signature unqualified—Personal liability—Suit on pro-note—Prayer in plaint for decree against principal or against agent in alternative—Subsequent prayer for decree against latter personally as maker of the note—Conversion of suit—Amendment—Whether allowable.*—A as the agent of B and C signed a pro-note in favour of G, for the price of cloths supplied by G, to the mother of B and C for the use and benefit of the latter. In the beginning of the pro-note A described himself as the agent of B and C but did neither sign the pronote as such agent nor did he use language in the recitals in the body of the pro-note expressly stating that he did not intend to make himself personally liable. G brought a suit against A, B and C, and prayed *inter alia* that A may be made liable in the alternative. The plaint as originally framed did not seek to make A liable as the maker of the pro-note, but subsequently an issue was framed regarding the liability of A as the executant of the pro-note. *Held, Per Sadasiva Iyer, J. (Sundara Iyer, J. contra);* that a man putting 'his unqualified signature' to a negotiable instrument cannot be allowed to escape personal liability, unless he clearly and unmistakeably indicates on the instrument taken as a whole that he did not undertake any personal liability (20 M.L.J. 144, (1911) 1 M.W.N. 143, (1909) 1 K.B. 73, 4 Ex. 102, 5 M. and S. 345, 33 M. 88; R.) and (ii) that the additional issue regarding A's personal liability was properly allowed to be raised in the Court below. *Held, Per Sundara Iyer, J.*—That A was not personally liable, because the pro-note itself indicated that A signed it as agent and that he did not intend to incur personal liability. According to English law, words should be added to the signature indicating that the executant signs for or on behalf of a principal. But the Indian Act does not require this, but only an indication, not in the signature, but anywhere in the body of the document, that the executant signs as agent. The words of s. 28, Negotiable Instruments Act, should be given their plain and ordinary meaning. It is not justifiable to require in India that there should be words added to the signature to show that it is that, of the principal and not of the man that puts it. (20 M.L.J. 144, (1911), M.W.N. 143 (1908), K.B. 73, 4 Ex. 102, 5 M. and S. 345, 30 M. 88, R.) The lower Courts were wrong in

Negotiable Instruments Act, 1881—continued.

allowing the additional issue to be raised, having regard to the allegations in the plaint which sought to make A liable merely as the agent of B and C. **R.P. KONETTI NALIKER v. JUTU GOPALAIYAR**, 23 M.L.J. 417 = 12 M.L.T. 367 = (1912) M.W.N. 984.

(46)—S. 28—See Nos. 12, 13, *supra*.

(47)—S. 30—*Applicability to hundis—Hundi drawn by manager of joint Hindu family—Notice of dishonour to drawer necessary.*—The Negotiable Instruments Act, in the absence of local usage to the contrary, applies to hundis. (6 A. 78; R.) [R., 1 S.L.R. 57]. A member of a Hindu family whom it is sought to make liable by a suit on a hundi drawn by the manager of the family, is entitled to urge that no notice of dishonour had been given to the manager (drawer) so as to make the latter liable under s. 30 of the Negotiable Instruments Act. **KRISHNASHET v. HARI VALJI**, 20 B. 488. [R., 23 M. 597, F.B., 30 C. 977.]

(48)—S. 30—See No. 18, *supra*.

(49)—Ss. 30, 39 and 86—*Hundi payable at sight—Liability of drawer where holder agrees to an agreement with acceptor for payment—Notice of dishonour, omission to give—Discharge of drawer.*—Where the acceptor of a hundi payable at sight at first accepted the hundi unconditionally, but, subsequently, said he would pay in three days' time, and the holder of the hundi agreed to this arrangement of which, however, he did not give any notice to the drawer, and where, the acceptor having failed to pay the amount of the hundi within the three days, the holder did not give notice of dishonour till after 10 days: *Held*, that the conduct of the holder discharged the drawer from his liability under the hundi according to the terms of ss. 30, 39 and 86 of the Negotiable Instruments Act. **ASKARAN BAID v. PIYAR BUX**, 12 C.W.N. 644 = 8 C.L.J. 163.

(50)—Ss. 30, 93, 98—*Notice of dishonour when can be dispensed with.—Onus of proof that party suffered damage, on whom lies.*—It is plain from the terms of ss. 30 and 93 of the Act, that notice of dishonour should be given to the drawer of a hundi to give the plaintiff a cause of action, and notice can only be dispensed with under the circumstances mentioned in s. 98. It is for the plaintiff (the payee), to show that notice was given or that the defendant, drawer, could not suffer damage for want of it. It is not for the defendant, the drawer, to show that he has suffered damage for want of notice. **AMIRUDDI BEHARI v. BAHADOOR KHAN**, 30 C. 977 = 7 C.W.N. 878. (6 A. 78, 20 B. 498, F.)

(51)—Ss. 30, 93, 98 (c)—*Notice of dishonour to the drawer—Damage—Burden of proof—Issue—Material irregularity—s. 70 (a) of Act XVIII of 1884 as amended.*—*Held* that:—Absence of formal notice required to be given under s. 33 and 93 of Act XXVI of 1881, to the drawer of a dishonoured hundi, is not a fatal bar to its holder's suit brought against the drawer, as the obligation created by these two

Negotiable Instruments Act, 1881—continued.

sections is qualified by s. 98 (c), which lays down that no notice of dishonour is necessary when the party charged could not suffer damage for want of notice. An omission to regard the qualification of an obligation created by law and to frame a definite issue in connection therewith amounts to material irregularity. So in a suit by the holder of a dishonoured hundi, where no notice of dishonour has been given to the drawer, the burden of proving that the party charged could not suffer damage for want of notice is on the plaintiff, and there should be a definite issue on the point. **JANDA RAM v. TODA MAL**, 96 P. W. R. 1911.

(52)—Ss. 30, 93, 98 (c)—*Notice of dishonour to the drawer—Damage—Burden of proof—Issue.*—In a suit by the holder of a dishonoured hundi, where no notice of dishonour has been given to the drawer, the burden of proving that the party charged could not suffer damage for want of notice is on the plaintiff, and there should be a definite issue on the point. **JANDA RAM v. TODA MAL**, 173 P.L.R. 1911.

(53)—S. 31—*Drawee's liability to the holder—Construction of hundi.*—The remedy of a holder of a cheque that has been dishonoured is against the drawer, and not against the drawee who refuses payment, as there is no privity of contract between them. **MAUNG PE v. CHELLAPPA CHETTY**, U.B.R. 1902—03, Vol. II, Civil Negotiable Instruments, 5.

(54)—S. 32—See Nos. 18, *supra* and No. 77, *infra*.

(55)—Ss. 32, 37—*Bill of exchange—Holder and acceptor—Accommodation acceptor—Contract to treat the acceptor as surety—Principal and surety.*—The general rule is that the acceptor of a bill of exchange is the principal debtor and the drawer the surety. A contract to the contrary may be entered into between these two parties inverting their positions, and such a contract may be proved in proceedings between them. No such contract can be set up as between the acceptor and the holder. Mere notice of the defendant's position as an accommodation acceptor is not sufficient to preclude the holder from treating him as a principal debtor. He cannot be so precluded, in the absence of evidence proving that there is a contract under which he is bound to treat the acceptor as a surety. **BELLEW v. BANK OF UPPER INDIA, LIMITED, LUCKNOW**, 13 O.C. 206 = 7 Ind. Cas. 727.

(56)—Ss. 32 and 45—*Bill of exchange—Failure of acceptor to pay—Suit for compensation—Maintainability by drawer—Plea involving collateral enquiry.*—Plaintiffs drew a bill upon a bank, which was accepted by the defendants, for value of certain articles supplied to the defendants, and at the same time, plaintiffs guaranteed to replace defective articles, if any, supplied by them. On the bill being presented for payment, the defendants dishonoured it on the ground that the articles were defective. Plaintiffs sued the defendants upon the bill, without

Negotiable Instruments Act, 1881—continued

the bill having been assigned to them by the Bank. *Held*, that the plaintiffs being drawers of the bill were parties to the same, and having suffered loss by the failure of the defendants as acceptors to pay the amount of the bill at maturity, were entitled to be compensated by the defendants under s. 32 of the Negotiable Instruments Act, 1881. *Held*, also, the amount due in money in respect of the defective articles supplied, cannot be ascertained without collateral enquiry and the defendants cannot therefore raise this plea of failure of consideration, in these proceedings, under s. 45. of the Act. **MESSRS. SCHRODER SMIDT & CO. v. MESSRS. J. SVAMOUR & CO., 2 Sind. L.R. 53.**

(57)—Ss. 32, 50, 120, and 121—*Payee of pro-note benamidar for another—Right of payee to sue.*—Where the payee of a pro-note is merely the benamidar for another in respect of the amount due under the note, such payee cannot maintain a suit against the drawer of the note for the money due thereunder. **GANAPATHY NAYAKAR v. SAMINADHA PILLAY, 7 M.L.J. 64 = C.R.P. No. 578 of 1895.** [Overruled, 30 M. 88 = 16 M.L.J. 508 = 1 M.L.T. 377; Diss., 28 M. 205 = 15 M.L.J. 249.]

(58)—S. 33—*See No. 17, supra.*

(59)—S. 35—*Civ. Pro. Code (Act V of 1908). O. VII, r. 16—Hundi—Lost hundi, suit on—Commisson Agent—Liability of—When he is also payee and endorsee of the hundi—Indemnity of, required from plaintiff—Mercantile usage—Burden of proof—Revision—Civil cases—Punjab Courts Act (X VIII of 1884), s. 70 (1) (b)—Findings of fact—Respondent can urge grounds in support of decision of lower Court.*—At the hearing of an appeal admitted under s. 70 (1), (b) of the Punjab Courts Act, the petitioner cannot contest the lower Court's decision on findings of fact. But it is open to the respondent to support the decision on any grounds, including those decided by the lower Courts in favour of the petitioner. A Commission Agent, through whom a hundi is bought, is liable to the purchaser for the amount of the hundi, when he is payee and indorsee of the same. If he sets up a plea that entry of his name in the hundi is benami and he is not liable by mercantile usage, he must prove that the entry is benami and that his liability is excluded by mercantile usage. Under O. VII, r. 16, of the Civ. Pro. Code, a plaintiff basing his suit on a lost hundi must furnish security against possible claims. **DURGA DAS v. KANSHI RAM, 166 P.L.R. 1912.**

(60)—Ss. 35, 43—*Cheque—Liability of endorser.*—Where a person endorses a cheque in blank at the request of the drawer, under the impression that it is only a formality, that he would incur no liability thereby, and that otherwise the cheque could not be cashed, and such blank endorsement is subsequently converted into a special endorsement without his knowledge and consent, the party who pays the cheque would be entitled to recover the amount from the endorser, even though the latter had

Negotiable Instruments Act, 1881—continued.

received no consideration. **ROHILKHAND AND KUMAUN v. ROW, 7 A. 490, F.B. = A.W.N. 1885, 101.**

(61)—S. 37—*See No. 55, supra.*

(62)—S. 39—*See No. 49, supra.*

(63)—Ss. 42 and 118, cl. (a)—*Reference by Lower Court—Question of Law, precise and general statement of—Civ. Pro. Code s. 617—Promissory note not negotiable—Consideration—Negotiable Instrument—Presumption.*—"In making a reference under s. 617, Civ. Pro. Code, the precise question of law or usage having the force of law must be formulated, and a general question without stating the precise question arising in the case should not be referred." (15 B 376; F.) Where a promissory note which is not negotiable alleges a deposit of cash as the consideration for the note and that consideration fails, the document will create no obligation between the parties even if it were negotiable under s. 43 of the Negotiable Instruments Act. It is only in the case of a negotiable instrument that the presumption arises that it was made or drawn for consideration. **CHOCKEN v. COOMARAPPA CHETTY, L.B.R. 1893—1900, 537, (15 B. 376, Appr.)**

(64)—*See Nos. 24, 30, 60, supra.*

(65)—Ss. 43, 53, 98, and 118—*Notice of dishonor, absence of.*—Neither presentment nor notice of dishonor is necessary if it is shown that at the time when the hundi was drawn there were no funds belonging to the drawer in the hands of the drawee (s. 98-c of the Negotiable Instruments Act, 1881) Under s. 118 of the Negotiable Instrument Act, 1881, the presumption is in favour of the holder in due course; and under s. 53 of the Act any subsequent holder whether for or without consideration stands in his shoes and can enforce his rights against the drawer. **SUBRAO v. SITARAM, 2 Bom. L.R. 891.**

(66)—S. 45—*Consideration—Partial failure—Collateral enquiry, portion not ascertainable in money without—Summary suit—Civ. Pro. Code, 1908, O. XXXVII—Leave to defend—Whether allowable.*—In a suit under O. XXXVII, Civ. Pro. Code, (1908), on a hundi, the defendant applied for leave to defend, on the grounds that the suit hundi and some other hundis were executed in consideration of the defendant getting a lease, subject to certain conditions to be fulfilled by the plaintiff, of a garden for two years, and that it was agreed that plaintiff was to be paid only if he performed his part of the contract, and that, owing to plaintiff's default in the performance of his part of the contract, there was a failure of consideration and that consequently, plaintiff cannot recover. It was found that there was only a partial failure of consideration. *Held*, that, under s. 45, Negotiable Instruments Act, where there has been a partial failure of consideration, it is only where that part is ascertainable in money without collateral enquiry that reduction can be made, and that the defence could not avail in this case, because, except by collateral enquiry,

Negotiable Instruments Act, 1881—continued.

that part could not be ascertained in money. **N.J.R. SETHNA v. LADAK KHAKU, 4 S.L.R. 147.**

(67)—S. 45—See NO. 56, *supra*.

(68)—S. 46—See NOS. 25, 26, 30, 31, 37, *supra*.

(69)—Ss. 46, 47, 48, 50—*Negotiable instrument if may be transferred by registered deed of gift—Transfer of Property Act (IV of 1882), s. 123—Mode in which transferee may enforce his rights—Evidence Act (I of 1872), s. 92—Oral evidence to prove deed of gift to be donatio mortis cause.*—When the holder of a Government promissory note purported to transfer it to another by a registered deed of gift. *Held*—that though there was no endorsement and delivery as contemplated by the Negotiable Instruments Act, there was a valid transfer of the document as a chattel, and the transferee was entitled to it and to the property referred to in it. (How such a voluntary transferee is to enforce recognition of his title and payment of the note, not decided.) Delivery of the property is not necessary where the gift is by a registered instrument. Oral evidence is not admissible to prove that a document which in terms is an out-and-out gift was really meant to be *donatio mortis causa*. **BENODE KISHORE GOSWAMI v. ASUTOSH MUKHOPADHYA, 16 C.W.N. 666.**

(70)—S. 47—See NO. 69, *supra*.

(71)—S. 48—See NOS. 36, 37, 69, *supra*.

(72)—S. 50—See NOS. 26, 57, 69, *supra*.

(73)—S. 51—*Promissory note payable to two persons—Endorsement by one payee in favour of the other—Suit by endorsee as such—Right of endorsee to sue as assignee of chose in action—Admissibility of endorsement as evidence of assignment.*—Suit on a promissory note payable to order executed in favour of two persons. One of the payees having obtained an endorsement of the note in his favour from the other, sued to recover the amount due on the note. *Held* that as endorsee or as one of two joint payees the plaintiff could not sue on the note, but as assignee of the actionable claim he might sue to enforce it. The endorsement was evidence of assignment by way of release. **MUHAMMAD KHUMARALI v. RANGA RAO, 24 M. 654. [Appr., 28 M. 544=15 M.L.J. 384; R., 28 M. 244, 144 P.R. 1906=106 P.L.R. 1907, 17 M.L.J. 393.]**

(74)—S. 51—*Transfer of promissory note otherwise than by endorsement—Right of transferee to sue on note.*—The transfer of a promissory note payable to order, otherwise than by means of an endorsement thereon is an assignment of a chose in action. The assignee takes the rights which the assignor had to convey, and can sue on the note in his own name. But he does not obtain the title which an endorsement would give him. **RAMACHANDRA RAO v. ABEEB ROWTHAN, 24 M. 657, Note. (11 M. 290, R.) [Appr., 28 M. 544=15 M.L.J. 384; R., 24 M. 654, 9 O.C. 175.]**

Negotiable Instruments Act, 1881—continued.

(75)—S. 53—*Promissory note—Consideration, Presumption as to—Holder in due course—Transfer of the note by a holder in due course—Right of the transferee under s. 53.*—The presumption is, that a pro-note was made for consideration, and if this presumption is not rebutted, the pro note must be taken to be supported by consideration. If a pro-note is made for consideration, and is payable to the payee or his order, then the payee is a holder in due course. And when such holder in due course transfers the note to another person, the latter acquires all the rights of the former under s. 53 of the Act. **VINDA MURI GURRAMMA JEENAUSETHI v. VEERARAGHAVALU, 5 M.L.T. 300=1 Ind. Cas. 621.**

(76)—S. 53—See NO. 65, *supra*.

(77)—Ss. 53, 134, 32 and 7—*Bills of exchange—Acceptance by drawee—Acceptance taken on copies of bills not a valid acceptance—Bills endorsed over to a drawee in case of need—Holder in due course—The drawee can maintain the suit without disclosing his principal as a holder in due course—Bills accepted need not be dishonoured and protested—Liability of acceptor at maturity of the bills—Assent not signed on bills but on copies—Assent not valid.*—The plaintiff sued to recover on certain bills drawn on the defendant and endorsed over to the plaintiff, the defendant having failed to pay them. In one of the suits, the acceptance by the defendant was signed upon the original bill but in others it was merely on copies of the bills. The lower appellate Court threw out the first suit on the grounds that the plaintiff was suing as agent for the London firm Francis Times and Co., without disclosing his principals, so that the suits were defective in form, and, secondly, that the suits were not competent as the bills had never been dishonoured and protested. The remaining suits were dismissed upon the ground that the acceptance was written on copies of the bills. *Held*, (1) that the bills were indorsed over to the plaintiff by the Banks in whose favour they were drawn, so that he was a holder deriving title from the holder in due course; and as such he was competent to sue under s. 53 of the Negotiable Instruments Act, 1881. (2) That the bills were made payable in Bombay, and, consequently, under ss. 134 and 32 of the Act the acceptor became liable at the maturity of the bills. Presentment is not necessary to charge the acceptor. The acceptor was the principal debtor and his liability was independent of presentment. (3) That whereas s. 7 of the Act lays down that the acceptance shall be signed either upon the bill or upon one of its parts, the defendant's assent was signed only upon copies of the bills; and thus a material requirement of the law was omitted with the result that there was no valid acceptance. **ARDESHIR SORABSHAH MOOS v. KHUSHAL DAS GOKULDAS, 10 Bom. L.R. 268=32 B. 247.**

(78)—S. 54—See NO. 27, *supra*.

(79)—S. 56—See NO. 32, *supra*.

Negotiable Instruments Act, 1881—continued.

(80)—S. 58 — *Fraud*.—Plaintiff brought a suit on two promissory notes made by the defendant R in favour of the defendant M. Plaintiff's case was that the two promissory notes were endorsed over to him by M, that he gave consideration for them, and that, therefore he was entitled to succeed upon both of them against R, the maker and M, the payee. R pleaded in defence that he contemplated the institution of a suit in the Court to recover a large sum of money from a person whom he believed to be his debtor, and that as funds had to be raised for the purpose of that legal proceeding, these two accommodation promissory notes were made between himself and M, the payee, the object of the transaction being to obtain cash thereon from any person who could be got to discount them, and that there was a fraud committed subsequently in respect of the proceeds obtained from the plaintiff by way of discount for the notes. *Held* that there was no fraud such as would bring the case within the provisions of s. 58 of the Negotiable Instruments Act, that at the time when M took the promissory notes to the plaintiff for discount, he did what he was entitled to do, and indeed what he had been empowered by the maker to do, namely, to get cash for them, that there was no antecedent fraud subsisting at the time which could affect a person discounting them, that if there was any fraud or offence committed subsequently in respect of the proceeds obtained from the plaintiff by way of discount for the notes, the fraud, if there were any at all, consisted in the misapplication of those proceeds, and that, however responsible M might have been to R for misconduct in thus applying the funds obtained, that was not such misconduct as could properly be held to affect the plaintiff, and would not constitute the fraud or offence contemplated by s. 58 of the Negotiable Instruments Act, and that therefore the plaintiff should succeed. **PITAM MAL v. RAM CHANDER, A.W.N. 1886, 34.**

(81)—S. 58—*See* NOS. 31, 33, *supra*.

(82)—S. 59—*See* NO. 31, *supra*.

(83)—S. 61—*Hundi payable at sight or on arrival at certain place—Time of presentation—Reasonable time—Delay—Liability of drawer*.—By the general law, there is no specific time within which a hundi, payable at sight, or payable on arrival at a particular place, is to be presented. S. 61 of the Negotiable Instruments Act leaves the law as it was before. In deciding whether a hundi has been presented within reasonable time, the situation and interests of both the drawee and the holder must be considered, as also the distance of the place of presentation from where it was drawn. In the above case, where the hundi was presented 25 days after arrival and dishonoured (the drawee's firm shortly thereafter becoming insolvent), *held*, there was not such delay as to absolve the drawers from liability. **MUTTY LALL v. CHOGE MULL, 11 C. 344.**

Negotiable Instruments Act, 1881—continued.

(84)—Ch. V, s. 63—*Hundi, scope of—Drawer and drawee same person—No notice of dishonour necessary—Dishonour by non-acceptance is itself cause of action for suit against drawer—Payee need not wait till maturity*.—Presentment for acceptance must always, and in every case, precede presentment for payment, and the drawer of a bill contracts that whenever the bill is duly presented, it will, subject to the provisions of s. 63 of the Negotiable Instruments Act, be accepted. The several sections in Ch. V relating to presentment for payment pre-suppose that the bill has not been already dishonoured by non-acceptance. When it is dishonoured by non-acceptance, as well as when it is dishonoured by non-payment, the provisions of Ch. VIII come into play. Although there is no such explicit declaration of the law upon this subject contained in the Indian, as in s. 43 (2) of the English Act, still, the whole scope and tenor of Ch. VIII of the Indian Act, appear to contemplate the same result as is there declared to follow from non-acceptance. No notice of dishonour is required where, as in this case, the drawer and the drawee of a hundi are the same person. On dishonour by non-acceptance of a hundi payable at a fixed date, the right to sue the drawer immediately accrues and is complete, and there is no need to wait till the maturity of the bill, or to present it to the drawee for payment. **RAM RAUJI JAMBHEKAR v. PRALHADAS SUBKARAN, 20 B. 133.**

(85)—S. 64—*Cause of action—Promissory note, Suit on—"Drawer," Legal representatives of*—S. 64 of the Negotiable Instruments Act is not applicable to a suit based on a promissory note payable on demand and not payable at a specified place. (148 P.R. 1883, R.) The word "drawer" in the section includes the legal representatives of a drawer. **HARI SINGH v. NARAIN SINGH, 120 P.L.R. 1903 = 60 P.R. 1903.**

(86)—S. 64—*Presentment for payment—Necessity for presentment—Suit upon bill not presented*.—One B.H. drew a bill of exchange on the Agra Savings Bank payable at ninety-one days. The bill was accepted by one F.A. There was no special condition that the bill was to be presented at any particular place or at any particular time. The bill was never presented for payment, but after maturity a suit was brought on the bill against the acceptor. *Held*, that the suit was sufficient demand and no presentment was necessary. **FARZAND ALI v. THE AGRA SAVINGS BANK, A.W.N. 1896, 201. [F., 21 A. 450.]**

(87)—Ss. 64, 56—*Non-presentment of promissory note for payment at maturity—Effect on maker's liability*.—Where a promissory note is not presented for payment at maturity as required by s. 66 of the Act, the maker of the note is not thereby relieved from his liability. S. 64 of the Act exempts from liability to the holder, in default of presentment, only parties

Negotiable Instruments Act, 1881—continued.

other than the maker of the note. PHUL CHAND v. GANGA GHULAM, 21 A. 450 = A.W. N. 1899, 157. (A.W.N. 1896, 201, 13 M 172, R.)

(88)—S. 66—See NO. 87, *supra*.

(89)—S. 74—See NO. 5, *supra*.

(90)—S. 78—*Endorsee as holder—Payment*.—An endorsee of a negotiable instrument is the holder thereof, and under s. 78 of the Act, payment must be made to the holder. VOLETI SREERAMULU v. GUDISA VENKATA REDDY, 8 M. L. T. 247 = 8 Ind. Cas. 355.

(91)—S. 78—See NOS. 18, 23, 24, 26, 32, *supra*.

(92)—S. 79—*Interest when rate specified—Payment by instalments*.—S. 79 of the Negotiable Instruments Act gives a Court no option to disallow interest, where a specified rate of interest is provided for in a pro-note. Where the principal sum lent was Rs. 40 and a sum of Rs. 74-10-0 had already been paid as principal and interest, the debtor's application to be allowed to pay by instalments was allowed. GOVIND-JEE v. C. KO PO YEE, 11 Ind. Cas. 891.

(93)—S. 79—*Pro-note—Interest*.—When the maker of a pro-note had entered into the contract knowingly, the interest must be allowed at the rate specified in the pro note, until some date after the institution of the suit. But there is no obligation on the Court to grant the specified rate of interest until the date of realization or up to the date of decree. HARSA SINGH v. MAUNG AUNG GYI, U.B.R. 1892—96, 591. (4 C. 137, R.) [R., U. B. R. 1892—1896, 300].

(94)—S. 79—See CONTRACT ACT, s. 74, U.B. R. 1892—1896, 300.

(95)—S. 80—*Evidence Act, s. 92, proviso 2—Negotiable instrument silent as to interest—Separate oral agreement as to interest whether can be proved—Separate entry as to interest in sahuksar's or broker's book whether proof of written agreement—Rate of interest when instrument silent—Remand for fresh evidence when not to be allowed*.—Where a suit is based on a negotiable instrument which is a document of a formal character, the existence of a separate oral agreement as to any matter on which the instrument is silent, cannot be proved under s. 92 of the Evidence Act, as proviso 2 to the section would not apply to the case. (29 A. 33 P. C. = 4 A.L.J. 29 = 5 C.L.J. 7 = 11 C.W.N. 105 = 9 Bom. L.R. 1 = 1 M.L.T. 427 = 17 M.L.J. 35, D.) A Shah Jog Hundi is an instrument of a formal character, and where it is silent as to interest, a separate oral agreement for payment of interest cannot be proved in virtue of proviso 2 to s. 92 of the Evidence Act. But interest at 6 per cent. per annum will be allowed under s. 80 of the Negotiable Instruments Act. Where a hundi does not contain the rate of interest, but such rate is entered separately in the books of the sahuksar and the broker, this entry by itself would not be sufficient evidence of a written agreement between the parties to pay interest at the rate therein mentioned. Where it would be dangerous, in the opinion of

Negotiable Instruments Act, 1881—continued.

the Appellate Court, to allow the production of fresh evidence on a point in respect to which the necessary proof ought to have been adduced in the lower Court, and a remand, if allowed, would open the door to the production of false evidence, the request for a remand should be refused. KISHORE CHAND v. GURDITTA MAL, 165 P.L.R. 1911.

(96)—S. 80—*Nattukottai Chetties' way of signing and drawing bills—Bill of exchange—Construction—Interest—Independent agreement*.—With regard to the Nattukottai Chetties who carry on most extensive business by means of agents in different parts of India, it is well known that they trade under names made up of a series of initials. In firm transactions, the initials, which are the name of the firm, are prefixed to the name of the signatory, and this is the ordinary way in which documents are signed on behalf of these firms, and may even be said to be the ordinary way in which these firms sign. In considering whether a signature in a bill is that of the principal or agent by whose hand it is written, the construction most favourable to the validity of the instrument must be adopted. S. 80 of the Negotiable Instruments Act does not affect the validity of collateral agreement to pay interest at a specified rate as to which the hundi is silent. MANGUMAL JESSE SINGH v. A. L. V.R.C.T. FIRM, 4 M.L.T. 309.

(97)—S. 80—*Hundi, suit on—Collateral agreement as to interest—Rate of interest—The Usury Laws Repeal Act (XXVIII of 1885) Evidence Act (I of 1872), s. 92, prov. (2)—Hundis upon which a suit was brought were silent as to interest*. But it was proved that in accordance with the custom of the district the parties had entered into a collateral agreement, embodied in written documents, that the hundis should bear interest at 30 per cent. per annum. Held—That s. 80 of the Negotiable Instruments Act, being an enabling section, was no bar to the recovery of interest at the above rate. GOSWAMI SRI GHANSHIAM LALJI v. RAM NARAIN, 11 C.W.N. 105, P.C. = 29 A. 33 = 17 M.L.J. 35 = 4 A.L.J. 29 = 1 M.L.T. 427 = 9 Bom. L.R. 1 = 5 C.L.J. 7.

(98)—S. 80—*Presumption as to interest when pro-note is silent—Oral evidence of contemporaneous agreement to pay interest, admissibility of—Evidence Act, s. 92, prov. 2*.—Where there is no mention in the pro-note of the rate of interest, interest at 6 per cent. is payable under s. 80, Negotiable Instruments Act, and oral evidence is inadmissible to prove a contemporaneous agreement to pay interest at a certain rate. FATUMA BIBI v. HANUMANTHA ROW, 17 M.L.J. 296. (30 C. 146, D.)

(99)—S. 80—*Rate of interest to be allowed*.—In the absence of a special contract contained in a hundi, the rate of interest allowable to the plaintiff in a suit thereon is that mentioned in this section, viz., 6 per cent. per annum. RAM DAS v. MATHRA DAS, 6 P.L.R. 1905.

Negotiable Instruments Act, 1881—continued.

(100)—S. 80—*Collateral agreement as to payment of interest—Overriding the provisions of statute.*—No agreement of parties, not embodied in a negotiable instrument, can override the provisions of s. 80 of the Negotiable Instruments Act. Where in a promissory note no mention was made as to the rate of interest, but there was a collateral agreement, for the payment of interest at 4 per cent. per mensem, held, that only 6 per cent. per annum should be allowed. **BASANTI BIBI v. SHEO MANGAL PARSHAD, 6 A.L.J. 233=2 Ind. Cas. 199.**

(101)—S. 80—*See INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 23 M. 18.*

(102)—S. 80—*Suit on Hundi—Interest—Costs—See PROV. S.C. COURTS ACT, 1887, s. 25, 113 P.L.R. 1911.*

(103)—S. 83—*'All previous parties'—Construction of the phrase—Whether includes drawer—Rule as to presentation for acceptance and payment—Whether applies to hundis payable after a certain number of days.*—The words 'all previous parties,' appearing in s. 83, Negotiable Instruments Act, should be construed as including the drawer. S. 83 applies only to bills of exchange in which acceptance by the drawee is obligatory, and does not apply to the hundis of the usual type payable after a certain number of days. **KHAN CHAND v. GOLAB RAM, 39 P.R. 1911 (Civil). (19 P.R. 1888, R.)**

(104)—S. 85—*See NO. 18, supra.*

(105)—S. 86—*See NO. 49, supra.*

(106)—S. 87—*Misconstruction of section—High Court—Revision—Civ. Pro. Code (Act V of 1908), s. 115.*—The fact that a Subordinate Court, in trying a suit, has misconstrued s. 87 of the Negotiable Instruments Act, is not a ground for interference by the High Court in revision under s. 115 of the Civ. Pro. Code, 1908. **VENKATA SUBRAMANIAM v. KANCHI RAJU, 12 Ind. Cas. 138.**

(107)—S. 87—*Promissory note—Plaintiff's deceased father's name inserted, instead of plaintiff's as promisee, by mistake—Evidence to prove mistake and the real intended promisee—Admissible.*—In a suit on a promissory note, the plaintiff wanted to show that his deceased father's name was entered as the promisee, instead of his own name, by a mistake of the writer. The Sub-Judge dismissed the suit on the ground that he must first bring a regular suit for the rectification of the promissory note. In revision, held:—(1) that there is no necessity for such a suit; and (2) that evidence can be given to show that there was such a mistake as is alleged by the plaintiff and that, by the promisee named in the pro-note, the plaintiff himself was intended. **GOPAL ROW GADEY RAM SAHIB v. VERAPPAN SERVAI KARAN, (1911) 2 M.W.N. 556=10 M.L.T. 522. (30 M. 88, D.)**

(108)—S. 87—*Liability of stranger signing bill or note—Pro-note—Addition of new maker.*—

Negotiable Instruments Act, 1881—continued.

The Indian Act differs from the English Bill of Exchange Act (s. 56) in not containing any provision for the liability of a stranger signing a bill or note. According to the English Law, a stranger, who signs a note or bill, incurs the liability of an endorser. The addition of a new maker is doubtless a material alteration. But where a pro-note is signed by two persons as makers, and whose names are also mentioned in the body of the note, the adding of a third person's name as a maker without mentioning his name in the body of the note, is not a material alteration. **MA KIN v. C.T.L. ADAGAPPA CHETTY, U B.R. 1902—1903, Vol. II, Civil, Negotiable Instruments, 1.**

(109)—S. 87—*Signing a pro-note at different times.*—The signing of a pro-note at different times renders the note void as against any one who was a party to the note, and a suit founded upon it is not maintainable. **MAUNG PE v. MAUNG SHWE AUNG, L.B.R. 1893—1900, 627.**

(110)—S. 87—*Material alteration.*—A note signed by more than one person and running "I promise to pay," is several as well as joint. But when a note is not only in the singular but also specified the person promising to pay by name, the addition of a signature to such a note, without alteration in any way of the body of the note, may not convert it into a joint note made by more than one maker. Such an addition is not a material alteration. **KO PE TWE v. A. L. V. R. R. M. VENKATACHELLUM CHETTY, U. B. R. 1892—96, 593. [R., U.B.R. 1902—1903, II, Negotiable Instruments, 1.]**

(111)—S. 87—*Promissory note—Addition of names—Material alteration.*—Where a pro-note contains the name of the maker, and according to its terms no one else could be a promisor unless his name is also added in the body of the note, the additional signature of a promisor is not a material alteration. The addition of words which could not prejudice any one, will not destroy the validity of a pro-note. A maker of a pro-note will not be discharged from his obligation to pay it because the holder has put in writing on the note what the law would have supplied. **MA SHWE YU v. K.K. N.K. RAMEN CHETTY, L.B.R. 1900—1902, Vol. I, 255. (L.B.R. 343, D.)**

(112)—S. 87—*Material alteration, what amounts to—Non-compliance with foreign stamp law—Admissibility under Indian Law—Private International law—Document whether bond or pronote.*—Plaintiff brought a suit upon two documents which were executed in his favour in Mysore by the father of defendants. In the plaint, these documents were described as bonds, but in the documents themselves they were described as pro-notes. These documents were torn in several places and pieced together again, but in such a way that the parts where the name of the payee and the words 'or order' would ordinarily appear were missing, with the result that they could be described as bonds as they

Negotiable Instruments Act, 1881—continued.

were described in the plaint: it appeared also that the documents were not stamped in accordance with the Mysore Stamp Law (Regulation II of 1900) and were entirely invalid in Mysore. *Held* that there had been a material alteration, inasmuch as the documents, which could not be sued upon in Mysore, were converted into those which could be sued upon, and that they were therefore void not only under s. 87 of the Negotiable Instruments Act, but upon general principles of law. In England, under s. 72 (1) (a) the Bills of Exchange Act, mere failure of compliance with foreign stamp law does not prevent bills being sued upon in England (5 Ex. 275, D.). But there is no section corresponding to that in the Negotiable Instruments Act: and s. 19 of the Stamp Act does not seem to throw light upon this question. **LAKSHMAMMAL v. NARASIMHARAGHAVA IYENGAR, 12 M.L.T. 333.**

(113)—Ss. 87 and 27—*Alteration of promissory note by insertion of date—Power of husband to sign on behalf of his wife.*—Insertion in a promissory note after execution of a date entered in the counterfoil and inadvertently omitted when the note was signed is an alteration made to carry out the common intention of the parties as contemplated in s. 87 of the Negotiable Instruments Act. Any general authority that the husband may have as lord of the household, to act on behalf of his wife, does not include the right to sign promissory notes on her behalf. **SAN PE v. MAUNG KYAN, L.B.R. 1903—1904, Vol. II, 324.** (1899 L.B.R. 568, 1891 L.B.R. 578, D.)

(114)—S. 88—*See* NO. 17, *supra*.

(115)—S. 92—*See* NO. 18, *supra*.

(116)—S. 93—*See* NOS. 50, 51 and 52, *supra*.

(117)—Ss. 93, 94, 98 (c)—*Hundi—Notice of dishonour.*—Where no local usage exists to the contrary, the doctrine of notice of dishonour as propounded in the Negotiable Instruments Act should be applied to hundis in the vernacular, "the reasonable time" within which it is to be given being determined according to the circumstances of each case. In the absence of such notice, a plaintiff suing on a dishonoured hundi must prove that those whom he seeks to make liable thereon could not suffer for want of such notice. **MOTI LAL v. MOTI LAL, 6 A. 78 = A.W.N. 1883, 216.** [R., 20 B. 488, 26 M. 239 = 12 M.L.J. 267, 30 C. 977.]

(118)—S. 94—*See* NOS. 6, 117, *supra*.

(119)—S. 98—*Want of notice—Damages—Burden of proof.*—In a suit by intermediate endorsers of a hundi against earlier endorsers, the Court found that the hundi had not been presented for payment within a reasonable time. *Held* that the *onus* lay upon the plaintiffs to prove that the party charged could not suffer damage by reason of want of notice. **MADHO RAM v. DURGA PRASAD, 7 A.L.J. 815 = 6 Ind. Cas. 793.**

(120)—S. 98—*Bill of exchange—Dishonour—Notice.*—In a suit on a dishonoured bill of

Negotiable Instruments Act, 1881—continued.

exchange, notice of dishonour is absolutely necessary to give plaintiff a cause of action. Notice can only be dispensed with under the circumstances mentioned in s. 98 of Act XXVI of 1881. **MITHEN v. PALTU, 14 Ind. Cas. 51.** (30 C. 977, 7 C.W.N 878, R.)

(121)—S. 98 (c)—*Dishonor of hundi after acceptance—Notice of dishonor—Omission to give notice—Burden of proving absence of damage consequent on omission to give notice—Partnership between drawer and drawee—Acceptor's liability barred by limitation—Drawer whether discharged.*—A hundi drawn payable at Rangoon within certain days was accepted by the drawee. The payee thereupon endorsed it to the plaintiff, who sent to Rangoon for payment but was refused payment by the acceptor. Thereupon, plaintiff sued to recover the amount due on the hundi, making the drawer and endorser parties to the suit. The acceptor was subsequently made a party, but at the time he was joined, the suit as against him was out of time. Plaintiff alleged that the acceptor was the partner of the drawer and that the hundi directed the acceptor to pay the amount due. No notice of dishonor had been given to the drawer of the hundi. *Held* that the burden of proving that the drawer could not have suffered damage by reason of notice not having been given to him of the dishonor of the bill by the acceptor lay on the plaintiff. *Held*, also, that the mere fact that the drawer and drawee of a bill happen to be partners cannot lead to any presumption that they were partners in respect of the drawing of the bill or that the bill was drawn by one of them on behalf of both. Assuming that the drawer and drawee were partners, there was no allegation in the plaint nor was it proved that the drawer drew the bill in question on behalf of himself and the drawee. *Held*, further, that the fact that the suit was barred by limitation as against the acceptor did not operate as a discharge of the drawer's obligation to pay. **JAMBU RAMASWAMY BHAGAVATHAR v. SUNDARARAJA CHETTI, 26 M. 239 = 12 M.L.J. 267.** [R., 26 M. 526.]

(122)—S. 98—*See* NOS. 50 to 52, 65, 117, *supra*.

(123)—S. 118—*Suit on negotiable pro-note—Plea of immoral consideration not substantiated—Plaintiff whether bound to prove consideration.*—Where, the defendant in a suit on a negotiable pro-note is unable to substantiate the plea of immoral consideration set up by him, the plaintiff is not bound to prove the passing of consideration; he is entitled to a decree in his favour. *Per Arnold White, C.J.*—If there had been a breaking off of immoral relations and a renewal of them as the outcome of a promise to pay, the continuance of the co-habitation would give rise to a strong presumption that the bond given during such co-habitation was given for an immoral consideration. *Per Bhashyam Ayyangar, J.*—A promise to pay, made in consideration of past co-habitation, is

Negotiable Instruments Act, 1881—continued.
valid and enforceable under s. 25 (2) of the Contract Act. **LAKSHMINARAYANA REDDIAR v. SUBHADRI AMMAL, 13 M.L.J. 7.**

(124)—S. 118—*Presumption—Proof of consideration—Undue influence—Contract Act, 1872, s. 16.*—Where a money lender admittedly lent money to a dissolute young man while he was still a minor, and again within a few days of his attaining his majority supplied him with large quantities of jewellery in presence only of his (plaintiff's) touts, relations and dependants, and then obviously gave a false colour to the transaction in his claim, *held*, that such circumstances are facts from which undue influence is to be presumed, and are sufficient to shift the ordinary presumption laid down in s. 118 of the Negotiable Instruments Act, 1881, that until the contrary is proved the presumption should be made that every negotiable instrument was made for consideration, and that the *onus* therefore of proving the actual amount of the advances must be laid on the plaintiff. **MIRAN BAKHS v. MUHAMMAD HUSSAIN, 2 P.R. 1902.** [R., 9 P.R. 1906 = 19 P.L.R. 1906.]

(125)—S. 118—*Promissory note—Presumption as to consideration—Practice—Plea not urged in the pleadings, not to be considered.*—A suit was brought on a promissory note alleged to have been executed by the defendant, who denied execution of the note. Both the lower Courts found the note was not supported by consideration, and so dismissed the suit. *Held*, under s. 118 of the Negotiable Instruments Act, the presumption is that the note was for consideration, and the burden of proof lay on the defendant to prove that there was none. So, in the absence of a plea to the effect that there was no consideration for the note, the question of consideration ought not to be gone into in second appeal. **MAUNG ME v. MA SEIN, 5 L.B.R. 46 = 2 Ind. Cas. 539.**

(126)—S. 118—*Onus—S. 115, Civ. Pro. Code—Powers of the High Court to correct a mere error of law in revision.*—In a suit on a pro-note, in which the defendant admitted execution of the note but pleaded failure of consideration, under s. 118, Neg. Instr. Act, it was incumbent on the defendant to make out his plea. When his evidence as to want of consideration was disbelieved, the plaintiff was entitled to judgment at once. Where, however, after the defence evidence was taken, the plaintiff proceeded to let in his own evidence to show how the consideration for the pronote was made up, and such evidence also was disbelieved by the trying Judge.—*Held, per Abdur Rahim, J.* :—It did not amount to an admission of want of consideration and it was open to the Judge to pass a decree in favour of the plaintiff. *Per Sundara Iyer, J.* :—It amounted to an admission of want of consideration and the Judge ought to have dismissed the suit.—*Per Sundara Iyer, J.* :—The High Court has no power to correct a mere error of law in revision. **M. VENKATARAGAVALLU CHETTY v. A. M. SABAPATHY CHETTY, 2 M.W.N. (1911) 253.**

Negotiable Instruments Act, 1881—concluded.

(127)—S. 118—*See BURDEN OF PROOF—DOCUMENTS RELATING TO LOANS AND SUITS RELATING THERETO, 20 B. 367.*

(128)—S. 118—*See CONTRACT ACT, 1872, s. 16, sub-s. (3), 5 O.C. 307.*

(129)—S. 118—*Absence of consideration for the making of a pro-note—Rights of a bona fide holder in due course for consideration and without notice of want of consideration—See NEGOTIABLE INSTRUMENTS—PROMISSORY NOTE, 1 M.L.T. 393.*

(130)—S. 118—*See NOS. 63, 65, supra.*

(131)—S. 120—*See NO. 57, supra.*

(132)—S. 121—*See NO. 57, supra.*

(133)—S. 134—*See NO. 77, supra.*

Negotiable Instruments, Summary Procedure on.

(1)—*Bills of Exchange Act (V of 1866)—Bona fides of defence—Leave to defend—Payment or security.*—In suits under the Bills of Exchange Act, where there is no pretence for a defence, the party sued should not be allowed to defend, and the holder should have judgment as of course; but if the defendant has a real defence, he should have leave to appear and set it up. It is only when there is a doubt as to the *bona fides* of the defence set up, that payment of money into Court should be ordered, or security for the same be directed to be given. **VON-LINTZGY v. NARAYAN SING, 6 B.L.R. App. 64.**

(2)—*Return of summons—Procedure.*—In a suit under Act V of 1866, the summons should be returned in the usual way, and after the expiration of the required time, an order of the Court or a decree should be obtained. **SCHILLER v. MARKER, 1 Ind. Jur. N.S. 283.**

(3)—*Time to obtain leave to defend—Act V of 1866, s. 3.*—Although Act V of 1866, s. 3, only gives the defendant seven days to get leave to come in and defend an action on a bill, note, etc., the Court must be satisfied before granting a decree that the defendant has had a full opportunity to obtain leave to defend. **GROB v. PALMER, 1 Ind. Jur. N.S. 395.**

(4)—*Act V of 1866—Endorsement on promissory note—Struck out—Plaint not admitted.*—In a suit under Act V of 1866 by the endorsee of a pro-note, the pro-note bore an endorsement of payment which had been struck out owing to payment not having been made on presentation by the endorsee. In rejecting the plaint, the Court (*Phear, J.*) observed:—"I cannot admit the plaint, unless evidence is given that the bill has not been paid, and to explain why the endorsement has been struck out. As, under Act V of 1866, evidence cannot be taken, the plaint cannot be admitted." **THE CHARTERED MERCANTILE BANK v. SECONDE, 3 B.L.R. O.C. 146.**

(5)—*Act V of 1866—Suit against resident out of jurisdiction—Summary procedure.*—Suits could not be brought under Act V of 1866,

Negotiable Instruments, Summary Procedure on—concluded.

against a defendant who was living outside the jurisdiction of the Court. In all cases (under Act V of 1866) in which the defendant resided so far off that the whole or a considerable portion of the time (*viz.*, 7 days) within which he might apply for leave to defend would be consumed in the mere journey, execution should be stayed so as to allow him time to make an application to set aside the judgment under s. 4. **CHANDRA KANT ROY v. N. P. POGOSE, 3 B. L.R. O.C. 83.** [*Expl.*, 5 C.W.N. 259.]

(6)—*Notarial protest—Evidence of dishonour—Hundi—Bill of Exchange.*—A notarial protest of any bill of exchange noted at any time after the passing of Act V of 1866, is *prima facie* evidence that the bill has been dishonoured under s. 13 of that Act, although the sections relating to summary procedure on bills of exchange did not come into operation till May 1st, 1866. A Hundi, which contains a direction on sufficient consideration to the drawee, and accepted by him, is within the terms of the Act, and such a document is assignable without any regular form of endorsement, if sufficient cause appears in the handwriting of an endorser to indicate an intention to assign it. **EAST INDIA BANK v. KHOJAH VULLIE GOOLWANY, 1 Ind. Jur. N.S. 247.**

(7)—*Act V of 1866—Summary procedure—Claim of plaintiff.*—Under the summary procedure in Bills of Exchange Act (V of 1866), the party is entitled to claim by his summons and obtain by his decree whatever sum, principal and interest, is, on the legal construction of the instrument, demandable. If, in a regular suit, interest would, on the construction of the instrument, be given, then it is claimable and obtainable in this summary process. **DESOUZA v. RANGAIAN, 6 M.H.C. 257.**

(8)—*Act V of 1866—Suit to be brought in the Court which has jurisdiction.*—In an undefended suit brought under Act V of 1866 on a pro-note for Rs. 342, there was nothing in the petition to show that the suit could not have been brought in the Small Cause Court; the High Court gave a decree for the amount of the note and costs. **W.P. DUFF v. G. E. FISHER, 8 B L.R. App. 10.**

Negotiation.

(1)—*Contract — Preliminary negotiations—Withdrawal before negotiation becomes contract.*—The negotiations preliminary to a contract are distinguishable from the contract itself. Where the matter has not gone beyond negotiation, one of the parties to it may withdraw from the same and it cannot be enforced until it has become a complete contract. **SHEIKH KASIM ALI v. MOONSHEE CHOONNEE LALL, 3 Agra 9.**

Negotiation of Government Securities.

See **POWER OF ATTORNEY, 8 C. 934, 10 C. 901, P. C. = 11 I. A. 94.**

Nelson's Manual.

Palayam, history of—Nelson's Manual, admissibility in evidence of—See **EVIDENCE ACT, 1872, s. 57, 1 M. L. J. 326.**

New Lands, Amending Act IX of 1847, Assessment of.

See **BEN. ACT, IV OF 1868.**

Newspaper.

Sale of goodwill in a—See **GOODWILL, 9 Bom. L. R. 312.**

Defamation—Malice—Copy by one—Of libellous matter in another, whether amounts to repetition—See **LIBEL, 14 B. 532.**

Newspaper libel—Assessment of damages—Matters to be considered—See **LIBEL, 13 C. W. N. 895 = 6 M. L. T. 73 = 36 C. 883 = 3 Ind. Cas. 224.**

Suit to recover arrears of subscription of, limitation for—See **LIMITATION ACT, 1908, art. 52, 7 Bom. L. R. 190.**

Practice—Citations — Mode of issuing citations—Payment for advertisements in newspapers—See **SUCCESSION ACT, 1865, s. 250, A. W. N. 1903, 30.**

New Trial.

(1)—*Want of jurisdiction—Ground for new trial.*—Though the plea of want of jurisdiction was not formally raised or recorded at the original hearing, a new trial on that ground may be granted. **CHUNDEE CHURN DUTT v. EDULJEE COWASJEE BIJNEE, 8 C. 678 = 11 C.L.R. 225.**

(2)—*Act VIII of 1859, ss. 119, 376—Ex parte decree—Application to set aside decree—Review—Application to set aside ex parte decree admitted by appellate Court—Records—Trial—Procedure.*—Where a petition is clearly and distinctly one under s. 119 of Act VIII of 1859 for re-trial of the case in the presence of the petitioner, the use of the word *review* in the petition adopted by the Munsif in his order cannot make it an application for review under s. 376 of the Civ. Pro. Code. The lower appellate Court admitting an application under s. 119 of Act VIII of 1859, for re-trial of a case decided *ex parte*, should send for the records of the suit, *as a suit and not as a miscellaneous case* so that the case may be tried as a suit by the appellate Court, the object of the law being that a suit should assume a complete form, and go to a full trial, not that one half should go to one Court and the other half to another. **KHOOB LALL SAHOO v. SHAIKH KADIR BUKSH, 15 W.R. 431.**

(3)—*Act X of 1867, s. 1—Act XI of 1865, s. 22—New trial.*—The hearing for a new trial is a hearing within s. 22, Act XI of 1865. An application for a new trial is a point in the proceedings previous to the hearing. A Small Cause Court Judge can ask the opinion of the High Court on a question of law upon such an application. **ISAN CHANDRA SING v. HARAN SINDAR, 3 B.L.R.A.C. 135 = 11 W.R. 525.** [*Cons.*, 15 M. 179.]

New Trial—continued.

(4)—*Settlement of issues and trial—Irregularities.*—A remand having been ordered for the proper issue to be laid down, and for the trial of the case *de novo* after calling upon the parties for their proofs, and the appellant having declined to adduce further evidence on the issues so settled, and having called for the judgment of the Court upon the evidence already given:—*Held* that, if this manner of trial were irregular, it was not for the appellant to complain of the irregularity. The suspicion that a party, who has failed to prove his case, may prove more successful on the second and fuller investigation, is no sufficient ground for directing a new trial. **MAHARAJAH KOONWAR NITRASUR SINGH v. BABOO NUND LALL, 1 W.R.P.C. 51 = 8 M.I.A. 199.**

(5)—*New trial—Discovery of document after judgment—No application for discovery before judgment—Fraud.*—Where no cause of fraud or surprise having been made out, a party to the suit sought for a new trial on the ground of discovery after judgment of an important document, which was in the possession of an opposite party, but of which the party first named had neglected to obtain discovery before judgment: *Held* that a new trial should not be granted. **TURNBULL & CO. v. DUVAL, 6 C.W. N. 809, P.C.**

(6)—*Application within seven days of decision for new trial—Act XI of 1865, s. 21, notice under, of intention to apply, deemed to be included in application itself.*—S. 21 of Act XI of 1865 contemplates a previous notice of the intention of the parties to apply for a new trial. While such notice of the application is different from the application itself and cannot include it, the application for a new trial may be such as to include the notice to the Court contemplated by s. 21; and, where an application contained in itself a notice of the intention to apply for a new trial, the requirements of the law will be satisfied if the applicant (being within the legal time) were permitted to treat the application as a notice under s. 21 of Act XI of 1865. **DAMODHUR DASS v. JUGGUR NATH, 83 P.R. 1869.**

See EVIDENCE — MISCELLANEOUS, 5 M. I.A. 43.

Appeal—Records destroyed—See PRACTICE AND PROCEDURE, 3 C.W.N. 150.

See PRESIDENCY SMALL CAUSE COURTS ACT, 1882, ss. 37, 38, 69, 20 M. 358 = 7 M.L.J. 140.

Rehearing of suit decreed ex parte—See PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 38, 3 C.L.J. 199.

New trial, application for, under s. 69, Act XV of 1882—Difference of opinion between Judges—Contingent judgment—Proper course—See PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 69, 11 C. 298.

S. 17, Provincial Small Cause Courts Act—Deposit of decree amount or tender of security

New Trial—concluded.

—Condition precedent to grant of new trial—*See SMALL CAUSE COURT, MOFUSSIL JURISDICTION OF—PRACTICE AND PROCEDURE, 18 C. 83.*

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—PRACTICE AND PROCEDURE, 17 W.R. 48, 18 W.R. 446, 88 P.R. 1876.

See SMALL CAUSE COURT, PRESIDENCY TOWNS, JURISDICTION OF—GENERAL, 29 C. 239.

Next Friend.

See CIV. PRO. CODE, 1908, O. XXXII, rr. 1 to 15.

See MINOR — SUITS BY AND AGAINST MINORS.

See GUARDIAN.

See GUARDIAN AD LITEM.

See LUNATIC.

(1)—*Mahomedan Law—Minor—Guardian ad litem—Civ. Pro. Code*—Though under the Mahomedan Law an uncle cannot be the guardian of the property of a minor, yet, that law does not prevent an uncle from representing in Court, as next friend, his minor nephew. All that is necessary under the Civ. Pro. Code, is that the minor should be represented by his next friend. **ABDUL BARI v. RASH BEHARI PAL, 6 C.L.R. 417.**

(2)—*Minor appellant—Death of next friend pending appeal—Omission to appoint new next friend, mere irregularity—Civ. Pro. Code, s. 578.*—*Held*, where the next friend of a minor appellant died during the pendency of an appeal, and the appeal was decreed in his favour without any person being appointed to act as his next friend, that the omission to make such appointment was a mere irregularity, and as no one was prejudiced thereby, the decree passed should not be disturbed. **BHOLAI RAM v. AJUDHIA PRASAD, 3 A.L.J. 81 = 28 A. 328 = A.W.N. 1906, 40. [R., 10 O.C. 360, 31 A. 176, F.B. = 6 A.L.J. 263 = 1 Ind. Cas. 479.]**

Power to refer to arbitration—See ARBITRATION — REFERENCE TO ARBITRATION, 92 P.R. 1885.

Gross negligence of next friend in suit instituted on behalf of minor—See CIV. PRO. CODE, 1908, O. II, r. 2, O. IX, rr. 8, 9, 22 C. 8.

Compromise by guardian or next friend when binding on minor—See COMPROMISE—COMPROMISE OF SUITS IN CIV. PRO. CODE, 17 A. 531 = A.W.N. 1895, 126.

Minor Zemindar—Court of Wards—Appointment of Collector to conduct suit—See COURT OF WARDS, 13 M. L.J. 7.

See DECREE — DECREE, CONSTRUCTION OF, A.W.N. 1889, 173.

Compromise entered into by—Or guardian for suit of minor, without leave of Court.—See GUARDIAN — DUTIES AND POWERS OF GUARDIANS, 2 O. C. 45.

Next Friend—concluded.

See PRACTICE AND PROCEDURE, 9 C. 629, 28 C. 264=5 C.W.N. 434.

Grant of succession certificate to minor through next friend—See SUCCESSION CERTIFICATE ACT, 1889, ss. 6, 7, 20 A. 352=A.W.N. 1898, 64.

Transfer of suit—Application for transfer by—of minor in the absence of guardian *ad litem*—See TRANSFER OF CIVIL CASES, 16 C. 771.

New Lands, Assessment of, Amending Act IX of 1847.

See BENG. ACT IV OF 1868.

Next-of-kin.

Estate of Parsi intestate—Administration—Debt due by—Next-of-kin barred by limitation at intestate's death—Liability—See ACT XXI OF 1865, s. 8, 2 B. 75.

Will—Grant of probate—Notice to next-of-kin—See PROBATE—PRACTICE AND PROCEDURE AS TO PROBATE, A.W.N. 1881, 56.

Probate, grant of—'Caveat' by mortgagee and attaching-creditor of—See PROBATE—REVOCA-
TION OF GRANT, 6 C. 460.

Nihangs.

Order of—in Gorakhpur ascetics—Succession to property of member—Necessity of proving that deceased was a member of the order—See HINDU LAW—INHERITANCE, 16 A. 191=21 I.A. 17, P.C.

Nimak Sayar Mehal.

(1)—Nimak sayar mehal, created before 1804—Regs. VIII of 1812 and IV of 1814, how affect right of grantees—Exclusive right to take saltpetre—Incorporeal right, grant of, at the time of permanent settlement—Monopoly—Abolition.—The present proprietress of the Bettiah Raj is entitled to the declaration of her right at the permanent settlement—Holder under Government of the saltpetre mehal of Sarkar Champaran which passed to the Bettiah Raj by purchase in 1804. Regs. VIII of 1812 and IV of 1814 were not intended either to extend or to limit the right which the Bettiah Raj had to the *nimak sayar mehal*. The abolition of the monopoly of the East India Company by the latter regulation was not intended to affect the right of the Raj to realise its dues, either in the shape of royalty from the manufacturers or itself to manufacture saltpetre to the exclusion of all other persons or proprietors of land in Sarkar Champaran. The right to grant licenses and realise royalty would not be inconsistent with the abolition of monopoly. GOLAB CHAND v. MOHARANI JANKI KOER, 13 C.W.N. 454=36 C. 267=1 Ind. Cas. 967.

Nisprahi Gosavis.

Nisprahi Gosavis, distinguished from Garbhari Gosavis—See HINDU LAW—MARRIAGE, 5 Bom. L.R. 318.

Nis-Santhana.

(1)—Construction of Words—'Nis-santhana'—The word *Nis-santhana* means 'without offspring of both sexes.' GOUR MONEE DEBEA v. KRISHNA CHUNDER SANNYAL, 4 C. 397. (4 C. 23, P.C., R.)

Noabad Mehal.

(1)—Temporary Settlement—Re-settlement—Area, if must be same—Preferential right of former holder to have settlement.—There is no legal obligation on Government at re-settlement to include any lands in a *Noabad* talukdari tenure according to the boundaries or daks of any former survey. A temporary settlement-holder specially an intermediate-holder for 10 years is not entitled to a settlement of the same area at the same rate, though he may have a preferential right to the fresh settlement the Government makes at the expiry of the old settlement. HAIDAR ALI SIKDAR v. SECRETARY OF STATE FOR INDIA IN COUNCIL, 13 C.W.N. 235=9 C.L.J. 265=4 Ind. Cas. 49.

(2)—In Chittagong District—Incidents—Taraf and noabad property distinguished—"Noabad taraf," what is—Settlement whether permanent or temporary.—Where the question was whether a certain mehal, known as mehal *noabad taraf* Joy Narain Ghosal, in the District of Chittagong was a part of the permanently settled "taraf" of the proprietor or consisted merely of ordinary "noabad" lands temporarily settled and liable to periodical re-settlement and annexed to the proprietor's "taraf" for convenience only.—Held—that the special history of the tenure from 1763, when it was created, showed that the mehal was neither the one nor the other. The mere fact that a mehal is a "noabad" mehal does not necessarily attach to it the incidents of ordinary noabad properties of later creation. All "noabad" mehals of Chittagong have this in common, that the proprietors have to pay rent or revenue to Government. But the incidents of different noabad mehals may vary very greatly. The incidents of the present mehal determined, and, held, mainly upon the basis of a *kabuliat* executed by the proprietors in favour of the Government in 1852, that the revenue was fixed in perpetuity on the *hasila* area only. RAM SUNDAR SAHA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 11 C.W.N. 928.

Chittagong—Perpetual or permanent settlements, onus of proving—See BURDEN OF PROOF—GENERAL, 26 C. 792=3 C.W.N. 695.

Noabad taluk, nature of settlement of—Re-settlement of such taluk, meaning of—See LIMITATION ACT, 1908, arts. 14, 121, 8 C.L.J. 470.

Non-appearance.

See CIV. PRO. CODE, 1859, ss. 216, 217, 5 B.L.R. App. 65=14 W.R. 155.

See RES JUDICATA—JUDGMENTS ON PRELIMINARY POINTS, EFFECT OF, 5 B.L.R. App. 64=14 W. R. 81.

Non-delivery.

See BAILMENT, 1 B.L.R. O.C. 68.

Non-feasance.

See C. P. ACT, XVIII OF 1889, s. 39, 11 C.P.L.R. 35.

A Municipal Corporation not liable for damages arising from—See CORPORATION, 6 Bom. L.R. 75=28 B. 340.

Non-joinder of Parties.

See CIV. PRO. CODE, 1908, O. I, rr. 8 to 13.

See JOINDER OF PARTIES.

See LIMITATION ACT, 1908, s. 22.

See PARTIES TO SUITS

(1)—*Civ. Pro. Code, s. 34—Objection as to want of parties.*—An objection for want of parties should be made at the earliest opportunity, and in all cases, before the first hearing; otherwise, under s. 34 of the Code, it must be deemed to have been waived by the defendant. *RAJ NARAIN BOSE v. THE UNIVERSAL LIFE ASSURANCE CO.*, 7 C. 594=10 C.L.R. 561. [R., 2 N.L.R. 45; Cons., 15 6 P.R. 1889.]

(2)—*Non-joinder, objection as to—Objection to be raised at proper time.*—If the defendants in a suit do not take the objection as to non-joinder at the proper time, they must take the risk of further proceedings. *VENGU PADIYACHI v. RAGAVA CHETTY*, 6 M.L.J. 59.

(3)—*Non-joinder of parties—Civ. Pro. Code, Section 34—Objection taken in proper time—Suit on hundis by one of the partners of the firm without joining as co-plaintiff, son and heir of the deceased partner.*—One Chela Ram, a partner of the firm known as Lok Ram Chela Ram, brought a suit to recover money due on hundis drawn in favour of his firm by the defendants. Among others, objection was taken as to the non-joinder of all the persons entitled to sue. It was admitted that Lok Ram died many years ago and was succeeded by his son Narain Das, who had a share in the firm. The suit was at first heard against Hukam Chand, one of the defendants *ex parte*, but on his application it was ordered to be re-heard, and he was allowed to put in a plea of non-joinder. *Held*, that the suit must be dismissed. The objection must be held to have been taken in proper time. The Court observed that the suit was re-opened and re-heard when Hukam Chand came into it, and the merits were then gone into. The Court refused to allow Narain Das to be impleaded as a defendant. *NARSINGH DAS v. CHELA RAM*, 2 P.L.R. 1900.

(4)—*Non-joinder of parties—Objection taken for the first time in appeal—Duty of appellate Court—Procedure.*—Where an objection that a particular person ought to have been made a party is taken for the first time only in appeal, the appellate Court ought to direct such a person to be made a party to the appeal and then dispose of it, or if necessary remit the suit to first Court for re-trial, and it ought not merely to dismiss the suit. *YENKANNA v. CHINNA SUBBA RAO*, 9 M.L.T. 503.

(5)—*Suit for ejectment—Plea of non-joinder—Waiver—Procedure—Practice—Code of Civil*

Non-joinder of Parties—continued.

Procedure (XIV of 1882), s. 34—Unwilling co-sharer joined as defendant—Suit maintainable.—Where, in a suit for ejectment, the plaintiff joined as defendants two of his co-sharers who were unwilling to join as plaintiffs, *held*, that the suit was maintainable, and that the plea of non-joinder, not having been taken in the written statement and at the first hearing, must be deemed to have been waived. *RAM BAKSH V. CHANDA*, 6 A.L.J. 541=5 M.L.T. 392=2 Ind. Cas. 306.

(6)—*Non-joinder of parties—Dismissal of suit.*—A suit ought not to be dismissed by the appellate Court on the ground of failure to make a certain person party to the suit. The Court should try the case on the merits. *MANOHAR KANDU v. PAHLAD KANDU*, A.W. N. 1882, 80.

(7)—*Suit by some representatives of a widow against her general agent for rendition of accounts—Plaintiff's wilful and deliberate refusal to make others parties notwithstanding objection, effect of.*—Where, on the death of a Hindu widow, a suit was brought by some of her representatives against her general agent for rendition of accounts and notwithstanding the objection to non-joinder of parties raised by defendant, the plaintiffs wilfully and deliberately refused to join the other representatives of the widow as parties thereto; *held*, the suit should be dismissed. *RAM SARUP v. MUSSAMMAT RIKI*, 12 P.R. 1905=73 P.L.R. 1905. (25 M. 26. 8 C. 49, 56 P.R. 1901, Cited & F.) [R., 69 P.R. 1906=118 P.L.R. 1906.]

(8)—*Parties, non-joinder of—Wrong person sued as heir of a deceased person—True heir not taking steps for a long time, effect of.*—M and R were two brothers. M died leaving a son J., A mortgage suit was brought against R, in which he was sued in his own capacity and also as the heir of his deceased brother, M. J, who was the legal representative of M, was not made a party to the suit. In execution of the personal decree obtained in that suit, certain property, which belonged to both R and M, was sold in 1879. No step was taken by J, until his suit to question the validity of the sale. *Held*, that J's interest in the property also passed away by the sale. *JAIMANGAL SONAR v. BACHU PANDE*, 10 Ind. Cas. 344.

(9)—*Non-joinder of parties—Trespass—Existence of other trespassers.*—A person who has trespassed cannot plead as a defence that some one else has trespassed along with him and that, therefore, he alone cannot be sued. *KHANDERAO v. SAKHARAM*, 2 Bom. L.R. 283.

(10)—*Non-joinder—Contract in name of member of joint Hindu family—Right to sue.*—When a contract has been made with a member of a joint Hindu family for the benefit of the family, he can sue on the contract in his own name without joining the other members. *RAMANUJACHARIAR v. SRINIVASACHARIAR*, 9 M.L.J. 103. [Not F., 19 M.L.J. 372=32 M. 284=5 M.L.T. 351.]

Non-joinder of Parties—continued.

(11)—*Procedure—Hindu family—Undivided member, if a necessary party to a suit to recover money not due to family—Acquiescence, cures the defect of non-joinder—Limitation Act, XV of 1877, art. 75, waiver.*—Where the plaintiff, the manager of a Hindu family, sued alone to recover money, which was not shown to be due to the family, *held*, that he could not bring the suit, without joining his undivided brother as plaintiff, though the brother acquiesced in the suit as brought. (9 M.L.J. 103, 22 M. 326, 18 M. 33, 23 M. 190, 29 A. 311, R.) The defect of non-joinder of the brother is not cured by the fact that he acquiesced in the bringing of the suit in the name of the first plaintiff. Where plaintiff credited defendants in his books with moneys he received in connection with a debt, and it was not shown that the credits were in respect of an instalment due, nor the fact of these sums being credited was communicated to the defendants, *held*, that there was no evidence of waiver. *SESHA PATTAR v. VEERA RAGHAVAN PATTAR*, 5 M.L.T. 351 = 32 M. 284 = 19 M.L.J. 372 = 4 Ind. Cas. 38. (7 M. 577, 583, 31 C. 297, 12 M. 192, 27 B. 1, 31 C. 297, R.)

(12)—*Non-joinder of parties—Joint Hindu family.*—Some only of the members of a joint Hindu family, carrying on and managing a family trading business, may sue in their own names, on a contract entered into with them, the names of the other members of the family not being disclosed at the time of the contract. Such a suit will not be bad for non-joinder of the other members of the family. *GOPALDAS RAI CHAUDHRI v. BADRI NATH*, 2 A.L.J. 3 = 27 A. 361 = A.W.N. 1904, 282. (7 C. 739, R.) [*F.*, 7 A.L.J. 161 = 32 A. 183.]

(13)—*Non-joinder of defendants—Suit by creditor against one only of four representatives of his deceased debtor—Effect of decree in such suit as against the other representatives.*—J. D. was the creditor of one S. on a simple money bond. S. died, leaving four representatives. J. D. sued upon his bond, making one only of such representatives, K. defendant, and obtained a decree, which was a simple money decree against K. only. In execution of that decree J. D. attached and brought to sale property which had been of S. in his lifetime and had since devolved on his four representatives jointly. On suit by the three representatives of S. other than K. against the auction-purchaser to recover their shares of the property sold it was *held* that J. D. was entitled under the decree which he had obtained to get execution only as against K's share in the property sold. *PREM SUKH v. KEDAR NATH*, A.W.N. 1894, 20.

Effect of—in appeal in a suit for rent—See APPEAL—GENERAL, 10 C.W.N. 981.

Objection raised for first time in appeal—See APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 14 M. 498 = 1 M.L.J. 752.

Suit on mortgage, effect of non-joinder of the necessary parties—Objection as to—rais-

Non-joinder of Parties—continued.

able on appeal—See APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 18 A. 109 = A.W.N. 1896, 7.

See CIV. PRO. CODE, 1908, O. VII, r. 11, O. VI, r. 18, 94 P.L.R. 1901 = 56 P.R. 1901.

In appeal—Limitation—See CIV. PRO. CODE, 1908, O. XLI, r. 20 A.W.N. 1893, 35.

See CONTRACT—MISCELLANEOUS, 6 C. 815 = 8 C.L.R. 457.

See CO-SHARERS—SUIT BY CO-SHARERS, 1 C.L.R. 248.

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 21 M. 373.

See HINDU LAW—ALIENATION, 6 O.C. 101.

Suit by a manager of a joint Hindu family—Omission to make other members, parties to the suit—See HINDU LAW—JOINT FAMILY, 69 P.R. 1906 = 118 P.L.R. 1906.

See HINDU LAW—JOINT FAMILY, 1 O.C. 112, 1 O.C. 169.

Plea of, taken in appeal—Proper course—See INAM, 7 M.L.T. 349 = 5 Ind. Cas. 455.

Objection not taken at the earliest opportunity—Waiver—See JOINDER OF PARTIES, 7 Ind. Cas. 102.

One of two mortgagees suing on a mortgage alleging that he bought up the share of the other mortgagee—Non-joinder of latter—Effect—Procedure—See MORTGAGE—REDEMPTION, 10 Ind. Cas. 776.

See MORTGAGE—SALE OF MORTGAGED PROPERTY, 5 B. 8.

See MORTGAGE—MISCELLANEOUS, 4 O.C. 93.

See PARTIES TO SUITS—GENERAL, 15 P. R. 1902.

Non-joinder of parties—Effect of—See PARTIES TO SUITS—ADDING PARTIES TO SUITS, 1 A. 453.

Non-joinder of necessary parties—Effect—See PARTNERSHIP—GENERAL, 1 S.L.R. 191.

See PLAINT—AMENDMENT OF PLAINT, 5 M.L.J. 95.

See POSSESSION—SUITS FOR POSSESSION, 8 M.L.J. 3.

Objection as to, after the first bearing—Earliest opportunity—Waiver—See PRE-EMPTION—MISCELLANEOUS, 4 Ind. Cas. 488.

See PRINCIPAL AND AGENT—MISCELLANEOUS, 69 P.R. 1903.

Remand of the suit for—See REMAND, 1 Bom. L.R. 29.

Putni lease under two estates by virtue of two leases—Subsequent break up of ownership in both estates—Suit for his share of rent by person entitled to one estate—Liability to make owners of the other estate parties to suit—See RENT, 9 C.W.N. 656.

Non-joinder of Parties—concluded.

Dismissal of suit for—After trial—Limitation Act, s. 14, applicability of—*See RES JUDICATA—ADJUDICATIONS*, 28 M. 338.

See SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, A.W.N. 1891, 121.

Possessory suit—Possession through tenants—Ouster of tenants—Tenants not made parties—*See SPECIFIC RELIEF ACT*, 1877, s. 9, 13 C. W.N. 303=1 Ind. Cas. 150.

Transfer of Property Act, s. 85—Civ. Pro. Code, s. 32—*See TRANSFER OF PROPERTY ACT*, s. 85, 27 A. 75=1 A.L.J. 476.

Joint Hindu family—Suit for sale, on mortgage by father, without joining sons—*See TRANSFER OF PROPERTY ACT*, 1882, ss. 85, 88, 1 O.C. 53.

Purchase of equity of redemption by mortgagee in execution-sale—Assignment of mortgagee's interest—Suit for redemption by mortgagor's vendees against assignee—Mortgagee's legal representatives not parties—*See TRANSFER OF PROPERTY ACT*, 1882, s. 99, 2 A.L.J. 210=A.W.N. 1905, 80=27 A. 517.

Suit for distributive share under an intestacy—Legacy—Deposit—*See WILL—MISCELLANEOUS*, 13 B.L.R. 142=22 W.R. 71.

Non-negotiable Instrument.

Lien—*See CONTRACT—CONSTRUCTION OF CONTRACTS*, U. B. R. 1904, 1st Qr., Contract, 1.

Non-Proprietor.

(1)—*House built by non-proprietor—House falling into ruins—Zemindar giving the site to others—Suit by first non-proprietor after 12 years—Custom—Burden of proof.*—Where a house built by a non-proprietor had fallen into ruins more than 12 years before the institution of the suit, it is for the non-proprietor plaintiff to prove that the site still belongs to him under the terms of the *wajib-ul-arz* or some village custom. *AMAN ALI KHAN v. MUSAMMAT NAZIMANNISSA*, 3 Ind. Cas. 19.

Non-Registration.

See REGISTRATION.

See REGISTRATION ACTS.

Effect of—Proof of actual contract of sale and possession on payment of purchase money—*See VENDOR AND PURCHASER—PURCHASERS, RIGHT OF*, 1 Agra 283.

Non-Regulation Districts, Agra Act.

See U. P. ACT. XXIV OF 1864.

Non-resident.

Purchase of land included in village site by—*See SALE—GENERAL*, L. B. R. 1893—1900, 117.

Meaning of—*See SUMMONS*, 6 B. 100.

Non-suit.

(1)—*Successive suits on same cause of action—Non-suiting of prior suit, no fresh cause of action afforded by.*—In this case, two separate suits founded on the same cause of action had been previously instituted one after another, in the Munsiff's Court, and had been successively non-suited. Deducting the interval occupied by such suits from the entire period that had elapsed from the accruing of the cause of action, a period of about 15 years had to be accounted for. Plaintiff, however, stated his cause of action to have arisen when the last of the plaints was non-suited, but this was held by the High Court to be untenable. The non-suiting of one or other of the previous suits could not give any new cause of action and the present suit was therefore evidently out of time. *HARADUN DEY v. RAM DOSS DEY*, 6 W.R. 15.

(2)—*Failure to prove prima facie case—Dismissal of suit—Non-suit—Punjab Civil Code, Part II, s. III, para 7—Raising questions not in issue between parties.*—Where a plaintiff fails to prove a *prima facie* case, his suit should be dismissed, and it is not correct procedure to non-suit him. The Court should not raise questions not in issue between the parties before it. *MULAWA v. LUCHMEEDHUR*, 28 P.R. 1866.

See DECREE—DECREE, CONSTRUCTION OF, 9 A. 690=A.W.N. 1887, 254.

Northern India Ferries Act.

See ACT XVII OF 1878.

Northern Indian Canal and Drain Act.

See ACT VIII OF 1873.

N. W. P. Acts.

See U.P. ACTS.

Notarial Protest.

See NEGOTIABLE INSTRUMENTS.

See NEGOTIABLE INSTRUMENTS ACT.

Evidence of dishonour—Hundi—Bill of Exchange—*See NEGOTIABLE INSTRUMENTS, SUMMARY PROCEDURE ON*, 1 Ind. Jur. N.S. 247.

Notary Public.

Power-of-attorney by executors, proof of, by means of declaration of attesting witnesses before Notary public—*See EVIDENCE ACT*, 1872, s. 85, 21 M. 492.

Declaration as to execution of power of attorney, before the Chief Magistrate, Glasgow—Certificate by Notary Public—*See PRACTICE AND PROCEDURE*, 22 C. 491.

Notes.

Lost or plundered in mutiny—*See LIMITATION ACT*, 1908, s. 18, art. 95, 1 Agra 213.

Notes of Judgment.

(1)—*Small Cause Courts—Rules of practice—Notes of judgment—Copy of decree—Act VII of 1870, sch. I, art. VII.*—Notes of judgment furnished to parties under the Rules of Practice for the guidance of Small Cause Courts are copies of decrees, and require a stamp under art VII, sch. I of Act VII of 1870. **PROCEEDINGS 20TH APRIL, 1871, 6 M.H.C. App. 23.**

Notice.

See **EJECTMENT, SUIT FOR.**

See **ENHANCEMENT OF RENT—ENHANCEMENT, NOTICE OF.**

See **LANDLORD AND TENANT—EJECTMENT.**

See **LIMITATION ACT, 1908, ART. 182—NOTICE OF EXECUTION.**

See **NOTICE TO QUIT.**

See **REGISTRATION ACT, 1908, s. 50.**

See **VENDOR AND PURCHASER—NOTICE.**

(1)—*Bona fide transferee of mortgaged property—Existing incumbrance.*—Where the only evidence that the purchaser of mortgaged property had notice of the mortgage was a statement made by him, in answer to interrogatories, that he was aware of the mortgage, but believed that it had been discharged; *held*, that such statement was no proof of the purchase having been made after notice of a prior mortgage, for it was inconsistent with the knowledge of an existing incumbrance. **SHEO DAYAL MAL v. HARI RAM, 7 A. 590 = A.W.N. 1885, 46.**

(2)—*Registration of document—Equity.*—Where the mortgagor hypothecated certain land out of his undivided share in joint property, and agreed with the mortgagee, that if at partition the mortgaged land or any part of it fell to the share of some other co-sharer, the mortgagor would in place thereof give the mortgagee possession of certain other land belonging to the mortgagor in his own right.—*Held*, that on the mortgaged land falling at partition to the share of other co-sharers, the mortgagee was not entitled to recover possession of the land which was agreed to be made over to him in the mortgage-deed, from a transferee in good faith of it from the mortgagor, who had paid money to the mortgagor without notice of the previous mortgage. Mere registration of the previous mortgage-deed was not notice in law to the subsequent transferee. **KANSI RAM v. PIR BAKHSI, 134 P.L.R. 1904.**

(3)—*Registration, if equivalent to notice—Law in Bombay.*—In the presidency of Bombay, registration is equivalent to notice to subsequent encumbrancers. **BALMUKUNDAS ATMARAM v. MOTI NARAYAN, 18 B. 444. [F., 6 Bom. L.R. 1043.]**

(4)—*Is registration notice—"Wilful abstention from enquiry and search," meaning of.*—The doctrine that registration is notice has no application so far as registered voluntary transfers as against

Notice—continued.

creditors or subsequent transferees for consideration are concerned. If the doctrine be applicable it can only apply for the purpose of either rebutting the presumption of fraud or preventing the presumption of fraud from arising. The doctrine of notice, if applied, must be applied in accordance with and subject to the definition of notice given in the Act itself. The words "wilful abstention from enquiry and search" must be taken to mean, such abstention from enquiry or search as would show want of *bona fides*. **JOSHUA v. ALLIANCE BANK OF SIMLA, 22 C. 185.**

(5)—*Doctrine of constructive notice—Registration Act.*—When a person is proved to have had a knowledge of certain facts, or to have been in a position, the reasonable consequence of which knowledge or position would be, that he would have been led to make further enquiry, which would have disclosed a particular fact, the law fixes him with having himself had notice of that particular fact. For, there may be such wilful negligence in abstaining from enquiry into facts which would convey actual notice, as may properly be held to have the consequences of notice actually obtained. But, if there is not actual notice, and no wilful or fraudulent turning away from an enquiry into, and consequent knowledge of, facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied. Constructive notice may apply as against third persons from a neglect to call for deeds and documents of title; but not to anything like the same extent when a Registration Act is in operation, as it would where no Registration Act prevails. **DOORGA NARAIN SEN v. BANEY MADHUB MOZOOMDAR, 7 C. 199. [R., 27 C. 358, 27 B. 452.]**

(6)—*Constructive notice—Execution purchaser.*—An execution purchaser takes subject to all equities affecting the judgment-debtor, and will be bound by constructive notice in the same way as an ordinary purchaser. **RAM LOCHUN SIRCAR v. RAMNARAIN, 1 C.L.R. 296.**

(7)—*To avoid under-tenure on sale.*—The law does not require any notice as a necessary preliminary to a suit to avoid an under-tenure. **KAMAL KUMARI CHOWDHURANI v. KIRAN CHANDRA ROY, 2 C.W.N. 229.**

(8)—*Service of notice of execution-sale—Notice.*—Notice of execution-sale required by Bengal Regulation XLV of 1793, s. 12, posted at the house of the judgment-debtor, though not within the ambit of *Pergannah* in which the land to be sold was situate, *held* sufficient. **LAMB v. BEJOY KISHEN DASS, 8 M.I.A. 427.**

(9)—*Alternative notice to pay enhanced rent or quit, validity of.—Quære:*—Whether a notice, by which a tenant is given his option either to pay an enhanced rent from a certain day or quit, is sufficient and valid. **MOHAMAYA GOOPTA v. NILMADAB RAI, 11 C. 533. (22 W. R. 548, Doubt.) [F., 1 L.B.R. 82; D., 22 B. 241.]**

Notice—continued.

(10)—*Relinquishment by ryot of portion of land—Notice of relinquishment, form of.*—In order that a ryot, by relinquishing a portion out of a considerable quantity of land held by him, may relieve himself from liability to pay rent, it is not enough that he gives notice that he relinquishes a part of the land without specifying what that portion is. **HABELA SIRCAR v. DOORGA KANT MOJOMDAR, 11 W.R. 456.**

(11)—*Land purchased from ostensible owners—Claim to recover—Proof of purchase with notice.*—Where plaintiffs had, by giving possession and reporting to the *thugyi* years previously that they had sold the land outright to the first defendant, put him in the position of ostensible owner of the property, and the first defendant in turn put the second and third defendants in the position of ostensible owners, *held*, that under the circumstances the plaintiffs, in claiming to recover from persons who had bought from the ostensible owners were bound to allege that those persons had bought with notice, actual or constructive, that the land was not the absolute property of the ostensible owners, and to fix them with knowledge of this. **U TO v. R. M. M. S. MEYAPPA CHETTY, 1 L B.R. 160.**

(12)—*Debt—Consignment and sale of cotton in lieu—Notice.*—A forwarded cotton to B to be sold on arrival through him in satisfaction of a debt. A further promised to send an agent to redeemed the cotton should he wish to do so. This A failed to do. B sold the cotton on arrival without giving notice to A. *Held* that it was unnecessary to give any notice. The agreement was to sell the cotton on arrival unless redeemed. A made default by not sending his agent, or by not paying up his debt; and B, who held the cotton, had a right to sell in pursuance of the agreement. **POKURMULL KISHEN DYAL v. GOKOOLDASS GOPALDASS, 5 M.L.J. 271.**

(13)—*Written statement—Time for filing—Time for service of notice on defendants—Duty of Court.*—A defendant should be given a reasonable time for filing his written statement. If the summons be served upon the defendant less than two clear days before the date fixed for his appearance, he should be allowed further time to file his statement. Special attention of the lower Courts called to the necessity there is that they should *carefully themselves see* that due and reasonable time is given in all cases for the *services of notices* in order that the Courts themselves may not be made the instruments of fraud and injustice by means of those processes, the vigilant superintendence of the issue and service of which properly and justly is one of their most important duties. **LOKHENATH THAKOOR v. SOBANATH MISSER, 5 W.R. Act X, Rul. 39.**

(14)—*Notice, reasonableness of—Second appeal.*—Whether a notice is or is not reasonable is a question of fact, and, therefore, ordinarily, the decision of the question is not open to second appeal. But if the finding of the Court below is based upon no evidence or upon untenable reasons, the propriety of such finding

Notice—continued.

might be questioned upon second appeal. There is no law in this country which requires a notice to quit in every case to expire at the end of the year; nor is there any law which requires a six months' notice to be given. What the Judge ought to find is, not what notice would have been reasonable, but whether the notice actually given in the case was or was not reasonable. **KALI KISHEN TAGORE v. GOLAM ALI, 13 C. 3. [F., 26 C. 761.]**

(15)—*Notice—Substituted service, when good.*—In cases of substituted service, that is, service substituted for the personal service which the statute requires, wherever it is practicable, the Court should take care to be satisfied that the condition on which alone substituted service is good exists, namely, that the person who ought to be served personally is keeping out of the way. **RAMA RAI v. SRIDHUR PERSHAD NARAIN, 4 C.L.R. 397. (19 W.R. 356, P.C., F.) [F., 10 B. 202.]**

(16)—*Suit dismissed for default—Application for restoration of suit—Notice to defendant returned unserved—Second application for issue of notice—Order to be passed—Civ. Pro. Code, 1882, ss. 100, 647—Practice and procedure.*—On the dismissal of a suit for plaintiff's default, the plaintiff applied to the Court for restoring the suit to file. The notice issued to the defendant was returned unserved, owing to the plaintiff's neglect to point out the defendant to the Court's bailiff. The plaintiff thereupon put in an application for the issue of a fresh notice to the defendant which application the Court rejected. On appeal by the plaintiff to the High Court: *Held*, that it was not competent to the Court to reject the application of the plaintiff for the issue of a fresh notice because the first notice had not been served on the defendant owing to plaintiff's neglect to point him out to the serving officer. Under ss. 100 and 647 of the Civ. Pro. Code, 1882, the Court in such cases, must order a fresh notice to issue and, if it thinks proper, it may order the plaintiff to pay the costs occasioned by the necessary postponement. **LALLUBHAI VAJERAM v. BAI MAGANGAVRI, 18 B. 59.**

(17)—*Service of, to respondent—Practice—Appeal—Notice to respondent.*—The notice to the respondent was served by being affixed on the door of a house at Satara at a time when he was living at Gwalior, and the District Judge made no enquiry, and no declaration was made that the notice was duly served: *Held*, that the respondent was entitled to have the appeal re-heard *ab initio* as it was improperly heard *ex parte*, no notice having been served on the respondent in the manner required by law. **NARAYAN v. RAGHAVENDRACHARYA, 2 Bom. L.R. 281.**

(18)—*Collector—Specification in notice to appear before Collector acting in judicial capacity.*—Where a notice is sent to a party to appear before the Collector of a District acting in a judicial capacity, the notice should specify at which building he will sit and dispose of the

Notice—continued.

matter. **SESHAMMA NAYANI v. DISTRICT FOREST SETTLEMENT OFFICER OF NORTH ARCOT, 7 M L.J. 83.**

(19)—*Appeal heard without notice of time of hearing—Dismissal for default—Jurisdiction.*—An appellate Court acts without jurisdiction in proceeding to hear an appeal without giving notice to the appellant of the date of hearing; and where, under such circumstances, it dismisses the appeal for default, its order is liable to be set aside. **BALA v. HAKIM, 90 P.R. 1879.** (48 P.R. 1875. Appl.)

(20)—*Second appeal—Notice—Search in the Registry office, failure to discover at—Misdirection as to evidence—Finding of fact—Error of law.*—Where the question was whether a purchaser for valuable consideration had notice, at the date of his purchase, of a registered instrument, dated the 25th Bhadra, 1300, when it was found that he, before the purchase, had caused a search to be made by his agent of the books in the Registry Office extending to the year 1300 in which the document was entered, and the agent had stated that he did not find the document in the book; and where, upon these facts, the District Judge held that he had no notice of the registered instrument. *Held*, that there was a presumption of notice of the contents of the book, and it could not be rebutted by the mere statement that, though a search was made, it was unsuccessful. *Held* further, that, although the question at issue was in essence a question of fact, yet the District Judge having misdirected himself in regard to the most important part of the evidence bearing upon the question, and having approached the consideration of that evidence from a wrong standpoint, had committed an error of law. **SRIMATTY AKHOY KUMARI DEBI v. KANAI LAL KUNDU, 17 C.W.N. 224.** (1 Sch. and Tef. 90=9 R. R. 21 (1803), 2 Sim and St. 221=25 P. R. 188 (1825), 2 Drew (1853), R.)

Butwarra—Collector's notice—*See* ACT XI OF 1838, 5 B.L.R. 135=13 W.R. 381.

See ACT XXXII OF 1839, A.W.N. 1887, 287.

Of intention to claim interest—Demand of interest already due—*See* ACT XXXII OF 1839, s. 1, 181 P.L.R. 1901.

See ACT XIX OF 1843, 18 B. 332.

See ACT IV OF 1869, 9 B.L.R. App. 39, 18 C. 539.

See ACT IV OF 1869, s. 16, 4 B.L.R. O.C. 52.

Petition for judicial separation containing statement referring to custody of child—No prayer to that effect in person—Application for custody of child—Notice to respondent—*See* ACT IV OF 1869, s. 42, 18 C. 473.

See ACT VIII OF 1873, s. 20, 144 P.R. 1894.

Necessity for—under s. 169 of the Companies Act VI of 1882—Company in liquidation—Application and order under s. 58—Appeal—*See* ACT VI OF 1882, ss. 58, 147, 169, A.W.N. 1905, 75=2 A.L.J. 311=27 A. 509.

Notice—continued.

See ACT VI OF 1882, ss. 162, 214, 18 A. 215=A.W.N. 1896, 39.

Application for extension of time—Notice if necessary—*See* ACT VI OF 1882, ss. 169, 204, 25 M. 576.

See ACT VI OF 1882, ss. 169, 214, 30 C. 758.

See ACT VI OF 1882, s. 182, 19 M. 85.

Of claim—Suit for recovery of excess freight collected—To whom—to be sent—*See* ACT IX OF 1890, ss. 3 (6), 77 and 140, A. W. N. 1906, 101=3 A.L.J. 329=28 A. 552.

See ACT IX OF 1890, s. 77, 24 C. 306.

See ACT IX OF 1890, s. 77, 4 Bom. L.R. 495=26 B. 669.

See ACT IX OF 1890, ss. 77, 80, 26 A. 207=A.W.N. 1903, 235.

Notice of claim to the Railway Company—*See* ACT IX OF 1890, ss. 77 and 140, 9 Bom. L.R. 942=31 B. 534.

Goods booked with one Railway Company—Loss on the line of another Company—Notice of claim—Sufficient notice—*See* ACT IX OF 1890, ss. 77 and 140, 12 C.W.N. 165.

Notice to Railway administration—Service on Traffic Manager—*See* ACT IX OF 1890, ss. 77, 140, 22 M. 137.

Of claim under s. 77 of Indian Railways Act on whom to be served—*See* ACT IX OF 1890, s. 140, 12 C.W.N. 450=35 C. 194.

No—of the enquiry held previous to declaration under s. 6, Land Acquisition Act, need be given to the owner of the property concerned—*See* ACT I OF 1894, ss. 6, 9, 11, 15, 18 and 40, 9 C.W.N. 454, P.C.=1 C.L.J. 227=7 Bom. L.R. 422=32 C. 605=2 A.L.J. 771.

See BEN. ACT XI OF 1859, s. 2, 31 C. 256, P.C.=31 I.A. 52=8 C.W.N. 649.

Non-issue of—under s. 5, Act XI of 1859—Effect of—on sale for arrears of revenue—*See* BEN. ACT XI OF 1859, ss. 5, 6, 13, 25 and 33, 32 C. 111=8 C.W.N. 757.

Necessity of—under Act XI of 1859, s. 5, even where a portion only of the estate in default is under attachment—*See* BEN. ACT XI OF 1859, ss. 5, 28, 1 C.L.J. 565.

See BEN. ACT XI OF 1859, s. 6, 30 C. 1=6 C. W.N. 688.

Irregularity in issue and service of—of sale on raiyat—Substantial injury—*See* BEN. ACT XI OF 1859, ss. 7, 18, 33, 10 C.W.N. 137=2 C.L.J. 325.

See BEN. ACT VIII OF 1869, s. 14, 3 C.L.R. 432.

See BEN. ACT VIII OF 1869, s. 15, 9 C.L.R. 207.

See BEN. ACT VIII OF 1869, s. 31, 4 C. 714.

Illegal exaction of tolls—Suit for refund of money—of action—*See* BEN. ACT IX OF 1871, s. 27, 15 C. 259.

Notice—continued.

See BEN. ACT IV OF 1876, s. 357, 18 C. 91.

Validity of—under s. 43 of Act VI OF 1880 (Bengal)—See BEN. ACT VI OF 1880, s. 43, 1 C.L.J. 260.

See BEN. ACT VII OF 1880, ss. 2 and 19, 21 C. 350.

See BEN. ACT VII OF 1880, ss. 5, 7, 9, 10, 5 C.W.N. 86.

Ben. Act VII of 1880, mode of notice under—See BEN. ACT VII OF 1880, s. 10, 12 C. 603.

See BEN. ACT VII OF 1880, s. 10, 2 C.W.N. 363.

See BEN. ACT IX OF 1880, ss. 50 to 71, 15 C. 237.

See BEN. ACT III OF 1884, ss. 85, 363, 2 C. W.N. 689.

See BEN. ACT VIII OF 1885, ss. 22 (1), 49 (b), 167, 31 C. 932.

Of deposit of rent on one of several joint landlords—EFFECT—LIMITATION—See BEN. ACT VIII OF 1885, s. 61, sch. III, art. 2 (a), 29 C. 283=6 C.W.N. 15.

See BEN. ACT VIII OF 1885, s. 73, 24 C. 642.

Whether necessary before suit to eject an under-raiyat—See BEN. ACT VIII OF 1885, s. 85, cl. 2, 11 C.W.N. 190.

See BEN. ACT VIII OF 1885, s. 87, 4 C. W.N. 493.

See BEN. ACT VIII OF 1885, s. 155, 22 C. 77.

Under s. 167 of the Bengal Tenancy Act, regularity of service of—Notice signed by Deputy Collector for Collector and sealed with the seal of the Collector—See BEN. ACT VIII OF 1885, ss. 160, cl. (g), 167, 9 C.W.N. 803=32 C. 911.

Application for issue of—to amend incumbrances under s. 167 of Act VIII of 1885 (Bengal Tenancy) must be made to a Collector and not to a Deputy Collector—A—issued by the Deputy Collector is invalid, though subsequently approved by the Collector—See BEN. ACT VIII OF 1885, s. 167, 2 C.L.J. 99.

To *am muktear* when he is husband of principal—Effect—See BEN. ACT VIII OF 1885, s. 167, 5 Ind. Cas. 652.

Suit by purchaser of certain *howla* to avoid incumbrances thereon—Liability of suit to dismissal in the absence of, under s. 167, Act VIII of 1885 (Bengal Tenancy)—Service of—on all defendants, except one, who disclaimed all interest in the tenure—Effect on suit—See BEN. ACT VIII OF 1885, s. 167, 32 C. 710.

Joint notice to several persons, validity of—See BEN. ACT VIII OF 1885, s. 167, 5 C.W.N. 272.

Service of—See BEN. ACT VIII OF 1885, s. 167, 25 C. 551.

Notice—continued.

Notice, form of—Directory—See BEN. ACT II OF 1888, s. 135, 6 C.W.N. 480.

Non-service of—under s. 10 of Act I of 1895 (Bengal)—See BEN. ACT I OF 1895, s. 10, 2 C.L.J. 504.

Service of—under Act I of 1895, how to be effected—When substituted service of—is not to be made—Whether knowledge dispenses with, or makes up for defect in service of—See BEN. ACT I OF 1895, ss. 10, 12, 15, 16, 21, 31, 1 C.L.J. 550.

Service of—for the validity of a sale under Act I of 1895—Necessity for—See BEN. ACT I OF 1895, ss. 10, 31, 3 C.L.J. 280.

Service of—under Act I of 1895 [Public Demands Recovery, (B.C.)]—Validity of—See BEN. ACT I OF 1895, ss. 15, 17, 19, 20 and 31, 1 C.L.J. 538=10 C.W.N. 130=33 C. 84.

Of suit under s. 424, Civ. Pro. Code—Object of notice—Who can object to validity or sufficiency of—See BEN. ACT I OF 1895, s. 19, cl. 2, 1 C.L.J. 542=32 C. 1130.

See BOM. ACT III OF 1872, s. 220, 8 B. 151.

See BOM. ACT VI OF 1873, ss. 11, cl. 1 and 21, 7 B. 399.

As to intended building—See BOM. ACT VI OF 1873, s. 33, 21 B. 187=P.J. 1895, 375.

Proposed building—of—Want of notice—Plan not furnished—Building without permission—Demolition of building—See BOM. ACT VI OF 1873, s. 33, cl. 1, 19 B. 27.

See BOM. ACT VI OF 1873, ss. 36, 39, 74, 2 B. 527.

See BOM. ACT VI OF 1873, ss. 42 (1), 48, 75, 19 B. 212.

To Municipality not confined to actions for damages—See BOM. ACT VI OF 1873, s. 86, 8 B. 421.

By landlord required where the annual tenancy under the Land Revenue Code, 1879, is meant to be determined—See BOM. ACT V OF 1879, s. 84, 9 Bom. L.R. 1332=32 B. 78.

Notice of conciliation agreement—Service through Subordinate Judge—See BOM. ACT XVII OF 1879, s. 49, 10 B. 189.

To tenant not necessary when the latter attempts to deny the former's title—See BOM. ACT I of 1880, ss. 20, 21, 2 Bom. L. R. 228=24 B. 426.

Suit for injunction to restrain Municipality from removing building—of action not necessary under s. 48 of Bombay Act II of 1884—Action under s. 33 of Act VI of 1873—Discretion of Municipality—Jurisdiction of Civil Courts—See BOM. ACT II OF 1884, s. 48, 22 B. 230=P.J. 1896, 296.

Halakore tax—Notice essential to levy tax—See BOM. ACT II OF 1884, s. 57, 20 B. 732.

Notice—continued.

See EOM. ACT III OF 1888, ss. 298, 299, 301, 504, 527, 19 B. 407.

Sufficiency of—See BOM. ACT III OF 1888, s. 527, 17 B. 307.

Legality of notice by tenant requiring landlord to purchase holding in eight days—See C. P. ACT XI OF 1898, s. 41, 14 C.P.L.R. 162.

See MAD. ACT II OF 1864, ss. 1, 2, 3, 38, 39, 7 M. 405.

See MAD. ACT VIII OF 1865, 3 M. 114.

Notice of sale—Onus of showing that requirements of Act have been complied with—See MAD. ACT VIII OF 1865, ss. 18, 36, 40, 27 M. 94=13 M.L.J. 479.

See MAD. ACT VIII OF 1865, s. 39, 18 M. 30.

See MAD. ACT III OF 1871, s. 168, 2 M. 124.

Requirements of valid—of action—See MAD. ACT I OF 1884, s. 433, 14 M. 386.

See MAD. ACT I OF 1884, s. 433, 18 M. 503.

Suit for injunction—Necessity for notice—Object of legislature in insisting on notice—See MAD. ACT IV OF 1884, ss. 3, 4, 21, 27, 261, 1 M.L.T. 333=16 M.L.J. 582=29 M. 539.

See MAD. ACT IV OF 1884, ss. 261, 262, 13 M.L.J. 426.

See MAD. ACT V OF 1884, ss. 27, 156, 16 M. 317.

Of action whether necessary, under s. 156 (1), Local Boards Act, in suit for injunction—See MAD. ACT V OF 1884, s. 156 (1) and (3), 4 M.L.T. 209, F.B.=32 M. 371=19 M.L.J. 333=4 Ind. Cas. 32.

See PUN. ACT IV OF 1872, s. 13, 60 P.R. 1867, 55 P.R. 1873.

Suit to contest notice of ejectment—See PUN. ACT XVI OF 1887, s. 50, 87 P.L.R. 1902=2 P.R. 1902.

See PUN. ACT XVI OF 1887, s. 53, 22 P.R. 1901.

See U. P. ACT XV OF 1873, ss. 28, 43, 1 A. 269.

Under pre-emption—See U. P. ACT XVIII OF 1876, s. 10, 2 O.C. 7.

See U.P. ACT XVIII OF 1876, s. 25, 3 O.C. 69.

To agent—Effect against principal—See U.P. ACT XXII OF 1886, 25 A. 1=29 I.A. 203, P.C.

Of suit against a Municipal Board for an injunction against a threatened act, necessity of—See U.P. ACT I OF 1900, s. 49, A.W.N. 1906, 107=3 A.L.J. 341=28 A. 600.

Issued under s. 88—*Bona fide* question of title—Jurisdiction of Civil Courts—See U.P. ACT I OF 1900, ss. 88, 152, 1 A.L.J. 377.

Mortgage to one without—of agreement—Validity of mortgage—See AGREEMENT, A.W. N. 1884, 254.

Notice—continued.

The plea of notice cannot be taken for the first time in special appeal—See APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 1 A. 269.

Objection of want of—to quit—Second Appeal—See APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 2 M. 346.

Omission to give—to parties cannot invalidate an award—See ARBITRATION—GENERAL, 29 M. 44.

Of attornment to tenants—Registration—Evidence—See ATTORNMENT, 19 B. 36.

See BUDDHIST LAW—GIFT, L.B.R. 1872—1892, 11.

Onus of proving irregularity or illegality in preparation, serving or posting of—See BURDEN OF PROOF—MISCELLANEOUS, 30 C. 1=6 C.W.N. 688.

See BURDEN OF PROOF—MISCELLANEOUS, 1 C.L.R. 466.

In suits against Official Assignee, is necessary before filing suit against him—See CIV. PRO. CODE, 1908, ss. 2 and 80, 4 Bom.L.R. 929=26 B. 809.

Application for transmission of decree—Execution—Court which should issue notice—Discretion—Court to which decree is to be transmitted to issue notice—See CIV. PRO. CODE, 1908, ss. 38, 39, 41, O. XXI, rr. 4, 5 and 22, 12 C.W.N. 897.

Of sale, non-issue of notice to a party concerned is not a material irregularity in publishing or conducting a sale under s. 311, Civ. Pro. Code—See CIV. PRO. CODE, 1908, s. 47, O. XXI, rr. 66, 70, 90 and 92, 10 Bom. L.R. 752=32 B. 572.

Application for rateable distribution—No necessity for—To decree-holder realizing assets—See CIV. PRO. CODE, 1908, s. 73, 27 A. 132=A.W.N. 1904, 188=1 A.L.J. 519.

Of suit to public officer—Act purporting to be done in official capacity—See CIV. PRO. CODE, 1908, s. 80, 9 O.C. 275.

Suit against Secretary of State not maintainable unless—prescribed by s. 424, Civ. Pro. Code, 1882, is given—See CIV. PRO. CODE, 1908, s. 80, 25 C. 239.

Public officer, suit against—Cause of action stated in notice—See CIV. PRO. CODE, 1908, s. 80, 13 C.L.R. 195.

Suit to recover water—Rate wrongly levied for two faslies—Notice given by two out of three owners of land in respect of one fasli only—Sufficiency of notice—Cause of action—See CIV. PRO. CODE, 1908, s. 80, 24 M. 279=11 M.L.J. 117.

Given to public officer before suit—Omission to state same in the plaint—See CIV. PRO. CODE, 1908, s. 80, 8 C.W.N. 913.

To Collector—See CIV. PRO. CODE, 1908, s. 80, A.W.N. 1881, 175.

Notice—continued.

Suit instituted without notice—Effect—*See* CIV. PRO. CODE, 1908, s. 80, 25 A. 187.

Suit against Police Officer for damages—Wrongful confinement—Malicious Act—Notice, if necessary—*See* CIV. PRO. CODE, 1908, s. 80, 26 A. 220=A.W.N. 1903, 241.

Suit against officer of Government—Suit *ex contractu*—Notice—*See* CIV. PRO. CODE, 1908, s. 80, 20 B. 697.

See CIV. PRO. CODE, 1908, s. 80, 24 C. 584, 1 L.B.R. 152.

To Secretary of State.—*See* CIV. PRO. CODE, 1908, ss. 80, 79, O. XXVII, rr. 1, 6, 4 O.C. 133.

Material irregularity—Notice to parties of time and place at which Court is to be held—*See* CIV. PRO. CODE, 1908, s. 115, 1 O.C. 166.

Execution of decree against surety—Competency of Court receiving decree for execution to issue—to surety—Civil Procedure Code, s. 253—*See* CIV. PRO. CODE, 1908, s. 145, 29 B. 29.

Suit under ss. 30 and 539, Civ. Pro. Code—Publication of notice, procedure for—*See* CIV. PRO. CODE, 1908, O.I, r. 8 (1), ss. 92, 93, 10 C.W.N. 867=33 C. 905.

Service of process—Signature of jailor—Judicial notice—*See* CIV. PRO. CODE, 1908, O.V, rr. 24, 29, 4 B.L.R. O.C. 51.

To judgment-debtor, whether necessary on application for execution of a decree for perpetual injunction—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 15 and 32, 3 C.L.J. 112=10 C.W. N. 297=33 C. 306.

Under s. 248, C.P. Code, issue of, on a time-barred decree—*See* CIV. PRO. CODE 1908, O. XXI, r. 22, 2 A.L.J. 67.

See CIV. PRO. CODE, 1908, O. XXXII, r. 12 (2), (3), 22 C. 270.

Stay of execution—Notice to decree-holder necessary before final order—Practice—Application to be supported by affidavit—*See* CIV. PRO. CODE, 1908, O. XLI, r. 5, 15 B. 536.

Service of notice—Service on the outer door of the house in which the person to whom the notice was addressed works as an employee—Not good service—*See* CIV. PRO. CODE, 1908, sch. ii, r. 1, O. V, r. 17, O. XXXII, r. 7, O. XLVII, rr. 2, 7, 9, 8 C.L.J. 294.

Notice to Collector *qua* guardian of a minor—*See* COLLECTOR, 11 M. 317.

Of issue of commission shown to party's pleader—Service—Refusing admission to commission—Penal Code, Act XLV of 1860, s. 174, proceedings under—*See* COMMISSION, 6 C.W.N. 927.

See COMPANY—ARTICLES OF ASSOCIATION AND LIABILITY OF SHAREHOLDERS, 17 B. 672.

Contributory resident in India, necessity of strict proof of service of notice on—*See* COMPANY—WINDING UP OF COMPANY, 11 B. 241.

Notice—continued.

See COMPANY—WINDING UP OF COMPANY, 5 B. 223, 7 B. 494, 12 B. 526, 4 C. 704=3 C.L. R. 581.

Vendor and purchaser—Possession of vendor after sale with consent of purchaser—Notice to public—Re-sale by the vendor to third party—Title of vendee—*See* CONTRACT ACT, 1872, s. 108, 81 P.L.R. 1902=27 P.R. 1902.

To a Mukhtyar is notice to his client—*See* CONTRACT ACT, 1872, s. 229, 4 Bom. L.R. 832.

Father of a minor son having notice of fact—Minor son cannot plead want of notice—*See* CONTRACT ACT, 1872, s. 245, 137 P.L.R. 1908=102 P.W.R. 1908.

See COURT FEES ACT, 1870, s. 10, cl. 11, s. 12, cl. 11, sch. II, art. 17, cl. 6, 15 M. 288.

Of suit for injunction, whether necessary against officials acting not as such—Civ. Pro. Code, s. 424—*See* COURT OF WARDS, 12 C.W. N. 1065=36 C. 28=1 Ind. Cas. 514.

Of enhancement, service of—Substituted service—*See* ENHANCEMENT OF RENT—GENERAL, 12 B.L.R. 229, P.C.=19 W.R. 353.

Rent Act B.C. Act VIII of 1869, ss. 14, 18—Enhanced rent on account of accretion—*See* ENHANCEMENT OF RENT—ENHANCEMENT, GROUNDS OF, 10 C.L.R. 559.

See ENHANCEMENT OF RENT—ENHANCEMENT, GROUNDS OF, 4 B.L.R. App. 61=21 W.R. 442, Note.

See ENHANCEMENT OF RENT—ENHANCEMENT, GIABILITY TO, 6 O.C. 190.

Act XII of 1881 s. 36—Service of—under—Effect—Ejectment suit—Trespasser—*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 15 A. 189=A.W.N. 1893, 93.

Mortgagee selling mortgaged property in execution of money-decree obtained against mortgagor—Purchase without notice of mortgage—Subsequent enforcement of mortgage by mortgagee against purchaser—*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 12 B. 678.

Previous sub-mortgage created by a prior mortgagee by deposit of his mortgage-deed—Subsequent mortgage though registered cannot acquire priority apart from the question of notice—*See* EQUITABLE MORTGAGE, 10 C.W. N. 276=33 C. 410=4 C.L.J. 102.

Secondary evidence—Unstamped instrument—to produce—*See* EVIDENCE—SECONDARY EVIDENCE, 2 M. 208.

See EVIDENCE—SECONDARY EVIDENCE, 9 A. 366=7 A.W.N. 34.

Plea of want or insufficiency of notice, when may be taken—*See* EVIDENCE ACT, 1872, s. 34, 8 Ind. Cas. 81.

Court of Wards, notice of adverse title set up by third party given to, how far binding upon proprietor—Limitation Act, arts. 91, 120, sch. II—*See* EVIDENCE ACT, 1872, ss. 90, 102, 6 O.C. 142.

Notice—continued.

Necessity for — to defendant, application for execution of conditional decrees — *See* EXECUTION OF DECREE — APPLICATION FOR EXECUTION AND POWERS OF COURT, 10 C. W.N. 306.

Required by s. 248, Civ. Pro. Code, 1882, a condition precedent to the execution of decree — *See* EXECUTION OF DECREE—NOTICE OF EXECUTION, 20 C. 370.

See FOREIGN COURT—JURISDICTION OF, 13 M. 496.

Person, of whose interest a mortgage has had—would not be bound by the mortgage decree unless they were parties to the suit by the mortgagee — *See* HINDU LAW—JOINT FAMILY, 3 C.L.J. 12.

Transfer of immoveable property for consideration—Transferee without notice—Charge for maintenance of Hindu widow declared by decree—Vendor and vendee—*See* HINDU LAW—MAINTENANCE, 27 C. 194.

Hindu Law—Possession by the widow, notice of her rights to the purchaser—*See* HINDU LAW—MAINTENANCE, 12 M. 334.

See HINDU LAW—MAINTENANCE, 8 B.L.R. 225=17 W.R. 433, note, 2 B. 494.

Of determination of tenancy—Tender of *pattah* at end of *Fasli*, not sufficient—*See* HINDU LAW—RELIGIOUS ENDOWMENT, 28 M. 391.

Obstruction to light—Suit for mandatory injunction—Delay in notice—*See* INJUNCTION—MISCELLANEOUS, 7 C. 453.

Insolvent—Private settlement with creditor, validity of—Absence of—to Official Assignee and other creditors—Public policy—*See* INSOLVENCY—GENERAL, 20 B. 636.

See INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 11 M. 136.

See INSURANCE, 4 B. 314, 6 B.L.R. 218, 7 B.L.R. 347.

See KABULIAT—GENERAL, B.L.R. Sup. Vol. 25=W.R. F.B. 83.

See KABULIAT—PRELIMINARIES TO SUIT, 2 C.L.R. 8.

See LANDLORD AND TENANT — FORFEITURE, 17 M. 218=3 M.L.J. 287.

Mortgage foreclosure Rent Title—to tenant—*See* LANDLORD AND TENANT—TRANSFER OF LANDLORD'S INTEREST, 12 C.L.R. 479.

Omission to give date—No irregularity—*See* LANDLORD AND TENANT—MISCELLANEOUS, 14 M.L.J. 145.

See LANDLORD AND TENANT—MISCELLANEOUS, 13 C. 248, 16 C. 414.

Objection as to want of, when may be taken — *See* LEASE—GENERAL, 5 Ind. Cas. 336.

Appeal from order of single Judge refusing application under s. 169 of Act VI of 1882—*See* LETTERS PATENT, HIGH COURT, 1865—N.W.P., s. 10, 17 A. 439=A.W.N. 1895, 89.

Notice—continued.

See LIMITATION ACT, 1908, s. 3, 5 B.L.R. App. 57 Note=13 W.R. 105.

See LIMITATION ACT, 1908, s. 10 and art. 134, 1 B. 269.

See LIMITATION ACT, 1908, art. 164, 2 C. 123.

See LIS PENDENS, 19 M. 257, 7 M.H.C. 104.

Omission by Judge to give—of his intended local inspection, effect of—*See* LOCAL INSPECTION, 33 C. 133.

Monthly servant leaving without—right of, to wages—*See* MASTER AND SERVANT. U.B. R. 1905, Contract 1.

See MASTER AND SERVANT, 6 B.L.R. 107, 140 P.L.R. 1901=118 P.R. 1901, 43 P.R. 1876.

Co-sharers—Measurement of lands—of intended measurement—*See* MEASUREMENT OF LANDS, 5 C.L.R. 132.

Mortgagee of vendee omitting to search register, not a *bona fide* transferee without notice—*See* MORTGAGE—GENERAL, 9 A. 591=A.W.N. 1887, 121.

Service of—Proof of service—*See* MORTGAGE—FORECLOSURE, 1 Agra 172.

See MORTGAGE—FORECLOSURE, 3 N.W. P. 325, 2 Agra 387, 2 Agra 407, W.R. 1864, 49, 84 P.R. 1882, 31 P.R. 1883, 32 P.R. 1883, 84 P.R. 1890, 94 P.R. 1892, 119 P.R. 1892, 36 P.R. 1893, 133 P.R. 1894, 24 P.R. 1895.

See MORTGAGE—FORM OF MORTGAGES, 10 A. 133=A.W.N. 1888, 35.

Mortgagor appearing to contest defective notice of foreclosure issued under Reg. XVII of 1806 and offering to pay proper persons—Whether such appearance and offer amount to waiver of right to take advantage of defects in the notice in a subsequent suit by him for redemption—*See* MORTGAGE—REDEMPTION, 28 P.R. 1908=41 P.W.R. 1908=141 P.L.R. 1908.

Mortgage—Payment of first mortgage by third mortgagee in ignorance of second—Registration—Notice—Presumption of intention to keep alive first mortgage—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 8 M. 246.

In what cases registration is and in what cases it is not—*See* MORTGAGE—MISCELLANEOUS, 29 B. 199.

Mortgage by ostensible owner of property—Transfer of benamidar, when not voidable—Notice of benami purchaser—*See* MORTGAGE—MISCELLANEOUS, 4 O C. 192.

See MORTGAGE—MISCELLANEOUS, A.W. N. 1887, 183.

Suit against Municipal Committee—of one month—*See* MUNICIPALITY, 59 P.R. 1872.

Bill of exchange, action against endorser and acceptors of—Notice of dishonour—*See* NEGOTIABLE INSTRUMENTS — BILL OF EXCHANGE, 3 B.L.R.A.C. 198.

Notice—continued.

See NEGOTIABLE INSTRUMENTS — BILL OF EXCHANGE, 3 N.W.P. 99.

Hundi—Notice of dishonour—See NEGOTIABLE INSTRUMENTS—HUNDIS—NOTICE OF DISHONOUR OF HUNDIS, 3 C. 339.

Suit on promissory note—Overdue note—Equities between payee, and maker binding on indorsee—Demand of payment—See NEGOTIABLE INSTRUMENTS—PROMISSORY NOTES—ASSIGNMENT, 7 M.H.C. 271.

Hundi payable at sight—Holder agreeing to arrangement with acceptor for payment—Notice of dishonour, omission to give—effect on drawer's liability — See NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 30, 39 and 86, 12 C.W.N. 644=8 C.L.J. 163.

Dishonour of hundi after acceptance—Notice of dishonour—Omission to give notice—Burden of proving absence of damage consequent on omission to give notice—Partnership between drawer and drawee—Acceptor's liability barred by limitation—Drawer whether discharged—See NEGOTIABLE INSTRUMENTS ACT, 1881, s. 98 (c), 26 M. 239=12 M.L.J. 267.

Life interest, not attachable by notice to trustee of funds—See OFFICIAL TRUSTEE, 12 M. 250.

See OFFICIAL TRUSTEE, 7 C. 499.

Payment of debt to representative of deceased person—Discharge—Right of execution of the deceased to ignore such payment—Notice of claim—Duty of executors—Negligence, effect of—See PAYMENT, 72 P.R. 1903.

Verification by person other than plaintiffs—See PLAINT—VERIFICATION AND SIGNATURE, 1 Ind. Jur. N.S. 226.

Effect of—of ejectment given to tenants claiming under-proprietary right—See POSSESSION—GENERAL, 9 O.C. 292.

Proof of service of, under s. 167 of the Bengal Tenancy Act—See POSSESSION—SUITS FOR POSSESSION, 7 C.L.J. 262.

Possession operates as—See POSSESSION—MISCELLANEOUS, 5 Bom. L.R. 269=27 B. 408.

Written statement—A fact conveyed in a written statement operates as notice—See PRACTICE AND PROCEDURE, 6 Bom. L.R. 284.

Notice to pleader if notice to client—See PRACTICE AND PROCEDURE, 13 C.W.N. 142=2 Ind. Cas. 547.

See PRACTICE AND PROCEDURE, 24 C. 437=2 C.W.N. 57.

See PRE-EMPTION — GENERAL, 1 O.C. 254, 262.

See PRE-EMPTION —RIGHT TO PRE-EMPT, 16 M. 301.

See PRINCIPAL AND AGENT — GENERAL, 6 C.L.R. 101, P.C.=7 I.A. 8.

Notice—continued.

Respondent in appeal to Privy Council whether entitled to, of transmission of records from High Court—See PRIVY COUNCIL, PRACTICE OF—REHEARING, 19 A. 209=24 I.A. 49, P.C.

Will—Grant of probate—Notice to next of kin—See PROBATE—PRACTICE AND PROCEDURE AS TO PROBATE, A.W.N. 1881, 56.

Of appeal—Refusal to receive—Copy not affixed—No service — *Ex parte* decree—Effect—See PROCESS, 16 B. 117.

See PROCESS, 15 W.R. 31.

Specific Relief Act, I of 1877, s. 42—Suit for decree declaratory of title without prayer for consequential relief—Relief by way of injunction not sought—Effect—Civ. Pro. Code, 1882, s. 424,—under—See PUBLIC OFFICER, 14 B. 395.

See RECOGNIZED AGENT, 17 W.R. 389.

Registered conveyance — Unregistered conveyance with possession—Priority—Notice—See REGISTRATION, 7 C. 753=10 C.L.R. 129.

Advantage of registration in the absence of proof of—See REGISTRATION, 16 C.P.L.R. 95.

Registration of document not notice thereof—See REGISTRATION, 13 C.P.L.R. 43.

Registration operates as—See REGISTRATION ACT, 1908, ss. 17 and 50, 5 Bom. L.R. 144=27 B. 452.

See REGISTRATION ACT, 1908, ss. 47, 49, 50, 1 L.B.R. 293.

See REGISTRATION ACT, 1908, ss. 49, 50, 8 M. 167.

Priority of mortgages—See REGISTRATION ACT, 1908, s. 50, A.W.N. 1897, 90.

Unregistered document optionally registrable—Subsequent registered document—Priority—See REGISTRATION ACT, 1908, s. 50, 26 P.L.R. 1900.

Earlier unregistered mortgage, priority of, over later registered mortgage—Effect of notice of prior mortgage—See REGISTRATION ACT, 1908, s. 50, 25 M. 1.

Registered and unregistered documents—Priority—Notice—See REGISTRATION ACT, 1908, s. 50, 20 A. 252=A.W.N. 1898, 32.

Conflict between an unregistered hypothecation bond and a subsequent registered conveyance—Notice—See REGISTRATION ACT, 1908, s. 50, 9 M. 495.

Registered mortgage-deed—Of previous valid unregistered mortgage, effect of—See REGISTRATION ACT, 1908, s. 50, 16 M. 148, F.B.=3 M.L.J. 54.

Purchaser of property, subject to unregistered mortgage not compulsorily registrable—Purchaser having notice of such mortgage before registration of sale-deed—Whether mortgage binding on purchaser—See REGISTRATION ACT, 1908, s. 50, A.W.N. 1909, 99=30 A. 238=5 A.L.J. 607.

Notice—continued.

Priority of unregistered mortgage over subsequent registered sale — Notice—Fraud — See REGISTRATION ACT, 1908, s. 50, 11 C. 667.

Holder of subsequent registered mortgage—Of previous mortgage unregistered, effect of, on priority between mortgagees—See REGISTRATION ACT, 1908, s. 50, 6 B. 515.

Prior unregistered document, possession under, notice to subsequent registered mortgagee—See REGISTRATION ACT, 1908, s. 50, 9 B. 427.

Of earlier unregistered deed, effect of, on priority claimable by holder of subsequent registered deed—See REGISTRATION ACT, 1908, s. 50, 19 A. 145 = A.W.N. 1897, 19.

See REGISTRATION ACT, 1908, s. 50, 10 C. 1073.

Contents of a valid notice under s. 51 of Reg. VIII of 1793 (Bengal Decennial Settlement)—See BEN. REG. VIII OF 1793, s. 51, 8 C.L.J. 329.

Misprints in—See BEN. REG. XVII OF 1806, 124 P.L.R. 1901 = 38 P.R. 1901.

Foreclosure—Irregular—When fatal—See BEN. REG. XVII OF 1806, ss. 7, 8, 74 P.L.R. 1906.

See BEN. REG. XVII OF 1806, ss. 7, 8, 83 P.L.R. 1903 = 21 P.R. 1903, 57 P.L.R. 1901 = 21 P.R. 1901.

Mortgage—Foreclosure proceedings—Service of notice—Substituted service when permissible, Demand by registered notice—Burden of proof—Evidence—See BEN. REG. XVII OF 1806, s. 8, 63 P.L.R. 1902.

See BEN. REG. XVII OF 1806, s. 8, 9 P.L.R. 1901 = 28 P.R. 1901.

See BEN. REG. VIII OF 1819, s. 8, 2 C.L.R. 419.

Of sale of tenure under Reg. VIII of 1819—Mode of publication—See BEN. REG. VIII OF 1819, s. 8 (2), 14 C. 365, P.C. = 14 I.A. 30.

Sticking up of—required by s. 8 of Regulation VIII of 1819 (Bengal)—Form and publication of—See BEN. REG. VIII OF 1819, ss. 8, 10, 32 C. 953 = 3 C.L.J. 46.

Publication of—See BEN. REG. VIII OF 1819, ss. 8, 14, cl. 2, 1 C. 175 = 24 W.R. 453.

See BEN. REG. VIII OF 1819, cl. 3, ss. 8 and 14, 18 C. 363, F.B.

Religious community worshipping at one synagogue—Resolutions at meeting of community dismissing officers of synagogue—Necessity of notice to officers—Decision by domestic tribunal for community, whether Court can interfere with—See RELIGIOUS COMMUNITY, 11 B. 185.

See RELINQUISHMENT OF TENURE, 7 B.L.R. App. 11 = 15 W.R. 454.

Alteration of date of appeal without notice to appellant or his pleader—See REMAND, A.W.N. 1894, 19.

Notice—continued.

Service of notice by post—Presumption—Question of fact—See RES JUDICATA—MATTERS IN ISSUE, 7 C.L.J. 251.

Suit for redemption, valuation of, for purposes of jurisdiction—Dekkan Agriculturists' Relief Act (XVII of 1879), consent once given to disposal under provisions of, whether could be withdrawn—Review by Special Judge under Act, necessity of notice to concerned parties—See REVIEW—PRACTICE AND PROCEDURE, 11 B. 591.

Notice of filing of award not given to parties—Passing of decree—Material irregularity—Revision—See REVISION—GENERAL, 20 A. 474 = A.W.N. 1898, 132.

Execution sale of under-tenure—Decree-holder—Mortgagee's right to—See SALE—SALE FOR ARREARS OF RENT—UNDER-TENURES AND PORTIONS OF SALE OF, 4 C. 438.

Non-service of—Irregularity—Objection not taken in appeal to Commissioner—Objection in regular suit—See SALE—SALE FOR ARREARS OF REVENUE AND CESS—SETTING ASIDE SALE AND ITS EFFECT, 13 C.L.R. 1.

Effect of want of notice under s. 232 (a), Civil Pro. Code—See SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, P.L.R. 1900, p. 157.

See SALE OF GOODS, 17 B. 62.

Sanction to prosecute—Notice—Municipal Commissioner—See SANCTION TO PROSECUTE, A.W.N. 1892, 31.

Sanction to prosecute—When necessary previous to sanction—See SANCTION TO PROSECUTE, 10 C. 1100.

Resumption of land—Notice—See SERVICE TENURE, 8 M. 72.

Necessity of—to under-tenants, prior to suing them in ejectment—See SERVICE TENURE, 11 C.W.N. 46 = 5 C.L.J. 53.

See SERVICE TENURE, 22 C. 938.

Four days' notice whether sufficient in law—See SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL, 3 M.L.T. 293.

Oral contract to execute lease—Subsequent registered lease with—Suit for—of oral agreement—See SPECIFIC PERFORMANCE, 6 C. 534 = 7 C.L.R. 487.

See SPECIFIC PERFORMANCE, 12 B. 568.

See SPECIFIC RELIEF ACT, 1877, s. 27, 27 C. 358 = 4 C.W.N. 490.

In suits on contract, not required where an action is brought on a contract—See STATUTORY DUTIES, 3 Bom. L.R. 158 = 25 B. 387.

See SUPERINTENDENCE OF HIGH COURT, 11 M. 144.

Registration when amounts to—See TRANSFER OF PROPERTY ACT, 1882, s. 3, 2 C.W.N. 750.

Notice—continued.

Registration of subsequent mortgage, how far notice to prior mortgagee—Registration Act, 1877, s. 50—See TRANSFER OF PROPERTY ACT, 1882, ss. 3, 85, 16 A. 478, F.B. = A.W.N. 1894, 151.

See TRANSFER OF PROPERTY ACT, 1882, ch. IV, ss. 3, 85, 13 A. 432, F.B.

See TRANSFER OF PROPERTY ACT, 1882, s. 4, 1 L.B.R. 196.

Whether transferee to be fixed with notice, if he has not exercised utmost care—See TRANSFER OF PROPERTY ACT, 1882, ss. 43 and 41, 14 Bur. L.R. 329.

Prior unregistered contract of sale—Subsequent registered sale—Suit for specific performance—See TRANSFER OF PROPERTY ACT, 1882, s. 54, A.W.N. 1887, 15.

See TRANSFER OF PROPERTY ACT, 1882, s. 69 (1), 11 M. 201.

See TRANSFER OF PROPERTY ACT, 1882, s. 78, 15 M. 268 = 2 M.L.J. 95.

Registration amounts to—See TRANSFER OF PROPERTY ACT, 1882, s. 81, 4 Bom. L.R. 253 = 26 B. 538.

See TRANSFER OF PROPERTY ACT, 1882, s. 81, 23 C. 790.

Necessity of, to be given to the mortgagor before order absolute for sale—See TRANSFER OF PROPERTY ACT, 1882, ss. 82, 89, 4 C.L.J. 317.

See TRANSFER OF PROPERTY ACT, 1882, s. 85, A.W.N. 1899, 34.

See TRANSFER OF PROPERTY ACT, 1882, ss. 85 and 3, 21 C. 116.

Necessity for notice to judgment-debtor before making order absolute—See TRANSFER OF PROPERTY ACT, 1882, s. 87, 9 C.P.L.R. 5.

No notice necessary before order absolute for sale is made—See TRANSFER OF PROPERTY ACT, 1882, s. 89, 25 M. 506 = 12 M.L.J. 62.

Service of notice through post by registered letter, whether sufficient—See TRANSFER OF PROPERTY ACT, 1882, s. 106, 28 C. 118 = 4 C.W.N. 790.

Of termination of lease of immoveable property—See TRANSFER OF PROPERTY ACT, 1882, ss. 106, 111, cl. (h), A.W.N. 1890, 175.

Notice of assignment of debt, object and effect of—See TRANSFER OF PROPERTY ACT, 1882, s. 131, 10 A. 20 = A.W.N. 1887, 270.

See TRANSFER OF PROPERTY ACT, 1882, s. 131, 12 C. 505, 10 M. 289.

See TRANSFER OF PROPERTY ACT, 1882, s. 132, 21 B. 60.

See TREASURE TROVE, 7 M.H.C. 150.

Owner may chop off penetrating roots—No—necessary, if he does not trespass on the other's land—See TREES, 31 C. 944 = 8 C.W.N. 710.

Notice—concluded.

Whether purchaser with notice of trust has also notice of trustee's conduct. See TRUST, 6 M.L.T. 143 = 2 Ind. Cas. 963 = 32 M. 490.

Trust—Purchase of trust property—Good faith—See TRUSTS ACT, 1882, s. 3, 2 O.C. 319.

Necessity of—on abandonment of an *Utbandi* tenure—See UTBANDI TENURE, 5 C.L.J. 398 = 11 C.W.N. 581.

See VENDOR AND PURCHASER—POSSESSION, 2 B. 299 = P.J. 1880, 57.

Mortgage with possession—Assignment of equity of redemption by mortgagor—Notice to mortgagee if necessary—Further loan by mortgagee to original mortgagor when assignee liable to pay up—Presumption from circumstances and conduct of assignee—See VENDOR AND PURCHASER—PURCHASE OF MORTGAGED PROPERTY, 12 B. 33.

See WRITTEN STATEMENT, 1 Ind. Jur. N.S. 39, 40.

Notice of Dishonour.

See NEGOTIABLE INSTRUMENTS.

See NEGOTIABLE INSTRUMENTS ACT.

Notice of Suit.

(1)—*Consul to receive notice of suit.*—A Court in India, in which a claim for wages may be made by a foreign seaman, must give the Consul of the nation to which the ship belongs, a notice that the suit has been instituted. FRITZ OLNER v. LAVEZZE, 10 C. 878.

Notice to Quit.

See EJECTMENT, SUIT FOR.

See LANDLORD AND TENANT — EJECTMENT.

See LEASE.

See NOTICE.

(1)—*Second appeal—Objection of want of proper notice to quit raised for first time in appeal—Practice.*—In a suit for ejectment, the objection by the tenant of want of a proper notice to quit may be raised for the first time even in second appeal, (2 M. 346, 12 M. 353, P.J. for 1880, p. 122, R.) In the present case, the objection was not taken in the written statement, nor apparently even in the memorandum of appeal. It was, nevertheless, in fact, dealt with by the appellate Court. Held that the High Court in second appeal would allow the defendant to take the objection of want of notice. VITHU v. DHONDI, 15 B. 407. [R., 18 B. 110.]

(2)—*Suit by landlord for possession—Denial of landlord's title by tenant—Notice to quit whether necessary.*—In a suit by a landlord to recover possession, whether the tenants defendants deny the title of the plaintiff, no notice to quit is necessary. AGARCHAND GUMAN-CHAND v. RAKHMA HANMANT, 12 B. 678.

Notice to Quit—continued.

(3)—*Landlord and tenant—Notice to quit sent by post—Refusal to receive—Service, whether good.*—Refusal to receive the notice to quit sent through the Post Office by a registered letter is equivalent to service of notice to quit. ISMAIL KHAN MAHOMED v. KALI KRISHNA MONDOL, 6 C.W.N. 134. (15 C. 681, R.)

(4)—*Permanent Tenancy—Notice to quit—Homestead land in Municipal town—Barisal.*—Notice to quit homestead land in the case of transferable leases ought to be a six months' notice, in order that it may be considered to be a reasonable one, whether the Transfer of Property Act applies to the case or not. DURGA MOHUN DASS v. RAKHAL CHANDRA ROY, 5 C.W.N. 801. (24 C. 720, R.) [R., 8 C.W. N. 901.]

(5)—*Notice to quit—Tenant—If reason necessary.*—Trustees have power to eject a tenant by giving a proper notice to quit. It is not necessary for them to give reasons for such notice. PARAMANAND KARAN v. BAPTIST MISSION SOCIETY OF LONDON, 8 C.W.N. 918.

See BEN. ACT X OF 1859, s. 23, cl. 5, 6 C. W.N. 199.

And its requisites—See BEN. ACT VIII OF 1885, 29 C. 231=6 C.W.N. 183.

To quit, whether necessary for maintainability of suit for ejectment of defendant, where defendant refuses to pay reasonable rent and sets up *mokurari pottah*—See BEN. ACT VIII OF 1865, s. 16, 7 C.L.J. 191.

To quit not necessary where the defendant is a trespasser—See BEN. ACT VIII OF 1885, s. 178 (1), cl. (a) and (3) cl. (a), 33 C. 136=10 C. W.N. 533.

To quit—necessity of, for ejectment of under-riyat by landlord purchasing occupancy-rights of tenant—See BEN. ACT VIII OF 1885, ss. 22, 49 (b) and 85 (2), 3 C.L.J. 155=34 C. 104.

Landlord's right of re-entry without—to quit—Whether—to under-riyat necessary—See BEN. ACT VIII OF 1885, ss. 22, 49, 85 and 86, cls. (5) and (7), 2 C.L.J. 570.

See BEN. ACT VIII OF 1885, s. 49, ch. I, r. 3, 28 C. 590=6 C.W.N. 67.

See BOM. ACT V OF 1879, s. 84, 20 B. 354, F.B.

Effect of—See C. P. ACT IX OF 1883, s. 55, 1 C.P.L.R. 120.

To quit—See APPELLATE COURT—OBJECTION FIRST TAKEN IN APPEAL, 1 C.L.R. 421.

To quit necessity for where defendant in a suit for ejectment set up a right in himself which was found to be false—See EJECTMENT, SUIT FOR, 9 C.W.N. 460=1 C.L.J. 116.

See EJECTMENT, SUIT FOR, 6 B. 67.

Lease granted by two co-owners jointly—Whether one co-owner can give lessee notice to quit and sue in ejectment—See EVIDENCE—PAROL EVIDENCE, 11 B. 644.

Notice to Quit—concluded.

See LANDLORD AND TENANT—ABANDONMENT OF TENURE, 4 C.W.N. 667.

See LANDLORD AND TENANT—FORFEITURE, 17 M. 218=3 M.L.J. 287, 10 B. 669.

See LANDLORD AND TENANT—HOLDING OVER, 12 B.L.R. 263, 7 C. 710=9 C.L.R. 240, L.B.R. 1872—1892, 439 and 277

See LANDLORD AND TENANT—NATURE OF TENANCY, L.B.R. 1872—1892, 427.

Notice to quit—See LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, 1 Bom. L.R. 739.

To quit containing alternative clause as to enhanced rent—See LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, 1 L.B.R. 82.

Grant of lands for service of private nature—Resumption of lands after discontinuance of service—Notice to quit in respect of certain lands—Sufficiency in respect of other lands—See LANDLORD AND TENANT—MISCELLANEOUS, 13 M.L.J. 209.

See LANDLORD AND TENANT—MISCELLANEOUS, 10 C.W.N. 841=8 C.L.J. 34, 42 P.L.R. 1904=5 P.R. 1904.

Order appointing Receiver, powers of Receiver under—Suit to eject tenant, right of—Monthly tenant—Notice to quit—Holding over—See RECEIVER, 18 C. 477.

Prior to ejectment—Sufficiency of the service—See RIGHT OF SUIT—GENERAL, 22 B. 754.

To quit—Agreement to render services as Medical Practitioner in lieu of rent of a house—Lease—See TRANSFER OF PROPERTY ACT, ss. 105, 106, 32 C. 243.

See TRANSFER OF PROPERTY ACT, s. 106, A.W.N. 1896, 51.

To quit, necessity for, in the case of a purchaser of the tenancy from the legatee of a deceased tenant—See TRANSFER OF PROPERTY ACT, ss. 106, 108, cl. 8 (j), 5 C.L.J. 205.

See TRANSFER OF PROPERTY ACT, 1882, ss. 111, 116, 20 B. 759.

To quit, necessity of, in a suit for ejectment—Forfeiture of tenure by denial of landlord's title—See SERVICE TENURE, 3 C.L.J. 274=33 C. 329.

Notice to show cause.

(1)—*Civ. Pro. Code, 1882, s. 623—Application for review—Notice to show cause—Right to begin.*—The party opposing an application for review of judgment has the right to begin, where a notice to show cause why the application should not be granted has been issued to him. GHANSHAM SINGH v. LAL SINGH, 9 A. 61, F.B.

(2)—*Adverse order—Notice to show cause—Practice.*—No order affecting a party should be passed without calling upon him to show cause why it should not be passed. SIRAJ-UL-HAQ v. KHADIM HUSSAIN, 5 A. 380=3 A. W. N. 60.

See CIV. PRO. CODE, 1908, O. XXIII, r. 1, 6 A. 211=A.W.N. 1884, 28.

Notifications.

Notification. **Civ. Cir. Or. No. 16, 24 W.R. Rules and Orders of the H.C., p. 15.**

Meaning of—*See* BEN. ACT III OF 1884, s. 2, 20 C. 699, F.B.

That candidate has passed—Cancelment of notification on ground of error—*See* APPEAL TO PRIVY COUNCIL—CASES WHERE APPEAL LIES OR NOT, 6 A. 163, F.B.=A.W.N. 1894, 15

No. 671 of 1880, Judicial—Civil Department, dated the 30th August 1880—*See* CIV. PRO. CODE, 1908, s. 68, A.W.N. 1882, 12.

No. 835, dated the 19th February 1886—*See* STAMP ACT, 1862, sch. A, arts. 12, 23, 35 and 46, A.W.N. 1900, 23.

Government—No. 2955, dated 1-12-1882, effect of—*See* STATUTES, CONSTRUCTION OF, 13 A. 66=A.W.N. 1890, 238.

Of Governor-General—*See* SUCCESSION CERTIFICATES ACT, 1889, ss. 17, 20, 19 B. 145.

Notification of Sale.

Objections by judgment-debtor—Order disallowing objection—Ministerial Act—Appeal—Civ. Pro. Code, 1882, s. 244—*See* APPEAL—ORDERS, A.W.N. 1887, 134.

Novation.

(1)—*Novation of contract—Assignment of business of firm—Liability of assignee for debt not shown in books of firm.*—A certain firm transferred all its business with all its demands and liabilities, as shown by its books, to the defendant firm. At the date of the transfer, the original firm was indebted to the plaintiff firm. This debt was not shown by the books of the firm and the defendant firm did not know of its existence. The plaintiff sued the defendant for the recovery of the amount. *Held* that as there was no contract between the plaintiff and the defendant, by which the former undertook to pay any debt due from the old firm to the latter, there was no novation of contract between the plaintiff and the defendant and that the defendant was not therefore liable. **JIT MAL v. GOKUL DAS, A.W.N. 1881, 52.**

(2)—*Elements of.*—A contract by novation requires it as an essential element that the rights against the original contractor shall be relinquished and the liability of the new contracting party accepted in their place. **NADI-MULLA v. CHANNAPPA, 5 Bom. L.R. 617.**

See BOND, 2 C.L.R. 565.

When does not arise—*See* CONTRACT ACT, 1872, s. 62, 14 Bom. L.R. 26.

See CONTRACT ACT, 1872, s. 62, A.W.N. 1883, 254, 80 P.L.R. 1903, 28 P.L.R. 1903=7 P.R. 1903.

See CONTRACT ACT, ss. 62, 63, 15 C. 319, 1 L.B.R. 170.

See CONTRACT ACT, 1872, s. 183, 4 Bom. L.R. 627.

Novation—concluded.

See DEBTOR AND CREDITOR, 8 M.L.J. 296.

See LIMITATION ACT, 1908, art. 73, 1 B. 503.

See MORTGAGE—FORECLOSURE, 26 A. 4=A.W.N. 1903, 175.

See PRIVY COUNCIL. PRACTICE OF—QUESTIONS OF FACT, 9 B.L.R. 364=16 W.R. P.C. 11=14 M.I.A. 86.

See REGISTRATION ACT, 1908, s. 50, 2 N.W. P. 37.

New bond in cancellation of old bonds—Registration refused—Suit on original bonds—*See* REGISTRATION ACT, 1908, s. 77, A.W.N. 1881, 98.

Nuisance.

See CIV. PRO. CODE, 1908, s. 91.

(1)—*Nuisance created by acts of many.*—What may not be appreciable and be no nuisance, if done by one, may become a serious nuisance, if done by many. **CHUNDER COOMAR MOOKERJEE v. KOYLASH CHUNDER SETT, 7 C. 665. [Affirmed, 8 C. 677.]**

(2)—*Crim. Pro. Code, s. 308—Nuisance.*—S. 308 of the Crim. Pro. Code does not apply to cases where the public are charged with committing a nuisance, by a private individual in the exercise of an admitted right. **BECHARAM GHOROOEE v. BOISTUBNATH BHOYAN, 14 W.R. 177. [Cons. and Expl., 19 M. 464].**

(3)—*Cause of action.*—A person is entitled to make a drain in his own land, and the Court is incompetent to decree that the drain should be closed, because only it might possibly in some season or another of the year, incommode the plaintiff's neighbouring house-owner's sense of smell; it will be time enough for the latter to take action to abate any nuisance that he may possibly discover in connection with it, when such nuisance in fact occurs. **NAIK SINGH v. MADHO SINGH, A.W.N. 1886, 156.**

(4)—*Abatement of—Smoke—Grant of perpetual injunction—Power of Court to refuse—Injury to reversion—Whether smoke nuisance amounts to—Nature and form of injunction to be granted.*—Plaintiff U, owner of two buildings, sued K. the owner of a mill to the west of plaintiff's buildings, for a declaration that the mill was a nuisance, and for an injunction to stop the working of the mill or otherwise to abate the nuisance, on the ground that the smoke, sparks and chaff of the said mill directly fly into the premises of the plaintiff and have rendered the same uninhabitable. Defendant contended, *inter alia*, that his mill was working for some years before plaintiff's father built his shops on one of the plaintiff sites. *Held*, (1) that the fact that the mill was working for some years past is no defence, for "plaintiff came to the house he occupied with all the rights which the common law affords, and one of them is a right to wholesome air." *Held*, also (2) that the case was one for a perpetual injunction as no damages would be

Nuisance—continued.

an adequate compensation for the practical destruction of the plaintiff's house as a place of residence, and also to prevent a multiplicity of suits; for a fresh cause of action arises from day to day as the nuisance continues. The discretion to refuse an injunction the Courts in India have in any case, but this is exercised when there is no substantial damage to the plaintiff. (13 B. 252, 18 B. 474, 20 B. 764, *F.*) *Held*, also (3) that a smoke nuisance is not a permanent injury and that the reversioner cannot claim damages even if it be shown that the tenants had given notice to quit and that the property would sell for less, and that the only possible injury to the reversion was that the smoke nuisance might become a prescriptive right, and that therefore all that was necessary for the plaintiff was to obtain a declaration that the discharge of smoke over his property is not done "as of right." An injunction in terms similar to that granted in *Walter v. Salfe* was granted. *UMAR v. KEWALMAL*, 3 Sind. L.R. 30=1 Ind. Cas. 958.

(5)—*Nuisance—Municipal Committee's power to carry water into a public drain—Municipal Act XX of 1891, s. 123—Injunction—Conditional injunction—Specific Relief Act, 1877, s. 56 (g).*—The Municipal Committee of Pindigheb had diverted the flow of the waste-water of a *dharmsala* by conveying it through a new masonry drain which emptied itself into a *katcha* drain in the public street, on which two suits were filed against the Municipal Committee, one by the owners of the houses whose houses abut in the public street for a perpetual injunction restraining the Municipal Committee from discharging the water of the *dharmsala* through the drain in the street, and the other by the person in charge of the *dharmsala* for a similar injunction to restrain the defendants from interfering with the discharge of water through certain properties and diverting its flow to the drain in the street above mentioned. The Court of the first instance, whilst holding that the Municipal Committee was within its rights in constructing the new drain, found that if the old drain remained *katcha* the increased quantity of water discharged into it might during the rainy season cause some damage to the plaintiff's houses, granted the injunction until the Municipal Committee converted the *katcha* drain into a *pacca* masonry one, but dismissed the second suit on the ground that the plaintiff has no status to maintain it, which orders were confirmed by the Divisional Judge. The plaintiffs in both cases appealed to the Chief Court on the grounds amongst others that the Committee had no power to alter the direction of the flow of water from private drains, or the direction of the drains, and that no conditional injunction should have been granted. *Held*, that the plaintiffs in the first case had no right whatever in preventing the Committee from allowing the water to flow into their drain, and could only object if their rights are interfered with by the diversion, and only to that extent. The Specific Relief

Nuisance—continued.

Act contains no prohibition against conditional injunction being granted, but that the form adopted was not correct, as it amounted to a temporary injunction of indefinite duration and not a perpetual one, the proper order would be to grant a perpetual injunction conditional upon defendant not removing the cause of prospective damage to the satisfaction of the Court within a fixed period. *Held*, also, that public bodies like Municipal Committees should act in accordance with the procedure provided by the statute governing their acts, but where with the tacit consent and acquiescence of the persons interested in a property they have acquired a footing with respect to the discharge of its waste water and do an act which has caused no damage but improved its conditions, interference by a Court of Justice would not be equitable. *HARI SINGH v. THE MUNICIPAL COMMITTEE OF PINDIGHER*, 78 P.R. 1901. (6 M.H.C. 112, *F.*)

(6)—*Suit for injunction and damages—Liability of Municipality to carry off refuse-liquid of shellac factory by kutchra drain—Exemplary damages, when should be awarded.*—A suit was instituted for a perpetual injunction to abate a nuisance and for damages on account of the same. The nuisance complained of consisted in the discharge by the defendant of the refuse-liquid of his shellac manufactory into a Municipal drain passing close to the plaintiff's garden. The defendant contended that the stench, if any, arose not from the liquid discharged into the drain but was due to the insanitary condition in which the plaintiff's garden was kept. He also contended that, if the Municipality had properly constructed the drain, there would not be any stagnation of the liquid and thus the decomposition and bad smell thereof would have been avoided. *Held*, doubtless, the bad odour was due to the liquid discharge and not to any insanitary condition of the plaintiff's garden. The refuse-liquid stagnated in the drain in consequence of the higher level of a culvert, under which the drain had to pass and as it consisted of vegetable and animal matter, it decomposed and emitted a very bad odour. *Held*, also, that the Municipality is not responsible. The defendant has no right to discharge the liquid into the Municipal drain. The drain is not a sewer and is not intended to carry off whatever people may choose to discharge into it. It is only a *katcha* drain and is intended for the mere drainage of surface water. The Municipality did not permit the defendant to discharge the refuse-liquid into the drain. On the other hand, it prosecuted, more than once, the defendant. Further no private person can claim a right to foul an ordinary drain by discharging into it what it was not intended to carry off, and then throw on the Municipality an obligation to alter the drain in order to remedy the nuisance that he has produced; nor can he say that other persons must meanwhile put up with such nuisance. Carrying on an offensive trade so as to interfere with another's health and comfort or his occupation of property, has

Nuisance—continued.

been held in England to be a legal nuisance against which the Courts will give relief. Here, the liquid is offensive, and does interfere with the ordinary comfort of the plaintiff's occupation and has caused him special injury. And, since the defendant has put the Municipal surface-drain to a use for which it was never constructed or intended, and has thus fouled it, and the consequences are highly injurious, the plaintiff is entitled to restrain him. From the history of the case, it appears that the defendant has successfully resisted Municipal control, that he has enlarged his factory, and that he has been discharging a greater volume of refuse-liquid into the drain. Consequently, an injunction for the permanent stoppage of the nuisance is the only effectual remedy. *Held*, further, that persistence in a proved nuisance is a just cause for giving exemplary damages. The defendant has certainly persisted in spite of Municipal warning. Consequently the damages awarded to the plaintiff should be substantial. *J.C. GALSTAUN v. DUNIA LAL SEAL*, 9 C.W.N. 612 = 32 C. 697.

(7)—*When actionable—City of Madras Municipal Act (I of 1884), ss. 392, 433—How far Municipal Council justified in opening burial-grounds and in causing nuisance thereby.—Limitation.*—It cannot be laid down as legal proposition or doctrine that anything, which under any circumstances, lessens the comfort or endangers the safety or health of a neighbour, must necessarily be an actionable nuisance. In determining whether the use of certain land acquired by a Municipal Council as a burning ground for the people amounts to an actionable nuisance, the Courts are bound to take into consideration the fact that the object of the burning ground is to provide a convenient and sanitary means of disposing of corpses in accordance with the general sentiment of the community; so the use of a place dedicated for the communal purpose of cremation in a way which is neither negligent nor unreasonable, and, which is not calculated to aggravate the inconveniences necessarily incident to such an act as it is generally performed in the country, does not amount to an actionable nuisance. (19 M. 464, F.) Where the Municipal Commissioners for the City of Madras acquired certain land and opened a burial and burning ground thereon, and an actionable nuisance was caused thereby to an adjacent landowner, *held*, that the Municipal Commissioners were protected by s. 392 of the City of Madras Municipal Act; the Legislature in enacting s. 392 of the Act clearly contemplated and authorised some interference with private right of property, since the above section empowers the Commissioners to acquire land compulsorily for the purpose of burning-grounds. They were protected by s. 392 which places them under a statutory obligation to open burning-grounds, and provides also for compensation. (L.R. 11 App. Cas. 45, F.; L.R. 6 App. Cas. 193, D.) (*Per Sir Arnold White, C.J.*). The mere fact that a neighbouring land-owner has sustained damage does not show

Nuisance—continued.

that the place provided by the Commissioners as a burning and burial ground, is not "convenient and fitting" within the meaning of s. 392 of the Act—(*Per Sir Arnold White, C.J.*). [R., 6 Bom. L.R. 131.] The cause of action for a suit for an injunction restraining the Municipal Commissioners of Madras from using certain land acquired by them as a burning and burial ground, and for damages caused to the plaintiff by the land having been so used, arises when the land begins to be used as a burning and burial ground; and the suit is barred under s. 433 of the Madras City Municipal Act, unless brought within six months of the above date. (*Per Sir Arnold White, C.J.*). *MUHAMMAD MOHIDIN SAIT v. THE MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS*, 25 M. 118.

(8)—S. 68 (2), Act XIII of 1884—*Public latrine—Erection by Municipal Committee—Legality of.*—S. 68 (2) (a) of the Punjab Municipal Act does not empower the Committee to erect public latrines at any place which might deem suitable to the committee. That section enables the committee to apply the funds for the payment of charges and expenses incidental to maintenance, construction, improvement, cleansing and repair of latrines and to construct public necessities. *MUNICIPAL COMMITTEE, DELHI v. HARPARSHAD*, 103 P.R. 1892.

(9)—*Slaughter house—Suit for injunction—Damnum absqueinjuria—Municipal Committee—Powers of.*—A suit for injunction was brought to prevent the user of certain premises as a slaughter house on the ground of nuisance and the probable consequence of danger to health, material discomfort and inconvenience to the plaintiffs. *Held* that unless it is clearly proved that the above consequences would ensue, injunction would not be granted and even if proved, the Court has full discretion to grant or to refuse it, also that the exercise of a lawful business, if it is not on other grounds a nuisance will not amount to a nuisance merely because it diminishes the value of the property. Diminution of the value of one's property without injury to the property by a legitimate use of one's own property is at best a "*damnum absque iniuria*." Powers of the Municipal Committee to justify a nuisance discussed. *RATTIGAN v. MUNICIPAL COMMITTEE OF LAHORE*, 106 P.R. 1888. [R. & F., 103 P.R. 1892.]

(10)—*Obstruction in public street—Special damage.*—In a suit for the removal of obstruction in a public street on the ground of nuisance, it must be proved that the damages the plaintiff had sustained is greater in degree or frequency than and different from that sustained by the rest of the public. *CHAJJU MAL v. GANDA MAL*, 4 P.R. 1895. (10 P.R. 1878, F.)

(11)—*Opening doorway—Common land—Injury—Right of suit.*—In a suit to remove a doorway opened by the defendant, the plaintiff must shew that the existence of such doorway

Nuisance—concluded.

causes injury to his property or that the land on which it opens is his. *PEEROO v. BUDHA*, 90 P.R. 1866. [*F.*, 46 P.R. 1868.]

Removal of nuisance—Suit to set aside Magistrate's order—See CRIM. PRO. CODE, 1861, s. 308, 4 B.L.R. F.B., 24=12 W.R. 18.

Interruption of light and air—Substantial diminution—Cause of action—See EASEMENT, 8 O.C. 356.

An obstruction of light and air in order to constitute an actionable obstruction must amount to a—See EASEMENT, 9 C.W.N. 543.

See EASEMENTS ACT, 1882, 19 B. 420.

See FERRY, 18 C. 652.

Buildings affected by, and smoke of adjacent mill—Awarding of combined relief of injunction and damages to occupier—Specific Relief Act I of 1877—Plaintiff when barred by laches—See INJUNCTION—SPECIAL CASES, 8 B. 35.

See INJUNCTION—SPECIAL CASES, A.W.N. 1901, 23.

See JURISDICTION OF CIVIL COURTS, 14 C. 60, 1 B.H.C. 1, 3 C. 20, F.B.

Municipal bye-law declaring erecting of cornice a—Civil Courts bound to take as conclusive—See MUNICIPALITY, 8 P.R. 1875.

Act XV of 1877, s. 26, proof of title under, how far necessary—Continuing—Saving of limitation under s. 23—See PRESCRIPTION—EASEMENTS—WATER, RIGHTS CONCERNING, 6 B. 20.

Penetration of trees on neighbour's wall—Continuing actionable—Threatened injury—Injunction—See SPECIFIC RELIEF ACT, 1877, s. 55, 31 C. 944=8 C.W.N. 710.

Nuisances Act, Local.

See ACT XXI OF 1841.

Nambudris.

See HINDU LAW—ADOPTION, 11 M. 116.

Nuncupative Will.

(1)—*Nature of proof—Finding as to a direction in will—Liability to be reviewed in second appeal.*—Held, that the party setting up a nuncupative Will should be required to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place (12 M.L.A. 1, R.) Held, also, that a finding of fact as to a direction in the Will, after such proof, is not liable to be set aside by the High Court on second appeal. *DHURILAL v. MT. DHANIA*, 5 N.L.R. 85=3 Ind. Cas. 59.

Nuncupative Will—Suit for declaration of its nullity, when lies—See DECLARATORY DECREE, SUIT FOR—WHEN DECLARATORY SUITS LIE, 1 A. 688, P.C.=2 C.L.R. 193=5 I.A. 87.

See HINDU LAW—WILL, 9 W.R. 15, P.C.=12 M.L.A. 1.

See PROBATE AND ADMINISTRATION ACT, 1881, s. 3, 25 A. 313=A.W.N. 1903, 63.

Nunc Pro Tunc.

Award made after death of one of the parties—Doctrine of, whether applicable—See ARBITRATION—MISCELLANEOUS, 14 C.W.N. 759=6 Ind. Cas. 170.

Oath.

(1)—*Chief Magistrate, Glasgow—Power to administer oaths.*—The Lord Provost of the City of Glasgow as Chief Magistrate and as Justice of the Peace has authority to administer oaths. *In the goods of HENDERSON*, 22 C. 491.

(2)—*Indian Oaths Act (X of 1873), s. 13—Evidence advisedly recorded without oath or affirmation.*—S. 13 of the Indian Oaths Act does not render the evidence of a child nine years old, whose evidence has been advisedly, and not by omission, recorded without any oath or affirmation, admissible as evidence. *QUEEN v. ANUNTO CHUCKERBUTTY*, 14 B.L.R. 295, Note.

(3)—*Indian Oaths Act (X of 1873), s. 13—'Omission,' meaning of—Evidence.*—The word "omission" in s. 13 of Act X of 1873 includes any omission, and is not limited to accidental or negligent omission. *QUEEN v. SEWA BHOGTA*, 14 B.L.R. 294, F.B.

(4)—*Oaths Act—Failure to take oath—Practice.*—A fact which was to have been proved by oath cannot be taken to have been proved, simply because a party resiles from an agreement to take oath. If a party resiles from his agreement to take oath or be bound by the oath, a decree cannot forthwith be passed against him. The only course open to the Court in such a case was to proceed with the trial of the suit in the ordinary way, drawing such inference as might be proper from the conduct of the defaulting party and mulcting him in costs that should be considered appropriate. *ULAGAPPA CHETTIAR v. PERIA KARUPPAN CHETTY*, 1912 M.W.N. 361. (17 M. L.J. 545, D.; 22 M. 234, 31 M. 1, 17 M.L.J. 99, & 100, R.)

(5)—*Evidence balanced on both sides—Refusal to take oath proposed by other party—Its effect.*—Where there is evidence on both sides, and a doubt arises as to which is the true case, a refusal to take oath may well be taken into consideration to decide the point (22 B. 683, F.) But where the Court found that the evidence for the defendant standing alone was not such that it could be safely acted on, the Court could not decide in the defendant's favour, merely because the plaintiff refused to take the oath proposed to him. *KOJAKULI RANGA NAIK v. GURUVIYA BHATTA*, 2 M.L.T. 327.

(6)—*Indian Oaths Act (X of 1873)—Refusal of one party to take oath proposed by other, whether conclusive evidence against former—Such refusal whether could operate as estoppel.*—The point that had to be decided in this case was how far the Judge of the lower Appellate Court was justified in having disregarded the evidence on the record and rejected the plaintiff's claim on the mere presumption drawn

Oath—continued.

from the refusal of the plaintiff to take a solemn oath, under the Oaths Act of 1873, that defendant's presentment of the case was false. That Court while admitting that, apart from the oath incident, the evidence was all in favour of the plaintiff, *held* that his refusal to take the oath prescribed had by itself the effect of establishing that the defendant was in the right and so decided in his favour. The High Court *held* that the lower Appellate Court should, under the circumstances, have disposed of the case solely on the evidence before it, irrespective of the party's refusal to make oath and was wrong in having decided the case by the ordeal. While a party, who makes an oath as prescribed by his adversary, confers by so doing, on his statement, the character of conclusive proof, his mere refusal to make the oath does not, under the terms of the Act, justify any legal presumption against him. The refusal is to be considered as a mere piece of conduct-evidence in the case, to be judged of along with other evidence. Such a refusal, therefore, cannot be deemed to work as an estoppel so as to conclusively prove the falseness of the claim made by the person refusing. Where, therefore, as in the present case, there is good evidence all in favour of the party refusing to make the oath, his mere refusal cannot afford any sufficient ground for setting aside that evidence. It is only where there has been evidence on both sides, and a doubt arises as to which is the true case, that the refusal to take oath may be taken into consideration as evidence towards deciding the case. *CHINTAMAN v. SHRINIVAS*, 22 B. 680. [F., 2 M.L.T. 327.]

(7)—*Evidence — Conscientious objections to take oath on Bible by member of Church of England—Admissibility of evidence not given on such oath.*—Where a member of the Church of England had conscientious objections to take oath on the Bible and was willing to make an affirmation binding upon his conscience, evidence given by him except on such oath could not be admitted as he was not exempt by law from taking an oath in a Court of Justice in India. *P. VALU MUDALI v. W. SOWERBY*, 2 M.H.C. 246.

(8)—*Agreement to be bound by defendant's oath—Power of withdrawing after acceptance by defendant.*—A complete proposal by the plaintiff to be bound by the defendant's oath before a certain temple, is binding upon the plaintiff, if the defendant accepts such proposal. It will not be open to the plaintiff to withdraw after the acceptance, except for some good reason. *VELAYUDA GOUNDEN v. NARAYANASWAMI GOUNDEN*, 17 M.L.J. 536. (22 M. 234, 17 M. L.J. 100, F.)

(9)—*Indian Oaths Act (X of 1873), s. 9, offer to be bound by oath of opposite party, whether could be retracted subsequent to its acceptance—Discretion of Court.*—The plaintiff in this case offered under s. 9 of the Indian Oaths Act, 1873, to be bound by the oath or affirmation of the defendant on a certain point. The lower Court treated the oath accordingly taken by

Oath—continued.

the defendant as conclusive against the plaintiff and dismissed his suit. Plaintiff appealed on the ground that he had retracted his offer before the oath was taken by the defendant, though after she had agreed to take it, and that, therefore, he was not bound by the oath. *Held*, the Act makes no exception in favour of a party who makes the offer which has been accepted by his adversary so as to permit him to subsequently retract it. The administering of the oath is discretionary with the Court, and where the party who has made the offer satisfies the Court as he had good grounds for retracting it, the Court would exercise a wise discretion in refusing to administer the oath, but when such party puts forward only frivolous reasons for his retraction, the Court would be justified in administering the oath notwithstanding such retraction. *ABAJI v. BALA*, 22 B. 281. [Appr., 22 M. 234; R., 85 P.R. 1903 = 143 P.L.R. 1903, 17 M.L.J. 99.]

(10)—*Award — Settling matter in dispute conditionally on one of the parties making oath to a certain effect—Form of oath taken in Upper Burma.*—Where the decision of a dispute depends upon the taking of an oath by one of the parties, it appears a fair and reasonable presumption that the intention is that such oath should be taken in the most solemn and binding form in ordinary use. *MAUNG PAN GAING v. MAUNG SAN HLA*, U.B.R. 1892—1896, Vol. II, 598.

(11)—*Oath in a particular form—Vakil offering to be bound by, though not specially empowered—Effect of.*—A vakil, unless specially empowered, cannot bring a suit to a close, by offering to be bound by the oath of the opposite party in a particular form. *RAMASAMI ODAYAN v. P. M. RAMASAMI ODAYAN*, 7 M.L.T. 43 = 5 Ind. Cas. 514 = 20 M.L.J. 396. (14 B. 455, F.)

(12)—*Proposal by plaintiff to take oath in one form — Plaintiff subsequently insisting upon another form—Defendant's duty.*—Where the defendant was willing to take the oath in the form proposed by the plaintiff, but the plaintiff insisted on taking the oath in another form, *held* that the defendant was not bound to take the oath in the form which the plaintiff insisted upon. *RAMALINGAM CHETTI v. VEERAYYA CHETTI*, 7 M.L.T. 197 = 5 Ind. Cas. 939. (17 M. L.J. 99, D.; 17 M.L.J. 546, R.)

(13)—*One party to a suit abiding by oath of other—Court's record, procedure with reference to.*—Where a case involves questions of law and fact, and one of the parties thereto agrees to abide by the oath of the opposite party, the record of the Court must show what questions are to be decided in accordance with the oath. *RAM LAL SAHU v. SALTANAT BEG*, 8 O.C. 11.

(14)—*Oath—Wager—Decision of suit on oath.*—The decision of a suit by the wager of oath is not recognised by law. *HURBUNS SINGH v. JHUNDOO LALL*, 51 P.R. 1868.

Oath—concluded.

(15)—*Oath affecting third party*—Act VI of 1872, s. 4.—The lower Courts held that defendant's oath on his son's head was binding on the plaintiff who offered to be bound by it under s. 4 of Act VI of 1872. *Held* that the lower Courts had erred because this is a form of oath which affected third parties, and, as such, was expressly excluded from the oaths that might be taken under that section. *RULDU MUL v. BHUPA*, 36 P.R. 1873. [*F.*, 66 P.R. 1910=114 P.L.R. 1910.]

This circular prescribes Forms of Oaths and Affirmations under s. 7, Act X of 1873. **Cir. Ord. No. 12, 20 W.R. Rules and Ors. of the H.C. p. 4.**

Power of Courts to settle cases by—Regs. III of 1802 and VI of 1876—*See* ACT X OF 1861, 4 M.H.C. App. 3.

Collector acting under Act I of 1894, not a Court—Power of Collector to administer oath—*See* ACT I OF 1894, s. 53, 27 C. 820.

Power of arbitrator to administer oath other than in prescribed form—*See* ARBITRATION—POWERS OF ARBITRATORS, 1 A. 535.

See CIV. PRO. CODE, 1908, O. XXXII, r. 7, 18 P.R. 1891.

Adjustment—Agreement to take an, by the parties to a suit filed in Court—*See* COMPROMISE—COMPROMISE OF SUITS IN CIV. PRO. CODE, 4 M.H.C. 422.

Statement by Counsel to Court—No necessity for—*See* LEGAL PRACTITIONERS—COUNSEL, 3 C.W.N. 694.

Statement of Counsel not on oath, if objected to by opposite party whether admissible in evidence—*Procedure re* Statement of Counsel—*See* LEGAL PRACTITIONERS—COUNSEL, 27 C. 428=4 C.W.N. 169.

Binding effect of oath by person not a party or witness—*See* MAINTENANCE, 157 P.W.R. 1911.

Oaths Act.

See ACT X OF 1873.

Obiter Dictum.

(1)—*Authority of.*—Unless it is established that a decision already given after careful consideration is grossly erroneous, the Court should be loath to depart from it, even if its correctness may be open to question, and even if the opinion expressed in it is only *obiter*; because, it is highly inexpedient that the decisions of the High Court in the Province should be frequently altered, and titles acquired on reliance on those decisions thus unsettled and shaken, (*Per Banerji, J.*) *WAHID-UN-NISSA v. GOBARDHAN DAS*, 22 A. 453=A.W.N. 1900, 160.

Objection by Respondents.

Cross objection against co-respondent—Rejection of cross-objection—*See* CIV. PRO. CODE, 1908, O. XLI, r. 22, 30 C. 655.

Objection by Respondents—concluded.

Memo of objections—Right of pauper respondent to present—without paying stamp-duty—*See* CIV. PRO. CODE, 1908, O. XLI, r. 22, 1 N.L.R. 33.

See SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL, A.W.N. 1893, 68.

See SPECIAL OR SECOND APPEAL—MISCELLANEOUS, 7 A. 765, F.B.=A.W.N. 1885, 225.

Objection to Jurisdiction.

(1)—*Jurisdiction, want of—Objection.*—No Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends. Where the objection made is found in the adjudication of a case the subject-matter of which is within the general jurisdiction of the Court, and there has been no omission or wrong disposal of any preliminary point essential to the enquiry by the Court, its decision cannot be impeached on the ground of want of jurisdiction. *SURJAN SINGH v. NAJABAT KHAN*, 83 P.R. 1874.

Objects and Reasons, Statement of, for Acts.

See STATUTES, CONSTRUCTION OF.

Obscene Songs.

(1)—*Penal Code, Act XLV of 1860, s. 294—Obscene songs.*—A conviction under s. 294 for singing obscene songs in a public place was set aside, in the absence of proof that the particular songs sung were obscene, though they belonged to a class of songs many of which were obscene. *REG. v. GANU Bin KRISHNA GURAW*, 4 B. H. C. Cr. 25.

Obstruction.

See NUISANCE.

See RIGHT OF SUIT—OBSTRUCTION TO PUBLIC HIGH WAY, SUITS CONCERNING.

(1)—*Public road—Suit for removal of obstruction—Special damage.*—In the absence of proof of special damage accruing to plaintiff, a suit for the removal of an obstruction upon a public road cannot be maintained. *BHAGEERUTH RISHEE v. GOKOOL CHUNDER MUNDUL*, 18 W.R. 58. [*Expl.*, 21 W.R. 145; *R.*, 1 A. 249.]

(2)—*Suit for removal of obstruction.*—Where an obstruction is admitted by defendant, Court cannot dismiss suit for its removal, on a finding of fact that it does not exist. *SHAIKH HUBEEBUL HOSSEIN v. SHIAKH SHAHAMUT ALI*, 25 W.R. 15.

(3)—*Procedure—Obstruction.*—The proper course of procedure for the removal of obstructions to public thoroughfares is that prescribed in the Code of Criminal Procedure. Because a party sustains special damage he cannot claim from the Civil Court that remedy which the law says must be afforded by the Magistrate after taking proceedings in a particular form. *KISTO NATH BHAGBUTTY v. JUMBOO NATH CHUCKERBUTTY*, 21 W.R. 145.

Obstruction—concluded.

(4)—*Limitation—Execution—Obstruction—*Proceedings may be taken against a judgment-debtor in the execution of a decree any time within three years from the last application of the kind, even though they are not instituted within 30 days after a wrongful obstruction alleged to have been put by him in the way of the judgment-creditor obtaining possession. *HUNKUR SINGH v. MADHO LALL*, 21 W.R. 147.

See APPELLATE COURT — OBJECTIONS FIRST TAKEN IN APPEAL, 6 B.L.R. App. 73.

To public way—See BUILDING, 9 C.W.N. 72=31 C. 979.

To light and air—Test of actionable—See EASEMENT, 9 C.W.N. 543.

Easement—Private right of way—Obstruction—Special damage, necessity of—Injunction. See EASEMENT, 64 P.R. 1901.

See INJUNCTION—SPECIAL CASES, 10 B. 390.

Occasional Residence.

See JURISDICTION—CAUSES OF JURISDICTION, 1 Ind. Jur. O.S. 85=Marsh 64=1 Hay 132.

Occupancy.

See RIGHT OF OCCUPANCY.

Occupancy Holding.

See RIGHT OF OCCUPANCY.

Occupancy Rights.

See RIGHT OF OCCUPANCY.

Occupancy Tenant.

See RIGHT OF OCCUPANCY.

Occupant.

Occupant, suit by an Inamdar for arrears of assessment against an—See INAMDAR, 5 Bom. L. R. 700=28 B. 92.

Occupation.

Agricultural lands—Tenancy created not only by contract, but by—See LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 25 C. 324.

Octroi.

(1)—*Octroi—farmer of—Suit to recover dues—Jurisdiction—Articles made within but sold beyond, municipal limits—Whether liable to octroi.*—A farmer of the octroi has no power to take action for the recovery of rates that may be due to him in the mode that land revenue is recovered; and he must go to the Civil Court to establish his claim against a defaulter. Articles made within the boundary of a municipality but sold outside its limits are not liable to octroi duty, as such duty is leviable under the rules on articles brought into a town for actual use or consumption therein. *UMRA v. HIRA NAND*, 55 P. R. 1876.

Illegal levying of, on through goods—Suit for refund against Municipality—See MUNICIPALITY, 31 P. R. 1876.

Octroi Duty.

See RIGHT OF SUIT—MISCELLANEOUS, 60 P. R. 1873.

Offence.

(1)—*Trial of offence committed in British ship on high sea—Jurisdiction.*—Offence committed in a British ship, during her voyage on the high seas can be tried by the Presidency Magistrate. *KING-EMPEROR v. THE CHIEF OFFICER OF THE SS. MUSHTARI*, 3 Bom. L. R. 253.

Offence before Penal Code came into operation.

(1)—*Perjury or forgery—Act I of 1848—Sanction in case of perjury or forgery.*—A case of perjury or forgery alleged to have been committed in a case before a Civil Court before January 1st, 1860, can be dealt with only under the old Procedure Law (Act I of 1848), according to which the sanction of the Court before which the offence was alleged to have been committed was necessary before criminal proceedings can be instituted. *In re RADHA-JEEBAN MOOSTAFFEE*, 5 W.R. Cr. 8=1 Ind. Jur. N.S. 97.

Offences, State Act.

See ACT XI OF 1857.

Offer.

What amounts to an—See CONTRACT—GENERAL, 8 Ind. Cas. 601.

Offer and Acceptance.

See CONTRACT ACT 1872, s. 7, 2 Bom. L. R. 691=24 B. 510.

Offerings.

See RIGHT OF SUIT—OFFICE OR EMOLUMENT, SUITS RELATING TO.

Gift of a fixed share of, made at a shrine—See MAHOMEDAN LAW—GIFT, 9 A.L.J. 555.

Claim for share in the offerings of a shrine—See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 92 P.W.R. 1911.

Office.

(1)—*Office—Meaning.*—The term "office" denotes a duty in the office-holder to be discharged by him as such. It consists in a right and a corresponding duty, to execute a public or private trust and take the emoluments belonging to it. *SRINIVASA THATHACHARIAR v. SRINIVASA AIYANGAR AND SRINIVASACHARIAR v. SRINIVASA THATHACHARIAR*, 9 M.L.J. 355.

Suit relating to office carrying emolument—See JURISDICTION OF CIVIL COURTS, 16 B. 281.

Claim to office and property belonging thereto—Limitation—See MAHOMEDAN LAW—WAKF, 3 Ind. Cas. 419=11 C.L.J. 304=14 C. W.N. 427=37 C. 263.

Suit to establish right to personal office, nature of—See RIGHT OF SUIT—OFFICE OR EMOLUMENT, SUITS RELATING TO, 22 C. 92.

Suit for removal from office—Valuation—See VALUATION OF SUITS, 11 M. 149.

Office brocage Contract.

Validity of—See CONTRACT ACT, 1872, s. 23, Illu (f), 17 M.L.J. 252=30 M. 530.

Office Inspection.

This circular deals with memoranda of office inspections, Rev. Cir. No. 2, 24 W.R. Rev, Cri. p. 4.

Office of Staff Corps.

See ATTACHMENT—SUBJECTS OF ATTACHMENT, 24 C. 102=1 C.W.N. 138.

Officer.

See ACT XVIII OF 1850.

See GOVERNMENT OFFICERS, ACTS OF.

See JUDICIAL OFFICER.

See JUDICIAL OFFICERS, LIABILITY OF.

(1)—*Bona fide belief that the person is acting in pursuance of statute.*—If a party *bona fide*, and not absurdly, believes that he is acting in pursuance of a Statute, he is entitled to the special protection which the Legislature intended for him, although he has done an illegal Act. SPOONER v. JUDDOO, 4 M.I.A. 353.

See BOM. ACT XX OF 1864, ss. 11, 15, 1 B. 318.

Attachment of moiety of pay of officer of the Indian Staff Corps—See ATTACHMENT—SUBJECTS OF ATTACHMENT, 25 M. 402.

Suit against Officer of Government—Suit *ex contractu*—Notice—See CIV. PRO. CODE, 1908, s. 80, 20 B. 697.

Public—Suit against—Notice of cause of action stated in notice—See CIV. PRO. CODE, 1908, s. 80, 13 C.L.R. 195.

How far the acts of a Government bind the Government—See ESTOPPEL—GENERAL, 2 W.R. 61, P.C.=8 M.I.A. 529.

Of Government—See GUARDIAN—APPOINTMENT OF GUARDIANS, 4 B. 642, Note 1.

Suit for debt against an—in the army—See LIMITATION—GENERAL, A.W.N. 1897, 203.

Dispossession under order passed by officer of Government—Suit for possession—See LIMITATION ACT, 1908, arts. 12, 14, 11 B. 429.

Religious community worshipping at one synagogue—Resolutions at meeting of Community dismissing officers of synagogue—Necessity of notice to officers—Decision by domestic tribunal for community, whether Court can interfere with—See RELIGIOUS COMMUNITY, 11 B. 185.

Officers, Bombay Joint Police.

See BOM. ACT XV OF 1855.

Officers, Hereditary, Bombay.

See BOM. ACT XI OF 1843.

Officers, Madras Uncovenanted.

See MAD. ACT. VII OF 1857.

Officers, Native Law.

See ACT XI OF 1864.

See BOM. ACT IV OF 1864.

Officers Trading, Supreme Courts'.

See ACT XV OF 1848.

Offices, Bombay Hereditary Act.

See BOM. ACT III OF 1874.

Offices, Hereditary (Amending Bom. Act. III of 1874.)

See BOM. ACT V OF 1886.

Offices, Madras Hereditary Village.

See MAD. ACT III OF 1895.

Official Assignee.

See INSOLVENCY.

See ST. 11 AND 12, VIC. CH. 21.

(1)—*Right of suit pertaining to insolvent.*—The right of suit pertaining to an insolvent does not pass at his insolvency to the Official Assignee as it is not enumerated in s. 7 of the Insolvent Act. DATTOOBHOY v. VALLU, 1 Bom. L.R. 828.

(2)—*Civ. Pro. Code, 1882, s. 244—Official Assignee representative of insolvent.*—The Official Assignee is a representative of the insolvent judgment-debtor, within the meaning of s. 244, Civ. Pro. Code, 1882. MILLER v. LUKHIMANI DEBI, 28 C. 419=5 C.W.N. 761. (7 A. 752, 21 B. 205, R.)

(3)—*Suit against Official Assignee to recover property improperly seized by him—Jurisdiction.*—The Mofussil Court and not the High Court has jurisdiction to try a suit against the Official Assignee for recovery of property improperly seized by him as part of the assets of an insolvent, on the ground, that it is not the property of the insolvent. BALDEO PARSHAD SAHU v. MILLER, 31 C. 667. [R., 4 A.L.J. 57.]

(4)—*Vesting of property in Official Assignee—Execution—Attachment—Attachment issued against a garnishee—Warrant of attachment to the garnishee—Payment by garnishee to the Sheriff—Insolvency of the debtor—Claim of the Official Assignee regarding the attached money as against the attaching creditor—Insolvency Act (St. 11 and 12 Vic., c. 42), s. 7.*—On the 1st August, 1899, the plaintiff obtained a decree against three defendants. Of them, defendant 2 had some monies due from N. On the 25th January, 1905, a warrant for attachment of the debt was issued; and a prohibitory order was served upon the garnishee N on the 27th January, 1905. On the 27th February, 1905, notice to pay was issued and was made absolute against N. Execution was then issued against N on the 28th February, 1905, as if he had been a judgment-debtor himself and the warrant of attachment was executed on the 1st March, 1905, when N paid to the Sheriff Rs. 1,200 and Rs. 83-0-9 for costs of the execution. But no order was obtained for payment of the money over to the plaintiff. It then appeared that the sum really due from N to the defendant No. 2, was only Rs. 399-12-9. But in the meanwhile, on the 2nd March 1905, the defendant No. 2 filed his petition in the Insolvent Court, and by a vesting order made

Official Assignee—continued.

on that day under s. 7 of the Insolvent Act the whole estate of the insolvent became vested in the Official Assignee. The Official Assignee then claimed Rs. 399-12-9 from the Sheriff, as against the plaintiff, the execution creditor: *Held*, that the title of the Official Assignee should prevail over that of the execution creditor, because although the money had been paid to the Sheriff, it could not be treated as equivalent to the actual payment to the creditor himself. **JITMAL v. RAMCHAND, 7 Bom. L.R. 488 = 29 B. 405.**

(5)—*After-acquired property of insolvent—Vesting of.*—Although the after-acquired property of an insolvent does vest in the Official Assignee by force of the vesting order, yet if the Official Assignee allows the insolvent to deal with his after-acquired property, then certain equitable considerations come in which may bar the Official Assignee from recovery. When the Official Assignee knows that the insolvent is carrying on a particular business or trade and does not actively intervene then third parties dealing with the insolvent will be justified in assuming that the dealings which the insolvent is carrying on are with the assent and sanction of the Official Assignee. **MACLEOD v. B.B. & C.I. RY. CO., 7 Bom. L.R. 337.**

See **ABATEMENT OF SUITS, 12 B.H.C. 257.**

See **ACT IX OF 1897, s. 4, 23 M. 440.**

Act XXIII of 1861, s. 11—Rejection of objection by—to execution of a decree—Right of—to present appeal against order rejecting objection—See **APPEAL—DECREES AND EXECUTION OF DECREES, 1 M.H.C. 8.**

The Official Assignee is a public officer within the meaning of s. 424 of the Civ. Pro. Code—See **CIV. PRO. CODE, 1908, ss. 2 and 80, 4 Bom. L.R. 929 = 26 B. 809.**

See **CIV. PRO. CODE, 1908, O XXI, r. 46, O. XXXVIII, rr. 5, 12, 26 M. 673.**

Company—Transfer of shares—Shareholder insolvent—His right to transfer shares—Suit to compel directors to register transfer—See COMPANY—TRANSFER OF SHARES, 16 B. 80.

Ordered to pay plaintiff's costs—Estates insufficient to pay costs—Personal liability of Assignee—See **COSTS—SPECIAL CASES, 7 B. 484.**

Insolvent Act (11 and 12 Vic. C. 21)—Suit to recover money from defendant who has been adjudicated an insolvent—Official Assignee not to be made a party—See **PARTIES TO SUITS—GENERAL, 18 C. 43.**

See **PARTIES TO SUITS—GENERAL, 22 C. 259.**

Suit against, by stranger—Right of suit—See **PRESIDENCY TOWNS INSOLVENCY ACT, 1909, ss. 7, 86, 13 Bom. L.R. 900.**

Suit by—on behalf of insolvent's creditors—Fraud of defendant, brother of insolvent—Limitation Act XV of 1877, s. 18—Civ. Pro. Code, 1882, ss. 13, 43—Person made party for purposes of inspection and discovery only, whether subject to *res judicata*—Several joint

Official Assignee—concluded.

wrong-doers, judgment obtained against one, a bar to action against the others—See **RES JUDICATA—PARTIES, 14 B. 408.**

See **RIGHT OF SUIT—MISCELLANEOUS, 11 B. 620, P.C. = 14 I.A. 11.**

See **SALE — SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 9 C. 217.**

Official Liquidator.

See **ACT X OF 1866, 11 A. 349 = A.W.N. 1889, 119.**

Lease in favour of Company—Covenant against assignment—Winding up of company—Application by official liquidator for sanction to sell company's property—Covenant not applying to assignment other than by act of parties.—See ACT VI OF 1882, s. 144, (c), 12 A. 192 = A.W.N. 1890, 71.

Companies Act VI of 1882, s. 744—Plaint put in by—Amendment of plaint as regards description of plaintiff—Expiry of limitation prior to amendment—See **LIMITATION ACT 1908, s. 22, 18 A. 193, F.B. = A.W.N. 1896, 28.**

Official Receiver.

(1)—*Position of—Assignment by—Suit by assignee—Validity—S. 503, Civ. Pro. Code, 1882.*—The status of a Receiver is merely that of an officer of the Court. He is sometimes referred to as the "hand of the Court." He acquires no proprietary rights or interest in the property of which he is appointed Receiver. Having no title to the property, he cannot convey or assign any title to it to any other person. The Court may direct him to sell property, but, in such a case, he merely carries out the Court's order. His assignee cannot maintain a suit in respect of the property assigned. **PO SHAN v. MAUNG GYI, 5 L B.R. 213, F.B. = 8 Ind. Cas. 976.**

Official Trustee.

(1) — **Civ. Pro. Code, s. 272** — *Life interest, not attachable by notice to trustee of funds.*—Where a decree-holder sought to attach the life-interest of his judgment-debtor in certain funds which were with the Official Trustee, such interest was held not to have been validly attached, since an attachment, under s. 272 of the Civ. Pro. Code, could be valid only so far as it related to any specific amount, which might be set forth in the prayer for attachment, as being then payable or likely to become payable to the defendant. **ABDUL LATEEF v. DOUTRE, 12 M. 250.**

(2)—*Suit against Official trustee—"Public Officer"—Suit against public officer—Notice—Object—Civ. Pro. Code, 1877, s. 424—Notice of suit.*—The official trustee is a "public officer" within the definition given in s. 2 of the Civ. Pro. Code. [*F.*, 12 M. 250.] The cases, in which a public officer is entitled to notice of suit under s. 424 of the Code, are those in which he is sued for damages for some wrong inadvertently committed by him in the discharge of his official duties; and the object is, that, if a public body or officer entrusted with powers

Official Trustee—concluded.

happens to commit an inadvertence, irregularity or wrong, before any one has a right to require payment in respect of that wrong, he shall have the opportunity of setting himself right, making amends, restoring what he has taken, or paying for the damages he has done. —*Per Cunningham, J.* [F., 14 B. 395; R., 13 B. 343, 11 M. 317, 20 B. 697, 22 B. 289, F.B., 25 B. 142, 26 A. 220, 32 C. 1130=1 C.L.J. 542, 3 A.L.J. 341=A.W.N. 1906, 107=28 A. 600, 9 O.C. 275; D., 24 C. 584, 1 L.B.R. 152.] When the question to be decided, in a suit against the official trustee, relates merely to the rights of the *cestuis que trustent* in respect of the trust fund, and not to a wrong committed by him, he is not entitled to notice of the suit. **SHAHEBZADEE SHAHUNSHAH BEGUM v. FERGUSSON, 7 C. 499.**

(3)—*Official Trustee whether can be made executor—Private testator—Official Trustees Act* (XVII of 1864), ss. 8, 10, 32.—It is not open to a testator to appoint the Official Trustee as constituted by Act XVII of 1864 as executor of his will; and if he be so appointed, he will not be entitled, by virtue of his office and in his character as Official Trustee, and in the name of the Official Trustee, to have a grant of probate. **C. E. GREY v. CHARUSILA DAS, 7 Ind. Cas. 247.**

APPOINTMENT OF—See ACT XVII OF 1864, s. 10, 25 C. 856.

Official Trustees Act.

See ACT XVII OF 1864.

Official Trustees and Administrators—General, Act.

See ACT V OF 1902.

Omission.

See POSSESSION—EVIDENCE OF POSSESSION AND TITLE, 9 W.R. 120.

See REVIEW—GROUNDS FOR REVIEW, 3 B.L.R. A.C. 346=12 W.R. 223.

Opium.

This circular notifies changes in the selling price of excise opium with effect from 1st April 1875, Rev. Cir. No. 9. **23 W.R. Rev. Cir., p. 35.**

Unlawful possession of, by member of joint family—Burden of proof—See ACT I OF 1878, s. 9, 2 O.C. 99.

Mercantile usage—Wager contracts—See INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 9 M.I. A. 256.

Opium Act.

See ACT I OF 1878.

Opium License.

This circular deals with alterations in Excise Form No. 26 and Register No. 82, regarding fee for Opium Licenses, Rev. Cir. No. 5, **21 W.R. Rev. Cir., p. 11.**

Onus of Proof.

See BURDEN OF PROOF.

See PRESUMPTION.

See PROOF.

Onus Probandi.

See BURDEN OF PROOF.

See HINDU LAW—ALIENATION, W.R. 1864, 310.

See LEGAL PRACTITIONERS—PLEADER—REMUNERATION, 8 P.R. 1873.

See MAHOMEDAN LAW—GIFT, W.R. 1864, 121.

See MINOR—EVIDENCE OF MINORITY, W. R. 1864, 304.

See SERVICE TENURE, 4 W.R. 30.

Oodhastoo Land.

See ENHANCEMENT OF RENT—ENHANCEMENT, LIABILITY TO, 6 W.R. Act X Rul. 92.

Opinion.

Evidence of judges' opinion of credit of witness, found in previous case—Admissibility—See EVIDENCE—MISCELLANEOUS, 4 C.W.N. 684.

Weight of opinion, evidence—See EVIDENCE ACT, 1872, ss. 32 (5), 48, 49, 60, 10 M.L.J. 267 P.C.=23 A. 37=5 C.W.N. 33=27 I. A. 238=7 Sar. 724=2 Bom. L.R. 831.

Oral Agreement.

To be inferred from conduct—See EVIDENCE ACT, 1872, s. 92, 6 Ind. Cas. 577=12 C.L.J. 646.

Oral agreement in Compromise—Decree creating a charge on immoveable property—See TRANSFER OF PROPERTY ACT, 1882, s. 59, 9 M. 103.

Oral Application.

Oral application for issue of sale notification—See LIMITATION ACT, 1908, art. 182—STEP IN AID OF EXECUTION, A.W.N. 1882, 169.

See LIMITATION ACT, 1908, art. 182—STEP IN AID OF EXECUTION, 5 A. 344=A.W. N. 1883, 57.

Oral Contract.

To execute lease—Subsequent registered lease to another with notice—Suit for specific performance of oral agreement—See SPECIFIC PERFORMANCE, 6 C. 534=7 C.L.R. 487.

Oral Evidence.

See EVIDENCE—PAROL EVIDENCE.

See EVIDENCE—SECONDARY EVIDENCE.

(1)—*Debt—Oral evidence.*—There is no rule of law which prohibits the decision of a disputed transaction by means of oral evidence, if the evidence is satisfactory and the transaction not very old. **GANGA RAM v. KISHEN LALL, 34 P.R. 1866.**

(2)—*Account stated—Entry of balance by debtor in creditor's account book—Contract in writing, requiring to be supplemented by oral evidence.*—A contract, however complete, cannot be said to have been reduced into writing, and to be a written contract, if, in order to

Oral Evidence—concluded.

prove it, oral evidence has to be given, in addition to that required to prove handwriting, by way of supplementing the writing and establishing a part of the transaction essentially requisite to constitute a complete contract between the parties. *Held* accordingly that an account stated from which it did not appear who was the party liable to pay and also the person to whom payment was to be made—these matters having to be proved by oral evidence—cannot be said to be a contract reduced to writing. **NARAIN DASS v. KANHYA LALL, 48 P.R. 1874.**

Oral Will.

See NONCUPATIVE WILL.

See WILL.

Orasa Child.

Daughter surviving parents with brother—Whether such daughter is—Share of children of such daughter—*See* BUDDIST LAW—INHERITANCE, 3 L.B.R. 45.

Orchard Land.

Possession of planter of trees—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 2 Agra 361.

Order.

See APPEAL—ORDERS.

See CIV. PRO. CODE, 1908, ss. 2, 47.

See DECREE.

(1)—*Order—Decree, not completed*—Court, power of, to recall order not drawn up—*Discretion*.—A suit for specific performance of a contract was dismissed by the High Court. The Court of Appeal reversed this decision and directed a decree for specific performance to be drawn up, subject to the record being amended by the addition of certain parties as plaintiffs. As soon as these persons applied to be and were added as plaintiffs, the defendant applied that the suit as constituted was barred by limitation and should be dismissed. *Held*, that, although the Court has inherent power to recall an order which has not been perfected, it would not do so, when the adoption of this course would mean a reconsideration of the whole matter in controversy between the parties. **PEARI DAI DEBI v. JOTINDRA NATH BOSE, 10 C.L.J. 496=4 Ind. Cas. 441.**

Compensation-money paid to Hindu widow—Reversioner's application for reference to Civil Court—Order by Judge on reference directing refund of money already paid by Collector—Order not one under s. 32, Land Acquisition Act—Incompetency of Judge to proceed under s. 32—No appeal from order under s. 32—Power of High Court to interfere in revision—*See* ACT I OF 1894, ss. 32, 54, 12 C.W.N. 1039=35 C. 1104.

See PUN. ACT XXVIII OF 1868, s. 2, 14 P. R. 1874.

When is a decree—*See* APPEAL—GENERAL, 14 C.L.J. 35.

Erroneous order carried out—Subsequent proceedings whether void—Waiver—*See* APPEAL—GENERAL, 6 C.L.J. 547=12 C.W. N. 590.

Order—concluded.

Appeal—Decree—Dismissal of suit on the ground that no plaint was to be found on the record—*See* APPEAL—CASES WHERE APPEAL LIES OR NOT, A.W.N. 1896, 54.

Sanctioning compromise under s. 257-A, Civ. Pro. Code, whether new decree or order subsequent to decree directing payment within the meaning of s. 230 (b), Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 10, 21, s. 48, 4 M.L.T. 233.

See CIV. PRO. CODE, 1908, O. XXI, rr. 66, 70, 27 M. 259, F.B.=14 M.L.J. 57.

Transgressing decree—Effect—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 66, 70, s. 115, 4 M. L.T. 352.

Giving leave to withdraw suit and file fresh one on same cause of action—Registrar granting leave to institute suit—Order *ultra vires*—Order one directing plaint to be returned to plaintiff—*See* CIV. PRO. CODE, 1908, O. XXIII, rr. 1 and 2, 12 C.W.N. 921=35 C. 924.

Refusing to re-admit appeal rejected for appellant's failure to furnish security for costs of respondent, under s. 549, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, O. XLI, r. 10, 5 A.L.J. 109=A.W.N. 1908, 53=3 M.L.T. 221=30 A. 143.

Application for review, Copy of decree or order or judgment whether should accompany—*See* REVIEW—PRACTICE AND PROCEDURE, 17 A. 213 (F.B.)=A.W.N. 1895, 61.

Order amounting to decree within the meaning of s. 2 of the Civ. Pro. Code, right of appeal from—*See* RIGHT OF SUIT—BUILDING, SUIT TO RESTRAIN, 9 B. 183.

Order Absolute.

See TRANSFER OF PROPERTY ACT, 1882, s. 89.

Application for—Decree for foreclosure—Appeal against portion of decree—Execution of decree of appellate Court—*See* LIMITATION ACT, 1908, arts. 181, 182, 2 A.L.J. 180=A.W. N. 1905, 70=27 A. 501, F.B.

Order in Council.

See CONSULAR COURT, 3 B. 58.

See LIMITATION—MISCELLANEOUS, 3 W. R.P.C. 31=8 M.I.A. 225.

See MESNE PROFITS—SUIT FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 14 W.R. 23, P.C.=13 M.I.A. 490.

See PRIVY COUNCIL, PRACTICE OF—RESTORATION OF APPEAL, 3 W.R. 36, P.C.=8 M.I.A. 160, 6 M.I.A. 204.

See PRIVY COUNCIL, PRACTICE OF—SPECIAL LEAVE TO APPEAL AND TO DEFEND APPEAL, 3 W.R. 14, P.C.=8 M.I.A. 165.

See PRIVY COUNCIL, PRACTICE OF—VALUATION OF APPEAL, 3 W.R. 14, P.C.=8 M.I.A. 164.

See ZANZIBAR, 26 B. 1, P.C.=28 I.A. 121.

Order in Council of the 13th June 1853.

See PRACTICE AND PROCEDURE, 6 M.I.A. 209.

Order Sheet.

Ex parte order in, evidentiary value of—See RES JUDICATA—MATTERS IN ISSUE, 7 C.L.J. 251.

Ordinance VI of 1838.

Arts. 210, 212—See MAHOMEDAN LAW—WAKF, 13 C.W.N. 26, P.C.=4 M.L.T. Special, p. 25=1 Ind. Cas. 314.

Original Civil Jurisdiction.

(1)—*Original Civil Jurisdiction—Scope—Wills.*—The words "original civil jurisdiction" are wide enough to include all matters which are not criminal and therefore to include those which relate to wills. ESOOF HASSHM BOOPLY v. FATIMA BIBI, 24 C. 30=1 C.W.N. 8.

Original Side of High Court.

See LEGAL PRACTITIONERS—VAKIL, 1 M. 24, F.B.

See SUCCESSION CERTIFICATE ACT, 1860, s. 6, 5 B.L.R., App., 21.

Originating Summons.

(1)—*Taxation of costs.*—In an originating summons, parties are entitled to instruct counsel: and without any certificate the costs of one counsel should be allowed on taxation. FATIMBIBI v. SHAIK HASSAN, 9 Bom. L.R. 1071.

Ornamentation.

(1)—*Indian Easements Act, 1882—Projection for purpose of ornamentation.*—There can be no prescriptive right to projection, which has been erected merely for the purpose of ornamentation. NRITTA KUMARI DASSI v. PUDDOMONI BEWAH, 30 C. 503=7 C.W.N. 649. (3 B.L.R. O.C., 18, 47, R.) [R., 29 M. 511=16 M.L.J. 281.]

Ornaments.

Additions to—Subsequent to marriage not governed by law applicable to nuptial gifts—See HINDU LAW—INHERITANCE, 28 C. 311.

Occasionally worn not stridhan—See HINDU LAW—STRIDHANAM, 2 C.P.L.R. 42.

Suit by wife for ornaments given during marriage—See STRIDHANAM, 81 P.R. 1880.

Orphan.

See HINDU LAW—ADOPTION, 2 M.H.C. 129.

Orthamulyani Lease.

Suit for possession based on title of—Art. of Limitation Act applicable, art. 144—See LIMITATION ACT, 1908, arts. 113, 116, 144, 3 M.L.T. 241=31 M. 51.

"Other Relief."

What is—under art. 95 of Limitation Act—See LIMITATION ACT, 1908, art. 95, 27 M. 343.

Otti.

See MALABAR LAW—MORTGAGE.

(1)—*Malabar law—Kaividu otti—Redemption.*—A demise of land on *Kaividu otti* is a mortgage and is redeemable. KUNDU v. IMPICHI, 7 M. 442.

Oudh Acts.

See U. P. ACTS.

Oudh Civil Courts Act.

See U. P. ACT XXXII OF 1871.

See U. P. ACT XIII OF 1879.

Oudh Civil Digest.

Pleader's fees, how to be calculated in a suit for pre-emption—Paragraph 288, r. 4—Decree, amendment of—Civ. Pro. Code, s. 206—See LEGAL PRACTITIONERS—PLEADER—REMUNERATION, 7 O.C. 43.

Oudh Courts Act.

See U. P. ACT XIV OF 1891.

Oudh Estates.

(1)—*Oudh Estates Act (I of 1869)—Order of Government of India of 10th October, 1859—Oudh Sub-Settlement Act (XXVI of 1866)—Jurisdiction of Governor-General-in-Council—Reformation of Sunnud—Subordinate Zemindar—Hindoo Law of inheritance—Hindoo widow.*—*Quære:*—Whether since the passing of the Oudh Estates Act, I of 1869, the Reformation of a Sunnud granted to any person named in the second schedule of that Act could be effected even by the Governor-General in Council without a special Act of the Legislature. To bring any person within the operation of the order of the Government of India (set out in the first schedule of the above Act) which declared that every talookdar with whom a summary settlement had been made since the re-occupation of the province, had thereby acquired certain rights, he must be shown to be one with whom a summary settlement was made between the 1st April 1858 and the 10th October, 1859 as talookdar. The appellant, because she originally claimed the superior, was held not barred now from asserting any subordinate right to which she may be entitled. Treating her interest, therefore, in the villages in question as that of a subordinate zemindar, or one entitled to and liable to make a sub-settlement for them, her liability to pay 10 per cent. to the talookdar, over and above the Government demand, was held to depend upon the effect of the provisions of the Oudh Settlement Act, XXVI of 1856. As the proprietor of certain villages and rights within a talook which she acquired by inheritance from her husband, her estate was held to be, not a life interest, but estate of inheritance of a Hindoo widow with all its rights and liabilities. WIDOW OF SHUNKER SAHAI v. RAJAH KASHI PERSHAD, 3 Suth. P.C.J. 4=I.A. Sup. 220=4 I.A. 198=3 Sar. 289.

(2)—*Oudh Estates Act (I of 1869)—Order of Government of India of 10th October, 1859—*

Oudh Estates—concluded.

Talooqua Chillaree—Temporary Revenue Settlement—Hindu Law of Inheritance—Female Heiress (Grand-mother).—The letter of the Government of India of the 10th October, 1859, which is set out in the first schedule to the Oudh Estates Act I of 1869, was held not to apply to a Revenue Settlement of Talooqua Chillaree for which the infant Rajah Digbehoy Sing was permitted to engage, and which was resumed, by Government after his death and before that letter was written; nor was it intended to create in the infant Rajah's grand-mother a proprietary right in the Talook by virtue of a temporary Revenue Settlement for three years to which she had not been allowed to succeed. The above Act cannot apply to a case in which the suit was commenced in 1867 and finally decided by the Courts in Oudh in 1868; nor where the plaintiff's name is not mentioned in the first of the lists mentioned in *S. S. RANEE OF CHILLAREE v. THE GOVERNMENT OF INDIA*, 3 Suth. P.C.J. 12 = I.A. Sup. 237 = 4 I.A. 208 = 3 Sar. 298.

Mortgagee in possession prior to confiscation of—Dispossession on re-settlement with talukdar—Claim to sub-settlement—See MORTGAGE—GENERAL, 4 C. 839, P.C. = 6 I.A. 1.

Oudh Estates Act.

See U.P. ACT I OF 1869.

Oudh Judicial Calendar.

As evidence of corresponding dates of different eras—See U.P. ACT XXII OF 1886, s. 132, 4 O.C. 182.

Oudh, King of, Act.

See U. P. ACT XIII OF 1868.

Oudh Land-Revenue Act.

See U.P. ACT XVII OF 1876.

Oudh Lands.

Confiscation and restoration of Oudh lands in 1858—Protection of existing rights—See CONFISCATION, 11 C. 318 = 12 I.A. 133.

Confiscation and restoration of Oudh lands—Effect in respect of claims—See CONFISCATION, 12 C. 1 = 12 I. A. 124, P.C.

Oudh Laws.

Relating to reduction in amount of dower—See MAHOMEDAN LAW—DOWER, 19 C. 689 = 19 I. A. 157.

Oudh Laws Act.

See U.P. ACT XVIII OF 1876.

Oudh, Lex Loci of.

Lex Loci of the Province of—See LEX LOCI, 2 W.R. 55, P.C. = 10 M.I.A. 252.

Mortgage of lands in Oudh—Application to Oudh of Punjab rules—See MORTGAGE—REDEMPTION, 8 M.L.J. 69.

Oudh, Limitation of certain Suits, Act.

See U.P. ACT XIII OF 1866.

Oudh Loans.

Oudh loans 1838 and 1842, payments due under—Political pension—Liability to attachment for debt, exemption from—S. 266 (g) Civ. Pro. Code, 1882—No distinction observed between state property vested in the sovereign of Oudh—See ATTACHMENT—SUBJECTS OF ATTACHMENT, 18 C. 216, P.C. = 17 I.A. 281.

Oudh Local Rates Act.

See U.P. ACT IV OF 1878.

See U.P. ACT V OF 1894.

Oudh Rent Act.

See U.P. ACT XIX OF 1868.

See U.P. ACT XXII OF 1886.

Oudh Rent, 1886, Amendment Act.

See U.P. ACT IV OF 1901.

Oudh, Revenue Courts, Act.

See U.P. ACT XVI OF 1865.

Oudh Settlement.

(1)—*Law of Oudh—Settlement—Obligation to release the property settled—Trust—Adverse possession.*—At the time of the first settlement of Oudh in 1859, a lady applied as malik for settlement of the villages in suit. Her claim was opposed by a Nawab, who was in possession until certain moneys, which he had disbursed on her account, were paid off. That objection was upheld and the settlement was made with the Nawab "in accordance with possession," and the lady was directed to proceed by a separate application to get the property released by payment of the money due by her. In 1867, when the regular settlement of the Province was in progress, the lady's application for settlement of the villages with her was again resisted on the ground that they were included in the *sanad* granted by government to the Nawab, and dismissed on the 31st October, 1868. The suit was instituted in 1905 to recover possession of a half share in the villages, and it was contended that the proceedings in 1859 constituted the Nawab a trustee on behalf of the lady: *Held*, that the correlative obligation that lay on the Nawab to release the property on payment of the money did neither create a trust nor constitute the Nawab a trustee for the lady; that, in 1867, when the lady applied for the regular settlement, an adverse title was distinctly set up by the Nawab, and from the 31st October, 1868, the date of the dismissal of her application, the Nawab's possession was adverse to the lady, and that the suit was, therefore, clearly barred. MUHAMMAD BAKAR v. MUHAMMAD BAKAR ALI KHAN, 8 A.L.J. 132, P.C. = 9 M. L.T. 200 = 15 C.W.N. 273 = 21 M.L.J. 109 = 13 Bom. L.R. 75 = 9 Ind. Cas. 391 = 14 O.C. 95 = 33 A. 125 = 13 C.L.J. 63. (26 I.A. 229, D.)

Oudh Sub-Settlement Act.

See U.P. ACT XXVI OF 1866.

Oudh Talukdar.

(1)—*Oudh Talukdar and his relatives—Superior proprietor—Sub-Proprietor—Provision for maintenance—Rule of the British Indian Association of Oudh—Construction—Suit in a Rent Court—Jurisdiction—Maintenance, payments on account of.*—Where in Oudh, sub-proprietary rights in a village were held by the relatives of a Talukdar, who held superior proprietary rights in it, under the provision for maintenance in accordance with one of the rules of practice, framed by the British Indian Association, with regard to suits instituted and decrees passed therein, dated the 25th September, 1867, viz., "This class will remain in possession of what they actually had at annexation rent-free during their lifetime, but subject to payment in the second generation of 25 per cent. to the Talukdar, and in the third 50 per cent., and will not have transferable rights. If such persons pay the Government revenue, plus 10 per cent. to the Talukdar, they will have heritable rights in addition." *Held*, that the bulksum out of which the percentages were to be struck was the assumed rental, of which 50 per cent. was the Government revenue. *Held*, also, that it was not within the province of a Rent Court to determine whether maintenance was or was not payable, and consequently, that certain payments made on account of maintenance to the respondent by the Court of Wards, which represented the appellant during his minority, could not be opened up by the appellant in a suit brought in a Rent Court by him after he attained his majority. *NAWAB ALI KHAN v. WAHID ALI*, 7 A.L.J. 41, P.C. = 14 C.W.N. 237 = 11 C.L.J. 116 = 5 Ind. Cas. 156 = 12 Bom. L.R. 161 = 32 A. 92 = 20 M.L.J. 195 = 13 O.C. 74 = 37 I.A. 12.

(2)—*Oudh Talukdar—Claim for share by collateral member—Presumptions.*—Even if it be assumed that a Hindu family owning an Oudh Taluk, which was inherited for a considerable time past by the eldest son, is for some purposes undivided, it would not be the case of an ordinary Hindu family, so as to throw the burden of proving certain properties other than the taluk having been acquired only from out of it, on the talukdar, in a suit against him by a collateral member for his share of the ancestral property. It was held that any presumption depended upon somewhat special circumstances. *RAGHUNATH BALI v. MAHARAJ BALI*, 11 C. 777, P.C. = 12 I.A. 112 = 4 Sar. 642.

(3)—*Oudh Talukdars—Title under sanad—Confiscation of 1858—Effect on previous gift—Part of Talukdari estate—Attempts to establish trust possession and proportionate payment of revenue to Talukdar—Effect.*—The sanad, which grants a talukdari estate, confers an absolute title upon the grantee *prima facie*. Where a deed of gift effectively made prior to the confiscation of 1858 by the son of the then talukdar to the brother of the talukdar, that deed of gift (whether it is an absolute gift, or one for maintenance only, in a matter of dispute) was displaced by Lord Canning's

Oudh Talukdar—concluded.

proclamation of 1858. The claim of the plaintiffs, based upon the principle that the conduct of the holder of a sanad had been sufficient to establish against him a liability to make good, out of his sanad, interest in the property which he had by that conduct either granted to other people or given them ground to claim, was not established, by the mere fact of possession of villages having been left with the plaintiffs and by their having paid to the talukdar that share of the revenue which would be payable to the villages held by them. There may be cases in which it will be quite just and proper to allow a person, who comes to claim recovery of villages or the right to a settlement in villages, on the ground of a proprietary right, to maintain, upon the same facts, that he is in effect a sub-proprietor. The question of sub-proprietary right in such villages is entirely irrelevant to the relief claimed in a suit for declaration of full proprietary right in those villages. *RAM SINGH v. DEPUTY COMMISSIONER OF BARA BANKI*, 17 C. 444 = 17 I. A. 54, P.C. = 5 Sar. 486.

Declaration of Oudh Talukdar to be a lunatic by Civil Court under Act XXXV of 1858—Effect—See LUNATIC, 13 C. 81.

See MAHOMEDAN LAW—WILL, 25 C. 816 = 25 I.A. 77 = 2 C.W.N. 385, P.C.

Oudh Talukdars Relief Act.

See U.P. ACT XXIV OF 1870.

See MESNE PROFITS—SUIT FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 10 C. 785, P.C. = 11 I.A. 88.

Ouster.

See POSSESSION—ADVERSE POSSESSION.

What constitutes — See CO-SHARERS — GENERAL, 11 C.L.J. 189 = 5 Ind. Cas. 171.

Plaintiff entitled to joint possession—Plaintiff ousted from such possession—Suit by plaintiff for exclusive possession—Right of plaintiff to damages for ouster—See DAMAGES—DAMAGES, SUITS FOR, 3 M.L.T. 277 = 18 M.L.J. 258.

Out Caste.

Defamation — Declaration as — illegally made—Damages—See DEFAMATION, 12 M. 495.

Property acquired by outcasted Brahmin—Succession—Brothers in caste and sons born while remaining outcasted—See HINDU LAW—INHERITANCE, 13 A. 573 = A.W.N. 1891, 157.

Death of husband while outcaste—Suit by widow to recover husbands' estate—See HINDU LAW—MARRIAGE, 8 M. 169.

Outer Door.

See EXECUTION OF DECREE—MODE OF EXECUTION, 3 B. 89.

Overruling.

Of old and unchallenged decisions—Duty of Court—See DECISIONS, 11 C.L.J. 106 = 5 Ind. Cas. 309.

Owerty-money.

Due to other sharers of joint estates by a co-sharer, creation of charge for, on share allotted to him in partition—Mortgage of his undivided share—Priority—See PARTITION—GENERAL, 12 C.W.N. 373=35 C. 388.

wner.

(1)—*and lessee—Distinction between.*—A person, who holds as owner on the terms of paying a fixed sum annually to the former owner, is not a lessee. The person entitled to receive such a sum has remedies, for its recovery, in some respects similar to the remedies of a landlord for rent proper. But there is no reversion. *BEJOY CHUNDER, BANERJEE v. KALLY PROSONNO MOOKERJEE*, 4 C. 327. [R., 18 C. 520, 18 B. 507.]

Claim in the capacity of—Inconsistent claim as under easement—See ALTERNATIVE CLAIMS, 4 C.L.J. 437=34 C. 51=11 C.W.N. 20=1 M.L.T. 364, F.B.

Ownership.

See BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE.

(1)—*Possession, suit for—Presumption—Ownership.*—Where plaintiff sued for possession of the beds of certain tanks, which the defendant had gradually reclaimed and made fit for cultivation, but which were situate within the *mal* estate of the plaintiff and had been measured and recorded in the Zemindary chittahs as being the *khas khamar* of the plaintiff and also described as being *nalaik*, or unfit for cultivation, held that the plaintiff may be presumed to have been in possession until dispossessed by the defendant, for, from the nature of the ground, he could not have been expected to show any direct acts of ownership. *RUFATOOLLAH CHOWDHRY v. SHUSHEE SHIKUR BANNERJEE*, 14 W.R. 57.

(2)—*Evidence of ownership—Presumption arising from possession—Issue as to identity of land reformed on submerged site.*—In a suit for possession of a *chur*, formerly carried away and afterwards reformed upon its former site, the issue being whether the land belonged to the plaintiffs or the defendants, held, on a question of parcel or no parcel, when possession has been established for a period, there is not an entire absence of evidence of anterior ownership, because *presumitur retro*. *ANANGAMANJARI CHOWDHRAIN v. TRIPURA SUNDARI CHOWDHRAIN*, 14 C. 740=14 I. A. 101, P. C.=5 Sar. 45. [R., 14 B. 392, 5 Bom. L. R. 186, 10 Bom. L. R. 571.]

(3)—*Long possession—Title—Presumption—Onus of proof—Ownership.*—When parties are in possession of an estate, it is generally to be presumed that they have been in possession as owners, and it lies on the party making the allegation that that possession is of a different nature, such as that of an under-tenant or the like, to prove such allegation. *SHAHABOODEEN CHOWDHRY v. RAM GUTTY CHUCKERBUTTY*, 9 W.R. 556.

Ownership—continued.

(4)—*Presumption—Question of possession doubtful—Inference of ownership from enjoyment of fruits.*—Where the question as to possession is doubtful, a presumption may arise in favour of the party who proves his right. There is no error of law in presuming ownership from proof of enjoyment of fruits of trees growing on the land in dispute. *DOB GOBIND GOOPTO v. BATOO alias KISTO CHUNDER CHUCKERBUTTY*, 22 W. R. 405.

(5)—*Presumption of ownership—Title.*—Lands which have never been occupied for cultivation, and which are of such a nature and description that no one can be said to be in possession, may be presumed rightfully to belong to the parties with whom the title rests. *MOOCHEE RAM MAJHEE v. BISSAM CHUR ROY CHOWDHRY*, 24 W.R. 410.

(6)—*Presumption of ownership—Adjoining buildings—Walls of adjoining buildings built on same foundation—Light and air—Obstruction.*—Where the external walls of two adjoining houses, which now belong to different owners but which at one time were the property of the same person, have been erected wholly or partly on the same foundation wall, and there is an entire absence of evidence on either side as to the dates of the several purchases or of the terms on which they were made, the presumption is that the line of demarcation of the two properties is that indicated by the superincumbent walls. *RADHA MOHUN ROY v. RAJ CHUNDER DASS*, 2 C.L.R. 377.

(7)—*Possession—Lands not capable of actual occupation—Wrongful possession—Limitation.*—When lands, which are not in their nature capable of actual occupation, such as a *khal*, appertain and belong to lands which are occupied, the possession in point of law necessarily follows the possession of the lands to which the former belong. But when the *khal* dries up and becomes capable of being cultivated, if any one to whom it does not belong takes actual possession of it, a cause of action accrues to the person in possession of the land to which it appertains. Generally speaking, a *khal* would continue in the possession of the person in possession of the lands to which it appertains until it becomes culturable; but if any one should take possession of it before it becomes culturable, or is brought into cultivation, the cause of action would accrue at that time and not from the time at which the *khal* becomes dry and culturable, or is actually brought into cultivation. *SUNNUD ALI v. MUSSAMUT KURIMOONISSA*, 9 W.R. 124. [F., 24 W.R. 410; Cons., 11 W.R. 283, 5 C. 36.]

(8)—*Adverse possession—Jungle land—Proof of user—Presumption—Ownership.*—In a suit for possession of certain jungle lands, in the absence of any proof of the exercise of clear acts of ownership on either side, the possession of such lands must be presumed to have continued with the person to whom they rightfully belong. *RAJAH LEELANUND SINGH v. MUSAMUT BASHEEROONISSA*, 16 W.R. 102. (3 W.R., 73 F.B., R.) [F., 24 W.R. 410.]

Ownership—continued.

(9)—*Presumption of ownership—Highway—Waste land.*—A highway or waste land adjoining it must be presumed to belong to the owners of the adjoining land, and when it is abandoned as a road, it reverts to such owners jointly. *NIHAL CHAND v. AZMAT ALI KHAN*, 7 A. 362 = A.W.N. 1885, 56. [R., 10 A. 553, 20 C. 732, 25 M. 635, 30 M. 185.]

(10)—*Ownership of road site between two properties.*—When a road has been, for many years, the boundary between two properties, and there is no evidence that the owner of either property gave up the whole of the land necessary for it, it must be presumed that each party was content to sacrifice one-half of the site for the benefit of the public. *MOBARUCK SHAH v. TOOFANY*, 4 C. 206 = 2 C.L.R. 446. [F., 15 C.P.L.R. 93.]

(11)—*Suit for possession—Acts of ownership—Specification of boundaries.*—In a suit for possession where it was found not only that all the land in dispute was comprised within boundaries specified in documents admitted by both parties, but also that plaintiff had for a long time stored bamboos and wood on one portion and grazed his cattle on another: *Held*, that these acts of ownership, taken in conjunction with the specification of boundaries, leave no doubt that the lands concerned are the property of plaintiff. *RAM NARAIN ROY v. NIL MONEE ADHIKAREE*, 24 W.R. 144.

(12)—*Enjoyment of produce.*—The enjoyment of any right of ownership over the soil, whether it be the cutting of timber, or of turf, or the gathering of produce, is *prima facie* proof of ownership of the soil, and when a Court finds that there had been such enjoyment of the forest as proved a title to the profits, it is logically bound to find a title established to the soil, especially when the enjoyment has throughout been accompanied with an assertion of such ownership. *SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA*, 9 M. 285. [R., 20 M. 299.]

(13)—*Suit for house partly built on plaintiff's land—Ownership.*—In a suit for a house partly built on plaintiff's land, the defendant did not prove proprietorship or tenancy in respect of the house. *Held*, that the house was the property of the owner of the soil on which it stands. *DEENDYAL PARAMANICK v. GAETREE DEBEE*, 1 W.R. 277.

(14)—*Alteration of map by ameen—Effect on ownership.*—An Ameen's alteration of his map being merely a proceeding on paper, not interrupting actual possession, does not amount to an act of ownership by either party, or affect question of possession. *JANOKEE NATH CHOWDHRY v. BERJENDRO COOMOR ROY CHOWDHRY*, 25 W.R. 65.

(15)—*Zemindar's right to a tract of hill and forest, proof of—Construction of istemrar sanad of 1803 as to lands granted—Specification of villages—Effect of proved acts of possession by zemindar.*—Where the proprietary right in a

Ownership—continued.

tract of land had been constantly asserted, all questions between the disputants, as to the amount of the use of the tract by the claimant, and as to the sufficiency of such use to establish his possession over his whole extent, are questions of fact. A zemindar claimed from the Government the proprietary possession of a tract of hill and forest, in virtue of an *istemrar sanad* of the year 1803, conferring, upon the grantee, his heirs and successors, a permanent property in the zemindari as then possessed. To the *sanad*, which was aptly worded to include the subject of this claim, the acts of the zemindar had been ascribed. But, it did not contain any description of the lands which it was intended to carry, a marginal note only specifying three villages then comprising the zemindari. *Held*, that the grant was not confined to the villages so named, and to an area in their immediate vicinity, but that the whole tract of hill and forest was claimable on its being shown, by direct evidence, or reasonable inference, that it was in the possession of the zemindar when he obtained a permanent title from the Government. As to part of the tract, the zemindar's acts of possession, such as grazing cattle, cutting timber, and collecting forest produce, had been exclusive of the exercise of such rights by any other persons; but as to another part of the tract, his acts of that character had been concurrent with a similar user of hill and forest by raiyats of neighbouring villages, not part of the zemindari, and belonging to the Government. *Held*, as to both parts, that the acts of possession, which had been found by both the Courts below to have been done by the zemindar, did not fall short of proving his proprietary possession, and that the user by the villagers, not having taken place in the exercise of conflicting proprietary right, and whether or not they were sufficient to establish rights of easement, were neither in amount nor quality sufficient to displace the zemindar's proprietary title. The decision of the first Court that the exercise of the above mentioned rights by the zemindar was evidence only of the right on his part to use the land of another, for the purposes indicated, had been rightly reversed by the High Court. *THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NELLAKUTTI SIVA SUBRAMANIA TEVAR*, 15 M. 101 = 18 I.A. 149, P.C. = 6 Sar. 74. [R., 15 M. 315.]

(16)—*Hindu Law—Beneficial use of soil—Rights of Crown.*—According to the Hindu Common Law, right to the possession of the land is acquired by the first person who makes a beneficial use of the soil. The Crown is entitled to assess the occupier with revenue, and if a person who has occupied land omits to use it, and the claim of the Crown to revenue is consequently affected. The Sovereign is entitled to take measures for the protection of the revenue. *SECRETARY OF STATE v. VIRA RAYAN*, 9 M. 175. [R., 20 M. 299.]

(17)—*Rights of.*—Owners of land may build what structure they please upon their own

Ownership—continued.

land; but if they interfere with the free enjoyment of their neighbour's property, they are liable for damages for the injury they thus do. *KASIM ALI KHAN v. BIRJ KISHORE*, 2 N.W.P. 182. [R., 10 A. 358.]

(18)—*Right of landlord to build on his own land—Adjoining owner's right to restrain such erection.*—A landlord has a right to build what he pleases on his land, so that he does not interfere with any easement which has been acquired by adjoining owners. *RAM ROOCH CHOWDHREE v. DEOKEE NUNDUN*, 2 N.W.P. 169.

(19)—*Reputed ownership of goods—Consent of true owner, termination of.*—Where goods are in the possession, order or disposition of a person as reputed owner with the consent of the true owner, a demand of the goods or an attempt to put an end to the reputed ownership is sufficient to terminate the consent. Questions of order and disposition are questions of fact. Where the mortgagee of goods had allowed them to remain with the mortgagor and had only taken care to see that they were not removed by the mortgagor, and before or after an ineffectual attempt by the mortgagee to deal with the goods, as per the terms of the deed, after default by the mortgagor, the mortgagee allowed the mortgagor some time for payment, when, however, the mortgagor filed his petition in insolvency, *held*, in the circumstances, that the grant of further time did not amount to a fresh consent on the mortgagee's part to the goods being in the mortgagor's possession as reputed owner. *In the matter of R. BROWN*, 12 C. 629. (2 Ind. Jur. N.S., 340, *Doubted*.)

See *ABSENTEE*, 115 P.R. 1876.

Island—Formation of island in river—thereof See *ALLUVION—FORMATION OF CHURS OR ISLANDS*, 1 M.H.C. 255.

See *DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS*, 9 W.R. 426.

Ownership—Easement—Distinction—See EASEMENT, 9 M. 285.

Claim to stolen notes—Verdict of criminal Court—Evidence of ownership—See EVIDENCE—MISCELLANEOUS DOCUMENTS, 3 B.L.R. App. 2.

Recital as to—Recital in document relating not to suit land but to neighbouring land—Effect—See EVIDENCE ACT, 1872, s. 32 (3), 8 Ind. Cas. 268.

See *EVIDENCE ACT, 1872, s. 110*, 1 B. 91.

Parsis—Custom—Husband and wife—Joint ownership—Right of Survivor—See HUSBAND AND WIFE, 16 B. 630.

Inamdar and khots, relative rights of—Proprietary rights not inherent in khotship—Levying of "thal" by khot on land tilled by inamdar, effect of—See KHOTI TENURE, 11 B. 680.

See *LIMITATION ACT, 1908, s. 26*, 16 B. 592.

Ownership—concluded.

Theft—Claim by accused of—Of subject of theft—Necessity for considering questions of—and bona fides of accused—See PENAL CODE, s. 379, 28 M. 304.

Plaint, plaintiff how far bound by case set up in his—Declaration of proprietary title and ejection of tenant, suit by taluqdar for—Denial of talukdari title and assertion of adverse title by defendant—Burden of proof—See PLEADINGS, 6 O.C. 119.

Suit on rent-note—Issue raised as to ownership—Omission to give finding on it—Duty of Court—See PRACTICE AND PROCEDURE, 16 B. 545.

Doctrine of reputed ownership—When goods may be restored to true owner—See PROVINCIAL INSOLVENCY ACT, 1907, ss. 2 (e), 13 (2), 16 (3), 11 Ind. Cas. 14.

See *TREES*, 16 B. 547.

Wild animals—Animals ferae nature—Ownership—Animus revertendi—Re-capture—See WILD ANIMALS, 3 C.L.R. 515.

Pachis Sawal.

Authority of—Tributary Mahals of Cuttack, customs relating to—See HINDU LAW—IMPARTIBLE ESTATE, 32 C. 158 = 9 C.W.N. 330.

Pachotra.

See *RIGHT OF SUIT—CONTRACTS, SUITS ON*, 31 P.R. 1872.

Paddy Cultivation.

Tenants for paddy cultivation, right of, to dig up shells—Property in the shells so dug up—See LANDLORD AND TENANT—GENERAL, 25 M. 669 = 12 M.L.J. 406.

Pagvand.

See *CUSTOMS—PUNJAB—INHERITANCE*, 75 P.R. 1889, 178 P.R. 1889, 4 P.R. 1891, 110 P.R. 1891, 4 P.R. 1893, 46 P.R. 1897, 74 P.R. 1898.

Paimaish Accounts.

See *EVIDENCE—ACCOUNTS*, 7 M. 297.

See *EVIDENCE—MISCELLANEOUS DOCUMENTS*, 3 M. 384, P.C. = 8 I.A. 143.

Pakki Adat.

See *CUSTOM*, 7 Bom. L.R. 557, 7 Bom. L.R. 611 = 30 B. 205, 9 Bom. L.R. 903, 10 Bom. L.R. 1230 = 33 B. 364.

Palanquin Allowances.

Palanquin allowances, grant given in commutation of—See DEED—CONSTRUCTION OF DEEDS, 7 Bom. L.R. 497 = 29 B. 480.

Palayam.

See *POLIEM*.

Palla Money.

Limitation applicable to a suit to recover, from the bride's father—See LIMITATION ACT, 1908, s. 10, 10 Bom. L.R. 540 = 32 B. 394.

Palla Money—concluded.

Deposit of, limitation applicable to a suit to recover—See **LIMITATION ACT**, 1908, art. 60, 5 Bom. L.R. 511.

Suit for—or right to worship in turn—Limitation—See **LIMITATION ACT**, 1908, art. 131, 8 C. 807=10 C.L.R. 439.

Palmyra Trees.

Puttah for—can be tendered—See **MAD. ACT VIII OF 1865**, 4 M.H.C. 398.

Panchayat.

(1)—*Regulation XII of 1816—Panchayat.*—There is nothing to limit the applicability of the procedure contained in Regulation XII of 1816 to cases in which a breach of the peace exists or is anticipated. The decision of a District Panchayat under the Regulation is final and conclusive between the parties, and cannot be impeached or set aside, except in the manner prescribed in the Regulation. Such decision is not summary because one only of the parties consented to refer the matter to the Panchayat. Nor would a failure to give notice before appointing the Panchayat invalidate the proceedings. **NARAYANA v. CHANDRA**, 15 M. 1.

See **AWARD**, 7 W.R. P.C. 8=3 M.L.A. 383.

Power of guardian to refer to caste—Question of customary partition—See **GUARDIAN—DUTIES AND POWERS OF GUARDIANS**, 2 M. H. C. 47.

Family pedigree—Report of—Evidence—See **HINDU LAW—ADOPTION**, 3 C.W.N. 130=26 I.A. 48=25 B. 1, P.C.

Reference to District Panchayat by Collector—Conditions precedent—See **MAD. REG. XII OF 1816**, 8 M. 569.

Panch Devasthan.

Panch devasthan, member of a right to bring a possessory suit—See **BOM. ACT III OF 1876**, 1 Bom. L.R. 199.

Panchnama.

(1)—*Panchnama—Proof.*—It is necessary if a *panchnama* is to be put in that it should be legally proved, for it does not prove itself. **EMPEROR v. MOTI**, 7 Bom. L. R. 982.

(2)—*Evidence.*—A commissioner appointed by the Court to draw a map of the premises in dispute, has no power to record the *panchnama* or opinions of Village Officers and other persons about the premises and the *panchnama* is no evidence. **SHITAWA v. BHIMAPPA**, 1 Bom. L. R. 493=24 B. 43.

Paper Book.

Second appeal, statement of plaintiffs in paper book of, not part of decree—Claim to be construed as in plaint—See **DECREE—DECREE, CONSTRUCTION OF**, 11 B. 177.

See **PRACTICE AND PROCEDURE**, 23 W. R. 458, 23 W. R. 459.

Appeal from original decree—Dismissal for default in depositing, costs for paper book—Application under rules of Calcutta High Court—See **REVIEW—JURISDICTION TO REVIEW**, 23 C. 339.

Paper Book—concluded.

Dismissal of appeal for default to deposit costs for preparation of paper book—Remedy—See **REVIEW—JURISDICTION TO REVIEW**, 24 C. 350, F.B.=1 C.W.N. 21.

Paper Currency.

See **ACT XX OF 1882**.

See **ACT III OF 1905**.

Paper Currency and Coinage.

See **ACT XXII OF 1899**.

Paraphrase.

Enactment always dangerous to paraphrase—See **STATUTES, CONSTRUCTION OF**, 18 C. 23=17 I. A. 122.

Parcel.

Holding construction of—See **BEN. ACT VIII OF 1885**, s. 3, cl. 9, 25 C. 917, Note=1 C. W. N. 521.

Pardanashin Woman.

(1)—*Pardanashin ladies, who are.*—The Privy Council did not treat as *purdanashin* a lady who had no objection to communicate, when necessary, in matters of business with men other than members of her own family, who was able to go to Court and give evidence and who was able to attend at the Registrar's office in person to acknowledge her deeds for the purpose of registration. **ISMAIL MUSSAJEE MOOKERDUM v. HAFIZ BOO** 8 Bom.L.R. 379=10 C.W. N. 570=3 A.L.J. 353=3 C.L.J. 484=33 C. 773=16 M.L.J. 166=33 I.A. 86.

(2)—*Contract—Undue influence—Purda woman—Burden of proof.*—A Hindu purda woman is entitled to receive in the Courts in British India that protection which the Court of Chancery in England always extends to the weak, ignorant and infirm, and to those who, for any other reason, are specially likely to be imposed upon by the exertion of undue influence over them. The undue influence is presumed to have been exerted unless the contrary be shown. It is, therefore, in all dealings with those persons who are so situated, always incumbent on the person who is interested in upholding the transactions to show that its terms are fair and equitable. The most usual mode of discharging this onus is to show that the lady had good independent advice in the matter, and acted therein altogether at arm's length from the other contracting party, and in the absence of such proof, the transaction would be set aside. **BIBEE RUKHUN v. SHAIKH AHMED HOSSEIN**, 22 W.R. 443. [Appl., 3 C.P. L.R. 118.]

(3)—*Native Purda ladies—Protection.*—A Hindu purda woman is entitled to receive in this Court that protection which the Court of Chancery in England always extends to the weak, ignorant and infirm, and to those who, for any other reasons, are specially likely to be imposed on by the exertion of undue influence over them. The undue influence is presumed to have been exerted unless the contrary be shown. It is, therefore, in all dealings with

Pardanashin Woman—continued.

those persons who are so situated, always incumbent on the person who is interested in upholding the transactions to show that its terms are fair and equitable. The most usual mode of discharging this *onus* is to show that the lady had good independent advice in the matter, and acted therein altogether at arm's length, from the other contracting party. (*Baker v. Monk*, 33 Beav. 419; *Clerk v. Malpar*, 31 Beav. 80; *Evans v. Llewelyn*, 1 Cox. 333, *Rel. on.*) The same burthen of proof lies on any one who, standing before the Court, in reliance upon a contract made with any one whether *pardanashin* or other towards whom he is in any fiduciary position relating to the subject of contract. *KANAI LAL JOWHARI v. KAMINI DEBI*, 1 B.L.R., O.C., 31. Note. [*F.*, 1 B.L.R., O.C., 28. 22 W.R. 443; *R.*, 26 C. 891=3 C.W.N. 670, 31 C. 233.]

(4)—*Execution of instrument by*—In the case of a *pardanashin* woman, with no legal assistance, the ordinary presumption that a person of competent capacity understood the instrument, to which he has affixed his name, does not arise; and it is incumbent upon the Court to be satisfied, as a matter of fact, that she really did understand the instrument to which she put her name. *ASHGAR ALI v. DEBROOS BANOO BEGUM*, 3 C. 324, P.C. [*Appl.*, 8 A. 267, 14 A. 8=A.W.N. 1891, 21; *Dist.*, 18 M. 257=2 M.L.J. 235, 3 M. 215, 12 M. 380, 3 Bom. L.R. 658, 7 O.C. 292, 2 A.L.J. 436.]

(5)—*Document executed by pardanashin woman—Estoppel.*—Where a person seeks to bind a *pardah* lady by a document alleged to have been executed by her or on her behalf by a third person, clear and strict proof of the agent's authority must be given. It is incumbent on the Court, when dealing with the disposition of her property by a *pardanashin* woman, to be satisfied that the transaction was explained to her, and that she knew what she was doing, and especially in a case where, for no consideration and without any equivalent, the lady had executed a document which deprived her of all her property. (3 C. 324, 13 M.L.A. 419, 17 W.R. 523, *Rel. on.*) [*Appl.*, 14 A. 8; *R.*, 12 C.L.J. 115=3 Ind. Cas. 330.] The rule of estoppel ought not to be rigorously applied as against a *pardah* woman. The same inferences should not be drawn from, or the same construction should not be placed upon, her silence and delay in bringing a suit as might be reasonable and proper in another case. *KANIZ FATIMA v. ABBAS ALI*, A.W.N. 1887, 84.

(6)—*Document executed by pardanashin woman—Conditions essential to validity of—Explanation of document.*—Where the executant happens to be a *pardanashin* lady, it is absolutely necessary before fixing her with liability under the deed alleged to have been made by herself or by an alleged execution by her of a general power-of-attorney, to be reasonably satisfied that the liability she was incurring and the nature of the transaction were explain-

Pardanashin Woman—continued.

ed to her. *ACCHAN KUAR v. THAKUR DAS*, 17 A. 125=A.W.N. 1895, 24. [*Affirmed on appeal*, 21 A. 71=2 C.W.N. 729=25 I.A. 183, P.C.; *R.*, 3 Bom. L.R. 658.]

(7)—*Instrument of authority by pardanashin woman—Explanation of document—Mukhtarnama by pardanashin woman—Account stated—Liability.*—To charge a *pardanashin* woman upon an instrument alleged to have been executed by her, it is necessary that satisfactory evidence should be given that the document was explained to and understood by her. [*F.*, 29 C. 749, P.C., 8 Bom. L.R. 781=31 B. 165; *Appl.*, 8 A. 267; *R.*, 3 Bom. L.R. 658, 7 O.C. 292; *D.*, 31 C. 233.] Where the husband of a *pardanashin* woman sought to make his wife liable for a debt on an account stated by him as her general mukhtear so empowered by a mukhtarnama executed by her, held, on a construction of the document, he had no authority to so bind her, though she might have been bound by an actual borrowing of money on her behalf. *SUDISHT LAL v. MUSSAMAT SHEOBARAT KOER*, 1 C. 245=8 I.A. 39, P.C.=4 Sar. 222. [*D.*, A.W.N. 1883, 24; *R.*, 13 C.L.R. 247.]

(8)—*Gosha woman—No denial of execution and knowledge of bond—No evidence of explanation of transaction—Validity of bond.*—Certain *gosha* ladies executed a bond in conjunction with their near relations. In a suit on the bond they did not deny the execution or knowledge of the contents thereof. There was, however, no evidence that the bond was explained to them. Held that the bond was not on that account invalid. *BADI BIBI SAHIBAL v. SAMI PILLAI*, 2 M.L.J. 235.

(9)—*Pardanashin—Documents signed by pardanashin ladies—Explanation of document.*—In a suit on a document signed by a *pardanashin* lady, in the absence of evidence that the necessary explanation of the transaction had been made to her, the Court ought not to presume her consent to matters, of which no direct information nor explanation has been conveyed to her. *ANNODA MOHUN CHOWDHRI v. BHUBAN MOHINI DEBI*, 28 C. 546, P.C.=28 I.A. 71=5 C.W.N. 489=11 M.L.J. 164=9 Bom. L.R. 386=8 Sar. 58.

(10)—*Purdanashin lady, deed executed by—Explanation of document.*—In the case of deeds and powers executed by *pardanashin* ladies, it is requisite that those who rely upon them should satisfy the Court that they had been explained to and understood by those who execute them. A *pardanashin* lady is not bound by a bond purporting to be signed in her name, where it is not shown that it was explained to her or that she understood its conditions and effect, although the bond was said to have been read out to her. *SHAMBATI KOERI v. JAGO BIBI*, 29 C. 749, P.C.=29 I.A. 127=6 C.W.N. 682=4 Bom. L.R. 444=8 Sar. 304. (7 C. 245, P.C., *F.*) [*F.*, 31 B. 165=8 Bom. L.R. 781; *R.*, 7 O.C. 292, 33 C. 861=4 C.L.J. 41, 8 Bom. L.R. 252; *D.*, 2 A.L.J. 436.]

Pardanashin Woman—continued.

(11)—*Document executed by—Not binding on—Unless understood and explained.*—In order to charge a pardanashim lady upon an instrument purporting to have been executed by her, it is requisite to give satisfactory evidence that the document was explained to and understood by her. Where a pardanashin lady fell in love with an adventurer and left her husband, and, at a time when no one but the adventurer had access to her, executed a power of attorney, in his favour, and he, on the authority of the power of attorney mortgaged the property to the plaintiffs, *held*, that there was nothing to show that the instrument was explained to and understood by her, and that the mortgage was not binding. **KUBRA v. AJODHIA PERSHAD, 7 A.L.J. 445=6 Ind. Cas. 689.**

(12)—*Deeds by—Mortgage deed—Execution of the deed—Explanation of the contents to the lady.*—In the case of a mortgage deed, purporting to be executed by a pardanashin lady, if it is shown that the deed was not explained to her, in so far as it affected her interest, it cannot be considered to be legally executed by her. **ANNODA v. BHUBAN, 3 Bom. L.R. 386.**

(13)—*Explanation of document.*—The Court, in dealing with cases where the disposition of property by a *pardah* woman is concerned, must be satisfied that she understood the full import and effect of the document she executed. **AMIRBIBI v. ABDUL, 3 Bom. L.R. 658.**

(14)—*Pardanashin lady—Execution of document—Inconsistent plea—Explaining document to her—Onus of proof—Independent advice—Lady of business habits literate and of intellectual capacity—Power-of-attorney given to husband—Estoppel.*—It is not open to a pardanashin lady to plead that she never executed a certain document, and in the alternative, that, if she executed it, she did so under circumstances which did not make it binding upon her as a pardanashin lady (15 I. A. 81=15 C. 684, *F.*) But where, in the first written statement filed by the lady, there was no suggestion that the document had not been executed by her, and at a later stage she endeavoured to file a new written statement which, if admitted, would have made her case contradictory to her previous allegations, but the attempt failed: *Held*, that the case of the lady as it stands in its original form is self-consistent and is not open to objection on the ground of inconsistency. The Court, when dealing with a deed alleged to have been executed by a pardanashin lady, must, before it gives effect to it, satisfy itself, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction; and thirdly, that she had independent and disinterested advice in the matter (8 A. 267, A.W.N. 1887, 84, 14 A. 8, *R.*) It is requisite that those, who rely upon documents executed by pardanashin ladies, should satisfy the Court that they had been explained to and understood by those who executed them (29 I. A. 127=29 C.

Pardanashin Woman—continued.

749, 8 I.A. 39=7 C. 245, *R.*) Where it is proved that the lady was of business habits, was literate and of considerable intellectual capacity, the Court will be less inclined to interfere with the deeds, which have been *prima facie* properly executed, or to interfere with transactions to which her consent had been deliberately given. Where the deed was of the simplest character, and the lady was herself able to read and write, and there is no foundation for any possible pretence that the deed was read out in such a way as not to convey its true meaning to the executant, *held*, that the deed was intelligently executed and that the lady fully understood the nature and effect of the transaction. (28 I. A. 71, 28 C. 546, *D.*) Where a paraanashin lady and her husband executed a deed, and, although the interest of the husband at the time was in conflict with that of the lady yet, she had opportunities for independent advice, as her sons were grown up and were about her at the time and they attested the document: *held*, that the deed was valid. A general power-of-attorney does not necessarily imply an unlimited authority to borrow, and the general words in a power-of-attorney confer upon the agent only such general powers as are necessary to carry out the special powers (6 C.L.J. 639, *R.*) If a pardanashin lady deliberately makes herself jointly and severally liable for a debt incurred by her husband on the strength of a power-of-attorney alleged to be given to him by her, she cannot subsequently be permitted to turn round and question his authority to pledge her credit. **BINDUBASHINI DAS v. GIRIDHARI LAL ROY, 3 Ind. Cas. 330=12 C.L.J. 115.**

(15)—*Deeds taken from—Explanation of document.*—The law requires that in the case of a deed taken from a pardanashin lady the Court must be careful to see that the party executing the deed has been a free agent and duly informed of what she is about and that the deed was explained to and understood by her. **SUMSUDDIN v. ABDUL, 8 Bom. L.R. 781=31 B. 165.**

(16)—*Mortgage by gosha ladies—Absence of proof that contents were explained to them—Right to claim exemption.*—Where certain gosha ladies, who had executed a mortgage-bond in conjunction with their son and brother, admitted execution thereof, they could not claim exemption from liability on the ground of absence of the evidence to show that the transaction was explained to them. **BADI BIBI SAHIBAL v. SAMI PILLAI, 18 M. 257. (3 C. 324, D.)**

(17)—*Pardanashin lady, document executed by—Knowledge of the contents of document.*—Where a pardanashin lady makes an appropriation, which so far as words go is a *wakf*, it still remains to consider whether it was intended by the appropriator to operate as such. Such ladies have a claim for special consideration, particularly where they deny on oath an effectual knowledge of the documents said to have been

Pardanashin Woman—continued.

executed by them. **DEBROOS BANOO BEGUM v. NAWAB SYED ASHGAR ALLY KHAN**, 15 **B.L.R. 167=23 W.R. 453.**

(18)—*Deed of gift—Allegation of fraud.—Explanation of document.*—The rule of law as to the evidence to be required, in cases where pardanashin ladies execute deeds and afterwards allege fraud or that they were taken at a disadvantage, is that the Court should be satisfied that the transaction was explained to the person parting with the property and that she knew what she was doing. **T. SIVITHRI ANDARJANOM v. M. VASUDEVAN NAMBU DRIPAD**, 3 **M. 215.** (3 C. 324, 1 I.A. 392, R.)

(19)—*Pardanashin woman—Execution of deed—Duty of Court—Proof—Explanation of document.*—In proving a document alleged to have been executed by a pardanashin lady, there must be evidence showing that the character of the deed was explained to her. It is essential in the case of pardanashin ladies that the Court should be satisfied on this point. **PHUNDO v. BHISHWA DAS**, **A.W.N. 1883, 246.**

(20)—*Document executed by pardahnashin woman, circumstances necessary to establish validity of.*—In a suit brought by a pardanashin woman to obtain a declaration that a deed executed by her may be declared null and void, on the ground that it was fraudulently framed so as not to express her intentions in executing it and was therefore inoperative and null, it is incumbent on the defendants relying upon the deed to show affirmatively that the plaintiff entered into it with full consenting and disposing power and with full notice, knowledge, and understanding in respect of all the terms and of the legal effect of the deed, not having been subject to any bodily or mental infirmity, and, having had independent legal advice relating to the matter, that the execution of the deed was not procured through fraud or coercion practised on the plaintiff, and that the entire transaction was free from circumstances throwing doubt or suspicion on the inception, execution, and application of the deed. **MARIAM BIBI v. SAKINA**, 14 **A. 8=A.W.N. 1891, 213.** (3 C. 324, 15 C. 684, 8 A. 627, A.W.N. 1887, 84, R.) [R., 3 Bom. L.R. 658; D., 2 A.L.J. 436.]

(21)—*Transactions with, when enforceable.*—Transactions with a pardanashin widow should not be enforced unless they are strictly fair and equitable. **MUST. ATAKOUR v. BHOJRAJ**, 3 **C.P.L.R. 118.** (8 A. 268, F.; 22 W.R. 443, R.) [R., 6 C.P.L.R. 35.]

(22)—*Execution of documents.*—In a suit against two Muhammadan ladies on a bond purporting to have been executed on their behalf by their husbands,—which, being compulsorily registrable, was registered under a power of attorney said to have been given by the two ladies—the only evidence of the execution of the power of attorney was that of a person who was not personally acquainted with them nor knew their voices, who deposed that there were two women behind the *pardha* who, the executant

Pardanashin Woman—continued.

said, were their wives, and that these women admit they had made the power of attorney; and there was nothing to show that the money borrowed on the bond was utilised for their benefit. *Held*, that even on the assumption that the ladies behind the *pardah* were the defendants, the evidence on the record was not sufficient to bind them and their properties. It was the duty of the plaintiff to show that they were free agents in the matter, and having a clear knowledge of what they were doing, accorded their consent to it. **BEHARI LAL v. HABIBA BIBI**, 8 **A. 267=A.W.N. 1886, 91.** (11 M.I.A. 551=8 W.R.P.C. 3, 3 C. 324, 7 C. 245=8 I.A. 39, R.) [F., 3 C.P.L.R. 118, 6 C.P.L.R. 35; Appr., 14 A. 8; R., 2 A.L.J. 436.]

(23)—*Want of legal advice—Misapprehension.*—A deed conveying the interest of a native married woman in land will not be set aside on the ground of want of legal advice or misapprehension, where the husband is aware of the alienation, and it is not shown that there is a gross inadequacy of price. **MONOHUR DOSS v. KHOOLSUN BEGUM**, **Cor. 121.**

(24)—*Pardanashin lady—When not bound by her conveyances—Independent advice.*—Before a pardanashin lady can be held liable upon a covenant of an unusual stringency, the Court must be satisfied that she had good independent advice in the matter and that she clearly understood the nature of the contract she was entering into, and the liabilities she was taking upon herself. **RAM CHUNDER DUTT v. DWAR-KANATH BYSACK**, 16 **C. 330.**

(25)—*Deed of gift by Hindu widow—No proper advice—Undue influence—Courts of Equity.*—A Court of Equity will not permit a person who takes advantage of a temporary quarrel in a family, and who entraps a widow deprived of the advice and countenance of her natural protector, into signing a deed of gift of considerable property which leaves her absolutely dependent upon him even for her maintenance, to profit by a document hastily extorted, and soon recalled. Our Courts are Courts of Equity, and in this character they look with particular jealousy on any proceedings, however plausible, by which persons incapable of judging of their own interests or of acting for themselves, such as widows and minors, are deprived of the management and enjoyment of their properties. **SOONDUR KOOMAREE DEBIA v. KISHOREE LAL SEIN**, 5 **W.R. 246.** [R., 7 W.R. 98.]

(26)—*Burden of proof—Sale-deed by pardanashin lady—Evidence—Suit to set aside sale-deed and for confirmation of possession—Declaratory decree—Form of relief.*—In a suit for setting aside a deed, some evidence ought to be given by the plaintiff in order to impeach the deed. But where a person claims under a deed of sale alleged to have been executed by a pardanashin lady living apart from her relatives, without those natural advisers who would, under ordinary circumstances, help her with their counsel, and especially where the

Pardanashin Woman—continued.

person profiting by the transaction occupied a position of confidence, he ought to give the strongest and most satisfactory evidence to show that the transaction was a real and *bona fide* one and fully understood by the lady who parted with her property. [*F.*, 3 C.L.R. 170, 3 M. 215; *Appr.*, 8 M. 304; *Expl.*, 5 A.L.J. 200, A.W.N. 1908, 79=30 A. 197; *R.*, 12 M. 380.] In a suit brought by the heirs of a Mahomedan lady for a confirmation of their possession of certain mouzas, their plaint which declared that the suit was for that confirmation, also prayed that it might be done after the reversal of a summary proceeding and after setting aside a fraudulent deed of sale alleged to have been fabricated and passed for no consideration. The Court of first instance gave a decree to the plaintiffs confirming them in possession and setting aside the sale. The High Court, on appeal, finding that the plaintiffs had failed to prove possession, reversed the first Court's decree so far as it confirmed the plaintiffs' possession and gave a declaratory decree concluding that they could not give substantive relief. *Held* that the High Court erred in coming to that conclusion, inasmuch as the plaint prayed that the deed might be set aside, which as a prayer for substantive relief, and that the High Court was not justified in substituting for that substantive relief a mere declaration of the plaintiffs' title. **THAKOOR DEEN TEWARY v. NAWAB SYED ALI HOSSEIN KHAN**, 13 B. L.R. 427, P.C.=21 W.R. 340=1 I.A. 192=3 Sar. 368. [*F.*, 22 W.R. 438; *R.*, 1 C. 456, 2 A. 720, F.B., 20 B. 736; *D.*, 4 C. 46.]

(27)—*Hindu Law—Document executed by purdanashin lady—Effect—Probability and proof.*—A recital in a *mukhtarnama* executed by the widows, that they held only a life-interest in the estate, could not be considered an admission of their limited interest, since they were *pardanashin* ladies and it was not proved that their attention had ever been directly called to the nature and effect of the recital. **SHAM KOER v. DAH KOER**, 29 C. 664, P.C.=29 I. A. 132=6 C.W.N. 657=4 Bom. L.R. 547=8 Sar. 280.

(28)—*Acquiescence—Presumption by.*—It is not the practice of the Courts in India to press a presumption by acquiescence against a female, Hindu or Mahomedan, in a rival claim, from the mere non-contestation for a limited time of an adverse title. **EBRAHIM v. FOOLBAI**, 4 Bom. L.R. 180=26 B. 577.

(29)—*Sale-deed by gosha woman—Burden of proof.*—In a suit based upon a deed purporting to have been executed by an aged *gosha* lady, in order that the conveyance may be deemed to be operative, it lies on the plaintiff to show that the deed was voluntarily executed, and that the transaction evidenced by it was real and concluded *bona fide*. **KHATIJA v. ISMAIL**, 12 M. 380.

(30)—*Will of a purdanashin lady—Onus probandi.*—When dealing with the case of a will, or a deed, executed by a *pardanashin* lady,

Pardanashin Woman—continued.

a particular and peculiar *onus* rests upon those who come forward to support the document to show that the executant thoroughly understood what she was doing, and was thoroughly and fully acquainted with the terms of the document she was executing, and the presumption as to the knowledge of the executant of the contents of the document she is executing, does not equally apply in the case of a *pardanashin* lady as in the case of other persons. **KHAS MEHAL v. THE ADMINISTRATOR-GENERAL OF BENGAL**, 5 C.W.N. 505. [*D.*, 31 C. 233]

(31)—*Evidence—Burden of proof—Suit by mooktear to enforce gift made by female client.*—Where a mooktear sued to enforce a gift made in his favour by a client, a Hindu widow, the burden of proving that the widow knew accurately what she was about and that she acted advisedly and after consultation with those best able to advise her, lay upon the plaintiff. **RAM PERSHAD MISSER v. RANEE PHOOLPUTTEE**, 7 W.R. 98.

(32)—*Suit against purdah women—Evidence—Onus.*—A suit against *pardah* women was held by the Privy Council (dissenting from the Agra High Court) to have failed as there was no proof that the deed upon which the suit was brought had been signed by the women or by any person authorized by them. **MUSSAMAT AZEEZOONNISSA v. BAQUR KHAN**, 10 B.L.R. 205=17 W.R. 393, P.C.

(33)—*Property claimed as a gift—Gift or sale.*—Where the evidence shows that a *pardanashin* intended by a deed to pass the property for some purpose, and the suggestion of a gift is excluded, the deed must operate, if at all, according to what it purports to be, as a sale. **HAKIM MUHAMMAD IKRAM-UD-DIN v. NAJIBAN**, 2 C.W.N. 545, P.C.=20 A. 447=25 I.A. 137=7 Sar. 353. [*D.*, 2 A.L.J. 436.]

(34)—*Mahomedan law—Attempt to set up death-bed gift as a sale.*—A death-bed deed of gift by a Mahomedan lady was in this case ineffectually attempted to be put in the form of a deed of sale in order to defeat the operation of the Mahomedan law of Wills by which a testator is precluded from giving more than one third of his property by Will. **KUMUROONISSA BEGUM v. MIRZA SYFOOLLAH KHAN**, 5 W.R. 198. [*Affirmed*, 16 W.R. P.C., 32.]

(35)—*Purdanashin lady, improvident gift by—Gift to priest—Fiduciary relation—Suit to cancel gift—Onus on defendant, extent of—Independent advice, solicitor's duty regarding—Solicitor if should act for both parties.*—Where a *pardanashin* lady with very slender means made a highly improvident gift to her priest. *Held*, in a suit by the lady to set aside the deed of gift, that, for the purpose of discharging the onus that lay on the defendant to prove the entire *bona fides* of the transaction, it was not enough for him to prove that the document had been read by an attorney and explained to the lady and that the attorney had explained to her that by it her interest in the property would cease and it would become the defendant's. He

Pardanashin Woman—continued.

must show that the whole of the circumstances were present to her mind and that the intention to give was really her own voluntary act. An attorney acting for both parties in such a transaction places himself in a very false position. An attorney called in to advise the donor in such a case should be independent of the donee in fact and not merely in name. A solicitor in such a case does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out a particular transaction. He must also satisfy himself that the gift is one that is right and proper for the donor to make under all the circumstances, and, if he is not so satisfied, his duty is to advise his client not to go on with the transaction and to refuse to act further for him if he persists. *KAMINI DOSSEE v. KRISHNA CHANDRA MUKERJEE*, 16 C.W.N. 649=39 C. 933=16 Ind. Cas. 110.

(36)—*Purdah woman—Agreement by widow in possession of property in favour of husband's brother.*—A document obtained by the chief male member of a family from a *purdah* woman should receive a strict construction. To suppose that a widow should, without consideration, absolutely give away property of which a portion only (*viz.*, the Government bonds) produced an income of Rs. 15,000 for an allowance amounting to only Rs. 660 per annum plus the value of the rice, and that secured only by personal engagement of the other party, was held to be a most improbable hypothesis, and one which would not be warranted by any reasonable construction which can be put upon the terms of the instrument. *SOOKYABOYE AMMAL v. LATCHMI AMMAL*, 13 W.R. P.C. 3.

(37)—*Purda lady—Suit to set aside sale—Fraud—Parol evidence.*—Where a *purda* lady brought a suit to set aside a bill of sale obtained by collusion and fraud, held that parol evidence was admissible to show that the bill of sale was intended by her to operate only as a mortgage, and to vary the rate of interest therein stipulated for. *MANOHAR DAS v. BHAGABATI DAS*, 1 B.L.R. O.C. 28. (1 B.L.R., O.C., 31, Note, F.) [Appr., 8 B.L.R. 89.]

(38)—*Unconscionable bargain—Recovery of exorbitant interest—Equity—Mukhtear.*—Fraud apart, a loan to a *purdanashin* woman from her own *mukhtear*, at an exorbitant rate of interest, the security being ample, appears to be a hard and unconscionable bargain, on which the contract for such rate of interest would not be enforced. *KAMINI SUNDARI CHAUDHRANI v. KALI PROSUNNO GHOSE*, 12 C. 225=12 I.A. 215, P.C., 4 Sar. 652. (*Bevnon v. Cook*, L.R. 10 Ch. Ap. 389, F.) [Appl., 26 C. 315, 25 A. 284=A.W.N. 1903, 44, 1 N.L.R. 76; D., 27 C. 421, 31 C. 233, 8 O.C. 210; R., 9 A. 228, 11 A. 57, 29 C. 823, 8 O.C. 193, 9 Bom. L.R. 1296=32 B. 208, 4 A.L.J. 222=29 A. 303=A.W.N. 1907, 55.]

(39)—*Power of attorney—Pardanashin woman—Her liability for debt contracted by mukhtar.*—Plaintiff sued the defendant, a *pardahnashin* woman, on a bond executed by her

Pardanashin Woman—continued.

husband on her behalf under a power of attorney. The defendant pleaded that, though the power of attorney given by her to her husband empowered him to borrow for her, still, she did not authorize him to execute the particular bond. Held that her plea was unsustainable and she was liable for the amount. *UDIT RAM v. KHATUN DAULAT*, A.W.N. 1883, 24.

(40)—*Mortgage alleged to have been executed by purdanashin lady—Suit for possession—Evidence—Secondary evidence.*—In a suit to recover possession of a property pledged in a mortgage-deed alleged to have been executed by defendant, a *purdanashin* lady, through her *mookhtar*, which was remanded to the Lower Appellate Court for enquiry as to whether the deed had been executed with due authority from the lady, and where the *mookhtar* deposed that the *mookhtarnama* had been returned to the defendant, who petitioned that it was still with the *mookhtar*, and pleaded that it did not give him authority to execute such documents as the deed in question, held that the most important question to be considered was whether the *mookhtarnama* was returned to the defendant. If the Judge concluded that it was with defendant, he would be justified in presuming the truth of the secondary evidence given with reference to the *mookhtarnama*; if he concluded that it was with the *mookhtear* he should, under the Evidence Act, ss. 65 and 66, consider upon the secondary evidence whether the document was executed with due authority, taking into consideration all the surrounding circumstances of the case. *BABOO AJOODHYA DOSS v. MUSSAMUT MOHUN KOOR*, 24 W.R. 67.

(41)—*Purdah women, transactions by—Registration—Mutation of names under mookhtarnamah—Validity of transaction—Impeaching of—Evidence.*—In cases of transactions by *purdah* women, mere registration does not go far to corroborate the proof of their validity unless a mutation of names takes place. But, if the mutation of names, though a solemn proceeding, takes place under a *mookhtarnamah* from the *purdah* woman, then the proceedings have not the same effect as against her as they would have against a person capable of transacting his own business and acting for himself. When a transaction of the kind mentioned above is impeached, there ought to be clear evidence, not only of the mere signature by the party, but that the secluded woman had the means of knowing what she was about. *SYED FUZZAL HOSSEIN v. AMJUD ALI KHAN*, 17 W.R. 523, P.C.

(42)—*Bond—Mookhtarnama by Mahomedan lady to raise money—Collusion—Duty of lender—Negligence.*—A person, wishing to charge Mahomedan ladies under a bond executed in their absence by A under a *mookhtarnama* which contains a provision empowering him to raise money for the payment of their debts, is bound to show, even granting that there was no collusion between him and A, that the advance was made after satisfying himself that it was

Pardanashin Woman—continued.

taken for their use, and was required by them for the purposes stated in the mookhtearnama; he must also show that the money taken was applied to the use of the ladies and that there was no negligence on his part. **SYUD GOLAM SOBHAN v. MUDDUN MOHUN PAUL, 18 W.R. 257.**

(43)—*Deposition by—Living in some degree of seclusion.*—It is not enough to entitle a woman to the special care with which the Courts regard the dispossession of a *pardanashin* woman that she lives in some degree of seclusion. Hence, where it was found that a lady appeared before the Registrar for registration of certain documents; that she stood as a witness in the box in a suit; that she put in tenants and fixed and recovered rents from them in respect of her house; that she paid Municipal rates and taxes, the Court held that she could not be treated as a *pardanashin* lady. **SHEIKH ISMAIL v. AMIRBIBI, 4 Bom. L.R. 146.**

(44)—*Execution of deed by young pardanashin woman—Matters to be considered in upholding deed.*—Where a young *pardanashin* woman executed a deed in favour of her deceased husband's brother in whose house she was then residing it is not enough to ascertain that she executed the deed voluntarily, in the sense that she was not acting under coercion, or that she knew what were the contents or even the full legal effect of it. It should be seen whether the transaction was a fair and equitable one and whether she acted with an intelligent appreciation of her own interest and not merely with a view to the interest of the person in whose favour the document was executed. **MT. JUARKUAR v. MAGANRAJ, 6 C.P.L.R. 35.**

(45)—*Deed, execution of, by purdah woman—Death-bed disposition—Court's duty.*—It is the duty of the Courts to see that a deed purporting to have been executed by a *pardah* woman is fairly taken from her, and that she was a free agent and duly informed of what she was about. Where the deed is in the nature of a death-bed disposition, the Court that upholds it ought, from whomsoever it proceeded, to be satisfied that it was the free, voluntary act of the party by whom it purports to have been executed and expresses his real intention. **GRISH CHUNDER LAHOREE v. MUSSAMUT BHUGGOBUTTY DEBIA, 14 W.R.P.C. 7 = 13 M.I.A. 419 = 2 Suth. 339 = 2 Sar. 579. [Expl. & D., 19 W.R. 223.]**

(46)—*Will of pardanashin lady—Attestation.*—Where in the case of a will by a *pardanashin* lady, there were two attesting witnesses, one of whom the testatrix could see and could be seen by him, and the other witness was so placed behind a curtain that neither could he see, nor could be seen by, the testatrix, held that both witnesses were sufficiently in the presence of the testatrix to make their attestation valid. **HORENDARA NARAIN ACHARJI CHOWDHRY v. CHANDRA KANTA LAHIRI, 16 C. 19. [D., 26 C. 78; R., 4 O.C. 408, 13 C.W.N. 40.]**

Pardanashin Woman—continued.

(47)—*Recital in deed—Pardah lady—Strangers not affected by recital.*—A recital contained in a deed made by a *pardah* lady must be regarded with caution and suspicion even as affecting herself, and should have no value attached to it, *quoad* any other person. **DURGA PRASAD v. RAM DIN SAHU, A.W.N. 1887, 69.**

(48)—*Pardanashin women, denial of execution of deed by—Burden of proof upon plaintiff when pardanashin woman denies execution of deed—Rule regarding case in which pardanashin women are sued upon deeds alleged to be executed by them.*—In a suit on a mortgage bond dated December 20th 1897, alleged to have been executed in favour of the plaintiffs by the defendant, a *pardanashin* woman, and her husband, it was contended by the defendant that she and her part of the mortgaged property were not bound by the deed. Her defence in her written statement was that she had had no occasion to borrow money of the plaintiffs, that she had borrowed none, and that she did not execute the deed and knew nothing about it. The question was whether a mere denial of "execution" by a *pardanashin* woman against whom a deed is brought to be enforced is sufficient to cast upon the plaintiff the duty of proving that the woman not only set her hand to the deed but understood what she was doing. *Held*, that in such cases it is incumbent upon the plaintiff to prove that the woman received the consideration stated in the deed and executed the deed with knowledge of its effect upon her interests. The rule as to pleading in cases in which a *pardanashin* woman is sued upon is this:—If she admits having executed the deed she must plead definitely that it is not binding upon her so as to give the plaintiff notice of the position which she intends to take. If she denies having executed the deed the plaintiff must prove not only the *factum* of mechanical execution by her but also that she signed it with knowledge of its bearing upon her interests. Upon the evidence in the case the Court *held* that it was not proved that the defendant received any part of the consideration for the mortgage-deed in suit or that she caused her sale to be affixed to the deed or that she understood the transaction or had any means of doing so. **MUSAMAT SAKINA BEGUM v. LALA Inder Pershad, 7 O.C. 292.**

(49)—*Mahomedan Law—Pardanashin lady Property of—Alienation by sons—Presumption—Limitation Act (XV of 1877), art. 144.*—Where the sons of a Mahomedan *Pardanashin* lady lease or mortgage family lands in which the mother is entitled as a co-sharer along with her sons. *Held*, the natural presumption is that they deal with the lands, as managers or agents, for her as well as for themselves, and the Courts will not presume and will refuse to believe, in the absence of clear proof, that they do so adversely to her. And in a suit to recover her share of the property alienated by them, the Court must, in the absence of such proof, date the commencement of adverse possession from the date of the sale by them, and not from

Pardanashin Woman—continued.

the date of the mortgage or lease given by them. *DHUNOMAL CHANDIRAM v. MUS-SAMTI KAIM KHATUN*, 2 S.L.R. 43.

(50)—*Quasi-purdanashin, meaning of—Quasi—Purdanashin, protection.*—A quasi-purdanashin woman means a woman who, not being of the *purdanashin* class, is yet close to them in kinship and habits and secluded from ordinary social intercourse. A quasi-purdanashin is not entitled to the same protection which the law extends to *purdanashins*. Outside the latter class, it must depend in each case on the character and position of the individual woman, whether those who deal with her are or are not bound to take special precautions that her actions shall be intelligent and voluntary, and to prove that it was so in case of dispute. *HODGES v. THE DELHI AND LONDON BANK LIMITED*, 5 C.W.N. 1=2 Bom. L.R. 967=27 I.A. 168=23 A. 137, P.C.=10 M.L.J. 279=7 Sar. 767.

(51)—*Pardanashin lady—Right to be examined on commission.*—A *Pardanashin* lady has a right, as a witness in a criminal case, to be exempted from personal attendance at Court and to be examined on commission. *In re HURRO SOONDERY CHOWDHRAIN*, 4 C. 20=3 C.L.R. 93. [*Disappr.*, 5 A. 92; R., 24 C. 551.]

(52)—*Attendance in Court—Commission.*—The Court will extend the privileges of *parda* to women who, though not *parda*, are not accustomed generally to appear before the public. *KISTOMOHUN MOOKERJEE v. ADARMONEY DABEE*, 2 Hyde 88.

(53)—S. 132 (=s. 640, *Civ. Pro. Code*, 1882)—*Commission to examine witness—“Pardanashin” lady.*—Even if a *pardanashin* lady offends against the rules of her class, that does not deprive her of her right to be examined under commission. *MOHESH CHUNDER ADDY v. MANICK LALL ADDY*, 26 C. 650=3 C.W.N. 751. (26 C. 651-N=3 C.W.N. 750, F.)

(54)—S. 640, *Civ. Pro. Code*, 1882.—*Commission to examine witness—“Pardanashin” lady.*—In an application for the examination of a Hindu lady, (a *pardanashin*) under commission, the question is not whether the lady, who does more or less frequently go about in public, should be made to appear in Court, but whether the Court ought to compel her to continue to appear in public. If there were allegations that such a lady had been in the habit of appearing in public and had no regard to the customs of her country and her religion, such allegations being denied in general terms, the Court should not force into public gaze a woman who may have gone outside the *purdah*, and a commission should be issued, for examining her as a witness. *CHAMATKAR MOHINEY DABEE v. MOHESH CHUNDER BOSE*, 26 C. 651. Note=3 C.W.N. 750. [F., 26 C. 650=3 C.W.N. 751.]

(55)—*Commission to examine witness—C.P.C.* (1882), s. 640—*Purdanashin lady.*—Application on behalf of the plaintiff, a *purdanashin* lady, for a commission for the examination of herself was granted, although it was admitted that

Pardanashin Woman—continued.

she had appeared personally in the Police Court and had been examined by the Magistrate. *SM. PROVAT KUMAREE DASSEE v. OPURBA KISSEN SETT*, 3 C.W.N. 753.

(56)—*Evidence—Commission—Examination of purdanusheen woman.*—A *purdanusheen* lady need not be examined on commission where she can be examined in Court in a *palkee* or otherwise on a proper identification. *NUSRUT BANOO v. MAHOMED SAYEM*, 18 W.R. 230.

(57)—*Commission to examine pardanashin lady—Costs.*—The costs of a commission to examine a *pardanashin* lady, a defendant in the suit, will not be ordered to be paid by her though the commission be on her own application. *MONINDROBHOOSUN BISWAS v. SHOSHEEBHOOSUN BISWAS*, 5 C. 866.

(58)—*Unmarried girl of twelve—No rank or station—Non-appearance in public—Evidence.*—In the case of an unmarried girl of some twelve years of age, without any distinguished rank or station, but belonging to that class of Hindoo society the female members of which never go out in public, held that she is entitled to the privilege of Act VIII of 1859, s. 21, even though it was essential to have her testimony in a case recorded by the Judge himself, and that her testimony should be taken out of Court under suitable precautions. *MAINATH SINGH v. MUSSAMUT MOORTA KOOR*, 24 W.R. 375.

(59)—Act XI of 1858, ss. 7, 10, 11, 12—*Certificate to purdanashin—Disqualification.*—The powers given by ss. 10, 11 and 12 of Act XI of 1858 only accrue upon the happening of the contingency which is mentioned in s. 9. The mere fact that the near relative who desires to have the charge of the property is *purdanashin* is not of itself a disqualification such as would take away the right to claim the certificate under s. 7. *MUSSAMUT KURUPPOOL KOOR v. THE COLLECTOR OF SHAHABAD*, 20 W.R. 432.

(60)—Act VIII of 1859, s. 21—*Pardanashin ladies—Execution—Arrest.*—*Pardanashin* women or women who, according to the usage of the country, ought not ordinarily to be compelled to appear in public, are not exempt from arrest and imprisonment in execution of decrees, either by s. 21, Act VIII of 1859, or under any other rule of law. *THE MAHARANI OF BURDWAN v. SRIMATI BARADASUNDARI DEBI*, 1 B.L.R. F.B. 31=10 W.R. F.B. 21. (2 W.R., Mis. 33, 8 W.R. 282, R.)

(61)—Act VIII of 1859, ss. 21 and 201—*“Women of rank” exemption of, from arrest in execution—Option to proceed against person or property of judgment-debtor—Simultaneous execution.*—Exemption from arrest on process of execution, as provided by s. 21 of Act VIII of 1859, does not extend to all women of rank but is limited to the women described in the section, viz., ‘women who, according to the custom and manners of the country, ought not to be compelled to appear in public.’ Under s. 201 and other provisions in Act VIII of 1859,

Pardanashin Woman—continued.

the judgment-creditor has an uncontrolled option whether he will proceed, in the first instance, against the person or the property of the judgment-debtor. That option is clearly given by s. 201; and by s. 15, Act XXIII of 1861, the Court is bound, if the application be in due form, to admit it, and when it is admitted, to order execution "according to the nature of the application." The Court further may, in its discretion, refuse execution against the person and property at the same time, and may also refuse execution against the person when, under s. 13, Act XXIII of 1861, or under s. 19, Act XI of 1865, application for immediate execution is made verbally at the time of passing the decree; but when application is made after the passing of the decree by written application under s. 207, Act VIII of 1859, the Court is bound to issue execution according to the nature of the application. *J. DAVIS AND CO. v. MRS. M. A. MIDDLETON*, 8 W.R. 282. [*Expl.*, 17 W.R. 165; *Cons.*, 22 W.R. 512.]

(62)—*Arrest of—Entry into zenana—Civ. Pro. Code* (X of 1877), s. 336.—If he can enter into a house, when he enters it, an officer authorised to arrest a pardanashin woman may break into the zenana, if necessary, for the arrest. No special order of Court authorising the sheriff to act as above is necessary. *S. M. KADUMBINEE DOSSEE v. S. M. KOYLASH KAMANEE DOSSEE*, 7 C. 19=9 C.L.R. 25.

See ACT XL OF 1858, ss. 6, 9, 12, A.W.N. 1889, 170.

See ACT XL OF 1858, s. 12, A.W.N. 1881, 102.

See APPELLATE COURT—PRACTICE AND PROCEDURE, 16 W.R. P.C. 32.

Execution behind *parda*—How to be attested—Document to be explained to and understood by—See ATTESTATION, 5 Ind. Cas. 539=11 C.L.J. 563=37 C. 526=14 C.W.N. 974.

Case in which a lady was not treated as a Pardanashin—See BENAMI TRANSACTION—GENERAL, 10 C.W.N. 570, P.C.=3 A.L.J. 353=3 C.L.J. 484=8 Bom. L.R. 379=16 M.L.J. 166=1 M.L.T. 137=33 C. 773.

See BENAMI TRANSACTION—GENERAL, 14 W.R.P.C. 7=13 M.I.A. 419.

See DEED—EXECUTION OF DEEDS, 9 P.L.R. 1904=77 P.R. 1903.

Plea of intimidation not proved—Assent to mutation of names in collectorate record of rights, validity of—See DURESS, 11 A. 399, P.C.

See EVIDENCE ACT, 1872, s. 111, A.W.N. 1884, 184.

Appointment of, as guardians—Validity—See GUARDIANS AND WARDS ACT, 1890, s. 8, 15 C.W.N. 676.

Executing a mortgage for interest due under previous mortgages Guardian of minor—See HINDU LAW—ALIENATION, 26 C. 707, P.C.=26 I.A. 97=3 C.W.N. 573.

Pardanashin Woman—concluded.

See HINDU LAW—ALIENATION, 8 M. 304.

See INSPECTION OF DOCUMENTS, 8 A. 265.

Appeal in *forma pauperis*—Presentation of appeal by authorised agent and not by advocate vakil, attorney or suitor—Appellant a pardanashin woman—See LETTERS PATENT, HIGH COURT, 1865, N.W.P. s. 8, 24 A. 172=A.W.N. 1901, 203.

See LIMITATION ACT, 1908, ss. 4, 5, 9 A. 11=A.W.N. 1886, 245, 9 A. 655.

See MAHOMEDAN LAW—GIFT, 7 B.H.C. O.C. 27.

Execution of document by—Attesting witnesses outside *parda*—See MORTGAGE—GENERAL, 3 Ind. Cas. 311=14 C.W.N. 165.

Want of independent advice—Nature of liability not understood—See MORTGAGE—MISCELLANEOUS, 2 A.L.J. 436.

Document by—Duty of Court—Rule as to, not applicable to literate lady of considerable intellectual capacity—See PLEADINGS, 7 Ind. Cas. 167=12 C.L.J. 357.

Pre-emption suit by—Plaintiffs having knowledge of sale—See PRE-EMPTION—LOSS OF RIGHT TO PRE-EMPT BY WAIVER, ETC, A.W.N. 1887, 260.

Position of—Test—See PROBATE—GENERAL, 9 C.L.J. 19=1 Ind. Cas. 573.

Attestation of *zurpeshgi patta* executed by—See TRANSFER OF PROPERTY ACT, 1882, s. 59, 13 C.W.N. 40=3 Ind. Cas. 309.

Pardons and Reprieves.

See ACT XVIII OF 1855.

Paricharaka.

See HINDU LAW—RELIGIOUS ENDOWMENT, 4 M. 391.

Parliament.

Authority of British Parliament recognising jurisdiction must be clear and express—See FOREIGN COURT—JUDGMENT OF, 3 Ind. Cas. 190=19 M.L.J. 459=32 M. 469.

Privilege of members of—Privilege of publication of reports of Parliamentary Proceedings—See LIBEL, 13 C.W.N. 895=6 M.L.T. 73=36 C. 883=3 Ind. Cas. 224.

Statements made in—Privilege—Relevancy—See LIBEL, 14 C.W.N. 713=6 Ind. Cas. 81=37 C. 760.

Parol Contracts.

See EVIDENCE—PAROL EVIDENCE.

See EVIDENCE—SECONDARY EVIDENCE.

See EVIDENCE ACT, 1872, ss. 91, 92.

See DOCUMENT, L.B.R. 1893—1900, 640.

Parol Evidence.

See EVIDENCE—PAROL EVIDENCE.

Parsi Charities.

Application of *cy pres* to—See CY PRES DOCTRINE, 9 Bom. L.R. 1203=32 B. 214.

Parsi Intestate Succession.

See ACT XXI OF 1865.

Parsi Law.

(1)—*Iran Shah — Anjuman of Udwada.*—It is opposed to the notions of the Parsi community that the Iran Shah should be regarded as capable of, or the subject of, ownership. The Anjuman of Udwada is the body that is vested with the control, management and supervision of the Atash Behram and all that appertain to it. *NOWROJI v. KHARSEDJI*, 5 Bom. L.R. 745=28 B. 20.

(2)—*Judicial separation—Permanent alimony — Immoveable estate of the husband charged with the alimony—Wife's alimony payable out of the estate of the deceased—Wife's right to distributive share.*—Among the Parsees, where a wife is granted permanent alimony and the husband's immoveable property is charged for payment of the same, the wife is entitled, at the death of her husband, to receive the permanent alimony out of the estate of the deceased and also to her distributive share out of the remaining estate of the deceased. *MOTIBAI v. MOTIBAI*, 2 Bom L.R. 602=24 B. 465.

Palak son—Executory bequest—Validity—See SUCCESSION ACT, 1865, ss. 82, 111, 125, 13 Bom. L.R. 141.

Parsi Marriage and Divorce.

See ACT XV OF 1865.

Parsis.

(1)—*Statute of frauds, applicability of, in the case of Parsis—Resulting trust under Will, necessity of taking probate.*—The parties to this suit were Parsis, and the suit related to a conveyance of a house which, according to the plaintiff, was made by her deceased husband G as a trust, the vendee J having accepted the trust in favour of the vendor's family. It was sought to make out a declaration on G's part and an acceptance of a trust by J, under which the plaintiff and her daughters became beneficiaries to whom J was directly responsible, and whose equitable rights adhered to the estate or followed it into the hands of the defendant, the widow and executrix of J, and it was held that if J had taken the house without consideration, the Court would be bound to give effect to the resulting trust in favour of G. It is the beneficial owner only who can declare, in the express writing any other trust which is to supersede the resulting trust in his own favour. The Statute of frauds, which in s. 7 lays down that such declaration must be in writing, applies in the case of the Parsee inhabitants of Bombay, with regard to transactions not having necessarily any religious character or governed by the family law. Further, in this case, even if G would be regarded as having devised the trust that resulted in his favour, the plaintiff not having taken out probate of the Will would not take up the possession of legal representative of her deceased husband entitled to enforce his rights, and, amongst others, his rights under the supposed resulting trust. Moreover, it was

Parsis — continued.

not contended nor could it be contended that, except as executrix or administratrix, the plaintiff could recover property or enforce rights equitably vested in her deceased husband. *BAI MANECKBAI v. BAI MERBAI*, 6 B. 363. [R., 33 B. 122=10 Bom. L.R. 417, 33 B. 509=11 Bom. L. R. 85=5 M.L.T. 301=2 Ind. Cas. 701.]

(2)—*Parsis in mofussil of Bombay—Construction of agreement—Rule in Shelley's Case, applicability of.*—The heirs of a deceased Parsi entered into an agreement with one another, by which they agreed that the remaining income after paying the deceased's debts, of a certain estate which had belonged to the deceased, situated in the Island of Salsette, and therefore in the mofussil of Bombay, should be apportioned among the various heirs of the deceased, the parties to the agreement, but "that after their death their shares are to be enjoyed and received by their heirs and children from generation to generation." Held that, it being the plain intention of the parties to the agreement, appearing on the face of the agreement, that they themselves should take only a life-estate to the extent of their respective shares in the remaining income of that estate, the rule in *Shelley's Case* ought not to be applied so as to defeat the plain intention. *MITHIBAI v. LIMJI NOWROJI BANAJI*, 5 B. 506. [Affirmed, 6 B. 151; F., 1 Bom. L.R. 303; R., 5 Bom. L.R. 983, 8 B. 323.]

(3)—*Agreement between members of Parsi family—Construction in accordance with intention of parties—Rule in "Shelley's Case" not applicable.*—Where, by an agreement entered into between the heirs of a deceased Parsi, the parties had themselves defined their interest in the property by mutually agreeing in express terms that, after their respective deaths, their respective shares in the income should be enjoyed and received by another designated class, thus plainly showing a distinct intention that their own interest in the property should be confined to the enjoyment of the income during their lives, it was held that to construe such agreement as giving more than a life-interest to the parties to it, would be to defeat their clear and obvious intention, and that the rule of construction in *Shelley's Case* which was of a feudal origin, and so inapplicable to the circumstances of India, could not be made use of in construing the agreement, so as to allow the words in it, "but after their death, their shares are to be enjoyed and received by their heirs and children from generation to generation for ever," to confer an absolute estate on the parties to the agreement in respect of their respective shares. *MITHIBAI v. LIMJI NOWRAJI BANAJI*, 6 B. 151. (On appeal from 5 B. 506.) [F., 1 Bom. L.R. 303; R., 33 B. 122=10 Bom. L.R. 417.]

(4)—*Parsis, law applicable to — Parsis — Muhammadans—By-al-wafa—Reg. IV of 1827, s. 26—Improvement of mortgaged estate—Costs of rebuilding premises destroyed by accident.*—

Parsis—continued.

There is no law generally applicable to Parsis in India; but the law applicable to them within the jurisdiction of the High Court on its Original side is that which is applied to British-born subjects, and, in the absence of any specific law for the Parsis in the Mofussil, the rule of justice, equity and good conscience should be observed: and, in such cases, the Court should follow with certain necessary modifications the practice of the Courts of Equity in England. [*R.*, 18 B. 366, 30 B. 359=7 Bom. L.R. 988] A Muhammadan sued to redeem certain property from a Parsi, alleging that it has been mortgaged by the ancestor of the plaintiff to the defendant's grandfather by deed (*by-al wafa*). *Held* that, according to s. 26, Reg. IV of 1827, the case was to be governed by the law of the defendant who was a Parsi. *Held* also that the *by-al-wafa* amounted to a mortgage and that the mortgagee in possession must be allowed for proper and necessary repairs to the estate. [*R.*, 7 B.H.C. O.C. 45, 9 B.H.C. 69.] The mortgagee in possession has the right, where the mortgaged building falls down as by accidental fire so as to be unfit for use, to pull it down and rebuild it, and, in such a case, the mortgagor should not be allowed to recover the property without paying also the costs incurred by the mortgagee in having rebuilt and repaired the premises. **MANCHARSHA ASHPANDIARJI v. KAMRUNISA BEGAM**, 5 B.H.C. A.C. 109. [*R.*, 14 B. 28.]

(5)—*Right of Parsees to make wills.*—Will by a *Parsee* established. *Semble.*—There is no restraint upon the testamentary power of disposition by a *Parsee*. **MODEE KAIKHOOSCROW HORMUSJEE v. COOVER BHAE**, 4 W.R. 94, P.C.=6 M.I.A. 448.

(6)—*Marriage of Parsi.*—*Parsi* may contract a valid marriage with a Jewess according to Jewish rights. It is competent to a *Parsi* to become a convert to the Jewish faith and to contract a valid marriage with a Jewess in London according to the Jewish rites. **JIWAJI v. BOMANJI**, 5 Bom. L.R. 655.

(7)—*Marriage among Parsis—Declaratory suit for declaration of invalidity of marriage during infancy—Effect of custom validating such marriage—Parsi Marriage and Divorce Act (XV of 1865), s. 3—Indian Majority Act (IX of 1875), ss. 2, 3—Limitation Act, XV of 1877, art. 120.*—Plaintiff, a *Parsi* woman, was found by the lower Courts to have attained the age of 18 on the 20th September, 1884, and on the 20th September, 1887, she was of the age of 21 years. On the 11th of September, 1890, which was within three years of the latter date, she filed the present suit praying for a decree declaring that the marriage ceremony performed in her infancy did not create the status of wife and husband between her and the defendant. *Held* that the effect of s. 7 of the Limitation Act was to allow the plaintiff three years' time within which to sue after attaining her majority and that she be deemed to have become a major

Parsis—continued.

for the purpose of bringing the suit only when she was 21 years old; and under art. 120 of the Limitation Act governing the suit, it was within time. A *Parsi* suing to have a marriage declared void should be deemed to be "acting in the matter of marriage" for the purpose of the saving provision in s. 2 of the Indian Majority Act (IX of 1875) so that his capacity is not to be affected by the 18 years' limit in s. 3 of the Act, but will be regulated by the provisions of the *Parsi Marriage and Divorce Act* (XV of 1865) fixing 21 as the age of majority for *Parsis*. On the merits, it was observed that Act XV of 1865 contained no provisions as to the age at which a *Parsi* can contract marriage, the matter being left to the general law governing *Parsis*, and, in the absence of legislation, the law to be observed was the usage of the locality, and the lower Courts had distinctly found in favour of the existence of a custom validating and rendering binding marriages between *Parsis* even though contracted when the parties were children of tender age, and it was not open to the High Court on second appeal, to arrive at an independent finding as to the existence of such a custom, especially as there was a large body of evidence on the record in support of it. **BAI SHIRINBAI v. KHARSHEDJI**, 22 B. 430. [*Not F.*, 29 M. 24=16 M. L.J. 8; *F.*, 33 B. 509=11 Bom. L.R. 85=5 M.L.T. 301=2 Ind. Cas. 701; *R.* 2 Bom. L.R. 845.]

(8)—*Parsi Succession Act (XXI of 1865), s. 7, sch. II, cl. 2—Estate of Parsi dying intestate, mode of distribution of.*—This originating summons had been taken out (under High Court Rule No. 82) for the purpose of determining who were the persons entitled to share in the estate of a *Parsi* widow who died intestate, and into what shares it was to be divided among them. Defendants were the persons other than the plaintiff who could be entitled to share in the estate as lineal descendants of the brothers and sisters of the intestate. An important question of the law of intestate succession among *Parsis* arose, which related to the construction of s. 7 and art. 2 of the second schedule to the *Parsi Succession Act*, XXI of 1865, and to the distribution of the property of a *Parsi* dying intestate whose nearest living relatives are the lineal descendants in different degrees, of pre-deceased brothers or sisters. *Held* that art. 2 of sch. II, read with s. 7 of *Parsi Succession Act*, gives the estate to "brothers and sisters," and the lineal descendants of such of them as shall have pre-deceased the intestate. In this case, there were no brothers or sisters but there were lineal descendants in different degrees of two pre-deceased brothers and of one pre-deceased sister. The descent to lineal descendants is substitutional under the said article in the sense that they take nothing if the head of their branch of the family is living, whereas, if he is dead, they stand in his place and take the share which he would have taken. In distributing the estate among "brothers and sisters and the lineal descendants of such of them as shall have pre-deceased

Parsis—continued.

the intestate," the primary division must be *per stirpes*. The Act provides that the lineal descendants of deceased brothers and sisters shall, in certain events, succeed to the property of the intestate, and succession *per stirpes* is as consistent with such terms as succession *per capita*, and is more consistent with the context and with the probable objects of the Legislature. If there are surviving brothers, and lineal descendants of a pre-deceased brother, then each surviving brother will take equal shares with the lineal descendants collectively. If all the brothers are dead, then the shares which each would have taken had he survived, will be taken by his lineal descendants. If, in either case, the pre-deceased was a sister, her lineal descendants will take her half-share only. *HIRJIBHAI CURSETJI v. BARJORJI*, 22 B. 909.

Infant marriage among—Validity—Consent of father or guardian—Suit by party to marriage to declare marriage invalid—Jurisdiction of High Court—Parsis Marriage Act XV of 1865—Letters Patent, s. 12—Law applicable to Parsis in matrimonial matters—Adoption by Parsis of Hindu Practices—See ACT XV OF 1865, 13 B. 302.

See ACT XV OF 1865, s. 30, 3 B.H.C. A.C. 113.

Law applicable to, in the Island of Bombay—Husband and wife—Suit for dissolution of marriage—Wife's costs by whom payable—Duty of wife's solicitors—See COSTS—GENERAL, 13 Bom. L.R. 920.

Gift of Government notes—Necessity of endorsement to complete gift—Creation of trust by donor constituting himself trustee—Enforceability of trust against representative of donor—Practice among Parsis—See GOVERNMENT PROMISSORY NOTES, 5 B. 268.

Custom—Presents to bride—Joint ownership—Right of survivor—See HUSBAND AND WIFE, 16 B. 630.

Suit by a—wife against her husband for restitution of conjugal rights—See JURISDICTION—ECCLESIASTICAL JURISDICTION, 4 W.R. P.C. 91=6 M.L.A. 348.

See LAND TENURE—IN BOMBAY, 4 B.H.C. O.C. 1.

Will of—Executed prior to 1st January 1866—Applicability of Act XXVII of 1860—See PROBATE—EFFECT OF PROBATE, 8 B. 474.

Suit for restitution of conjugal rights by—Husband—Separate living of wife, agreement in respect of—See RESTITUTION OF CONJUGAL RIGHTS, 23 B. 279.

Letters of administration to estate of deceased—Right of suit—See SUCCESSION ACT, 1865, s. 190, 19 B. 828.

Status of—See TRUST, 11 Bom. L.R. 85=5 M.L.T. 301=33 B. 509=2 Ind. Cas. 701.

See WILL—CONSTRUCTION, 23 B. 80.

Parsis—concluded.

Bequests under will of Parsi—Perpetual trusts for performance of religious ceremonies—Clause restraining alienation, invalidity of—See WILL—MISCELLANEOUS, 11 B. 441.

Parsis Succession to Immoveable Property.

See ACT IX OF 1837.

Parties.

See PARTIES TO SUIT.

Parties to Suit.

1.—GENERAL.

2.—ADDING PARTIES TO SUIT.

3.—SUBSTITUTION OF PARTIES TO SUIT.

4.—SUITS BY REPRESENTATIVES OF A CLASS.

5.—TRANSPOSITION OF PARTIES TO SUIT.

6.—MISCELLANEOUS.

—1.—General.

See CIV. PRO. CODE, 1908, s. 11.

See CIV. PRO. CODE, 1908, s. 47.

See CIV. PRO. CODE, 1908, O. I. rr. 1 to 13.

See LIMITATION ACT, 1908, s. 22.

See MISJOINDER OF PARTIES.

See MULTIFARIOUSNESS.

See NON-JOINDER OF PARTIES.

See RES JUDICATA—PARTIES.

(1)—Ss. 28, 32, 295. *Civ. Pro. Code*, 1882—*Essentials to make a person party to a suit.*—In order that a party may be considered a necessary party defendant, two conditions are essential:—There must be a right to some relief against him, in respect of the matter involved in the suit. His presence must be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. In a suit for declaration of right and confirmation of possession of certain immoveable property, and for declaration that the same is not liable to attachment and sale in execution of certain decrees obtained by (defendant) P against (defendant) Q, certain other persons, who had also attached the property in dispute in execution of decrees obtained by them against (defendant) Q and had successfully resisted the claim preferred by plaintiff, are necessary parties, to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit as the plaintiff has a right to relief against them in respect of the matter involved in the suit. The plaintiff's suit cannot be maintained, if he omits to bring those persons on the record as defendants. *DURGA CHARAN SARKAR v. JOTINDRA MOHAN TAGORE*, 27 C. 493. (5 B.H.C. 83, F.; 4 C.355; D.) [R. & D., 6 C.L.J. 558=12 C.W.N. 84.]

(2)—*Parties to the suit—Persons when to be made defendants.*—It is the practice in India to implead as defendants persons who should properly be made parties as plaintiffs, but who

Parties to Suit—continued.

—1.—General—continued.

have refused to concur in a suit. *PATINHARI-PAT v. CHEKUR NAMAKKAL*, 4 M. 141. [F., 17 C. 160; R., 9 A. 486.]

(3)—*Outsider's right to be made party to suit.*—The right of an outsider to claim to be made a party to a suit accrues when the necessity for his so claiming arises. *THE ORIENTAL BANK CORPORATION v. J. A. CHARRIOL*, 12 C. 642.

(4)—*Non-joinder of parties—Effect—Fraud.*—Under ordinary circumstances, a Court of Equity would not throw out a suit merely because a necessary party had not been made a defendant. It would supply the omission and have the case tried in the presence of all interested. But, where a plaintiff acts unfairly by intentionally omitting a party and concealing facts relating to the defendant and also endeavours to make him responsible for the entire claim, the claim was held to be liable to be dismissed. *BROJO GOBINDA DOSS v. CHAND RAM DOSS*, 19 W. R. 428.

(5)—*Addition of new defendant—Effect—Limitation Act, 1877, s. 22.*—Where the defendant's objection indicated that a necessary party had been omitted without whose presence on the record the suit could not be adjudicated upon, and such party was added after the period of limitation had expired, held that the suit was barred against all the defendants under s. 22 of the Limitation Act. *RAM CHAND v. SOBHAN BAKHS*, 69 P.R. 1902. (3 C. 26, 58 P.R. 1882, 104 P.R. 1882, 149 P.R. 1889, 2 P. R. 1882, R.; 6 C. 815, 8 P.R. 1886, 65 P.R. 1884, 66 P.R. 1896, 14 C. 791, 25 C. 409, *Cited*.) [D, 57 P.R. 1905.]

(6)—*Adding plaintiff—Original plaintiff objecting—Procedure—Objection to the addition of party as co-plaintiff—Second appeal to High Court—Civ. Pro. Code, 1877, s. 591.*—Where the original plaintiff disputes the right of a person, joined as co-plaintiff at the defendant's instance, to be joined with him in the suit, the intervening party should, if at all, be more properly joined as defendant. A plaintiff, unsuccessfully objecting to the addition of a party as co-plaintiff, can, under s. 591 of the Civ. Pro. Code, prefer a second appeal to the High Court. *GOOGLEE SAHOO v. PREMLALL SAHOO*, 7 C. 148. [R., 9 A. 447, 14 B. 232, U.B.R. 1897—1901, Vol. II, 310.]

(7)—*Revision of an order refusing to add parties—Failure to exercise jurisdiction—'Case,' meaning of—Civ. Pro. Code (Act V of 1908), O. I, r. 10, Civ. Pro. Code (Act V of 1908), s. 115.*—Where the lower Court rejected the applicants' application to be made a party in the case on the ground that plaintiff was not willing to implead them as defendants, held that the Court failed to exercise the jurisdiction vested in it under O. I, r. 10 of Act V of 1908, inasmuch as it failed altogether to consider whether it was necessary, for the effectual and complete adjudication of all the questions involved in the suit, to join them as parties to the suit. Held further, that the

Parties to Suit—continued.

—1.—General—continued.

petition of the applicants, the proceedings held thereon and the order of the Court rejecting the petition, amounted to a "case" within the meaning of s. 115 of Act V of 1908. *RAISAT ALI (CHAUDRI) v. RAE RAJESHAH BALI*, 13 O.C. 109. (5 O.C. 91, 10 O.C. 8, 12 O.C. 405, R.)

(8)—*Practice—Suit by some only of several plaintiffs entitled to sue—Others joined as co-defendants.*—Where several persons had a right to sue as co-plaintiffs, but some only of them appeared as plaintiffs, the others being joined as co-defendants, held that the suit ought not to be dismissed merely because the plaintiff had not proved that the co-defendants had refused to join as co-plaintiffs. (26 C. 409, F.; 17 C. 160, R.) In this case, it was further apparent from the written statement which was filed by the co-defendants, that they disclaimed all interest in the subject-matter of the suit, and would not willingly have been made plaintiffs to it. *BIRI SINGH v. NAWAL SINGH*, 24 A. 226 = A.W.N. 1902, 31. [F., 26 M. 461, 26 M. 649, F.B., 29 M. 302, D., 189 P.L.R. 1908.]

(9)—*Ss. 559, 561, Civ. Pro. Code, 1882—Non-appealing defendants may be made parties, if interested in the result of appeal—Cross objections—Right to urge against co-respondent.*—If non-appealing defendants are found to be interested in the result of an appeal, within the meaning of s. 559, Civ. Pro. Code, the appellate Court may add them as parties to the appeal. As a general rule, the right of respondent to urge cross objections should be limited to his urging them against the appellants; and it is only by way of exception to this general rule that one respondent may urge cross objections against the other respondents, the exception holding good, among other cases in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. *BISHUN CHURN ROY CHOWDRY v. JOGENDRA NATH ROY*, 26 C. 114. (1 W.R. 226, 15 W.R. 26, 21 W.R. 338, 7 M. 215, 25 C. 565, R.) [F., 30 C. 655, 28 A. 95 = A.W.N. 1905, 200 = 2 A.L.J. 667, R., 14 C.P.L.R. 46, 28 M. 229 = 15 M.L.J. 212, 35 C. 538 = 12 C.W.N. 720.]

(10)—*Costs—Scale of fees—Unnecessarily making one a party to suit—Parties.*—The plaintiff and defendants were jointly liable under a decree, and the plaintiff having paid a far larger amount than was due as between herself and her co-defendants, this suit was brought for the recovery, from the defendants, of the amount so paid by the plaintiff in excess of her share of the liability. One of the defendants had paid into Court more than the full amount of his share. Thereupon the lower Court dismissed the claim as against this defendant, but awarded him no costs. Held that, as the plaintiff had no claim against this defendant, it was not necessary to make him a party and that he was entitled to his costs.

Parties to Suit—continued.**—1.—General—continued.**

Held also that the scale upon which this defendant was entitled to his costs depended upon what the plaintiff claimed against him and that he was entitled to costs on the usual scale as on a suit for an amount for which the suit was brought. **KASHEENATH SEIN v. CHUNDER MONEE DEBEE**, 9 W.R. 288.

(11)—*Suit for service-lands improperly alienated—Government impleaded as defendant—Cause of action of ghatwal different from that of Government—Government entitled to be made co-plaintiff.*—Plaintiff, a Tabeydar Ghatwal, sued to recover possession of certain service-lands alleged to have been improperly alienated by the Sirdar Ghatwal to third parties. The issue on the point whether the land belonged to the tenure of the Sirdar or the Tabeydar Ghatwal was decided by the lower Courts in favour of the former. The Government having been made a defendant in the suit by the plaintiffs, applied to be made a plaintiff, in the suit, not because it joined with the plaintiff the Tabeydar Ghatwal, in alleging that the land belonged to his tenure, but to obtain a declaration as against the Sirdar Ghatwal that he had no authority to make a perpetual alienation to a sub-tenant, of his service-lands. The High Court *held* that the Government could not claim to be made a co-plaintiff. What the Government asked for was a declaration that a Ghatwal could not make a permanent alienation or a permanent sub-tenure of his service-lands. Its cause of action and ground of action were completely distinct from those of the plaintiff, and the two suits could not be joined together. This was not the case of a plaintiff having two causes of action against the same defendant, but of two plaintiffs having two separate causes of action against the same defendant. The two plaintiffs could not sue together. **THE GOVERNMENT v. BOURIE BHOOMIZ TABEYDAR GHATWAL**, 2 W.R. 280.

(12)—*Suit for a declaration of right to participate in Permanent Settlement of Mahal parties—Defect.*—A suit for a declaration of plaintiff's right to share in the settlement of an accretion will lie without the Government being made a party to it. **KRISHNA CHANDRA SANDYAL CHOWDHRY v. HARISH CHANDRA CHOWDHRY**, 8 B.L.R. 524=17 W.R. 145.

(13)—*Government whether necessary party.*—In a suit for land brought by a person claiming to be the owner against a person who had obtained a temporary settlement from Government, the Government, ought to be a party to the suit. **MAHOMED ISRAILE v. WISE**, 13 B.L.R. 118, F.B.=21 W.R. 327. [F., 22 W.R. 52, 5 C.L.R. 154; Con. & Expl., 2 C.L.R. 467; R., 21 W.R. 395, 21 B. 229, 5 C.L.J. 583=12 C.W.N. 193=34 C. 753.]

(14)—*Revenue sale, suit to set aside—Parties.*—Though the Government has such an interest in a suit to set aside a revenue sale as would entitle it to be made a party thereto, the Secretary of State is not a necessary party.

Parties to Suit—continued.**—1.—General—continued.**

BAL MOKOOND LALL v. JIRJUDHUN ROY, 9 C. 271=11 C.L.R. 466. [Appr., 25 C. 833, P.C.; Rel. on, 7 C.W.N. 377; D., 8 C.W.N. 657=31 C. 159.]

(15)—*Decree annulling illegal sale not res judicata—Secretary of State not a necessary respondent.*—The decree, obtained in a suit against the Secretary of State for illegally selling an estate for a fictitious arrear of revenue shown to be due by an erroneous debit against the estate in the Collectorate books not being *res judicata* in any future question or proceeding, as between the Government and the unsuccessful purchaser, that Minister is not a necessary respondent. The position of the Indian Secretary, in similar cases, is correctly explained, in 9 C. 271 (276) by Mr. Justice Mitter. **BALKISHEN DAS v. SIMPSON**, 25 C. 833, P.C.=25 I.A. 151=2 C.W.N. 513. [Rel. on, 7 C.W.N. 377; D., 31 C. 159=8 C.W.N. 657.]

(16)—*Suit to set aside revenue-sale—Secretary of State if necessary party.*—The Secretary of State is not a necessary party to an action to set aside a sale held for arrears of revenue. **JAHHNOVI CHOWDHARANI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL**, 7 C.W.N. 377. (25 C. 833, 9 C. 271, Rel. on.)

(17)—*Parties—Suit to set aside sale for arrears of revenue under Public Demands Recovery Act (I of 1895, B.C.)—Secretary of State for India in Council.*—In a suit to set aside a sale effected under the provisions of Act I of 1895 (B.C.), the Secretary of State for India in Council is a necessary party. **GOBINDA CHANDRA SHAHA v. HEMANTA KUMARI DEBI**, 31 C. 159=8 C.W.N. 657.

(18)—*Suit for declaration of title against a Municipality—Parties.*—The Secretary of State is not a necessary party to a suit against a Municipality for a declaration of title to certain property situated within the limits of such Municipality. **KRISHNAYYA v. THE BELLARY MUNICIPAL COUNCIL**, 15 M. 292.

(19)—*Act III of 1864 (B.C.), ss. 87, 64—Suit against Municipality—Notice—Bona fide proceedings under Act—Building, state of—Damage to joint property—Members right to claim compensation.*—Municipal Commissioners when they have acted *bona fide* under the belief that they were exercising powers given to them by Act III of 1864 (B.C.), are entitled strictly to one month's notice of action under s. 87 of the Act. But if the facts show that their conduct was not justified by the Act of 1864, and their proceedings were only colorably done under cover of that Act, then they would not be entitled to the protection of the notice at all. By s. 64, Act III of 1864 (B.C.), the Municipal Commissioners, if they deem a house or building to be in a ruinous state, may, after the notice prescribed by that section, cause the same to be taken down. A member of a joint Hindu family is entitled to sue alone to obtain

Parties to Suit—continued.**—1.—General—continued.**

compensation in respect of a loss to himself personally caused by reason of the defendant's wrongful destruction of property in which he had definite share. Such a loss would give rise to a distinct right of action in that member himself, entirely separate from all consideration of other persons. *GOPEE KISHEN GOS-SAIN v. W.-H. RYLAND*, 9 W.R. 279.

(20)—*Chur land—Suit to set aside order of settlement—Collector, a necessary party.*—The Collector is a necessary party to a suit to set aside an order of settlement of a Commissioner of Revenue in respect of certain *chur* land, to recover possession of the land, and to obtain a declaration of plaintiff's title to the said land with possession. *KRISHNO LALL NAG v. BHYRUB CHUNDER DEB*, 22 W.R. 52. (21 W.R. 327, F.B., F.) (R., 8 B.L.R. 338=22 W.R. 52, Note, 21 B. 229, 34 C. 753=5 C.L.J. 583=12 C.W.N. 193.)

(21)—*Butwarra—Joint estate—Collector whether necessary party.*—Where the Government revenue can in no way be affected by a partition of a joint estate, a shareholder thereof may bring a suit for a partition without making the Collector a party to the suit. *BAMA SOON-DUREE DABEE CHOWDHRAIN v. KASHEE KASHORE ROY CHOWDHRY*, 22 W.R. 245.

(22)—*Suits to procure transfer of registration—Collector, a necessary party.*—In suits to procure transfer of registration, no action will lie, unless the Collector (the Registering officer) be made a party. *MANGAMMA v. TIMMAPAIYA*, 3 M.H.C. 134. (F., 19 M.L.J. 627=6 M.L.T. 198=33 M. 41; R., 11 M. 452, 26 M. 521.)

(23)—*Suit for mutation of names to register—Parties.*—The Collector of a district is a necessary party to a suit by the purchaser of land, against his vendor, for mutation of names in the Collector's registry. *VIRASAMI v. RAM DOSS*, 15 M. 350=1 M.L.J. 231.

(24)—*Bombay Abkari Act (V of 1878), ss. 29, 67—Suit against Abkari farmer for refund of money illegally levied—Collector not a necessary party.*—Plaintiff sought in this suit to recover money which the Collector had forced him to pay to the defendant, a revenue farmer. His suit was dismissed by the lower Courts on the ground that the Collector was a necessary party to the suit and the suit as against him could not be brought in the Subordinate Judge's Court. The High Court, however, held that the suit might be maintained against the defendant-farmer without the Collector being impleaded as a necessary party. If he were a necessary party, because of his official act in aiding the farmer, the consequence would be that the farmer also would take the benefit of this exemption and escape responsibility. For the discretionary exercise of his authority under s. 29 of the Abkari Act, the Collector is not subject to any action in a Civil Court. He is protected by s. 67 of the Act. No protection however is expressly afforded to the revenue

Parties to Suit—continued.**—1.—General—continued.**

farmer. According to the view of the Legislature, there is nothing inconsistent in a responsibility to be enforced by the Civil Courts resting on a person who has put the Collector in motion, while the Collector himself stands exempt from their jurisdiction. It is open to a person subjected to an undue demand to take steps by which the Collector's proceedings will be stayed, but it does not follow that his abstaining from this course will deprive him of his ordinary right to recover money wrongfully taken from him for the benefit of a private person. *NARAYAN VENKU v. SAKHARAM NAGU*, 11 B. 519. [Appr., 20 B. 803, 20 B. 764.]

(25)—*Parties to a suit, Political agent—Superintendent of Estate.*—Where, at the request of a Raja, the Government of India provided for the due administration of his State by appointing a Political Agent or Superintendent to be in charge of the State, held, in a suit brought by such "Political Agent and Superintendent of the State on the part of the Government of India" for the recovery of certain moveable and immoveable properties belonging to the State, that he had no *locus standi*, as, either the Raja, if he was the proprietor of the properties, or the Government of India, if his rights and interests had passed to them, could alone have a *locus standi* to sue. *GIRDHARI v. POWLETT*, 2 A. 690.

(26)—*Wife with English domicile—Suit without joining husband—Suit to determine rights of mortgagees inter se—Representatives of mortgagors—Parties.*—A wife having an English domicile was held capable of suing without joining her husband as a co-plaintiff. Both the law of England and s. 4 of the Indian Succession Act permit such a suit. Where the object of a suit was to determine the rights of mortgagees *inter se*, the representatives of certain mortgagors were held to be necessary parties on the following grounds:—(a) the rights of the mortgagees could not be determined without at the same time determining the liability of the mortgagors, which would otherwise involve a multiplicity of suits, (b) to give them an opportunity of being present at the taking of any account that might be ordered as between the mortgagees and (c) to entitle the plaintiff or defendant to obtain costs out of the proceeds of the sale of the mortgaged property. *HUGHES v. DELHI AND LONDON BANK*, 15 C. 35.

(27)—*Married Women's Property Act, III of 1874, s. 8—Wife's separate property, suit against—Husband, whether necessary party.*—In a suit against a woman in respect of her separate property, she having been married before 1865, the husband would not be a necessary party. *C. N. STEPHEN v. MARY STEPHEN*, 10 C.L.R. 536.

(28)—*Wife added as party—Portion of estate purchased with her separate property.*—Case where a wife was made a party to the suit, on the ground that a building on the estate was

Parties to Suit—continued.—1.—**General**—continued.

erected by her husband with money forming her separate estate. **GOURGOPAL DUTT v. BISHONATH GHOSE, Cor. 41.**

(29)—*Minor and father made co-defendants—Minor's mother not a party defendant.*—On a minor and her father being impleaded as co-defendants, the latter, and not the minor's mother, is the proper party to defend the suit. **JOOBRAJ CHOWKEEDAR v. MISS WHELAN, 13 W.R. 399.**

(30)—*Husband and wife—Right to sue—Hindu woman.*—A Hindu woman may at all times sue either alone or jointly with her husband. **BHOYRUB CHUNDER DOSS v. MADHUB CHUNDER PARAMANICK, 1 Hyde 281.**

(31)—*Hindu law—Deed of mortgage executed in favour of Hindu wife—Her right to sue upon it.*—A Hindu wife need not join her husband in a suit upon a deed, of mortgage executed in her favour, nor is it necessary for her to show by evidence that she has separate property or separate business. **MANADA SUNDARI DEBI v. MAHANANDA SARNAKAR, 2 C.W.N. 367.**

(32)—*Suit by mother and guardian of minors for partition—Conveyance by plaintiff to third party—Third party cannot be a co-plaintiff.*—Until a division of ancestral property is effected, no member of the family can give a stranger any interest in the property. In a suit by the mother and guardian of two minors to obtain partition of joint family property, the Court did not allow a third party who was made co-plaintiff by virtue of an alleged conveyance from the plaintiff to remain on record as co-plaintiff, on the ground that the mother and guardian could not give him a right of suit against the other members of the family, and that the proprietary interests of the minors might ultimately be prejudiced. **MUDDUN GOPAL LALL v. MUSSAMUT GOWURBUTTY, 21 W.R. 190.**

(33)—*Suit against widow by adopted son—Reversioner not necessary party.*—In a suit by plaintiff to recover possession of certain property as the adopted son of the husband of the defendant who, as the widow, was in possession of her deceased husband's property, the reversioner should not be made a co-defendant. **KRISTO SUNKUR DUTT ROY v. KOYLASH-NATH DUTT ROY, 15 W.R. 6.**

(34)—*Hindu Law—Will relating to property partly within and partly outside Bombay—Probate of Will—Probate and Administration Act (V of 1881), s. 4—Vesting of property—Right of survivorship—Hindu Wills Act (XXI of 1870)—Indian Succession Act (X of 1865), 179—Suit by administrator—Parties.*—L died in 1873 leaving behind him a widow H and a son M and possessed of large properties situated partly in Bombay and partly in Surat. Before his death, L willed away all his property to his son M and appointed certain

Parties to Suit—continued.—1.—**General**—continued.

executors to manage the property during the minority of M. In 1877, M died leaving a childless widow G (who also was minor) and thereupon R and B were appointed administrators of the estate of G. In 1879, a probate of the will of L was obtained by one of his executors from the High Court of Bombay. The present suit was instituted in 1884 by R and B the administrators of the estate of G against H for recovering possession of the property forming part of the minor's estate. The defendant pleaded that the suit property had vested under the will of L, in his executor who had obtained probate of the will, that she held the property under the executor, and that the suit was bad for non-joinder, the executor not having been made a party thereto. *Held* that the executor was not a necessary party to the suit. The will was made when Act XXI of 1870 (Hindu Wills Act) was in force and, under that Act, s. 179 of Act X of 1865 (Indian Succession Act) had no application to it, so far as it related to any property out of Bombay. As the testator and the son lived joint in estate, on the death of the former, the property vested in the latter by right of survivorship, and on the son's death in 1877, it vested in his widow G, on whose behalf the present suit was brought by the administrators of her property appointed under Act XX of 1864. Under the provisions of s. 4 of Act V of 1881 (Probate and Administration Act), if that Act can be held to operate at all in the mofussil before a notification is issued under s. 2, the estate could not vest in the executor, the same having passed by survivorship to another person long before the Act came into operation. **BAI HARKAR v. MANEKLOL RASIKDOS, 12 B. 621. [R., 9 Bom. L.R. 287 = 31 B. 418.]**

(35)—*H. L.—Partition suit—Necessary parties.*—All the members of a J. H. family, governed by the Mitakshara Law, are necessary parties to a suit by one of the family for a specific share of the family property. **NATHUM MAHTON v. MANRAJ MAHTON, 2 C. 149.**

(36)—*Partition Suit—Multifariousness.*—In a suit for partition and recovery of shares in family property improperly alienated, the alienees may be properly joined as defendants, but a number of cultivating ryots taking objection, cannot be joined as defendants and ejected. **SAMINADA PILLAI v. SUBBA REDDYAR, 1 M. 333. [D., 29 M. 29.]**

(37)—*Hindu family—Suit for partition—Party to suit—Debtor of father.*—In a suit for partition by a Hindu son against his father and elder brother, the creditor of the father, who had lent him money on a bond for the purpose of paying off a debt of the grand-father of the plaintiff and obtained a decree enforcing his lien on the property the subject-matter of the suit, was a necessary party to the suit, and the plaintiff was responsible for the debt in common with the rest of the family. **SRIMAN NARAIN CHAND v. RAM SEWAK, A.W.N. 1881, 86.**

Parties to Suit—continued.

—1.—General—continued.

(38)—*Suit in nature of suit for partition—Defect of parties.*—A suit which is in the nature of a suit for partition cannot be properly dealt with unless all who are admittedly share-holders in the joint property are before the Court. **PAHALADHA SINGH v. MUSSAMUT LUCHMUN-BUTTY**, 12 W.R. 256. [Appr., 17 C. 906, 28 B. 209=5 Bom L.R. 937; R., 5 N.L.R. 152.]

(39)—*Hindu Law—Partition among sons by different wives—Parties.*—To a suit for partition between the sons, by different wives, of a deceased Hindu, the widows are necessary parties, as they have a right to share with their sons. **TORIT BHOOSUN BONNERJEE v. TARA-PROSONNO BONNERJEE**, 4 C. 756=4 C.L.R. 161. (1 Ind. Jur. N.S. 284, F.) [R., 13 C. 39, 31 C. 1065=8 C.W.N. 763.]

(40)—S. 30, Civ. Pro. Code, 1882—*Defective order—Suit for partition—Defect of parties.*—Where an order, purporting to have been passed under s. 30, does not give permission to any definite person or persons, and where the Court does not give notice to the persons interested in the suit, held that such an order is void. Where persons interested in the result of the suit, who are necessary parties, have not been properly made parties to it, the suit must fail by reason of defect of parties. In a suit for partition, all the sharers must be brought before the Court. In a suit by the plaintiffs to establish their right, without making the other sharers parties, held that to make any declaration in a suit to which they were not parties would be in effect to partition joint property, and to define the share of each without all the sharers being before the Court. **KALI KANTA SURMA v. GOURI PROSAD SURMA BARDEURI**, 17 C. 906. (12 W.R. 256, R.) [F., 28 B. 209.]

(41)—*Parties, Array of—Suit against some only of several persons in joint possession—Other defendants joined after expiry of limitation.*—A plaintiff suing for possession of immoveable property originally made defendants some only of several persons in joint possession; the others were not made defendants until after the period of limitation prescribed for such a suit had expired. Held that the suit would not fail as against all the defendants, but the plaintiff would be entitled to a decree for joint possession with such of the defendants as he had omitted to join as parties, until after limitation had expired. **BEHARI LAL v. GIRDHARI LAL**, A W.N. 1897, 36.

(42)—*Member of joint Hindu family contracting alone—Suit—Parties.*—Where, in a suit upon a contract entered into with the plaintiff alone, it is not expressly pleaded, and there is no evidence upon the record to show, that the plaintiff did, at the time of the mortgage, disclose that he was contracting not only on his behalf, but also on behalf of the other members of the joint Hindu family who were co-sharers with the plaintiff, the suit may be instituted by the plaintiff alone without making the co-sharers parties. **BUNGSEE SINGH v. SOODIST**

Parties to Suit—continued.

—1.—General—continued.

LALL, 7 C. 739=10 C.L.R. 263. (10 M.I.A. 160, F.) [F., 27 A. 361=2 A.L.J. 3=A.W.N. 1904, 282, 127 P.R. 1906=10 P.W.R. 1907; R., 22 M. 326, 9 Bom. L.R. 482=31 B. 516; D., 79 P.R. 1906.]

(43)—*Parties—Practice—Joinder of parties—Right of co-owner to sue singly.*—Unless there is a special provision of law, co-owners are not permitted to sue through some or one of their members, but all must join in a suit to recover their property (3 M. 234, F.) Nor can the defendant be deprived of his right to insist on the other co-owners being joined in the record, by reason of there being evidence to show that they approve of the suit being brought by the plaintiff alone. **BALKRISHNA MORESHWAR KUNTE v. THE MUNICIPALITY OF MAHAD**, 10 B. 32. (7 B. 217, F.) [F., 21 B. 154, 5 Bom. L.R. 577, 29 A. 311=4 A.L.J. 194=A.W.N. 1907, 58; R., 7 C.L.J. 251; D., 22 B. 718.]

(44)—Act XIV of 1863, s. 1, cl. 2—*Right of co-sharer to sue—Liability to account to co-parceners.*—Cl. 2, s. 1, Act XIV of 1863, provides for suits by co-sharers for their share of the profits of an estate or any part thereof after payment of the Government revenue and village expenses or for a settlement of accounts. The party against whom such a suit could be brought is the person who is appointed or is entitled by custom to make the collections of rent on behalf of the proprietary body of the estate or any part thereof, and is bound to pay the revenue and village expenses and to account to his co-parceners for his receipts and expenditure as their representative. **SRI KISHEN v. ESHREE PURTAB RAI**, 2 Agra 299. [R., 3 A. 144.]

(45)—*Joint family property—Suit by one member—Right of suit.*—A suit for the recovery of property belonging to a joint Hindu family cannot be brought by only one member of the family. If the other members do not join in the suit as plaintiffs, they may be impleaded as defendants. **GOKOOL PERSHAD v. ETWAREE MAHTO**, 20 W.R. 138. [R., 28 B. 11.]

(46)—*Hindu law—Debt—Hypothecation bond in favour of eldest brother for benefit of family—Suit on bond by promisee alone—Discharge—Payment to younger brother—Burden of proof.*—Plaintiff, the eldest brother of an undivided Hindu family, sued to recover the amount due on a registered hypothecation bond executed to him. The defendants, while admitting the execution of the bond and the consideration therefor, contended that the plaintiff alone could not maintain the suit inasmuch as the bond was executed in the name of the plaintiff for the benefit of himself and his brothers, and that the suit bond had been discharged by payment to a brother of the plaintiff. Held that the plaintiff alone could sue, inasmuch as the contract on which the suit was based was in his sole name and did not purport to have been obtained by him on behalf of any others but himself. Held also that as regards the promisor the plaintiff was the sole promisee under

Parties to Suit—continued.**—1.—General—continued.**

the contract, and in consequence the only person *prima facie* entitled to payment. Payment to any member of a family is not by itself necessarily binding on the member who takes a contract in his own name. It was for the defendants to show that the payment to the younger brother was binding on the plaintiff. No circumstances justifying such payment were proved. **ADAIKKALAM CHETTI v. MARIMUTHU, 22 M. 326=9 M.L.J. 31.** [Not F., 32 M. 284=5 M.L.T. 351, 19 M.L.J. 372; F., 24 B. 123.]

(47)—*Joint Hindu family—Suit for sale on mortgage by father without joining sons—Transfer of Property Act (IV of 1882), s. 88.—Held by the Full Bench (Banerji, J., dissenting), that where a plaintiff-mortgagee institutes a suit for sale under s. 88 of the Transfer of Property Act against his mortgagor, who is the father of sons in an undivided Hindu family governed by the Mitakshara, without joining as parties to the suit the sons of the mortgagor, of whose interests he has notice, and obtains a decree and an order absolute for sale against the father only, the sons can successfully sue for a declaration that the mortgagee decree-holder is not entitled to sell in execution of that decree for sale, their interest in the property comprised in the mortgage given by their father, although the sole ground of their suit is that they were not parties to the suit by the mortgagee.* **BHAWANI PRASAD v. KALLU, 17 A. 537, F.B.=A.W.N. 1895, 12.** [Diss., 1 O.C. 53, 21 M. 222=8 M.L.J. 126, 22 M. 207, 27 C. 724; F., 21 A. 301; R., 18 A. 109, 18 A. 320, 20 A. 110, F.B., 19 A.W.N. 27=21 A. 193, 21 A. 356, 22 A. 307, 22 A. 408, 24 A. 211=A.W.N. 1902, 24, 7 O.C. 137, 33 C. 676=3 C.L.J. 131, 2 N.L.R. 90, 29 A. 544=A.W.N. 1907, 159=4 A.L.J. 424, 30 A. 256=A.W.N. 1908, 106=5 A.L.J. 267, 64 P.R. 1908=132 P.W.R. 1908; D., 21 M. 167, 22 A. 394, 28 C. 517=5 C.W.N. 640, 25 A. 214, F.B.=A.W.N. 1903, 21.]

(48)—*Hindu Law—Manager of joint Hindu family granting a lease as such—Right to sue for rent during life-time of manager—Death of manager—Suit for rent—Parties to suit.—Where the manager of a joint Hindu family has, as such, granted a lease of the family property, he is the only person competent to sue for rent during his life-time. But, after his death, his son, who does not succeed to the management, must, if he wants to sue for such rent, join the other co-parceners as parties to suit.* **DAYABHAI LALLUBHAI v. GOPALJI DAYABHAI, 18 B. 141.** [Rel. on, 22 M. 326.]

(49)—*Hindu law—Suit on behalf of joint family, not maintainable by managing member alone.—Plaintiff who had an undivided brother sued alone, by himself, as the managing member of the family, seeking to recover certain land with a declaration that the land was the property of the family. He was held not entitled to sue alone without making his brother a party to the suit. But both the lower Courts*

Parties to Suit—continued.**—1.—General—continued.**

having upheld the plaintiff's contention that he was entitled to sue alone, the High Court, deciding that the suit ought not to be dismissed on the ground of non-joinder, remanded the suit to the Court of first instance in order that the plaintiff's brother might be made a party to the suit and the case re-tried. **ANGAMUTHU PILLAI v. KOLANDAVELU PILLAI, 23 M. 190.** (18 M. 33, F.; 21 M. 373, D.) [F., 29 A. 311=4 A.L.J. 194=A.W.N. 1907, 58; R., 28 B. 11, 57 P.R. 1905=76 P.L.R. 1905, 69 P.R. 1906=118 P.L.R. 1906, 17 M.L.J. 25, Note, 32 M. 284=5 M.L.T. 351=19 M.L.J. 372.]

(50)—*Hindu law—Undivided family—Right of suit by one member without joining others as parties.—No member of a joint undivided Hindu family, in whom a right claimed inheres, has the right to bring a suit for that right, without joining the other members as parties, plaintiffs or defendants, unless he is the managing member of the family, or brings the suit in that capacity.* **ARUNACHALA v. VYTHIALINGA, 6 M. 27.** [Not F., 23 M. 190; R., 17 B. 6, 18 M. 33, 21 B. 154, 28 B. 11, 69 P.R. (1906)=118 P.L.R. (1906); D., 10 M. 322.]

(51)—*Agreement to advance moneys to firm for carrying out contract with Government—Power of attorney executed by firm authorising lender to receive from Government money due to firm—Equitable assignment of moneys due on contractor's bills—Right of member of family contracting in individual capacity—Contract by one of the members of a firm, when binding on firm.—W.S. and F.E., the partners of a firm, took a contract from Government to construct a barrel-house at a gun-powder manufactory. About two weeks later plaintiff agreed to advance moneys, up to a certain amount, for the purpose of carrying out the contract, the plaintiff to receive all sums becoming due from Government on the contractor's bills, and to pay the balance to the firm after satisfying the advances, with interest. On the same day the firm executed a power of attorney to the plaintiff, authorizing him to receive from the Government Engineer all sums to become due under the bills of the contractors. Several months afterwards, a second agreement was entered into between plaintiff and F.E., one of the partners of the firm, undertaking to make similar further advances to the firm. The right of W.S. in a sum of money due to the firm on the contract was attached by the defendant under a decree against W.S. An application by the plaintiff for removal of the attachment was refused, and he thereon instituted the present suit. The Court below found that the plaintiff was one of the members of a joint Hindu family and could not institute the suit by himself and also that he was not, in any case, entitled to recover the money attached and received by the defendant. On appeal by the plaintiff, it was held as to whether the suit was maintainable by himself alone, that the contract was entered into with*

Parties to Suit—continued.**—1.—General—continued.**

the plaintiff in his individual capacity, and not on behalf of the family, that there was nothing on the face of the contract to show that he was acting on behalf of the family, and he was therefore entitled to sue alone. With regard to the effect of the agreements, the second agreement, though entered into by one member of the firm, was necessary to the carrying out of the partnership business, and was therefore binding on the firm. The two agreements, accompanied by the power of attorney, remained in force throughout, and operated as an assignment to the plaintiff of all the moneys to become due on the contractors' bills as a security for plaintiff's advances with interest, and he was therefore entitled to recover the sum paid to the defendant under the attachment. The decree of the lower Court was therefore reversed and judgment passed for plaintiff. **JAGABHAI LALLUBHAI v. RUSTOMJI NASSAR-WANJI, 9 B. 311.** [Appr., 25 A. 378 = A.W.N. 1903, 76.]

(52)—*Hindu Law—Joint family—Sale by two members—Suit by the son of one to set aside sale—Parties.*—Where property belonging jointly to the plaintiff's father and uncle (the father's brother), members of a Hindu family, is sold, the plaintiff cannot sue to recover either his own share, or his own and his father's share in the absence of the father's brother, who, jointly with the father, is interested in the property, and jointly with the father contracted the debt to raise money for the payment of which the estate is sold. **SHEO CHURN NARAIN SINGH v. CHUKRAREE PERSHAD NARAIN SINGH, 15 W.R. 436.** [F., 2 C. 149.]

(53)—*Joint family—Suit by manager—All co-parceners, whether necessary parties—Objection as to parties to be taken at early stage—Amendment of plaint by adding parties allowable in second appeal.*—Plaintiff sued alone as manager of a family to recover land from the defendant, who took the objection of non-joinder, stating that the other members of the family should be made parties to the suit, and it was held that in such a case, the defendant is always entitled, when he has taken the objection of non-joinder at an early stage, to have all the members of the family placed on the record to ensure him against the possibility of the plaintiff's acting without authority. Under the circumstances, the High Court directed that the plaintiff be allowed to amend his plaint by making the other members of the family mentioned by the defendant parties to the suit. **HARI GOPAL v. GOKALDAS KUSHABASHET, 12 B. 158.** [Appr., 9 Bom. L.R. 1126; R., 21 B. 154, 28 B. 11 = 5 Bom. L.R. 621.]

(54)—*Alienation of debutter lands—Suit to set aside—Parties.*—To a suit by the representatives of three out of four Hindus, joint *sebaits* managing *debutter* property, to have an alienation by the fourth *sebit* alone set aside, the latter is a necessary party. **RAJENDRONATH**

Parties to Suit—continued.**—1.—General—continued.**

DUTT v. SHAIK MAHOMED LALL, 8 C. 42, P.C. = 8 I.A. 135 = 4 Sar. 254. [F., 11 C. 338, 12 P.R. 1905 = 73 P.L.R. 1905; R., 18 A. 227, 69 P.R. 1906 = 118 P.L.R. 1906, 5 C.L.J. 527.]

(55)—*Hindu law — Mitakshara — Alienation by one member of joint family — No legal necessity — Suit to set aside alienation — Parties — Proper issues — Onus — Recital in deed as to legal necessity — Court's duty to raise issue — Portion of sum raised used for legal necessity — Rights of alienee — Charge — Setting aside alienation in proportion to absence of legal necessity — Decree for possession on plaintiff's paying amount spent for legal necessity — Joint Hindu family — Right of one member to alienate his share without legal necessity — Consent of other sharers.*—Plaintiff, on behalf of himself and his minor brother, as sons and heirs of J, deceased, sued to recover possession of certain lands by reversal of certain deeds of absolute and conditional sale executed by his father J, which the plaintiff alleged were executed without any necessity. The deeds were all executed by J and his undivided brother O jointly, but the plaintiff's claim was confined to the one half share alleged to have belonged to J, his father. The property was ancestral property subject to the *Mitakshara* Law. Neither O nor any one representing him had been made a party to the suit. There was nothing to show that the joint family had been separated, or the joint property partitioned. Held that the suit should have been brought by all the joint owners to set aside the deed as to the charge created by O, as well as to the charge created by J, and not by two of them alone who, before partition, had no definite share. If the other members of the joint family refused to join as plaintiffs, they should have been made defendants in the suit. [F., 2 C. 149, 5 B.L.R. App. 14; R., 17 W.R. 266, 22 W.R. 56, P.C. = 14 B.L.R. 187 = 1 I.A. 321, 156 P.R. 1889, 7 C.L.J. 251; D., 1 C. 226, P.C., 5 C.L.R. 112 = 5 C. 425; Cons., 18 W.R. 48.] A recital in a deed of sale, which if true, showed that there was a necessity for borrowing, makes it incumbent on the Court trying the case to raise an issue on the subject. [F., 18 W.R. 77, 15 W.R. 436.] If a larger sum of money was borrowed or raised by the alienation than was required for a legal necessity, and a larger portion of the estate than was necessary for the purpose of raising the sum legally required was mortgaged or sold, the vendees or mortgagees, as the case may be, would be entitled to a charge upon the lands mortgaged or sold to the extent of the money required and taken up for purposes recognized by the *Mitakshara* law as necessary. [F., 5 B.L.R. App. 14, 15 W.R. 436; Cons., 18 W.R. 48.] In a suit to set aside a deed *in toto* and to recover possession upon the ground that the whole of the money was used by the father for the purposes of his own extravagance, the Court might, upon the defendants establishing a necessity for part of the loan, decree that the

Parties to Suit—continued.

—1.—General—continued.

deed should be set aside, and the plaintiff recover possession upon paying the amount which was legally taken up for necessary purposes recognized by law, or that the deed should be set aside in proportion. Under the *Mitakshara* law, one of several members of a joint Hindu family cannot, without legal necessity, alienate any portion of the undivided ancestral property without the consent of the whole of his co-sharers and such alienation is not valid even for the share to which the alienor would have been entitled on partition. **RAJA RAM TEWARI v. LACHMAN PRASAD**, 4 B.L.R.A.C. 118=12 W.R. 478. [F., 14 W.R. 339.]

(56)—*Parties to a mortgage suit*.—In a suit by a sub-mortgage of the mortgage right of the original mortgagee, the original mortgagors are necessary parties, as having an interest in the property from which the plaintiff wants to realise his security. **VENKATA v. RANGA**, 10 M. 160.

(57)—*Parties to suit on mortgage*.—It is not absolutely incumbent upon the holder of a mortgage, to make subsequent incumbrancer's parties to his suit for the enforcement of his mortgage. Of course, such subsequent incumbrancers, if they are not made parties, might, at any time before sale, come in and redeem, and they will not be bound by the decree, but, if they do not redeem, and a sale takes place, their liens will be defeated, unless they can show something more than the existence of their subsequent incumbrances, some fraud or collusion which entitled them to defeat the first incumbrance or to have it postponed to their own. **ALI HASAN v. DHIRAJ**, 4 A. 518=A.W.N. 1882, 118, (1 A. 240, F.) [Not F., 10 A. 520; R., 7 B. 146, 8 A. 324, 13 A. 432 F.B., 1 O.C. 105.]

(58)—*Parties—Mortgage—Alienees of mortgaged property*.—In a suit upon a mortgage the mortgagee is bound to implead as parties persons who are alienees subsequent to the mortgage and who are in possession of the mortgaged security. It is not enough if he makes the mortgagor alone a party. **RAM YAD SINGH v. LALLA SALIGRAM SINGH**, 16 W. R. 98.

(59)—*Transfer of Property Act, s. 85—Parties to a mortgage suit*.—In a suit by a mortgagee on his mortgage, all the mortgagors and the subsequent incumbrancers are necessary parties. **SUBBAN v. ARUNACHALAM**, 15 M. 487. [R., 1 O. C. 53, 31 M. 333.]

(60)—*Mortgage—Liability of person in possession of part of mortgaged property*.—A person who has in his hands half of the property mortgaged is liable to be sued in respect of half the original liability on the mortgage. **SYUD MOBARACK HOSSAIN v. SHEO GOBIND MISR**, 18 W.R. 61.

(61)—*Execution of decree—Powers of Court executing decree—Hindu law—Mortgage decree against father—Son made party*.—A Court executing a decree is bound to give effect to the

Parties to Suit—continued.

—1.—General—continued.

decree as it finds it, and is not competent to vary or alter it in any way. Where, therefore, a decree for sale is made on a mortgage, directing that the whole of the mortgaged property should be sold, the Court executing the decree cannot go into the question whether any portion of that property was exempt from liability under the decree. [F., 32 C. 265.] In the case of a mortgage decree against the father alone of a joint Hindu family, it is not open to the son who has been made a party to the execution proceedings as the legal representative of his father, to raise an objection in these execution proceedings, that the decree against his father was not binding on him in his personal capacity by reason of his not having been made a party to the suit in which the decree was passed. **HIRA LAL SAHU v. PARMESWAR RAI**, 21 A. 356=A.W.N. 1899, 100. (A.W.N. 1899, 24, Overruled; 17 A. 537, 19 A. 480, 21 A. 277, R.)

(62)—*Transfer of Property Act, IV of 1882, s. 85—Mortgage decree against Hindu father—Sons not parties—Effect*.—In a suit by the sons of a Hindu father for a declaration that a decree for sale of mortgaged properties, passed against him without making them parties, was not binding on their share in family properties, it was held that the decree was binding on them and that the real effect of s. 85 of the Transfer of Property Act in such cases was that laid down in 21 M. 222. The ruling in 17 A. 537 was not followed. **PALANI GOUNDAN v. RANGAYYA GOUNDAN**, 22 M. 207. [R., 5 C.W.N. 640, 27 C. 724, 28 C. 517, 27 M. 326=14 M.L.J. 181, 2 N. L. R. 90, 5 N.L.R. 117.]

(63)—*Hindu Law—Decree on mortgage executed by father—Sons not made parties under s. 85, Transfer of Property Act—Onus on sons of proving mortgagees knowledge of their interests*.—In cases where Hindu sons seek to prevent, so far as their interests are concerned, a sale of ancestral property in execution of a mortgage-decree against their father only, it is for the sons to prove that the sale would not, under the circumstances, affect their interests. Where such sons come with the allegation that their shares were not liable to sale under the mortgage-decree in consequence of the mortgagee's omission to implead them as parties to his suit as required by s. 85 of the Transfer of Property Act, it is for them to prove that the mortgagee had notice of their interests in the mortgaged property. **RAM NATH RAI v. LACHMAN RAI**, 21 A. 193. [R., 16 C. P.L.R. 169, 11 C.W.N. 1078=6 C.L.J. 719, 5 N.L. R. 117.] See also **MEWA LAL LACHMI NARAIN v. RAUBAHADUR SINGH**, 21 A. 195, Note.

(64)—*Mortgage in name of two members of joint Hindu family—Right of such members to sue alone—Non-joinder of others*.—A contract in favour of an individual member of a joint Hindu family, and treated by the parties to the contract as such can be sued upon by that member alone, where it is not shown to be on

Parties to Suit—continued.**—1.—General—continued.**

behalf, or for the benefit of the joint family. **SOHNA SHAH v. DIPA SHAH, 15 P.R. 1902.** [R., 102 P.R. 1907, 35 P.R. 1907.]

(65)—*Partition suit—Mortgagee of undivided co-parcener if party—Fraud.*—A mortgagee of an undivided co-parcener, not in possession, was held to be not a necessary party to a partition suit; and where there was no fraud or collusion, he was held bound by the decision of the partition suit. **HEM CHUNDER GHOSE v. THAKO MONI DEBI, 20 C. 533.** [F., 18 M. 316, 8 C.L.J. 478=13 C.W.N. 281, 2 C.W.N. 29; Appr., 23 B. 385; R., 10 C.L.J. 150, 101 P.R. 1894, 2 Bom. L.R. 32, 24 A. 483=A.W.N. 1902, 137.]

(66)—*Appeal against part of decree for redemption—Mortgagees—Necessary parties.*—Where an appeal is preferred against part of a decree for redemption, the mortgagees, though they may not be interested in opposing the appeal, are necessary parties to the appeal; and if they are struck off from the array of parties to the appeal on the application of the appealing plaintiff himself, the appeal cannot proceed against the others and should be dismissed. **MANAKAL VASUDEVAN v. THE COLLECTOR OF MALABAR, 9 M.L.J. 49.** [D., 2 C.L.J. 202.]

(67)—*Transfer of Property Act (IV of 1882), s. 55 (2)—Suit for redemption by puisne mortgagee—Parties.*—When a puisne mortgagee seeks to redeem a prior encumbrance, the mortgagor or his representative is a necessary party to a suit. **CHINNAN v. RAMACHANDRA, 15 M. 54.**

(68)—*Redemption, Suit for—Parties—Co-heir to plaintiff.*—A co-heir of the plaintiff, who has an interest in the mortgaged property at the time of the redemption suit is a necessary party to the suit, but not otherwise. **TRIMBAK JIVAJI DESHMUKHA v. SAKHARAM GOPAL, 16 B. 599.**

(69)—*Mortgage—Redemption—Joinder of person claiming right in opposition to plaintiff.*—In a suit for redemption of mortgage the plaintiff may implead other persons who claim the right of redemption in opposition to himself. **BHOOP SINGH v. NARSING RAI, 3 Agra 144.**

(70)—*Joint mortgagors—Right of each to redeem whole estate—Suit for redemption, parties to.*—Plaintiffs sued to redeem a share of a *Khoti* village which had been jointly mortgaged by its co-owners. Plaintiffs claimed as purchasers at two Court sales of the equity of redemption of portions of the several sharers. They urged that, as owners of a part of the equity of redemption, they were entitled to redeem the whole mortgaged estate, and to seek contribution from the other sharers, including the defendants, who had purchased shares, and that their right so to redeem could not be affected by the defendants' purchase pending the

Parties to Suit—continued.**—1.—General—continued.**

suit, or the partial redemption permitted pending the appeal, whereas the defendants contended that the indivisible character of the mortgage has been destroyed by such purchase and partial redemption. *Held* that, though the property was held by the original mortgagors in shares as members of an undivided family, it was yet mortgaged as a whole for an entire sum and was redeemable only upon payment of the entire sum. Each and every one of the mortgagors was interested in payment of that sum and the redemption of the estate, and each and every one of them had a right, by such payment, to redeem the estate, seeking his contribution from the others. So, at the time the suit was instituted, the present plaintiffs had a right to redeem the whole and that right could not be affected by any act of the defendants *post litem motam*. When sued, the defendants were enjoying as mortgagees and were not entitled to resist the plaintiff's claim; and by thereafter purchasing a share in the equity of redemption, they could not claim to compel the plaintiffs to resort to a suit for partition. The Court was of opinion that a decree for the redemption of a portion of the mortgaged property could not rightly be made in the circumstances of the present case, since the plaintiffs were entitled to redeem the whole estate, but it did not pass a decree to that effect because all the persons interested in portions of the equity of redemption had not been made parties to the suit as they should have been. The suit was, therefore, remanded for re-trial, after being properly constituted as to the necessary parties. **NARO HARI BHAVE v. VITHALBHAT, 10 B. 648.** [R., 21 B. 619; D., 20 M. 295]

(71)—*Suit for redemption—Dismissal of suit without adjudication of claim—Mortgagors disavowing their claims not made parties.*—Any one of the mortgagors or his legal representative if the mortgage-debt has been discharged, is unquestionably entitled to be put in possession of his own share of the estate, whatever his co-parceners may choose to do in the matter. The dismissal of a suit for redemption in the absence of a finding that the mortgage-debt has not been discharged, on the ground that the majority of the mortgagors had no interest in the estate, is not justifiable. **HURDEO v. GANESHEE LALL, 1 Agra 36.**

(72)—*Redemption of mortgage, suit for—Parties—Persons interested in equity of redemption.*—The plaintiff brought a suit against the defendant to redeem certain *khoti* lands mortgaged by the plaintiff's father to the uncle of the defendant. The defendant contended *inter alia* that the plaintiff could not sue alone, as there were eight co-sharers of the plaintiff who ought to be made co-plaintiffs. Their co-sharers were the plaintiff's uncle and the sons of another uncle, who had ceased to be members of the undivided family of the plaintiff at the time the plaintiff's father executed the

Parties to Suit—continued.**—1.—General—continued.**

mortgage. These relations did not claim any interest in the equity of redemption. *Held* that the plaintiff's uncle and cousins were not necessary parties to the suit. The mortgage did not purport to have been made by the plaintiff's father as manager of the family and the plaintiff's uncle and cousins did not claim any interest in the equity of redemption. In the absence of all evidence to that effect, it could not be presumed that the plaintiff's father effected the mortgage otherwise than in his individual capacity. If the defendant had made out that the plaintiff's father and uncles were undivided at that time, it might have been presumed that the mortgage was for and on behalf of them as well as himself, but this the defendant had failed in doing. The mere fact of their relationship did not give them any interest in it. **RAGHO VINAYAK v. SHEIKH DAUD, 13 B. 51.**

(73)—*Second mortgagee suing to redeem first mortgage—Parties—Act XXIV of 1867, s. 17—Administrator-General.*—A second mortgagee sued the overpaid first mortgagees for compelling them to convey to him the mortgaged property. *Held*, that the heir or the legal representative of the deceased mortgagor was a necessary party to the suit. He was not what is denominated in equity a passive party. [*R.*, 7 B.H.C. O.C. 45, 5 B. 14, 5 Bom. L.R. 177.] Having regard to the special circumstances of this case the cause was allowed to stand over for two months for the purpose of enabling the plaintiff to apply for an order to the Administrator-General, under s. 17 of Act XXIV of 1867, directing him to apply for letters of administration of the estate and effects of the deceased mortgagor. In the event of such letters of administration being granted to the Administrator-General, the plaintiff was allowed to amend the plaint, and all other proceedings, by making the Administrator General, a party to the same. The plaintiff should give security for the probable costs of the Administrator-General. **VITHALDAS NAROTAMDAS v. KARSANDAS KESHANDAS, 5 B.H.C. O.C. 76.**

(74)—*Zuripeshgee mortgage—Suit by heirs of mortgagee (a Mahomedan)—Parties—Division of liability.*—In a suit by the heirs of a zuripeshgee mortgagee to recover the amount due under the mortgage, all the heirs of the mortgagee must be represented either as plaintiffs or as defendants, or those who sue must claim in proportion to what they are entitled to under the Mahomedan Law. There can be no division of liability in respect of money advanced on a mortgage. **MUSSAMAT MUJEE-DOONISSA v. SYUD DILDAR HOSSEIN, 14 W.R. 216.**

(75)—*Single mortgage-bond—Property conveyed to different persons—Parties—Multifariousness.*—In a suit on a single mortgage-bond where part of the property is conveyed or is alleged to have been conveyed to different persons, all of them are entitled to notice and

Parties to Suit—continued.**—1.—General—continued.**

should be made parties. There is no multifariousness in such a suit. **KRISHNA GOPAUL GHOSE v. HURRY NATH DUTT, 25 W.R. 60. (8 W.R. 15, D.)**

(76)—*Transfer of Property Act (IV of 1882), s. 85—Prior and subsequent mortgages—Non-compliance with section, effect of.*—A prior mortgagee of certain property sued on the mortgage without making a puisne-mortgagee of the same property a party, obtained a decree for sale, and in execution purchased the property himself. Afterwards, the puisne-mortgagee instituted a suit on his mortgage without making the prior mortgagee a party, and obtaining a decree advertised the property for sale. Thereupon, the prior mortgagee who had purchased the property at the previous execution sale, sued for a declaration that the property was not liable to be sold in execution of the decree. *Held*, that he was entitled to a declaratory decree that the puisne-mortgagee cannot bring to sale the mortgaged property in execution of a decree in a suit to which the prior mortgagee was no party. (16 A. 478, R.) *Semble*, that in a properly constituted suit with a proper array of parties and in a suit in which the puisne-mortgagee offers to redeem the prior mortgage, he may be entitled to bring the property to sale after such redemption. **MEHRBANO v. NADIR ALI, 22 A. 212 = A.W. N. 1900, 27. [D., 23 A. 25.]**

(77)—*Suit by puisne-mortgagee—Necessary party—Proper party—Validity of prior mortgage, whether determinable between co-defendants.*—In a suit by a puisne-mortgagee, on his mortgage, a prior mortgagee is not a necessary party, but is a proper party, if such puisne-mortgagee offer to redeem his mortgage. When the validity of the prior mortgage is in question, the offer to redeem should be conditional on the establishment of such mortgage. The question of the validity of a prior mortgage is determinable between co-defendants in a mortgage suit. **RAJ COOMARY DASSEE v. PREO MADHUB NUNDY, 1 C.W.N. 453. [R. : C.L.J. 337, 29 A. 385, F.B. = A.W.N. 1907, 97 = 4 A.L.J. 273.]**

(78)—*Transfer of Property Act (IV of 1882), s. 85—Suit by mortgagee against mortgagor and two of his sons, sale under decree obtained in—Suit by third son for his share.*—A mortgagee who omits to join persons interested in the property may have his suit dismissed, or, if he obtains a decree, may find notwithstanding that he has to institute or defend another suit. As against a Hindu father, however, a decree which is passed in the absence of his sons is a good and valid decree. The creditor, although he may have failed to obey the rule contained in the section, has got the decree which he requires as a foundation for his application to sell the whole estate. Also, whether the sale sought to be impeached by the son is a voluntary sale or one procured by a proceeding *in invitum*, its validity depends upon the existence of a just debt in satisfaction of which the sale is effected

Parties to Suit—continued.**—1.—General—continued.**

and, in either case, the son may question alike the existence and the nature of the debt in consequence of which the sale has taken place. **RAMASAMAYYAN v. VIRASAMI AYYAR**, 21 M. 222=8 M.L.J. 126. (17 A. 537, R.) [Appr., 22 M. 207, 27 C. 724; R., 22 M. 372, 28 C. 517=5 C.W.N. 640, 27 M. 326=14 M.L.J. 181, 2 N.L.R. 90, 64 P.R. 1908=132 P.W.R. 1903, 5 N.L.R. 117.]

(79)—*Transfer of Property Act (IV of 1882), s. 85—Persons interested in mortgaged property—Mortgages prior and subsequent, omission to implead as parties, effect of.*—The respondents brought a suit for sale upon their mortgage and obtained a decree against their mortgagor and against the present appellant, a subsequent mortgagee. A prior mortgagee who had not been made a party to the above suit instituted a suit on his mortgage without impleading the present respondents and obtained a decree and, at the execution sale thereunder, the said appellant, a subsequent mortgagee happened to purchase a portion of the mortgaged property. On an application by the respondents for an order absolute for sale with reference to their decree, the objections raised by the appellant were upheld to the effect that the appellant having purchased the property in execution of the prior mortgagee's decree, stood in the shoes of that mortgagee, and that, though the respondent not having been made parties to the suit on the prior mortgage, they had the right to redeem the appellant, that circumstances could not entitle them to treat the prior-mortgage decree as non-existent so as to bring the property to sale, under their decree, free from the prior incumbrance. **HARI LAL v. KISHAN LAL**, 19 A. 543=A.W.N. 1897, 153. (3 A 432, R.) [R., 1 C.L.J. 337.]

(80)—*Transfer of Property Act (IV of 1882), s. 85—Suit on mortgage—Holder of mortgage created subsequent to suit, whether a necessary party.*—A person holding a mortgage executed only subsequently to the institution of a suit on a prior mortgage for sale of the mortgaged property, is not necessarily to be made a party under s. 85 of the Transfer of Property Act, since he became a person interested in the property only subsequent to the filing of such suit. **ISHAQ ALI KHAN v. CHUNNI**, 21 A. 149.

(81)—*Mortgagor and mortgagee—Suit by mortgagee for possession against third party—Mortgagor to be impleaded—Separate suit unnecessary.*—In a suit by a mortgagee to obtain possession from a third party of the mortgaged property in his possession, when the title of the mortgagor and therefore also of the mortgagee is denied by the defendant, it is necessary that the plaintiff should show the extent of the rights and interests of the mortgagor in the property. But in order to do this, it is not necessary for the plaintiff to bring a separate suit against the mortgagor. It is sufficient that the mortgagor is made a party defendant

Parties to Suit—continued.**—1.—General—continued.**

to the suit. **DOOLAY SINGH v. GOOLAM HOSSEIN**, 2 N.W.P. 72.

(82)—*Khas possession, Suit for, by mortgagees—Fellow-mortgagees parties to suits—Land suits—Boundaries to be specified.*—Where the plaintiff-mortgagee, a four-anna sharer in the mortgage, maintained a suit for khas possession of an undefined area of land within another area, held he could not sue without making his fellow-mortgagees parties to the suit. Held, also that a suit to recover land without defining the boundaries must be dismissed because the decree, if obtained, would not be capable of execution. **MAHOMED ISMAIL v. LALA DOUNDIR KISHORE NARAIN**, 25 W.R. 39. [D., 26 C. 845.]

(83)—*Suit for foreclosure against assignee of mortgaged property—Representatives of mortgagor.*—In a suit for foreclosure, held that it was necessary to make the personal representatives of the mortgagor parties. He who has the equity of redemption is the only necessary party. **BLAQUIERE v. RAMDHONE DOSS**, **Bourke O.C. 319.**

(84)—*Mortgage by lumbardar to pay Government revenue—Mortgagee as agent of co-sharers—Foreclosure—Notice—Suit by co-sharers to recover their sharers—No appeal against decree of first Court—Acquiescence—Repudiation—Parties.*—The plaintiffs were shareholders whose interests were mortgaged by their lumbardar with his own share to the lumbardars of another puttee in the same estate to raise a sum necessary to satisfy an arrear of Government revenue. The defendants had served notice of foreclosure upon the lumbardar who represented the plaintiffs, and obtained a declaration that the sale had become absolute and they also sued and obtained a decree against the lumbardar for possession. The plaintiffs brought this suit claiming to recover possession of their own share in the puttee on the ground that the mortgage was made without their authority and was not binding on them and claiming pre-emption of the share of the lumbardar. Held that the plaintiffs must be taken to have been parties through their agent the lumbardar to the mortgage deed, for if they were not, they should have repudiated the judgment of the Court of first instance which decreed them their shares conditionally on their paying their quota of the mortgage debt; moreover inasmuch as the mortgage was made to obtain the sum necessary to discharge the arrears of Government revenue, the plaintiffs must be held to have been acquainted with the act of their lumbardar and content to be bound by it. Therefore, as parties to the mortgage through their lumbardar they could not repudiate the consequences of the deed to which they were parties. Where a mortgage was made by a lumbardar for himself and as agent for other sharers, it is necessary to issue notice of foreclosure both to the lumbardar and to his co-sharers and in a suit

Parties to Suit—continued.

—1.—General—continued.

for possession, the co-sharers also should be made parties. **PUNCHUM SINGH v. MUNGLE SINGH, 2 Agra 407.**

(85)—*Mortgage—Foreclosure decree—Effect.*—A foreclosure decree only affects the interest of the parties to the suit. **ANUNDO MOYEE DOSSEE v. DHONENDRO CHUNDER MOOKERJEE, 16 W.R. 19, P.C.=8 B.L.R. 122=14 M.L.A. 101. [R., 28 B. 153=5 Bom. L. R. 892.]**

(86)—*Suit in High Court for foreclosure—Mortgagees not parties—Decree, effect of.*—Where the defendants mortgagors were not parties to a suit for foreclosure of the mortgage on which the plaintiff purchased, their rights could not be affected by the decree passed in it by the proceedings in execution. **JAMES MACKILLIAN v. KALEE DOSS ROY, 25 W.R. 436.**

(87)—*Suit to establish a right to share in property against co sharers in possession thereof—Necessary parties—Misjoinder—Cause of action—Civ. Pro. Code, 1882, s. 28.*—In a suit for possession of certain immoveable property, the plaintiffs alleged that a 5 biswas share was held by B for her life, that she died in December 1888, that thereupon they and the 15 defendants became entitled to that share, and that defendants Nos. 1 to 4 claimed certain parts of the property under mortgages and sales in their favour, which the plaintiffs did not specify, but those mortgages and sales were set out by defendants Nos. 1 to 4 in their written statement. It was found that, with the exception of 32 bigbas, defendants Nos. 1 to 4 were not in joint possession of any of the lands in suit. It was contended by the defendants that the suit was bad on the score of misjoinder. *Held* that, in a suit to establish a right to share in property, all the alleged co-sharers are necessary parties whether they are in opposition to the plaintiffs or not, that it does not matter what title or titles the defendants choose to set up and that such titles do not form part of the plaintiffs' cause of action. In the present case, the plaintiffs' cause of action was that they became entitled to the property on the death of B and that other persons were in wrongful possession. *Held*, therefore, that the suit was not open to objection on the score of misjoinder. **KATIR KHAN v. TALEWAND KHAN, 6 O.C. 379. [F., 9 O. C. 339.]**

(88)—*Co-sharers—Private arrangement among them resulting in the partition of certain lands, other lands remaining joint as before—One co-sharer granting putni lease of separate share—S. 128, Bengal Act VIII of 1876, subsequent partition proceedings by the Collector under—Putnidars proper parties.*—The plaintiffs were three of the co-sharers of a certain estate, a lady being the fourth co-sharer. By means of a private arrangement among them, certain lands were assigned to the various co-sharers in severalty, other lands remaining *ijmali* or joint

Parties to Suit—continued.

—1.—General—continued.

as before. Some 40 years after, the lady co-sharer leased out her share in the estate, in putni, to third parties, who were consequently in possession. There had been separate possession of these lands by virtue of the private partition for the past 70 years. Subsequently the Collector, under Bengal Act VIII of 1876, effected a partition of the whole estate. In the course of the proceedings, the specific lands allotted to the lady co-sharer in the original private partition were allotted to the plaintiffs and these plaintiffs instituted suits for rent against the tenants of the land making the putnidars defendants. *Held*, that the putnidars were properly made defendants in the suits, and that the Courts were justified in trying the question of the right to receive the rent as between the plaintiffs and the putnidars (23 W.R. 227, 4 C. 350, 12 C. 555, R.) The putnidars were entitled to retain possession of the lands allotted to their lessor (the lady co-sharer) in the private partition, by which the plaintiffs were bound notwithstanding the subsequent partition by the Collector under Bengal Act (VIII of 1876), even assuming that the putnidars were not parties to the said partition proceedings by the Collector. **HRIDOY NATH SHAHA v. MOHOLENTNESSA BIBE, 20 C. 285. (13 W.R. 447, 8 C. 72, 12 C.L.R. 281, Appr.; 1 I. A. 106, D.)**

(89)—*Co-sharers of estate—Partition of portion thereof—Parties to suit.*—The lessee under the owner of a share in a joint zemindari will not be entitled to claim partition of the plot of land for which he holds the lease, as against the putnidar of the remaining share, without making either zemindar a party to the suit. Such suits for partition would not be allowed, in view of the multiplicity of suits that would be brought as against the defendant by persons in the plaintiff's position. **PARBATI CHURN DEB v. AIN-UD-DEEN, 7 C. 577=9 C.L.R. 170. [F., 14 C. 122; R., 20 C. 379, 24 C. 575, F.B., 9 C.W.N. 699; D., 27 M. 361=14 M.L.J. 14, 1 C.L.J. 40; Com. on., 12 C.W.N. 640.]**

(90)—*Suit for rent—Co-sharers.*—Where, in a suit for rent, it appeared that, according to a butwara, other persons than the plaintiff were interested in the share for which rent was claimed, *held*, the suit was bad, as all the co-sharers had not been made parties. **OBHOY GOBIND CHOWDHRY v. HURUCHURN CHOWDHRY, 8 C. 277.**

(91)—*One of several co-sharers, not competent to sue for ejectment of tenant—All co-sharers to join in suit.*—A person, who is admittedly only one of a number of persons claiming to be the co-sharers and joint owners of certain land, until he obtains partition of his share, is not competent to bring a suit against a tenant holding such joint land to oust him from a proportional share of the land. Where he wishes to sue without obtaining partition, he must get his co-sharers to join with him in bringing the suit.

Parties to Suit—continued.

—1.—General—continued.

for ejectment of the tenant. **ATTAR SINGH v. DEWA SINGH**, 17 P.R. 1879. [R., 77 P.R. 1883.]

(92 & 93) —*Some of many co-sharers suing trespasser re common land—Effect of non-joinder of other co-sharers—Civ. Pro. Code, 1882, s. 30—Decree, form of.*—One or several of many co-sharers are at liberty to bring an action to prevent invasion of their common land by a mere trespasser. A decree for sole possession or for possession on behalf of other co-sharers, should not in these cases generally be given. A decree for the restoration of the property to its condition prior to the trespasser's invasion protecting the invaded rights which the plaintiff and other co-sharers, possessed in the property would be proper. **RAMSAN ALI v. BASHARAT ALI**, 105 P.R. 1901. [R., 53 P.R. 1907.]

(94)—*Civ. Pro. Code, 1859, s. 73—Parties—Intervention—Discretion of Court.*—Plaintiffs who had obtained a decree in a foreclosure suit brought the present suit against the mortgagors for possession and registration of names as proprietors. Whilst the suit was pending, the respondents intervened and asked to be made parties under s. 73 of the Code on the ground that the plaintiffs were entitled only to a smaller share and that they were entitled to the remainder by purchase. Held that it was very proper to allow them to be made parties to the suit. S. 73 of the Code was intended to leave Courts a discretion in cases where intervenors apply to be made parties to a suit. **SALIGRAM SINGH v. GHEENOO SINGH**, 16 W.R. 19. (7 W.R. 202, 11 W.R. 361, R.)

(95)—*Act VIII (B.C.) of 1869, s. 102—Intervenor—Rent suit—District Judge—Appeal.*—It is not necessary to admit an intervenor in a rent suit under Act VIII (B.C.) of 1869, if his interest cannot be injured by a decree therein. [F., 23 W.R. 168; Appr., 1 C.L.R. 39, F.B.; F., 8 B.L.R. 180=16 W.R. 235.] The words "District Judge" in s. 102, Act VIII (B.C.) of 1869, mean the Judge of the district, and not any Subordinate Judge to whom the case may be transferred for disposal, and an appeal therefore lies under that section in a case tried by a Subordinate Judge. **ISWAR CHANDRA SEN v. BEPIN BEHARI ROY**, 8 B.L.R. 188, Note=16 W.R. 132. [F., 8 B.L.R. 180=16 W.R. 235.]

(96)—*Rent suit—Intervenor—Act X of 1859—Act VIII of 1859 (Civ. Pro. Code), s. 73—Intervenor—Practice.*—Where, in a suit for rent before a Munsif, a party had been irregularly admitted as an intervenor as if it was being tried under Act X of 1859, held, he was not entitled to be treated as if he had been made a party under s. 73, Act VIII of 1859. **CHUNDER KALEE GHOSE v. SHIBNATH BHUTTACHARJEE**, 17 W.R. 176. [Appr., 23 W.R. 168.]

(97)—*Suit for rent—Intervenor—Discretion of Court—Act VIII of 1859, s. 73—Secondary evidence—Decree.*—The discretion of the Court,

Parties to Suit—continued.

—1.—General—continued.

under s. 73, Act VIII of 1859, to add an intervenor, must always be sparingly exercised; and Courts ought not to put on the record any person other than those whom the plaintiff sues, without good cause for so doing. So, it was held that a person preferring opposing claims to the plaintiff in a rent suit should not be made an intervenor, unless his position as such opponent would be seriously compromised by the result of a decree passed in plaintiff's favour. [Cons., 24 W.R. 101.] The plaintiff must prove his case by adducing the best evidence available. Where such evidence is not adduced, but only secondary evidence is let in, no objection having been taken thereto by the opposite side, it is the duty of the Court to pass a decree on such evidence as there is before it. **CHOOIE LALL v. KOKIL SINGH**, 19 W.R. 248.

(98)—*Rent suit—Intervention of third party—Determination of question of title.*—Where, in a suit for rent, a third party intervened and the defendant supported the story of the intervenor, that the plaintiff was merely a benamidar for him, the Court can go into the question of title to determine who had been in receipt of rent. **RADHAMONEE v. RAM NARAIN DEY**, 22 W.R. 440. [Cons., 24 W.R. 101.]

(99)—*Suit for rent—Intervenor claiming land as lakhiraj—Nature of right of—Decree—Effect.*—Where the plaintiff sued for arrears of rent and the defendant, who claimed the land as lakhiraj, intervened, and the lower appellate Court declared the land to be *mal* land of the plaintiff, held, on a special appeal by the defendant, that, the interest claimed by the latter being only in the land and not in the subject-matter of the suit, the decree (if the plaintiff got one) would not be prejudicial to the defendant, and that the latter should not have been made a party. Consequently, the High Court set aside so much of the lower Appellate Court's judgment as decided the question of title against him. **KATTYANEE DEBIA v. GRISH CHUNDER BANERJEE**, 23 W. R. 168.

(100)—*Remand for trial of particular issues—First Court allowing intervention—Registered tenants—Zemindar's sherishta.*—In a rent suit, which a Munsif was trying after remand, he was held to have done wrong in admitting certain parties to intervene. And as names of the intervenors had not been registered in the zemindar's sherishta, held, they had no right to question in this suit the decree passed against the registered tenants. **AMATAL FATIMA KHANUM v. TARANATH CHAND**, 24 W. R. 151.

(101)—*Rent-suit—Intervenor—Right to be impleaded—New issue, introduction of.*—In a suit for arrears of rent, an intervenor has no right to be made a defendant, or to introduce into the suit an entirely new issue, an issue concerning title between himself and the plaintiff. **BIRESSUR PAUREY v. JOGENDRO CHUNDER DEB**, 24 W.R. 261. [F., 8 C. 238; Expl., 25 W.R. 29.]

Parties to Suit—continued.**—1.—General—continued.**

(102)—*Rent suit—Intervenor—Question in first Court—New question re possession not to be raised by lower Appellate Court—Act X of 1859, s. 77—Practice*—Where the parties, in a suit for rent in which an intervenor appears, had chosen to litigate their dispute on a basis which, whether right or wrong, the Munsiff had accepted and which neither party had objected to, viz., to ascertain who in fact was up to the time of the commencement of the suit actually and in good faith in the receipt and the enjoyment of rent, the Judge on appeal should not raise the question of title. *Quere.*—Is the Munsiff's procedure in this case the right one, now that Act X of 1859, s. 77, has been repealed, and not re enacted in the new law? *AULUCK MONEE DABEE v. DINO NATH GHOSE, 24 W.R. 421. [F., 8 C. 238.]*

(103)—*Intervenor claiming rent of larger share of land—Party to suit.*—Where an intervenor claimed, in a suit for rent, to receive the rents of a larger share of land of which plaintiff claimed all the rent, held that the intervenor was properly impleaded as a party to the suit. *KANHYE ROY v. SHAIKH HYDER BUKSH, 25 W.R. 29. (24 W.R. 261, 8 B.L.R. 196, R.)*

(104)—*Suit for rent—Intervention of third party—Setting up new question.*—Upon a suit brought by a person claiming as landlord for arrears of rent, a third person ought not to be allowed to intervene, and, by setting up a superior claim to the landlord's title, to raise, as between himself and the original plaintiff, an entirely distinct question between new parties. *PROTAP CHUNDER ROY CHOWDHRY v. JOGENDRO CHUNDER GHOSE, 4 C.L.R. 168. [F., 7 C.W.N. 596.]*

(105)—*Necessary parties to a suit for constructive possession.*—Where, what the plaintiffs asked for was not partition or exclusive possession of any specific portion of the disputed land which formed part of the other estates, but only indirect or constructive possession by receipt of rent to the extent of their share from the tenants, the proprietors of such other estates were not necessary parties. *KAMAL KUMARI CHOWDHURANI v. KIRAN CHANDRA ROY, 2 C.W.N. 229. [D., 35 C. 807=7 C.L.J. 483.]*

(106)—*Suit for possession, maintainability of, where both parties are lessees.*—In a suit to recover possession of certain lands which the plaintiffs alleged belonged to them by virtue of a talooka putta granted by the zemindars, the defendants pleaded that the lands belonged to some third party under whom they held as tenants. The first and the lower appellate Courts held that the suit was not maintainable as the plaintiff and the defendants held under certain superior landholders. *Held*, in special appeal, that the suit would lie. When a plaintiff sues under a title given by a superior landholder, he is entitled, if that title is called

Parties to Suit—continued.**—1.—General—continued.**

in question, to have it put in issue and determined. *Held* also, that the lessors on either side were unnecessarily made parties, there being no cause of action against either of them. *NAGUR CHAND v. DOORGA DOSS CHOWDHRY, 11 W.R. 137.*

(107)—*Suit—Lessee—Possession.*—A lessee whose lessors have never been in possession of the lands comprised in the lease, has a right to bring an action to establish the title of his lessors, if he makes them co-defendants in the suit along with the parties in possession. *FRANKRISHNA DEY v. BISWAMBAR SEN, 2 B.L.R. A.C. 207=11 W.R. 80. [F., 22 W.R. 99, 25 W.R. 223, 14 M. 269; Appl., 25 W.R. 48; Appr., 23 W.R. 131; R., 2 B. 299.]*

(108)—*Suit for dispossession by one ryot against another—Zemindar—Party.*—In a suit brought by one ryot against another for dispossessing him, it is not necessary that the zemindar should be made a party. *RAM KANT DASS v. BATANOO DASS, 1 W.R. 140.*

(109)—*Parties to suit—Suit for declaration of right—Proprietor and not karindah to be made party.*—In a suit for declaration of right against the proprietor of an estate, it is necessary that the proprietor himself be made a party to the suit and not his *karindah* only. *MADHO RAO APA v. THAKOOR PERSHAD, 3 Agra 127.*

(110)—*Civ. Pro. Code, Act XIV of 1882, s. 32—Suit in ejectment against lessee—Proper parties.*—In an ejectment suit by a lessor against his lessee, the lessor's lessor or persons claiming to hold the land from a third person, or such third person, ought not to be added as parties, since such a joinder changes a suit of one character into a suit of an entirely different character. *SANKARA NARAYANAN v. ANANTA NARAYANAYYAN, 20 M. 375.*

(111)—*Specific Relief Act (I of 1877), s. 9, suit under—Ejectment by several persons—Ejectment by single person—Defence that ejector acted as agent of another—Mis-statement in pleading as to area of land sued for—Proper person to sue.*—When three persons join in ousting a fourth from the possession of any property, they all by that act become the co-possessors of the property from which they expelled him. In such a case, if he brings a suit under s. 9 of the Specific Relief Act, he may implead all the three as defendants, for he has no means of knowing which of the three is principal and which are assistants, so as to acquire possession not for themselves but for their employer. [*R.*, 15 B. 685, 12 C.P.L.R. 52, 16 C.P.L.R. 154.] If we take the case of a single person ejecting another, and a suit brought to recover possession, it is not to be contended that the intention of the Specific Relief Act (I of 1877), s. 9, may be frustrated, by any private arrangement under which the ejector has acted, or consents to hold on behalf of some other person. As between him and such other person, his possession may be that of an agent, but to the

Parties to Suit—continued.

—1.—General—continued.

former holder he is the dispossessor: possession derived from him cannot be superior to his, and (the right of suit being given in general terms) is equally subject as his to the result of proceedings taken within the prescribed six months. Even a declaration made by the ejector at the time of ouster, may not affect the case. He may name some person beyond the reach of the Court's process; or some one who, in fact, has given him no authority. The person ejected is not compelled to take the risk of suing such a defendant, much less of abandoning his suit against the immediate trespasser. If, indeed, he is satisfied that the active agent in ejecting him has been impelled by some one else, he may sue the latter. He may sue both; but the wrong-doer who has taken possession is the one from whom primarily the property is to be reclaimed. If a third party desire to maintain the expulsion as an act done on his behalf, it is for him to come forward and avow it. He may claim to be admitted as a defendant; but if he had himself a right to do what his agent has done, his right and his authority may be pleaded by the agent, and will be an effectual answer. The alleged owner or principal, therefore, is not a necessary party for the protection of the agent. The suit against the latter will fail if he acted on due authority where that authority is shown. In a suit for ejectment, if the space to be recovered is precisely defined by proper description, a mis-statement of its measurement in square yards may be treated as surplusage and of no consequence. Where under a contract between A and B, exclusive possession of immoveable property is given to A, he is the proper person to sue for possession under s. 9 of the Specific Relief Act. If, however, B desires to sue immediately on the possessory right, he should sue in A's name, though, for an injury to the reversion, he (B) may properly sue in his own name. **VIRJIVANDAS MADHAVDAS v. MAHOMADALI KHAN, 5 B. 208.**

(112)—*Suit to eject trespassers from a village*—*Competence of one or more co-sharers to sue.*—*Held* that there is nothing to prohibit one or more of several joint co-sharers in a village from suing to eject a trespasser from the joint lands. **MANNU v. NASRAT-ULLAH KHAN, A.W.N. 1901, 36. (5 A. 602, F.; A.W.N. 1888, 156, Diss. from.)**

(113)—*Suit to eject from village common land*—*Necessary parties*—*Punjab Civil Code, s. 21, para 8*—*Common land*—*Village site.*—In this suit to eject a fakir from a piece of land occupied by him with the permission of the plaintiff within the last 8 years, it was found that the land was village cultivable land belonging to the proprietary body. *Held*, that para 8 of s. 21 of the Punjab Civil Code had no application to the case, and it was necessary that the other members of the proprietary body must be made parties to the suit, which was therefore remanded to make them parties. **KHAN SINGH v. GOBIND DOSS, 39 P.R. 1866.**

Parties to Suit—continued.

—1.—General—continued.

(114)—*Common land, suit relating to*—*Necessary parties.*—In dealing with a suit relating to common land, the Court must have before it the whole proprietary body as parties. **HOKMA SINGH v. FUTTEH SINGH, 103 P.R. 1866.**

(115)—*Village community*—*Common land*—*Common rights*—*Separate rights*—*Conveyance of right to dig kunker.*—Many of the rights of landholders in a village belong to them collectively, but, in regard to their several holdings, they are in a state of more or less perfect partition, and there is nothing to prevent each khewutdar from granting the right to enter and dig kunker upon his own distinct holding. But in regard to the common land, there is no separation. In this the property is blended, and the rights of the village proprietors as individuals can be asserted only in one way—by a claim for partition. None of the common proprietors can make any change without the approbation of all parties concerned. So, where plaintiff claimed the right to dig kunker in a village under a deed executed by 25 out of the 37 sharers therein, it was *held* that such rights could be claimed only in respect of the private lands of the khewutdars and could not be claimed in respect of the common land or any portion of it. **MR. J.P.C. ANDERSON v. MR. E. TAYLOR, 70 P.R. 1866. (F., 109 P.R. 1879; D., 148 P.R. 1882.)**

(116)—*Shamilat land*—*Right of occupancy*—*Suit involving rights of proprietary body*—*Necessary parties.*—No decree adverse to the rights of the proprietary body can be passed unless they are made parties to the suit, either as a body or through their customary representatives. **BOOTA v. WUZEERA, 18 P.R. 1867.**

(117)—*Act XIV of 1863, s. 7*—*Lambardar*—*Collection of rent in putteedaree estate*—*Putteedars severally collecting their shares.*—Ordinarily, a lambardar in these provinces would collect the rent in putteedaree estates, and as such, might distrain for them. But s. 7, Act XIV of 1863, recognizes a different state of things, where the rent of a puttee is not collected by a lambardar, but through the putteedar entitled to receive the rent. **BHOLA NATH v. BISHESHUR TEWAREE, 2 Agra 365.**

(118)—*Parties to suit*—*Transferee of rights.*—Two putneedaras sued the dur-putneedaras for arrears of rent. It was admitted that the defendants had executed an engagement to pay rent to these two persons as putneedaras, but as regards one of the plaintiffs, it came out in the proceedings that she was not a sole owner of the putnee rights which she claimed, but that these rights were shared by her husband's brother, and, as to the second plaintiff, that previous to the commencement of the suit, she had executed an ekrarnamah by which she assigned all her rights to her son. *Held* that, when the engagement of the defendants was executed in favour of the plaintiffs, and when

Parties to Suit—continued.**—1.—General—continued.**

the parties, who were stated to have subsequently acquired their interest, appeared and petitioned the Court assenting to the suit being brought in that way, there was a quite sufficiently constituted suit, a quite sufficient array of parties, to enable the Court to give a decree upon the plaint. **SREENATH MOOKERJEE v. MR. JOHN WHITE, 13 W.R. 126.**

(119)—*Ryot's interest in tenure sold in execution of talookdar's decree—Subsequent suit for arrears by talookdar—Execution-purchaser necessary party.*—A talukdar, having got a decree in a suit under Act X, against a ryot of his, took out execution and put up for sale the right and interest of the tenant in the tenure. Another suit was subsequently instituted against the same ryot by the talukdar for arrears and ejectment, and it was held that, as he had caused the sale in execution of the decree in the former suit, he must, if he wished the decree for ejectment to be binding upon the execution-purchaser, have made her a party to that suit. **PROSUNNO MOYEE DOSSEE v. BHUBO TARINEE DOSSEE, 10 W.R. 494.** [*F.*, 17 W.R. 417; *R.*, 15 W.R. 341.]

(120)—*Parties to suit—Persons interested to be impleaded*—When a superior holder representing the zemindar by whom certain *mokurru-ree* pottahs were granted, brings a suit, against a party holding a small portion of land as grantee by a title derived from lessees under the *mokurru-ree* pottahs, for a declaration that the pottahs were forgeries, it is necessary that all those parties who were interested and claim under those pottahs should have been made parties to the suit, according to the general rule that all persons who were interested in the question must be made parties to a suit instituted in a Court of equity. **DUKHEENA MOHUN ROY v. AMEERODDEEN MAHOMED, 12 W.R. 247.**

(121)—*Lease—Suit by one of several joint-lessors for his share of rent.*—A suit is not maintainable by one of several joint lessors for his share of the rent payable to all of them, even though the other lessors should be impleaded as defendants. **MANOHAR DAS v. MANSUR ALI, 5 A. 40 = A.W.N. 1882, 143.** [*R.*, 6 A. 576, 68 P.L.R. 1901.]

(122)—*Act VIII (B.C.) of 1869—Rent suits—Issues.*—A suit for rent, as authorized by Act VIII of 1869 (B.C.), must be a *bona fide* suit for rent, and is not to be a trial of a wholly different issue between parties advancing conflicting claims of ownership to the estate. **RADHA MALAKAR v. SHRISHTEE NARAIN SHAHA, 21 W.R. 88.** [*Cons.*, 22 W.R. 526, 24 W.R. 101.]

(123)—*Act X of 1859, s. 77—Landlord and Tenant parties in Civil Court—Applicability of section to Civil Court.*—Neither Act X of 1859, s. 77, nor anything analogous to that section, can apply to a suit in the Civil Court, to which the only parties are the landholder who claims

Parties to Suit—continued.**—1.—General—continued.**

the rent and the ryot who disputes his title to receive rent. **SREEMUTTY WOOMA TARA v. BHUROS RAM DASS, 24 W.R. 409.**

(124)—*Rent suit—Defendant setting up title of third party.*—Where the defendant in a suit for rent sets up the title of a third person, under whom he claims to hold the land, such third person ought not to be made a party to the suit, so as to convert a suit for rent into one for the determination of title. (The issues to be tried in such a suit explained by *Field, J.*) **LODAI MOLLAH v. KALLY DASS ROY, 8 C.238 = 10 C.L.R. 581.** [*F.*, 12 C.P.L.R. 1.]

(125)—*Act VIII (B.C.) of 1869, s. 7—Suit to determine title between plaintiff and third party under color of rent suit—Maintainability of suit.*—Where a suit was brought with a view of bringing in a third party and of having tried, under color of a rent suit, a question of title between that plaintiff and the party, such a proceeding being opposed to the principle laid down in s. 7 of Act VIII of 1869, the suit was not maintainable. **BYKUNT KYBURTO DOSS v. SHUSHEE MOHUN PUAL CHOWDHRY, 22 W.R. 526.**

(126)—*Rent suit—Intervention—Act VIII of 1859, s. 73—Issue whether property formed part of one mouzah or another—Dispossession of intervenor—Remedy.*—In a suit against a ryot for rent of certain land, a third party intervened and got himself made a party under s. 73, Act VIII of 1859, and as between him and the plaintiff an issue was raised whether the property formed part of one mouzah or another: *Held*, that this was giving an entirely new scope and character to the suit. If the ryot had taken land under plaintiff, and either agreed or made himself liable to pay rent to him, the plaintiff was entitled to a decree against him. If by those proceedings the intervenor had been dispossessed, it was his business to bring a Civil suit to recover possession of the land. **GOOROO PROSUNNO BANERJEE v. GUGGUN CHUNDER DUTT, 20 W.R. 383.** [*Appr.*, 24 W.R. 357, 9 C. 671; *D.*, 22 W.R. 440.]

(127)—*Holding let to several ryots—Suit for rent not legally maintainable against one only of such ryots.*—Plaintiff, having let out certain lands to three ryots, sued one of them for the rent of the total holding. *Held* that the suit was not properly and legally brought, as it was impossible, unless all the three ryots were included, to decide what the rights of the defendant were. The rent being due from three persons, the suit should have been brought against those three. **ROOP NARAIN SINGH v. JUGGOO SINGH, 10 W.R. 304.** [*R.*, 15 C.W.N. 191 = 7 Ind. Cas. 840 = 12 C.L.J. 642.]

(128)—*Landlord and tenant—Rent suit by one of several co-sharers—Parties.*—No suit for arrears of rent can be brought by one of several co-sharers, unless it is shown that the

Parties to Suit—continued.**—1.—General—continued.**

co-sharers are unwilling to join in it as plaintiffs. **RAJA SHOSHEE SHEKHARESWAR ROY v. GIRIS CHANDRA LAHIRI, 1 C.W.N. 659.**

(129)—*Parties—Rent suit—Tenant raising title of third party—Necessary party—Remand by lower appellate Court—Civ. Pro. Code (Act V of 1908), s. 151, O. I, r. 10, O. XLI, r. 23.*—In a rent-suit, the tenant set up the title of a third person. The suit was decreed by the first Court, but on appeal the lower appellate Court held that that person should be brought in as a defendant, and remanded the case for re-trial on the question of title between him and the plaintiffs. *Held*, that, although that person may not be an absolutely necessary party to the suit, he was a proper party, and the lower appellate Court was entitled to hold that his presence was necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, within the meaning of O. I, r. 10 of the Civ. Pro. Code. It was competent to the appellate Court to remand this case by the exercise of its inherent powers under s. 151 of the Code. **UPENDRA CHANDRA v. SHAIKH SABHAN, 11 Ind. Cas. 183. (7 Ind. Cas. 75, 12 C.L.J. 368, F.)**

(130)—*Suit for rent—Decree against tenant—Dismissal of suit against tenant's vendee—Party to suit—Special appeal.*—Where a suit for rent was decreed by a lower appellate Court against the tenant, but dismissed against his vendee, who had been wrongly added as a party-defendant, *held*, that no special appeal by the latter lay to the High Court to have it declared that he was liable for rent as vendee from the tenant. **MUSSUMAT OOGNEE CHOWDHRAIN v. SHAIKH KERAMUTOOLLAH, 17 W.R. 219. [D., 9 C.W.N. 584.]**

(131)—*Suit for profits of common land—Revenue Court, jurisdiction of—Special appeal—Partition suit.*—A suit for a share in the profits of common land of a village, brought by one proprietor against another would, prior to the passing of Act XIX of 1865, and at the time of the passing of Act XI of 1865, have been cognizable by Revenue Court in the Punjab, and a special appeal would lie in such a case. But as all the co-sharers are necessary parties to a suit of that nature, a suit will not lie by each co-sharer for his share against the individuals who have realized the proceeds of a particular portion of the *shamilat* (common land). **JAFIR KHAN v. FIROZ KHAN, 110 P.R. 1876.**

(132)—*Suit for dissolution of partnership—Heir of deceased partner not made party.*—Decree for an account of dealings and transactions of a deceased partner in a Hindu family bank, and for a dissolution of the partnership, reversed, on the ground that the respective rights of the parties were not sufficiently defined and declared, and that the decree, under any circumstances, was erroneous, being made without the heir or legal representative of the

Parties to Suit—continued.**—1.—General—continued.**

deceased partner being a party to the suit. **BABOO JANOEY DOSS v. BINDABUN DOSS, 3 M.I.A. 175.**

(133)—*Representatives of a deceased partner.*—The representatives of a deceased partner are not necessary parties to an action for damages under a guarantee to the original firm. **BURKIN YOUNG v. BHOOBUN MOHUN BONERJEE, Cor. 90.**

(134)—*S. 45, Contract Act (IX of 1872)—S. 4, Succession Certificate Act (1889)—Suit for recovery of partnership debt—Representatives of deceased partner, necessary parties.*—Where the surviving partners sued for the recovery of a partnership debt, which became due during the life-time of a deceased partner, *held* his representatives must always be made necessary parties, under s. 45, Act IX of 1872. For the proper framing of the suit, the provisions of s. 4, Succession Certificate Act, must be complied with. *Obiter.*—In the case of a family partnership under the Mitakshara Law, a question might possibly arise as to the applicability of s. 45 of the Contract Act and of s. 4 of the Succession Certificate Act. **RAM NARAIN NURSING DOSS v. RAM CHUNDER JANKEE LOLL, 18 C. 86. (9 A. 496 Diss.) [F., L.B.R. 1872—1892, 651; Rel on, 70 P.R. 1904; R., 17 M. 147, 9 C.P.L.R. 65, U.B.R. 1892-1896, 204, 13 C.W.N. 509=9 C.L.J. 331; Diss., 20 A. 365, 10 P.R. 1906, 4 L.B.R. 99; Not F., 17 B. 6.]**

(135)—*Trading partnership—Suit to recover partnership debt—Parties—Death of partner pending suit—Representative need not be added as party.*—In a suit to recover a debt due to a trading partnership in which it happens that a deceased person was a partner up to the time of his death, it is not necessary to join as plaintiff any representative whatever of the deceased partner. **DEBI DAS v. NIRPAT, 20 A. 365=A.W.N. 1898, 73. (9 A. 486, 18 C. 86, 17 B. 6. R.) [F., 10 P.R. 1906; R., 13 C.W.N. 50=9 C.L.J. 331.]**

(136)—*Party—Suit for account by partner against representatives of deceased partner—Receiver of deceased partner's estate, whether necessary party—Civ. Pro. Code (Act of 1908), s. 151, O. XLI, r. 23—Remand by appellate Court when suit not disposed on preliminary point—Inherent power of Court.*—In a suit to wind up a partnership business brought by one partner against the representatives of a deceased partner it is necessary to join as party defendant the receiver appointed by competent Court to take charge of the estate of the deceased. (6 Ind. Cas. 214, 14 C.W.N. 653, 6 Ind. Cas. 63, 11 C.L.J. 958, R.) When a decree has been made by an original Court in a suit improperly framed by reason of the failure of the plaintiff to join a necessary party as a defendant, it is competent to the Court of appeal, under s. 151 of the Civ. Pro. Code, to set aside the decision and to remand the case for re-trial with directions to add all

Parties to Suit—continued.**—1.—General—continued.**

necessary parties. *TOHRA BIBI v. ZBAEDA KHATOON*, 7 Ind. Cas. 75=12 C.L.J. 368. (18 A. 131, 18 A. 396, 23 A. 167, 25 A. 194, R.)

(137)—*Hindu father employing son as manager of mercantile business—Right of suit.*—A Hindu father, who was the sole owner of a mercantile business, employed his eldest son as manager of the business. The son sued the defendants for money due in respect of his dealings with the firm in that capacity, instituting the suit in his own name. *Held*, that the son was not competent to sue in his own name, as he had no personal right of suit, and as such right could not be conferred upon him by his father's consent to the exercise thereof. *AJUDHIA PRASAD v. GAYA DIN*, A.W.N. 1881, 23.

(138)—*Hindu family trade—Partnership—One member alone suing—Non-joinder.*—One member of a joint Hindu trading family cannot sue in respect of the partnership without making the other partners parties. If, by adding the parties, the defendants were deprived of the defence of limitation, the amendment ought not to be allowed. *ALAGAPPA CHETTY v. VELLIAN CHETTI*, 18 M. 33=4 M.L.J. 283. [F., 23 M. 190, 29 A. 311=4 A.L.J. 194=A.W.N. 1907, 58, 17 M.L.J. 25; R., 28 B. 11, 25 A. 378, 57 P.R. 1905=76 P.L.R. 1905, 118 P.L.R. 1906=69 P.R. 1906, 2 N.L.R. 79, 5 M.L.T. 351, 32 M. 284=19 M.L.J. 372; D., 10 P.W.R. 1907=58 P.L.R. 1907=127 P.R. 1906, 103 P.L.R. 1902.]

(139)—*Suit by principal partner's wife—Wife a partner—Minor partners, suit against—Parties to be impleaded.*—Case where it was held that, under the Contract Law, the wife of a principal partner in a firm, even though a partner herself, cannot sue the minor partners without impleading the principal partner as a party in the suit. *NIRMUL CHUNDER DUTT v. SHOWROBINEE DOSSI*, 25 W.R. 203.

(140)—*Death of proprietor of firm—Dissolution of firm—Continuation of Business—Suit on behalf of firm.*—A firm is dissolved if the original proprietors are dead, and if somebody comes in their place, and carries on the business of the firm; the business whether carried on under the old name or under a new one, is not the business of the old firm, but of an entirely new firm. A suit brought on behalf of such a new firm must be brought in the name of the persons carrying it on. *GOSSAIN GUNGA DUTT BHARUTEE v. DABEE DASS BABOO*, 25 W.R. 188.

(141)—*Suit for administration of estate of deceased partner.*—The fact that surviving partners are made parties to an administration suit of the estate of a deceased partner does not of itself alone enable the Court to direct such surviving partners to render an account of the partnership estate. Surviving partners cannot be made co-defendants with the executors in

Parties to Suit—continued.**—1.—General—continued.**

such a suit merely by reason of their partnership. They can be made co-defendants, in certain special cases, as where the relation between the executors or administrators of the deceased partner and the surviving partners is such as to present a substantial impediment to the prosecution by the executors or administrators of the rights of the parties interested in the estate against the surviving partners. *ELIAS v. HUBOOR MOOSHEE MOOSHEE, Bourke*, O.C. 350.

(142)—*Partners—Refusal to join as plaintiffs.*—A, B, C and others were partners in a firm and had transactions, as such partners, with another firm, in which C also was a partner. In a suit by the former firm against the latter, C and other partners in the former firm refused to join as plaintiffs. *Held* (reversing the decision of the Court below) that C and the other partners of the former firm were rightly made defendants. *BISSONATH RUCKITT v. GUNNESH CHUNDER DEY*, 2 Ind. Jur. N. S. 203. See also *RUSTUM ALLY v. AMEER ALLY SOUDAGUR*, 10 W.R. 487.

(143)—*Indian Contract Act (IX of 1872), s. 43—Suit against one partner for money due by firm, not bad for non-joinder—Civ. Pro. Code, s. 29.*—Under the law contained in s. 43 of the Indian Contract Act read with s. 29 of the Code of Civil Procedure, in suing to recover a sum due to the plaintiff by a firm of partners it is not incumbent on the plaintiff to make all the partners defendants to the suit. It is quite competent to him to institute his suit against such of the partners alone as he may choose, and such a suit would not be bad for non-joinder of the remaining partners. *NARAYANA CHETTI v. LAKSHMANA CHETTI*, 21 M. 256. (6 B. 700, R.) [R., 22 A. 307, 15 C.P.L.R. 51.]

(144)—*Contribution—Suit against co-sharer—No adjustment of accounts—Necessity for making other partners parties to suit.*—Where an action was brought by some members of a defunct firm, whose accounts had not been adjusted, against a co-sharer to recover money due by way of contribution in respect of a debt paid by them it was necessary that the other partners should have been made parties. *PEAREE MOHUN ROY v. CHUNDER NATH ROY*, 18 W.R. 408.

(145)—*Right of co-contractor to sue alone.*—There is no equity, but often much injustice, in allowing one joint contractor, out of many, to sue a defendant, notwithstanding an objection duly made by the latter: and the Court has no right to allow one contractor to recover under such circumstances, though he may no doubt afterwards adjust the sum which he recovers with his co-contractors. *RAMSEBUK v. RAMLAL KOONDOO*, 6 C. 815=8 C. L. R. 457.

(146)—*Application to wind up business of partnership after its termination.*—Parties to

Parties to Suit—continued.

—1.—General—continued.

such suit—*Limitation Act*, 1877, sch. II, arts. 106, 120.—In a suit for dissolution of partnership and for taking accounts, an assignee or purchaser of the rights and interests of one of the partners is a necessary party. [R., 107 P. R. 1907.] A suit of the above kind is governed by art. 120 and not by art. 106 of sch. II of the Limitation Act. **HARRISON v. THE DELHI AND LONDON BANK**, 4 A. 437 = A.W.N. 1882, 87.

(147)—*Mahomedan family—Bond—Parties*.—The daughters of a Mahomedan widow are not necessary parties to a suit by her against her husband's brother, on behalf of herself and her minor sons, for their share in a debt due to her husband and his two brothers but recovered by one brother alone. **NURUNNISSA v. BIBI ROUSHAN JAN**, 2 B.L.R., App., 1.

(148)—*Mahomedan Law—Suit to recover endowed property—Joint mutwallis—Parties to suit*.—In a suit to recover property belonging to an endowment, from a person alleging that it is his absolute property, all the mutwallis of the endowment should, if possible, be made plaintiffs; but if any of them refused, they should be made defendants. **BECHU LAL v. OLIULLAH**, 11 C. 338. (8 I.A. 135, R.) [Cons., 156 P.R. 1889; R., 5 C.L.J. 527.]

(149)—*Mahomedan Law—Gift by father to son—Reservation of interest to father for life—Intention to affect succession ab intestato, deed of gift not vitiated by*.—Although ordinarily a mere *benami* or *ismfurzee* title is simply a nominal title without interest, such a disposition by a donor where the transfer of the property, from its very nature, effected a legal transfer of it, would be simply the creation of a trust in his favour, and would, of course, leave the disposition *ab intestato* undisturbed. In the present case, a Mahomedan father transferred Company's paper to his son, reserving to himself for life the interest accruing on the said paper, his object being to give the son a larger share of his property than would come to him by succession *ab intestato*. It was sought to treat such transfer and its intention as evasive of the testamentary law of the Mahomedans and as inconsistent with their law of gifts. But the Judicial Committee observed that, in the absence of immoral or illegal purposes accompanying or prompting an act of disposition of property, a disposition which the law admits cannot be evasive of the law. The law of succession *ab intestato* applies only to the assets which constitute the succession. If the law allow alienation so as to defeat a succession, the question whether a subject of property is an asset or not raises simply the question whether the transfer of it is legally complete. The design to alter and so in one sense to defeat a succession by a disposition of property which the law allows is simply a design to conform to the law whilst working out an unforbidden design. It was also sought to be contended that a transfer of property by

Parties to Suit—continued.

—1.—General—continued.

a donor in his life-time under the Mahomedan law, preserving not the dominion over the *corpus* of the property, nor any share of dominion over the *corpus*, but simply stipulating for and obtaining a right to the recurring produce during the transferor's life-time, would be an incomplete gift under the Mahomedan law. But the Judicial Committee held that, even assuming that the agreement for the reservation of the interest to the father for his life may possibly be treated as a condition repugnant to the whole enjoyment by the donee, the Mahomedan law would in such a case defeat, not the grant itself, but only the condition. **NAWAB UMJAD ALLY KHAN v. MOHUMDEE BEGUM**, 10 W.R., P.C., 25 = 11 M.I.A. 517. [R., 16 W.R. 175, 9 C. 138, 5 A. 285, 35 C. 1, P.C. = 34 I.A. 167 = 11 C.W.N. 973 = 6 C.L.J. 695 = 9 Bom. L.R. 872 = 4 A.L.J. 572 = 17 M.L.J. 408.]

(150) — *Drawer and acceptor of a bill of exchange*.—The holder of a bill of exchange can join the drawer and acceptor thereof as co-defendants in the same suit. **PESTONJEE EDULJEE GURDUR v. MIRZA MOHAMED ALLY**, 3 C. 541.

(151)—*Hundi—Right to sue drawer when arises—Parties to suit*.—Immediately on the failure of payment of a draft at sight, whatever may be the real state of the account between the drawer and the drawee, the former becomes liable to the payee for the amount which would place him, at the stipulated time and place, in the same position as if the money had been duly paid. Where there has been no acceptance, no cause of action can have arisen to the payee against the drawee. Nor is the legal relation between the drawer and the payee altered by a partial acceptance, the contract being in its nature indivisible; much less can any mere promise to pay part at a future time, in any way satisfy the payee's claim or postpone his right to reimbursement of his loss from the drawer. The payee in the above cases ought not to join the drawer and the drawee as defendants in the same suit, but he must sue the drawer alone. **SHETH KHAN-DAS NARANDAS v. DAHIABAI**, 3 B. 182.

(152)—*Hundi—Dishonour—Notice—Right of purchaser to sue indorser alone*.—A purchaser of a *hundi* on its being dishonoured is bound to present the same for payment within a reasonable time and give reasonable notice of dishonour, i.e., within the time within which it is ordinarily given according to the custom of the merchants and bankers of the district, not the immediate notice required by English law in cases of bills of exchange. The purchaser may sue his endorser alone and it is not absolutely necessary to implead the acceptor and drawer in the same suit. He does not lose his right of suit against the drawer and acceptor, if he does not sue them at once, as long as he sues within the time allowed by the law of limitation. **GOPAL DASS v. SEETA RAM**, 3 Agra 268.

Parties to Suit—continued.**— 1.—General—continued.**

(153)—*Suit on lost cheque—Cause of action—Parties to suit—Civ. Pro. Code, 1877, s. 61.*—When a cheque is lost by a payee or indorsee, the refusal of the drawer or the indorser to renew the cheque or refund its amount to the payee or indorsee, gives the latter a cause of action against the former. Where the indorsee sues the indorser for renewal of a lost cheque, the drawer also must be impleaded, as the cheque cannot be renewed without his co-operation. **BALDEO PRASAD v. GRISH CHANDAR BHOSE, 2 A. 734.**

(154)—*Suit to recover property—Suit by fictitious owner—Right of suit*—In the Courts in India, where a suit is brought to recover property, it ought to be brought by the real owner, and not by a person who claims to be owner by virtue of a transaction, which is found not to be a real one. **BIBEE TANAOONNISSA v. WOOLJULMONEE DOSSEE, 20 W.R. 72.**

(155)—*Right of suit—Bond in name of person other than plaintiff—Oral evidence admissible to show nature of transaction—Representative of obligee necessary party to suit.*—Plaintiff sued on bonds that stood in the name of his deceased sister, alleging that the money belonged to him and that his sister was merely a name-lender. *Held* that it was open to the plaintiff to show by oral evidence that the debt secured by the bonds was money advanced by him and on his behalf through his sister, the deceased, and so entitle himself to recover the amount due upon the bond in a suit properly framed; but to such a suit it was necessary that the personal representatives of the deceased should have been made parties. **DEVA ROW v. VENKATESA ACHARIYAR, 1 M H C 452.**

(156)—*Right to sue—Benamidar—Real owner.*—A *benami* holder may sue as trustee on behalf of the beneficial owner without disclosing the name of the real owner; and if the defendant does not object to the suit proceeding in that form and raises no issue upon the real title of plaintiff, the suit might proceed and be decided, the *benamidar* suing in the place of the real owner. But if the defendant objects to the suit being instituted by the nominal and fictitious owner, and denies plaintiff's title to bring any suit at all, the suit cannot proceed or must be dismissed. **PROSUNNO COOMAR ROY CHOWDHRY v. GOOROO CHURN SEIN, 3 W.R. 159.** [*Diss.*, 18 A. 69 = A.W.N. 1895, 60; *F.*, 16 C. 364; *R.*, 13 C.P.L.R. 33, 3 O.C. 265, 30 M. 245 = 17 M.L.J. 174; *D.*, 18 W.R. 454.]

(157)—*S. 85, Transfer of Property Act, 1882—Suit by benamidar for foreclosure of mortgage, maintainability of.*—A person named in the mortgage-deed, as mortgagee, though he is only a *benamidar*, may maintain a suit for foreclosure and for possession of the land mortgaged. Such a suit should not be dismissed, because the beneficial owner is not added as a party. **SACHITANANDA MOHAPATRA v. BALORAM GORAIN, 24 C. 644.** [*F.*, 21 A. 380 = A.W.N. 1899, 130; *R.*, 1 O.C. 10, 13 C.P.L.R. 33, 30 C. 265; *D.*, 64 P.R. 1908 = 132 P.W.R. 1908.]

Parties to Suit—continued.**— 1.—General—continued.**

(158)—*Benamidar—Right to sue—Disclaimer of real owner—Parties.*—A mere *benamidar* has no right to sue as such, and neither the disclaimer of the real owner, nor the fact that he was a party to the suit, is sufficient to enable the *benamidar* to maintain the suit when instituted, or to entitle him to have the real owner joined as a co-plaintiff. [*F.*, 25 C. 98 = 3 C.W.N. 20, 25 C. 874; *Appr.*, 30 C. 265, 30 M. 245 = 17 M.L.J. 174; *Expl.*, 7 C.W.N. 229; *Diss.*, 18 A. 69 = A.W.N. 1895, 160, 22 B. 672, 21 A. 380 = 19 A.W.N. 130; *D.*, 21 M. 30; *R.*, 1 O.C. 10, 13 C.P.L.R. 33, 12 C.W.N. 409.] A statement by any party to the suit subsequent to the date of its institution cannot give the plaintiff a title. **HAR GOBIND ADHIKARI v. AKHOY KUMAR MOZUMDAR, 16 C. 364.** (3 W.R. 159, *F.*)

(159)—*Act X of 1859, s. 105—Provisions relating to auction purchasers not applicable to defaulting tenant purchasing his own tenure—Reg. VIII of 1819, ss. 8, 11, rights of auction purchaser when arises under—Benamidar, whether competent to sue for property.*—Plaintiff having failed in his intervention in a suit for arrears of rent instituted by the defendant against certain ryots, brought this action for the purpose of getting his title declared to certain lands alleged by him to appertain to a *howala* tenure, which he had purchased at a sale held by the Collector under the provisions of s. 105, Act X of 1859. Finding that, as set up by the defendant, the plaintiff was a mere *benamidar* for the defaulting *howaladar*, and that the plaintiff had failed to establish his title to the land which he sued for, both the lower Courts dismissed the suit. On remand in special appeal, the lower appellate Court found that the *howala* tenure in question, was one which was liable to be brought to sale by virtue of certain express reservations to that effect contained in the original lease by which it was created, and that, therefore, the plaintiff as a purchaser of a tenure under the provisions of s. 105, Act X of 1859, was competent to get rid of all alienations and encumbrances made by the former tenant, and passed a decree in favour of the plaintiff. This decree was reversed by the High Court on the ground that plaintiff, as a mere *benami* purchaser for the defaulting *howaladar*, had no right whatsoever to maintain the suit, and that the benefit of the law relating to auction purchasers under s. 105, Act X of 1859, was one which the defaulting tenant himself could not claim before a Court of Justice. It is very improper to allow a tenant to commit default, and after purchasing the tenure in execution of a decree passed against himself, to come forward against a third party whose title had been created by himself, and to ask the Court to set aside that title, merely because he chooses to come in the garb of an auction purchaser. In case he has sold to a third party, he would be bound not only by the purchase of that party but also by all the *bona fide*

Parties to Suit—continued.**—1.—General—continued.**

leases under such party. Merely because benami usage is permitted by the Courts, it does not follow, as a necessary consequence, that the real owner should be permitted to keep himself aloof and to carry on litigation in the name of a person who has no interest whatsoever in that litigation so far as he himself is concerned. A mere benamidar is not entitled to maintain a suit for property in which he has no beneficial interest. Moreover the High Court was of opinion that there was nothing in the original lease by which the howal⁴ tenure was created, to show that the tenure was expressly reserved for sale for non-payment of rent, or, in other words, to show that the tenure was one of the description given in s. 8 of Reg. VIII of 1819. The contract was between the Zemindar and the howaladar, and plaintiff could have no right to come forward and ask for the enforcement of a privilege which was not reserved for his benefit and which did not, therefore, belong to him. **MEHEROONISSA BIBEE v. HUR CHURN BOSE**, 10 W.R. 220. [R., 10 C. 697, 22 B. 820, 1 O.C. 12, 13 C.P.L.R. 33; *Doubted*, 5 C.L.R. 102; D., 18 A. 69=15 A.W.N. 160.]

(160)—*Right of benamidar to maintain suit for ejectment.*—A person who is only a *benamidar*, cannot maintain a suit for ejectment. He has neither title nor possession. **ISSUR CHANDRA DUTT v. GOPAL CHANDRA DAS**, 25 C. 98=3 C.W.N. 20. (16 C. 364, F.; 18 A. 69. *Not F.*) [F., 25 C. 784, 7 C.W.N. 229; *Appr.*, 30 C. 268, 30 M. 245=17 M.L.J. 174; *Diss.*, 21 A. 380=A.W.N. 1899, 130, 13 C.P.L.R. 33.]

(161)—*Benamidar's right to sue for land.*—A benamidar has no right to maintain a suit for recovery of possession of land purchased. **BARODA SUNDARI GHOSE v. DINO BANDHU KHAN**, 25 C. 874=3 C.W.N. 12. (16 C. 364, 25 C. 98, F.; 18 A. 69, R.; 10 C. 697, D.) [F., 7 C.W.N. 229; *Appr.*, 30 M. 245=17 M.L.J. 174; *Rel. on*, 30 C. 265; *Diss.*, 21 A. 380=A.W.N. 1899, 130; D., 13 C.P.L.R. 33.]

(162)—*Mortgage, suit for sale on—Maintainability of suit by benamidar.*—A suit for sale of the mortgaged property may be brought by the person named in the mortgage deed, though he is only a *benamidar*, and the suit should not be dismissed because the beneficial owner is not a party. **YAD RAM v. UMRao SINGH**, 21 A. 380. (18 A. 69, 10 C. 697, 24 C. 34, 24 C. 644, 15 M. 267, 22 B. 672, 28 B. 820, R.; 16 C. 864, 25 C. 98, 25 C. 874, *Not F.*) [*Diss.*, 30 C. 265; F., 28 A. 44=2 A.L.J. 702=A.W.N. 1905, 173; R., 13 C.P.L.R. 33, 10 O.C. 263.]

(163)—*Parties—Benamidar, suit in sole name of.*—Where a suit is brought in the name of a *benamidar* only, the Court ought to direct, that the beneficial owners should be made parties, and not to dismiss the suit. **SITA NATH SHAHA v. NOBIN CHUNDER ROY**, 5 C.L.R. 102. [R., 16 C. 364, 13 C.P.L.R. 33, 4 Ind. Cas. 488; D., 10 C. 697.]

Parties to Suit—continued.**—1 —General—continued.**

(164)—*Advocate-General—Suit for account of endowed property of death on last surviving trustee.*—*Quere*—Whether the Advocate-General must not be made a party in all cases where an account is sued for of property left by will to a charitable institution of which the last surviving trustee has died. Notice of the decree directed to be given to the Advocate-General, in case he should think fit, on behalf of the Crown, to propose a scheme for the management of the charity. **POWERS OF THE ADVOCATE-GENERAL THAKOOR DOSS SETT v. HOGG**, Cor. 68.

(165)—*Direction in will to keep properties in trust for several beneficiaries—Suit to recover entire trust properties, whether maintainable by some alone of the beneficiaries.*—A suit was brought by two out of eleven beneficiaries under a Will, by which the testator directed that certain properties to be kept in trust and the rents realised therefrom be divided equally among the whole of his children and their heirs respectively for a declaration that certain properties were among the trust properties under the Will, and for recovery of possession of the same, on the ground that a certain compromise and the sales in pursuance of it, under which the defendant claimed, were contrary to the directions of the Will and the trust and therefore not binding upon them. The suit as brought was held to be not maintainable by the two plaintiffs alone. The properties would be vested in the trustees until their removal, and a suit demanding transfer of possession to the beneficiaries would have to be properly brought by all of them together. The plaintiffs, who were only two out of the eleven beneficiaries, could not seek to recover possession on behalf of all the other beneficiaries, unless the latter were also parties before the Court. Also, apart from any question of the form of the action, the alienations in question were binding on the plaintiffs and therefore neither of them had any cause of action. *Per Subramania Ayyar, J. (dissentiente.)* The mere fact of the plaintiffs having asked for larger relief than they were entitled to could not be taken to warrant the dismissal of the suit altogether. Plaintiffs were not precluded from suing in respect of their shares alone, since their claim fell within the class of cases in which one of the *cestui que trustent* may be entitled to sue the trustee and a third party jointly, but in which he will be bound to confine his suit to the specific matter in respect of which alone the third party is liable. **PADMANABHA CHETTIAR v. WILLIAMS**, 23 M. 239=10 M.L.J. 10. [R., 6 M.L.T. 143=32 M. 490.]

(166)—*S. 28, Civ. Pro. Code, 1882—Application to set aside a consent decree in suit to set aside trust deed—Right of trustee.*—Where an application is made to set aside a consent decree in a suit to set aside a trust deed, in which though added as a party, the trustee did not appear, and the suit was subsequently withdrawn as against him, the trustee was entitled to appear

Parties to Suit—continued.**—1.—General—continued.**

in the application, and be heard on the motion as a necessary party. **NUNDO LAL BOSE v. NISTARINI DASSI, 27 C. 428=4 C.W.N. 169.**

(167)—*Civ. Pro. Code, 1882, s. 539 (=ss. 92, 93, new Code)—Suit for removal of trustee—Alienees of trustees not necessary parties.*—A suit to have a trustee removed and another appointed in his place is a suit which is covered by the provisions of s. 539, Civ. Pro. Code, and therefore is maintainable. (12 M. 157, 14 M. 1, 186, 20 C. 397, 20 C. 810, 17 M. 462, 15 B. 612, 16 B. 626, 21 B. 48, 24 C. 418, R.) [F., 21 A. 200; R., 5 O.C. 110, 2 C.L.J. 431, 2 C.L.J. 460, 33 C. 789=10 C.W.N. 581.] In such a suit as is mentioned in para. (1), it is not necessary that the transferees from the trustees, the defendants, should also be made parties. **HUSENI BEGAM v. THE COLLECTOR OF MORADABAD, 20 A. 46=A.W.N. 1897, 210.** (15 L.A. 1, 15 B. 612, R.)

(168)—*Decision as to extent of trusts—Trustee's right to surplus—Parties.*—In a suit in which all the parties interested are not before the Court, the Court cannot decide as to the extent of the religious trusts, or whether any surplus profit after the performance of these trusts would belong to the trustee personally. **BISHEN CHAND BASAMAT v. NADIR HOSSEIN, 15 C. 329=15 L.A. 1, P. C.=5 Sar. 113.** [R., 20 A. 46=A.W.N. 1897, 210.]

(169)—*Uralers—Samudayi—Party competent to sue.*—The Uralers or trustees of a temple are the proper persons to bring a suit on behalf of the temple and not their agent, the Samudayi. **RAMA VARAR v. KRISHNEN NAMBUDRI, 2 M. 270.**

(170)—*Procedure—Right of suit—Party entitled to sue must sue—Agents.*—All suits should be brought by the person or persons in whom the legal right of suit is vested, and not by agents in their own names. Where a suit is brought by the agents in their own names, then the whole procedure is vitiated. An objection taken to such procedure is an important one and it materially affects the regularity of procedure. In this case, the suit was dismissed and the costs of the whole litigation were borne by the plaintiffs. **LALA MANOHUR DOSS v. KISHEN DYAL, 3 N.W.P. 175.**

(171)—*Act X of 1859—Institution of suit by agent in his own name.*—Act X of 1859 allows suits to be instituted by a zemindar, or in his name by his authorized agent. The agent has no right to institute the suit in his own name. The zemindar's name must appear on the record as the plaintiff. **LADLEE PERSHAD v. GUNGA PERSHAD, 4 N.W.P. 59.**

(172)—*Appeal—Agent—Suit by agent in his own name.*—Where the suit brought by the plaintiffs, *karindas* of the appellant, in their own name, was dismissed on the merits and appeals preferred by the appellant in his own name to the Judge and to the High Court, held that the procedure adopted was illegal, and the decrees

Parties to Suit—continued.**—1.—General—continued.**

of the lower Courts must be set aside. **FYAZ-OD-DEEN v. MUSSAMUT PUDMEE, 4 N.W.P. 68.**

(173)—*Person appointed by general power-of-attorney—Whether he could sue in his own name.*—A person appointed under a general power-of-attorney cannot sue in his own name, and such suits should be brought in the name of the persons on whose behalf he has been appointed as attorney. **CHOONNEE SOOKUL v. HUR PERSHAD, 1 N.W.P. 277.**

(174)—*Principal and agent—Right of agent to sue or be sued—General rule—Exceptions.*—The general rule is that the principal and not the agent is the person to sue or be sued in any matter, either of contract or tort. When a contract is made by an agent in his own name, without disclosing that he is an agent in the matter, and nothing appears to prevent him from claiming to be principal, it may often be necessary for the safety of the defendant, that the agent should bring a suit on the contract in the character which he appears to have under the contract. Also where a person, who is agent in a matter, even on the face of the contract, may be personally liable in consequence of the contract, or of something arising out of it. In such a case he might well be sued as a defendant, even though the plaintiff knew he was merely an agent in the matter. Where the agent is himself interested in the matter or property which is the subject of the contract which he has entered into on behalf of another, it may be necessary that he should be a party to the suit, either as plaintiff or defendant, not because he was agent, but because he has this interest. **WILKINSON v. GANGADHAR SIRKAR, 6 B.L.R. 486.**

(175)—*Rent suit—Suing by agent—Tahsildar's right to sue for arrears of rent during predecessors time—Act X of 1859, s. 69—General authority to collect rents—Necessity of writing.*—No one can be plaintiff except the person or persons who have the right to recover. The only effect of s. 69 of Act X of 1859, is to enable the person who is employed in the collection of rents to do that, as agent, which would otherwise have to be done by the plaintiff in person. A newly appointed Tahsildar stands precisely in the same position in respect of arrears of rent which accrued during the time of his predecessor, as he does in respect of rents which accrue during his own time. It is his duty to collect both, and he may take advantage of s. 69 of Act X of 1859 in respect of one, as well as of the other. *Per Markby, J.* Though it has been decided that a general *sunnud* to collect rents and sue for them must be stamped, there is no decision to the effect that a general authority to collect rents and sue for them must be in writing. **MODHOO SOODUN SINGH v. MESSRS. WILLIAM MORAN AND CO., 11 W.R. 43.** See **MEJAH KHAN v. AKALLY, Marsh. 384=2 Hay. 426.**

Parties to Suit—continued.**—1.—General**—continued.

(176)—*Principal and agent—Decree against agent—Principal not impleaded—Execution.*—A suit for the recovery of a sum due from a firm was brought and decreed against the *Gomashta* of the firm; neither the owner of the firm nor his heirs were impleaded and properly represented in the Court. The decree was sought to be executed against the firm. *Held* that if the decree was meant to be passed against the owner of the firm, it was illegal as it was passed against a person not only not present or properly represented, but dead at the time; if it was passed against the *Gomashta*, it could not be executed against the firm. **PHOOL CHUND v. SHIVA PERSHAD, 2 Agra Mis. 4.**

(177)—*Act VIII (B.C.), 1869, s. 13—Recognized agent—Written authority—Rent suit—Gomastah.*—Where a gomastah holds a written authority from the hands of his employer and sues for rent in the name and on behalf of his employer, he must be admitted as the recognized agent of such employer within the meaning of s. 13 of Act VIII of 1869. **RAM LALL KURFURMA v. RAM TARUN KUNDOO, 16 W.R. 254.**

(178)—*Suit in the name of gumasta—Bengal Act VIII of 1869, s. 32.*—A gumasta, under s. 32 of Bengal Act VIII of 1869, has no right to sue in his own name, but must, like any other agent, sue and conduct the suit in his employer's name. **KOONJOO BEHARY ROY v. POORNO CHUNDER CHATTERJEE, 9 C. 450 = 12 C.L. R. 55.**

(179)—*Sale to agent of firm—Suit by agent to establish right—Parties—Minors—Guardian ad litem.*—A, in order to pay off a decree and other debts, sold the houses in dispute to the firm of which the plaintiff was *Gomashta*. B, another creditor of A, attached the said houses, whereupon the plaintiff intervened and preferred a claim; the claim was dismissed and the plaintiff was referred to a regular suit. Then the plaintiff, as *Gomashta* of the firm (the members of which were minors), sued on behalf of the firm both A and B to establish the right to the houses sold to him. *Held* that the lower Court having to decide on rights alleged by the plaintiff to belong to minors, for whom he stated that he acted as a trustee, ought not to have passed its decision without making those persons parties, appointing a guardian *ad litem* to represent the minors; and, in deciding on the issue as to the validity of the sale, the Court should endeavour to ascertain whether the money paid in satisfaction of the decree against A was or was not paid by the plaintiff out of the monies of, or on behalf of, the minors. **GOBIND DASS v. JAYKISHEN DASS, 2 Agra 101.**

(180)—*Agent—Suit by agent—Contract not personally with agent—Agent having no interest in suit—Right to maintain suit.*—In an action brought by G as manager of a concern on the basis of a *kabooleut* or contract to cultivate

Parties to Suit—continued.**—1.—General**—continued.

indigo, alleged to have been executed by the defendant, and addressed to a previous manager of the said concern, now deceased, the plaintiff did not disclose that G had any interest of his own in the suit, nor was the *kabooleut* in terms with him personally. *Held* that G could not maintain the action in his own name. **GLASCOTT v. GOPAL SHEIKH, 9 W.R. 254 [R., 12 W. R. 208, 23 W.R. 242.]**

(181)—*Official Assignee—Recognized agent—Amendment of plaint.*—The recognized agent of an Official Assignee had no *locus standi* to sue as plaintiff. The Official Assignee should be made a plaintiff and then he might sue by his recognized agent. The plaint was accordingly returned for amendment. **CARTER v. MISREE LAL, 2 N.W.P. 179. [R., 21 B. 205, L.B.R. (1907-1908) 95.]**

(182)—*Frame of suit—Suit against corporate body—Suit against agent—Error in merits of case—Civ. Pro. Code, 1859, s. 350—Addition of parties—Discretion—New party likely to be affected by result of suit.*—A suit against a corporate body, not brought in its corporate capacity, but through an agent, is bad in form. Where the decree of the Lower Court is one which makes a party liable who is clearly not liable, there is an error in the decision which affects the substantial merits of the case. Under s. 73 of Act VIII of 1859, it is not imperative on the Court to admit parties to a record. It is in the discretion of the Court to do so or not. A Court is justified in refusing an application to make a person party to a suit, if that person is likely to be affected by the result of the suit. **NUBEEN CHUNDER PAUL v. CECIL STEPHENSON, 15 W.R. 534.**

(183)—*Party to suit—Servant of real defendant—Decree, Proper form of.*—Where, before the lower appellate Court, plaintiff in the memorandum of appeal committed the error of mentioning the servant of the real defendant as the defendant and the Judge failed to notice the irregularity, the High Court remanding the case *held*, that the memorandum of appeal may be returned for amendment or rejected. Where the decree did not specify the relief granted but merely repeated the judgment "that the appeal may be decreed," *held* that that was not a sufficient compliance with the requirements of the law. **HURSARUN SINGH v. PURSHUN SINGH, 2 N.W.P. 415. [D., A. W.N. 1908, 237 = 5 A.L.J. 742.]**

(184)—*Insolvency—Assignment to trustees for benefit of creditors—Validity of assignment, suit valuation—Suit by trustees in insolvency to set aside attachment—Joinder of parties.*—An insolvent debtor in the *mofussil* may assign all his property to trustees for the benefit of creditors, who may assent to the conditions of the assignment, and such an assignment will be valid, although it may operate to defeat an expected execution, if it be the intention of the assignor to confer on the assenting creditors a substantial interest in the property assigned,

Parties to Suit—continued.**—1.—General—continued.**

and not merely to defeat or hinder a judgment-creditor. Such an assignment may be made to trustees, and it is not requisite that it should be made directly to the assenting creditors. It will confer on the trustees a title to the property assigned superior to that of a judgment-creditor who has obtained an order for attachment subsequently to the assignment. It is not invalid if made subject to a condition requiring assenting creditors to execute a release of the debtor; but *semble*, the Court might order such resulting trust to be executed for the benefit of judgment-creditors who decline to the assignment. Nor is it invalid, if it empowers the trustees to permit the debtor to retain such portion of his furniture, linen, etc., as they may think fit; but this power should be exercised only when the other assets are sufficient to discharge the primary objects of the trust. Nor is it invalid, if it contain a power for the trustees to continue the business, if the power so given is ancillary to winding up the business and realizing the assets of the estate. Nor is it invalid, if executed only by a minority of the creditors. Nor can it be invalidated by subsequent negligence on the part of the trustees. The question of intention of the debtor in executing such an assignment is a question of fact rather than of law, and, in determining this question, the condition and trust subject to which the assignment is made may be considered. The valuation for stamp duty of a suit brought by the trustees in insolvency to set aside an attachment, should be calculated on the value of the lien claimed by the judgment-creditor. All the creditors of an insolvent need not be joined as parties to a suit by the trustees in insolvency to set aside an attachment. **TRUSTEES OF PALMER'S ESTATE v. COLONEL BOMGARTNER, 3 Agra 104.**

(185)—*Insolvent Act (11 and 12 Vic. C. 21)*—*Suit to recover money from defendant who has been adjudicated an insolvent—Official Assignee not to be made a party*—There is nothing in the Insolvency Act, which enables a suit brought by the plaintiff, against a person, who, shortly before the suit, having been adjudicated an insolvent under the Indian Insolvent Act and his estate being vested in the Official Assignee, to be continued against the Official Assignee, for the Official Assignee was not a proper party. The Official Assignee's name should not be placed on the record as a defendant. If his name had been wrongly placed there and judgment was entered against him for the sum claimed, to be paid out of the insolvent's estate, such a judgment would work manifest injustice and prevent the beneficial operation of the Insolvency sections of the Act, because a judgment of this kind, as against the Official Assignee, comes to this, that he is to pay the money out of the estate in his hands, and that the plaintiff is entitled to get the whole of his claim and that it is to be paid in full, if the whole estate of the insolvent is sufficient to pay him. This is

Parties to Suit—continued.**—1.—General—continued.**

clearly wrong. **MILLER v. BUDH SINGH DUDHURIA, 18 C. 43.** [R., 22 C. 259, 25 M. 406; Diss., 31 C. 667.]

(186)—*Official Assignee not a necessary party to a suit to recover a money-debt from an insolvent.*—The Official Assignee is not a necessary party in any suit to recover a money-debt from person who is either an insolvent at the time the suit is instituted or becomes insolvent pending the suit. **CHANDMAL v. RANEE SOONDERY DOSSEE, 22 C. 259.** (1 B.H.C. 251, 18 C. 43, R.). [Appr., 25 M. 406; R., 5. A.L.J. 553 = A.W.N. 1908, 203.]

(187)—*Specific performance, suit for.*—In a suit for specific performance of a single contract, the parties on each side must be marshalled as plaintiffs and defendants. **KAZI SHAFIAR RAHAMAN v. MOHEEMUNNESSA, 2 C.W.N. 42.**

(188)—*Specific Relief Act, I of 1877, s. 42—Suit under—Parties.*—A stranger to a contract, of which specific performance is sought, cannot be a party to the suit. **LUCKEMSEY OOKERDA v. FAZULLA CASSUMBHOY, 5 B. 177.**

(189)—*Civ. Pro. Code, s. 28—Minor—Party to suit for specific performance of contract.*—In a suit for the specific performance of a contract of partition entered into between the members of a joint Hindu family, a minor son of one of the defendants, though not a party to the contract, may be properly joined as defendant, though as against him a decree for specific performance cannot be obtained. **ALAGAPPA MUDALIAR v. SIVARAMA SUNDARA MUDALIAR, 19 M. 211.** [R., 11 Bom. L.R. 545.]

(190)—*Civ. Pro. Code, s. 32—Suit for increase of maintenance by member of Malabar tarwad—Necessary parties—Joinder by appellate Court.*—A member of a Malabar tarwad cannot sue the karnavan for an increased rate of maintenance, where there has been an arrangement assigning properties to the several tavarais for the maintenance of their members, unless he brings all the members of the tarwad before the Court. But, of course, he may implead some as representatives of the whole body. The appellate Court should add the necessary parties when it finds that they have not been joined as parties. **MAMMELI v. PAKKI, 7 M. 428.**

(191)—*Right to maintenance.*—As to the right of an illegitimate son of a Gosavi by a married woman living in adultery with him to maintenance out of his father's property, it cannot be decided in a suit which concerns only one portion of the deceased's property, and to which all persons in possession of the rest of it are not parties. **NARAYAN BHARTHI v. LAVING BHARTHI, 2 B. 140.**

(192)—*Contract for sale of goods—Time for delivery or payment not mentioned in agreement—Suit for damages by seller for balance of*

Parties to Suit—continued.**—1.—General**—continued.

purchase money maintainable—Principal to be made party and not agent.—Nothing having been said in an agreement for sale of goods, about the time of delivery or payment, the construction of law is, that the seller would deliver on payment of the price, and that the buyer would pay the price upon receiving the goods; either party being competent to call upon the other within a reasonable time to fulfil his part of the bargain, provided he was ready to fulfil his own, but not otherwise. Nothing in the circumstances showing a contrary intention, the parties may be presumed to have intended to make the payment of the price contemporaneous with the delivery of the possession. The name of the principal alone and not that of his agent should have been used in such suit. **JUGGUN NATH v. BECK, 2 N.W.P. 60.**

(193)—*Practice—Parties—Defendant who has assigned interest in property in suit—No right to be made co-plaintiff—Plaintiff without right of action—No right to remedy defect by joining others in whom right supposed to lie.*—A defendant who has assigned all his interests in the subject-matter of the suit, and has no longer any right in it, has no right to be made a co-plaintiff. A plaintiff who has no right of action when he brings his suit, cannot remedy the defect and acquire the right by joining with him persons in whom such right lies. **SAYAD ABDUL HAK v. GULAM JILANI, 20 B. 677.** [Disappr., 12 C.L.J. 537; R., 1 O.C. 10, 3 O.C. 347; D., 25 B. 433, 7 O.C. 193.]

(194)—*Money bond—Bona fide assignment—Assignor if liable to be made party to suit by assignee to enforce bond.*—Where a common money bond was bona fide transferred to another, the assignor was not a necessary party to a suit by the assignee to enforce the payment of the amount due under the bond, and a joint decree could not be passed against the assignor along with the obligor. **ANONYMOUS v. MUTTUSAMIYA PILLAI, 1 M.H.C. 140.**

(195)—*Pre-emption—Suit to enforce right of pre-emption—Parties—Vendor not a necessary party.*—Held that in a suit for pre-emption the vendor is not a necessary party. **LOK SINGH v. BALWAN SINGH, A.W.N. 1903, 239.** (6 A. 57, F.) [F., 10 O.C. 49, A.W.N. 1904, 128, 26 A. 549; R., 6 A.L.J. 926.]

(196)—*Pre-emption suit—Vendor, whether necessary party.*—In a suit for pre-emption, the vendor is not a necessary party. **RAM SARUP v. SITAL PRASAD, 26 A. 549=1 A.L.J. 278.** (6 A. 57, A.W.N. 1903, 239, F.) [R., 10 O.C. 49, 6 A.L.J. 296=6 M.L.T. 300=32 A. 14=3 Ind. Cas. 735.]

(197)—*Purchase of land—Subsequent transfer to pre-emptor—Profits—Purchaser's right to.*—A person who purchases land which he has to surrender to a pre-emptor subsequently, has a claim to the rents and profits of the land accruing between the date of his purchase and the

Parties to Suit—continued.**—1.—General**—continued.

transfer, and in a suit by him to recover the same, the pre-emptor also must be made a party to it. **BULDEO PERSHAD v. MOHUN, 1 Agra Rev. 30.** [F., 8 A. 502=A.W.N. 1886, 149; Appl., 12 A. 234, F.B.]

(198)—*Distribution of sale proceeds—S. 270, Civ. Pro. Code, 1859—Suit by one attaching creditor against others—Parties.*—An attaching creditor, not satisfied with the share allotted to him on a distribution of sale proceeds under Act VIII of 1859, s. 270, suing the other attaching creditors, alleging himself to have made the first attachment, ought to implead as defendants all who have shared in the distribution. **BROJOKANTH CHUCKERBUTTY v. BANEE MADHUB DISCHIT, 23 W.R. 434.** [Appr., 13 C. 159.]

(199)—*Ss. 74, 76, 108, 109, and 443, Civ. Pro. Code, 1882—Auction-purchaser at a sale in execution of an ex parte decree, whether a necessary party.*—Where an application is made under s. 108, Civ. Pro. Code, the only parties entitled to notice are those that come under the description of "opposite party," in s. 109 of the Code. But an auction-purchaser at a sale in execution of an ex parte decree, not being of the description stated above, is not a necessary party to an application by the judgment-debtor for setting aside the decree. He is not entitled to notice. S. 443, Civ. Pro. Code, 1882, does not control ss. 74, 76. **JATINDRA MOHAN PODDAR v. SRINATH ROY, 26 C. 267=3 C.W.N. 261.**

(200)—*Civ. Pro. Code, ss. 246, 258—Execution sale—Purchase-moneys—Parties.*—The execution creditor is a proper party to a suit under s. 246, Civ. Pro. Code, 1859 (=s. 283 of Act XIV of 1882) by the owner against the purchaser of property wrongfully attached, to restore all parties to the position which they occupied prior to such attachment and sale. On a sale being set aside by reason of the execution-creditor having no interest in the property sold, the purchaser of such property has a right to receive back his purchase-money, as on a consideration that has failed. **BANK OF HINDUSTAN v. PREM CHAND RAI CHAND, 5 B.H.C.O.C. 83.** [Diss., 9 B.H.C. 92; Appr., 2 A. 720; R., 6 B.H.C.A.C. 258, 19 W.R. 16, Com. on, 2 B. 258; Expl., 116 B. 608.]

(201)—*Parties to suit—Champerous agreement.*—A person who has no real interest in a suit ought not to be allowed to join in it to defray the costs of the suit from beginning to end, in consideration of sharing the profits of the litigation. **HAZARI LAL v. JADAUN SINGH, 5 A. 76=A.W.N. 1882, 180.**

(202)—*Receiver, Leave to sue—Suit for possession.*—The Receiver is not a necessary party to a suit for possession of immoveable property in his possession. **KUMAR SUTTYA SUTTYA GHOSAL v. RANI GOLAP MONI DEBI, 5 C.W.N. 27.**

Parties to Suit—continued.

—1.—General—continued.

(203)—*Review—Compromise decree in appeal varying lower Court's decree—Compromise inconsistent with pleadings.*—Certain property was purchased by a father on behalf of his minor daughter. Part of the purchase-money having been paid, by the father, for the balance due, mortgaged the property purchased and executed a mortgage-deed in favour of the vendor. The money due not having been paid, the vendor instituted a suit upon the bond against the father personally and as the guardian of his daughter. He did not, however, ask for any relief against the mortgaged property. The father admitted his liability to pay the debt and a personal decree was passed against him alone. He then preferred an appeal to the Sudder Adawlut Court on the ground that his daughter ought to have been joined in the decree, and, in the course of the appeal, entered into a compromise with the plaintiff to the effect that the plaintiff should proceed against the mortgaged property in the first instance and levy from the appellant only the balance of amount that might become due thereafter. The Sudder Adawlut Court passed a decree in terms of the compromise, thus varying the decree of the first Court. Upon the daughter attaining her majority, and being married, she and her husband applied to the High Court, which had come into existence by that time, for a review of the decision of the Sudder Adawlut Court. *Held*, that the High Court had jurisdiction to re-hear. *Held* also that the compromise was tainted with the vice of having been made without the party who was principally affected by it being sufficiently represented and was inconsistent with the father's admission of liability to pay. The appeal to the Sudder Court by the father was really an appeal against his co-defendant, his own daughter. The Court exercised no control over the compromise. Consequently, the compromise decree did not bind the daughter and she was entitled to obtain a review of the decree based upon the compromise. *UNNODO DABEE v. MARIA LOUISA STEVENSON*, 22 W.R. 290, P.C. [Appr., 10 C.L.J. 420=13 C.W.N. 1197=2 Ind. Cas. 129; R., 31 C. 111.]

(204)—S. 77, *Registration Act*—*Suit to compel Registration—Right of suit.*—In the event of a refusal or neglect to admit the execution of a document, a suit would lie under s. 77 for the purpose of having the document registered. The Registrar is not a necessary party to such a suit. *RADHA KISSEN ROWRA DAKNA v. CHOONEE LALL DUTT*, 5 C. 445=5 C.L.R. 172. [F., 11 B. 691; R., 25 C. 93].

(205)—*Parties—Agent—Benamidar—Transfer of Property Act* (IV of 1882), s. 41—*Re-purchase, condition for—Bona fide purchaser for consideration without notice.*—Where, in any transaction, a person is an avowed agent or a benamidar for another, he is not a necessary party to a suit in respect of such transaction. A stipulation for re-purchase cannot be enforced

Parties to Suit—continued.

—1.—General—continued.

against a *bona fide* transferee for consideration without notice. *MAUNG BYA v. MAUNG SAN THU*, 10 Ind. Cas. 779.

See ABATEMENT OF SUITS, 9 A. 131.

See ACT XVII OF 1873, s. 12, 9 C. 704=10 I. A. 39, P.C.=12 C.L.R. 395.

See ACT VI OF 1882, s. 58, 22 A. 410=A.W.N. 1900, 139.

Secretary of State or corporation for whose benefit land is acquired—If necessary party to a reference under Land Acquisition Act—See ACT I OF 1894, ss. 18, 50, 13 C.W.N. 116=4 Ind. Cas. 332.

See BEN. ACT XI OF 1859, s. 37, 24 C. 334.

Rule that same man cannot be plaintiff and defendant in the same suit—Applicability in India—See BEN. ACT VIII OF 1885, ss. 93, 98, 2 Ind. Cas. 597.

Suit for declaration under Act I of 1895—Secretary of State, whether a necessary party.—See BEN. ACT I OF 1885, 1 Ind. Cas. 313.

See U.P. ACT XXII OF 1886, s. 138, 2 O.C. 135.

Suit to recover Chur lands claimed by Government as an island and settled with defendants—See ALLUVION—FORMATION OF CHURS OR ISLANDS, 5 C.L.R. 154.

But not to the appeal—See APPEAL—DECREES AND EXECUTION OF DECREES, 17 B. 49.

Suit on mortgage, effect of non-joinder of the necessary parties—Objection as to non-joinder, raisable on appeal—See APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 18 A. 109=A.W.N. 1896, 7.

Suit against two defendants—Decree exonerating one of them—No appeal by plaintiff against exonerated defendant—Exonerated defendant made liable on appeal by the other defendant—Power of appellate Court to make exonerated defendant liable—See APPELLATE COURT—POWERS OF APPELLATE COURT, 27 A. 23=1 A.L.J. 358.

Suit by benamidar—Decision therein binding upon beneficial owner—See BENAMI TRANSACTION—GENERAL, 1 O.C. 697.

Result of non-examination of—English and Indian practice—See BURDEN OF PROOF—GENERAL, 7 M.L.T. 57=14 C.W.N. 285=11 C.L.J. 172=12 Bom. L.R. 244=32 A. 140=20 M.L.J. 182=5 Ind. Cas. 549, P.C.

See CHAMPERTY, 8 B.H.C. O.C. 1.

See CHARTER PARTY, L.B.R. 1872—1892, 658.

Exonerated defendant whether party to suit.—See CIV. PRO. CODE, 1908, s. 47, 21 M. 45.

Parties to Suit—continued.**—1.—General**—continued.

See CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 90, 29 C. 682=6 C.W.N. 706.

Suit for declaration of ownership in property sought to be sold in execution—See CIV. PRO. CODE, 1908, O. XXI, r. 63, A.W.N. 1901, 14.

See CIV. PRO. CODE, 1908, O. XXI, r. 63, 16 B. 608.

Right of party subsequently added to raise plea of limitation—See CIV. PRO. CODE, 1908, O. XXI, rr. 97, 99, 103, 7 M.L.T. 306=6 Ind. Cas. 680.

See CIV. PRO. CODE, 1908, O. XXII, r. 4, 11 C. 694.

Suit instituted by Receiver—Change of Receiver pending suit—Suit does not abate—Necessity to make new Receiver party to proceedings—See CIV. PRO. CODE, 1908, O. XL, rr. 1 to 3, 28 M. 157.

See CO-CONTRACTORS, 26 C. 409=3 C.W.N. 271, F.B.

See COMMON LAND, 108 P.R. 1889.

Agreement between—Parties to a suit may agree that evidence taken in one suit may be used in another—See CONSENT, 2 Bom. L.R. 386=24 B. 591.

See CONTRACT—ILLEGAL CONTRACTS, 22 B. 861.

Suit on a contract made by a firm maintainable against some members only—See CONTRACT ACT, 1872, s. 43, 6 B. 700.

Suit to recover debt due to partnership, representatives of deceased partner not necessary parties to—Civ. Pro. Code, s. 26—See CONTRACT ACT, 1872, ss. 45, 46, 9 A. 486=A.W.N. 1887, 133.

Co-sharers, mortgage of entire property owned by—Suit for redemption brought by one co-sharer, necessary parties to—See CO-SHARERS—SUIT BY CO-SHARERS, 9 B. 128.

Co-sharers—Suit for separate share of rent—Kabuliyat—See CO-SHARERS—SUIT BY CO-SHARERS, 12 B.L.R. 293, Note=16 W.R. 281.

Enhancement of rent of a joint tenant by single share-holder—Parties to Suit—See CO-SHARERS—SUIT BY CO-SHARERS, 7 C. 751.

See CO-SHARERS—SUIT BY CO-SHARERS, 17 P.R. 1879.

Party sued unnecessarily—Costs—See CUSTOMS, PUNJAB—INHERITANCE, 19 P.L.R. 1912=32 P.W.R. 1912.

Declaratory suit by reversioner—Parties—See DECLARATORY DECREE, SUIT FOR—ADOPTIONS, 7 M. 401.

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 21 M. 373, 15 C. 460, F.B.

Alienation by widow—Right of daughter's son to join as plaintiff with his mother to question the alienation—See DECLARATORY DECREE, SUIT FOR—REVERSIONERS, 10 M. 1.

Parties to Suit—continued.**—1.—General**—continued.

See DECREE—ALTERATION OR AMENDMENT OF DECREE, 2 C.L.R. 461.

See DECREE—DECREE, FORM OF, 3 B.L.R. A.C. 23=11 W.R. 361.

Suit in ejectment—Parties alleging lease from Government—Government whether necessary party—See EJECTMENT, SUIT FOR, 21 B. 229.

See EXECUTION OF DECREE—MISCELLANEOUS, 30 C. 142=7 C.W.N. 305.

Meaning of the term—See GUARDIAN—APPOINTMENT OF GUARDIANS, 13 C.W.N. 1182, P.C.=10 C.L.J. 318=6 A.L.J. 822=11 Bom. L.R. 1225=6 M.L.T. 279=19 M.L.J. 631.

Hindu law—Mitakshara—Joint family consisting of father and minor son—Mortgage by father—Mortgagee's suit against father whether binding on minor son—See HINDU LAW—ALIENATION, 27 C. 724=4 C.W.N. 701.

See HINDU LAW—ALIENATION, 8 M. 75.

Hindu Law—Joint family—Mortgage by father—Sons if can be made parties to suit on mortgage—See HINDU LAW—DEBTS, 24 A. 459=A.W.N. 1902, 123.

Suit by manager on contract—Rules for joinder of—See HINDU LAW—JOINT FAMILY 4 S.L.R. 2=7 Ind. Cas. 584.

In suits on behalf of a member of a joint family all members must join as parties—See HINDU LAW—JOINT FAMILY, 9 Bom. L.R. 1126.

Trade debt—Bond in favour of one co-parcener—Suit by obligee—Non-joinder of other co-parceners—See HINDU LAW—JOINT FAMILY, 7 A.L.J. 161=32 A. 183=5 Ind. Cas. 767.

Persons of whose interest a mortgagee has had notice would not be bound by the mortgage decree unless they were parties to the suit by the mortgagee—See HINDU LAW—JOINT FAMILY, 3 C.L.J. 12.

Hindu Law—Mitakshara—Infant's interest in Joint family business—Suit by managing member—Plea of non-joinder of parties—See HINDU LAW—JOINT FAMILY, 26 C. 349=3 C.W.N. 190.

Partnership—Joint Hindu family—Suit by one member for debt due to firm—See HINDU LAW—JOINT FAMILY, 8 A. 264=A.W.N. 1886, 89.

See HINDU LAW—JOINT FAMILY, 20 B. 435.

Hindu idol or deity—Juridical person—Party to suit—See HINDU LAW—RELIGIOUS ENDOWMENT, 6 C.W.N. 178.

See HINDU LAW—WIDOW, 30 P.L.R. 1901, 23 C. 636.

Parties to Suit—continued.**—1.—General—continued.**

Beneficiary joined as co-plaintiff on appeal when plaintiff-trustee surrenders decree—*See* HINDU TEMPLE, 12 C.W.N. 946, P.C.=4 M.L.T. 101=8 C.L.J. 230=31 M. 236=10 Bom. L.R. 781=18 M.L.J. 387=35 I.A. 176.

See INSOLVENCY—MISCELLANEOUS, 16 B. 452, 3 A. 799.

Suit against Secretary of State—Nominal defendant—*See* JURISDICTION—CAUSES OF JURISDICTION, 14 C. 256.

See JURISDICTION OF CIVIL COURTS, 9 A. 394.

Objection as to defect of—Failure of plaintiff's attempt to defeat objection—Prayer in second appeal to join party, not to be allowed—*See* LANDLORD AND TENANT—PAYMENT OF RENT BY TENANT, 5 Ind. Cas. 105=11 C.L.J. 601.

See LEAVE TO SUE, 11 C. 213.

Joinder of—Suit originally against some of several promisors—Subsequent joinder of others, effect of, as regards limitation—*See* LIMITATION ACT, 1908, s. 22, 116 P.L.R. 1905=81 P.R. 1905.

See LIMITATION ACT, 1908, arts. 132, 147, L.B.R. 1872—1892, 555.

Suit for recovering property redeemed, necessary parties to—Possession by redeeming co-mortgagor, not adverse to other co-owners—*See* LIMITATION ACT, 1908, art. 144, 11 B. 425.

See LIS PENDENS, 11 B.H.C. 64, A.W.N. 1885, 242.

See LUNATIC, 6 W.R. 115.

Whether Crown is a necessary party in suit relating to mosque—*See* MAHOMEDAN LAW—WAKF, 13 C.W.N. 26, P.C.=4 M.L.T. Special, p. 25=1 Ind. Cas. 314.

Devasom—Suit by uralars—All must be parties—*See* MALABAR LAW—ENDOWMENT, 9 M.L.J. 312.

See MALABAR LAW — ENDOWMENT, 2 M. 167.

Malabar Law—Suit by one uralan for redemption without consulting other uralan—Co-uralan made defendant—Maintainability of suit—*See* MALABAR LAW—MORTGAGE, 24 M. 296.

For sale of mortgaged property by prior incumbrancer—Non-joinder of puisne mortgagees, effect of—*See* MORTGAGE—GENERAL, 64 P.R. 1908=132 P.W.R. 1908.

Decree on mortgage-bond—Purchase of equity of redemption not made party to suit—Effect—*See* MORTGAGE—GENERAL, A.W.N. 1887, 188.

Decree for redemption—Appeal by some defendants alone—Other defendants necessary parties to appeal—Practice—*See* MORTGAGE—REDEMPTION, 6 M.L.T. 346.

Parties to Suit—continued.**—1.—General—continued.**

Who are proper parties in a redemption suit—*See* MORTGAGE—REDEMPTION, 2 Ind. Cas. 662.

Non-joinder of—Effect—*See* MORTGAGE—REDEMPTION, 3 Ind. Cas. 291.

See MORTGAGE—REDEMPTION, 13 A. 315=A.W.N. 1891, 90, 8 C. 79=9 C.L.R. 173=10 C.L.R. 113, 4 C.W.N. 507, 5 C.W.N. 83.

Transferees of purchaser from mortgagor, necessary parties to suit by mortgagee—Right of redemption of transferees not impleaded—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 21 M. 64=8 M.L.J. 21.

Right of sale of mortgaged property—Suit to bring mortgaged property to sale—Necessary Parties—Prior and subsequent incumbrancers—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 13 A. 432, F.B.

See MORTGAGE—SALE OF MORTGAGED PROPERTY, 9 A. 68, F.B., 4 C.W.N. 452.

First and second Mortgages—Suit by first mortgagee—Second mortgagee not made party—Effect—*See* MORTGAGE—MISCELLANEOUS, A.W.N. 1887, 97.

Mortgage-decree obtained by puisne mortgagees—Sale of mortgaged properties—Suit to establish priority and enforce subsequent mortgage—Intention to keep the previous mortgage alive—*See* MORTGAGE—MISCELLANEOUS, 2 C.L.J. 574.

Prior registered mortgage—Equity of redemption—Subsequent mortgage—Parties to be impleaded in suit by prior mortgagee—*See* MORTGAGE—MISCELLANEOUS, 8 B. 168.

Suit for specific performance and possession—Subsequent purchaser—Misjoinder—*See* MULTIFARIOUSNESS, 18 M. 415=5 M.L.J. 164.

Person only indirectly interested—Whether necessary party—Power of Court—*See* PARTIES TO SUITS—ADDING PARTIES TO SUITS, 6 Ind. Cas. 36.

Addition and substitution of—Suit for accounts—Mistake of fact or law—*See* PARTIES TO SUITS—ADDING PARTIES TO SUITS, 12 C.L.J. 537=8 Ind. Cas. 87.

Suit for partition by putnidars against durputnidars of co-putnidars—Who are necessary parties to suit—*See* PARTITION—GENERAL, 7 C.L.J. 449=12 C.W.N. 670.

See PARTITION—RIGHT TO PARTITION, 6 W.R. 192.

Parties to a suit regarding partnership shares—Award of interest—*See* PARTNERSHIP—SUITS RELATING TO PARTNERSHIP, 18 C. 616, P.C.

See PARTNERSHIP—SUITS RELATING TO PARTNERSHIP, 25 A. 378=A.W.N. 1903, 76, 21 B. 412.

Parties to Suit—continued.

—1.—General—continued.

See PLAINT—FORM AND CONTENTS OF PLAINT, 10 B.H.C. 182.

Land in possession of village community—Delivery to defendant by Government—Suit for possession—Secretary of State whether a necessary party—See POSSESSION—SUIT FOR POSSESSION, 6 Ind. Cas. 419=8 M.L.T. 248.

See POSSESSION—MISCELLANEOUS, 4 C.W. N. 297.

Pre-emption—Sale of a pre-emption decree—No cause of action for a fresh suit—Parties—Vendor not a necessary party—Abatement of appeal—See PRE-EMPTION—GENERAL, 134 P. L.R. 1902=94 P.R. 1902.

See PRE-EMPTION—MISCELLANEOUS, 134 P.R. 1889, 6 A.L.J. 926=32 A. 14=3 Ind. Cas. 735=6 M.L.T. 300.

See PRIVY COUNCIL, PRACTICE OF—MISCELLANEOUS, 17 C. 693, P.C.

Appellate Court's power to add—See PROBATE—GENERAL, 12 C.L.J. 91=6 Ind. Cas. 912.

See RECEIVER, 19 B. 83.

See REGISTRATION ACT, 1908, s. 27, 8 B. 269.

See RELIGIOUS ENDOWMENT, 1 B.H.C. App. 9.

See REMAND, 1 Bom. L.R. 29.

In rent suits—See RENT, 6 Ind. Cas. 570=12 C.L.J. 267.

See RENT, SUIT FOR, 2 B.L.R. A.C. 237=11 W.R. 120.

Wrong admission in plaint that certain persons were parties to a previous litigation, not binding on plaintiffs—See RES JUDICATA—MISCELLANEOUS, 6 A.L.J. 527=2 Ind. Cas. 587.

Hearing of case on merits in the absence of—See REVISION—GENERAL, 56 P.L.R. 1909=59 P.W.R. 1909=4 Ind. Cas. 550.

Party to a suit, addition of, in second appeal—Practice—See ROAD, 5 M.L.T. 225.

See SALE—SALE BY AUCTION, 1 B.H.C. 20.

Suit by auction-purchaser to eject a stranger in possession—Whether judgment-debtor is a necessary party—See SALE—SALE IN EXECUTION OF DECREE—GENERAL, 2 S.L.R. 80.

See SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 19 C. 683=19 I.A. 166.

See SPECIAL OR SECOND APPEAL—RIGHT OF SPECIAL APPEAL, 5 W. R. 215.

Claim of private right by plaintiff over land—Claim of public right by defendants—Who are necessary parties—See SPECIFIC RELIEF ACT, 1877, s. 42, 6 Ind. Cas. 46.

Parties to Suit—continued.

—1.—General—concluded.

See SPECIFIC RELIEF ACT, 1877, s. 42, 25 P. L. R. 1900.

Registration of subsequent mortgage how far notice to prior mortgagee—Registration Act, 1877, s. 50—See TRANSFER OF PROPERTY ACT, 1882, ss. 3, 85, 16 A. 478, F.B.=A.W.N. 1894, 151.

Waiver of objection as to want of—See TRANSFER OF PROPERTY ACT, 1882, s. 44, 3 A L. J. 474=A. W. N. 1906, 199.

—2.—Adding Parties to Suits.

See LIMITATION ACT, 1908, s. 22.

(1)—*Adding parties not interested in the suit*—Practice.—It is not the practice of the Indian Courts, even if they have the power, to add parties to the record who are not interested in the suit. *HAJI JAKARIA v. HAJI CASIM*, 1 B. 496.

(2)—*Parties—Who can be joined as defendants*.—Those persons only should be joined as defendants in a suit, whose claims are necessary to be taken into consideration before deciding on the plaintiff's title. *FERGUSON v. THE GOVERNMENT*, 9 W.R. 158.

(3)—*Act VIII of 1859, s. 73—Object of Code—Discretion*.—The object of the Civ. Pro. Code is to simplify and shorten litigation in Courts. S. 73 of Act VIII of 1859 is expressly enacted to avoid needless litigation, and there are cases in which the Judge exercises the discretion vested in him under that section, even if the plaintiff omits to ask him for it, as for instance where it is necessary to make plaintiff's co-parceners defendants. *MOTEE CHUND DOSS v. MOORULEE DHUR DOSS*, 15 W.R. 432.

(4)—*Civ. Pro. Code, 1859, s. 73—Addition of parties*.—S. 73 must be construed liberally, and when necessary adopted *cy pres* to the requirements of the High Court in its ordinary jurisdiction. Where in a suit a preliminary decree has been passed and the matter has been referred to the Commissioner's office to have accounts taken and property sold, and therefore no final decree can be made until after his report has been submitted to the Court, the Court is competent to add fresh parties. *VAKATCHAND LAKMICHAND v. THE ADVOCATE-GENERAL*, 8 B.H.C., O.C., 96. [R., 8 B. 323.]

(5)—*Act VIII of 1859, s. 73*.—Where there is no right of suit in the plaintiff, the suit should be dismissed and the introduction under this section of another person as plaintiff cannot cure this defect. A decree in favour of both the plaintiffs does not admit of execution. *SUBBAIYAR v. KRISTNAIYAR*, 1 M. 383. [F., 18 M. 250, 20 B. 537; Appr., 11 A. 104=A.W.N. 1888, 287, 32 C. 1060=9 C.W.N. 847=2 C.L.J. 396; R., 8 M. 175, 10 A. 425=A.W.N. 1888, 157, L.B.R. 1872-1892, 617.]

(6)—*Act VIII of 1859, s. 73—Making third parties defendants*.—S. 73, Act VIII of 1859, does not enable third parties not likely to be

Parties to Suit—continued.**—2.—Adding Parties to Suits—continued.**

affected by the result to come into a suit, and raise new questions which do not properly arise. **PADMALOHAN SEN v. LAL CHAND GUPTA**, 1 B.L.R., S.N., 26=10 W.R. 283. [F., 3 B.L.R., A.C., 23.]

(7)—*Act VIII of 1859, s. 73—Scope*—S. 73, Act VIII of 1859, enables a Court to add to the list of plaintiffs or defendants any persons in whose absence the subject-matter or the claim cannot be fully investigated and disposed of, or who are likely when added as parties to be affected by the result of the investigation and determination of the question in the cause. **NGA THAYA v. MIKHAN MHAW**, 5 B.L.R. 371=13 W.R. 443.

(8)—*Act VIII of 1859, s. 73—Discretion of Court in adding defendants under, not to be interfered with unless unjudicial or wrong.*—In this case, the defendant purchased, at an auction-sale in execution of a decree held by Government, the right and interest of the judgment debtor in certain lands. The present plaintiff appeared in the execution proceedings, and claimed the land under a prior sale from the judgment-debtor, but his claim was disallowed. He then instituted this suit to establish title, and got a decree from the lower Court. On appeal it was urged that the suit was incomplete in its frame, as the Government had not been made a party, although both the lower Courts were specially prayed to add the Government as a defendant under s. 73 of Act VIII of 1859; but it was held that the Court has clearly a discretion as to adding or not adding defendants under the said s. 73, and the exercise of such a discretion cannot be interfered with by the appellate Court unless there has been an exercise of it manifestly unjudicial and wrong. In the present case, the lower Court could not be said to have wrongly exercised its discretion in not having made the Government a party. The plaintiff sought no relief against Government. The suit was quite complete without the Government, and the Government was not necessarily affected by any decree made. **GYARAM SEAL v. ISSUR CHUNDER CHUCKERBUTTY**, 2 W.R. 158.

(9)—*Joinder of plaintiff—Consent—Civ. Pro. Code (Act X of 1877), ss. 32, 34.*—No person can be added as a plaintiff without his consent; the proper course is to make a party, objecting to be added as a plaintiff, a defendant. [R., 9 A. 486=A.W.N. 1887, 133.] Under s. 34, Civ. Pro. Code, all objections for want of parties or for joinder of parties who have an interest in the suit, should be taken at the earliest possible opportunity, and in all cases, before the first hearing. **UMA SUNDARIDASI v. RAMJI HALDAR**, 7 C. 242=9 C.L.R. 13. [Cons., 156 P.R. 1889, F.B.]

(10)—*Addition of parties—C.F.C., 1877, s. 32.*—No party should be added either as plaintiff or defendant in a suit unless he has, in either of

Parties to Suit—continued.**—2.—Adding Parties to Suits—continued.**

such capacities, an identity or community of interest with that party in the litigation on whose side he is to be ranged, in the questions directly arising out of and incident to the original cause of action. Where, therefore, two persons claiming adversely to one another as heirs of the same person, deceased, filed two suits against the same defendant, and each of them was, on his application, made a defendant in the other suit, held that, as the priority of rights of these plaintiffs *inter se* was not in issue in either suit, and the presence of the added defendants was not necessary to effectually and completely adjudicate upon and settle all the questions involved in the suits, such addition of parties was improper. **NARAINI KUAR v. DURJAN KUAR**, **NARAINI KUAR v. PIAREY LAL**, 2 A. 738. (7 W.R. 202, 8 W.R. 15, 10 W.R. 369=3 B.L.R., A.C., 28, 4 C. 355, F. and Appl.) [R., 8 A. 91, 10 A. 223, F.B., 118 P.R. 1890, 5 O.C. 94, 2 L.B.R. 246.]

(11)—*Dismissal or addition of parties—Revenue Court, power of—Act XVIII of 1873 (N.W.P. Rent Act), s. 106—Civ. Pro. Code (1877), s. 32*—Although the provisions of s. 32 of the Civ. Pro. Code, (1877) have not been declared applicable by the N. W. P. Rent Act to the procedure of Revenue Courts, still a Revenue Court, whether of first instance or of appeal, does not act illegally in allowing an amendment of the plaint; and the addition of parties, where the same is required for the ends of justice, is consonant to judicial practice, and not repugnant to the provisions of the Rent Act. **SHIB GOPAL v. BALDEO SAHAI**, 2 A. 264.

(12)—*Plaintiff, addition of, after commencement of suit—Bona fide mistake, institution of suit through—Code of Civil Procedure, s. 27.*—The original plaintiffs claimed title to the property in suit under a *tamliknam* executed in their favour by their father, B. The defendant denied that the plaintiffs had any title to the property in suit; he did not plead that the *tamliknama* did not cover the property in suit and did not at any time ask for an issue as to the effect of the *tamliknama*. In the course of the arguments, the defendant contended that the plaintiffs had acquired no title to the property in suit from their father, firstly, because the property in suit was not included in the *tamliknama*, and secondly, because possession had not passed upon the execution of that document. B then presented a petition that he might be added as a plaintiff, and his sons made the same request. Upon the facts of the case, the Court held that the suit was commenced as it was through a *bona fide* mistake on the part of the plaintiffs within the meaning of s. 27 of the Code of Civil Procedure. Held further, that the case fell within s. 27 which allows an addition or substitution of a plaintiff "at any stage of the case" and that B was rightly added as plaintiff. **ABDUL WAHID KHAN v. SADIP ALI KHAN**, 7 O. C. 193.

Parties to Suit—continued.**—2.—Adding Parties to Suits—continued.**

(13)—*Application to be made a defendant—Civ. Pro. Code, s. 32.*—Z died in August 1893. In August 1896, his brother filed a suit against his other brothers and sisters, praying that his share in the estate of the deceased might be decreed to him by administration and actual partition. The issues were fixed in November 1896. The first Court dismissed the suit; on appeal that the decision was set aside in February 1898, and the suit was remanded for disposal on the merits. In April 1898, F, the wife of one of the original defendants, applied to be made defendant in the case under s. 32, Civ. Pro. Code. *Held*, that the application, seeking to alter the entire character of the pleadings, was far too late and could not be granted. **MOHAMMAD ZAKI ALI KHAN v. MOHAMMAD JAFER ALI KHAN, 2 O.C. 25.**

(14)—*Civ. Pro. Code, 1882, s. 32—Suit by plaintiff having no interest in subject-matter—Subsequent joinder of person having interest as co-plaintiff—Right of action.*—A suit would be good only if the plaintiff has some interest in the subject matter of the suit at the time of the institution thereof. The subsequent joinder of a person having such interest as co-plaintiff cannot alter the plaintiff's position or confer on him any right of suit. **BHANU v. KASHINATH, 20 B. 537. (1 M. 383, 6 C. 370, R.) [Disappr., 12 C.L.J. 537; R., 1 O.C. 10, 3 O.C. 347; D., 25 B. 433, 7 O.C. 193.]**

(15)—*Civ. Pro. Code, s. 32—Power of Court to add parties.*—A material question common to the parties and to third parties should be tried once for all, and to secure this result the Court has a discretion to add parties, which it should exercise, unless by the addition of new parties, either of the parties already on record would be prejudiced or hindered of their remedies. **VYDIANADA v. SITARAMA, 5 M. 52. [N.F., 118 P.R. 1890; F., 1 L.B.R. 252, 13 C. 90, 17 M. 122, 2 L.B.R. 245.]**

(16)—*Addition of parties upon their own application—Civ. Pro. Code, s. 32.*—A Court may, in the exercise of its discretion, under s. 32 of the Civ. Pro. Code, add a party to a suit upon his own application. **RABBABA KHANUM v. NOORJEHAN BEGUM, 13 C. 90. (8 B. 323, followed.) [R., 21 C. 539.]**

(17)—*Civ. Pro. Code (Act VIII of 1859), s. 73—S. 32 (Act XIV of 1882)—Joinder of parties*—Notwithstanding the fact that the result of a suit might affect a third party, not a party to the suit, such third party ought not to be made a party unless he is entitled to, or claims some interest in, the subject-matter of the suit. **KOEGLER v. PROSONNO COOMAR CHATTERJEE, 2 C. 472.**

(18)—*Adding parties—Civ. Pro. Code (of 1877), s. 32.—Suit for partition—Mortgagee of interest of co-owner, addition of, as party.*—The above section does not contemplate any application to the Court by the person proposed to be added. **[R., 13 C. 90.]** The mortgagees of the

Parties to Suit—continued.**—2.—Adding Parties to Suits—continued.**

right, title and interest of the plaintiff in a suit for partition of joint family property need not be added as parties to the suit under s. 32 of the Civ. Pro. Code, their presence not being necessary 'to enable the Court effectually and completely to adjudicate and settle all the questions involved in the suit. **MOHINDROBHOSUN BIGWAS v. SHOSHEE BHOSUN BISWAS, 5 C. 882. [R., 118 P.R. 1890.]**

(19)—*Civ. Pro. Code, s. 32.—Party added after decree.*—It is unusual and inconvenient, to allow a person, who might have applied before decree, to be joined as co-plaintiff after decree, even if it be lawful to do so, where no interest has devolved and no interest has been created since the institution of proceedings. *Quære*:—Whether s. 32, C. P. C., does not give a discretionary power to a Court to add parties at any stage of a suit, even after adjudication of the question raised in the suit. **LINGAMMAL v. VENKATAMMAL, 6 M. 227. [Disc., 32 C. 483.]**

(20)—*Civ. Pro. Code, s. 32 — Joinder of new defendant.*—Though the plaint contains no prayer for relief against a person who, on the pleadings in the case, ought to have been made a defendant, the Court is justified in ordering, under s. 32, Code of Civil Procedure, such a person to be made a defendant, so as to avoid a multiplicity of suits. **THIRTHASAMI v. GOPALA, 13 M. 32.**

(21)—*Civ. Pro. Code, 1882, ss. 32 (= O. I., r. 10(2) new Code), 108 (= O. IX. r. 13)—Power to add parties exercisable even after re-instatement of suit.*—The Court can exercise the discretionary power vested in it under s. 32, as regards the addition of parties, even after a suit has been re-instated on an application under s. 108 made by one of the defendants who had not been served with notice of the suit. The Court, however, should be cautious in similar cases, in making an order under s. 32. The parties here brought on, were all in the same interest, being members of a joint Hindu family and parties interested within the meaning of s. 85, Transfer of Property Act. Other cases might occur in which the interests might be conflicting. **TIKAN SINGH v. THAKUR KISHORE RAMANJI MAHARAJ, 20 A. 188 = A.W.N. 1898, 12.**

(22)—*Civ. Pro. Code, s. 32—Power of Court to add parties, limits of.*—Where the owner of certain property which was sold under an order for sale in execution passed by the first Court which had overruled his objection, got an order in his favour on appeal to the High Court and thereon brought a suit against the decreeholders and auction-purchasers, claiming the property from them, it was *held* that the first Court should not have, as it did, added as defendant, a third person who based his claim on a title quite different from that set forth in the suit, and tried, as between such new person and the plaintiff, an issue which was not

Parties to Suit—continued.**—2.—Adding Parties to Suits**—continued.

raised by the pleadings between the real parties to the suit. S. 32 of the Civ. Pro. Code, does not enable a Court to go contrary to s. 45 of the Code, and to impose on the plaintiff to a suit persons as defendants whom he has made no claim against and against whom he may never make any claim and who have no community of title with the real defendant to the suit. **KALIAN RAI v. RAM RATAN**, 18 A. 306 = A.W.N. 1896, 72. [R., 5 O.C. 94, 38 P.R. 1903 = 87 P.L.R. 1903.]

(23)—*Parties—Procedure—Addition of defendants by Court—Added defendants subsequently made plaintiffs by Court—Appeal—Civ. Pro. Code, s. 588.*—Where a Court, having of its own motion added certain persons as defendants to a suit, subsequently transferred the names of such parties from the array of defendants to the array of plaintiffs, it was held that the last mentioned order transferring the names was appealable. **ACHAMBIT RAI, v. HANSRAJ RAI**, A.W.N. 1896, 101.

(24)—*Civ. Pro. Code, 1877, ss. 32, 34 (= O. I. rr. 10 (2) and 13, new Code)—Addition of parties, when can be allowed.*—S. 34, Civ. Pro. Code, 1877, limits the defendant's rights to object in respect of want of parties, to any time before the first hearing, but the second passage of s. 32 leaves it open to the plaintiff "at any time" before the decree to obtain permission to add new parties. Even in the case of defendants, cases might occur in which s. 34 would not prevent even the defendant from objecting to the want of a proper party after the first hearing, viz., where after the first hearing and before decree a co-parcener or remainderman or reversioner is born, or where a woman (who is a party) is married to a man who is not a party to the suit. The objection did not exist at or before the first hearing, and therefore could not have been made or waived by the defendant, and if he made it at the earliest opportunity after it came into existence, he would have satisfied the spirit of s. 34. **RAND N. MODHE v. S. DONGRE**, 5 B. 609.

(25)—*O. I. r. 10, Civ. Pro. Code, 1908—Adding of parties to suit—Person only indirectly interested—Power of Court—Jurisdiction, question of.*—The addition of persons, who are only indirectly affected and not directly interested in the issues between the plaintiffs and the defendant, as parties to the suit, is a question of jurisdiction; and the Court has no power, under O. I. r. 10 of the Code, to add persons only indirectly interested as parties to the suit. **PANDIT RUP CHAND v. FATEH CHAND**, 6 Ind. Cas. 36.

(26)—*O. I. r. 10 cl. (3), Civ. Pro. Code, 1908—Land Acquisition Act (I of 1894), s. 53—Party, addition of—Revenue-sale, purchaser of—High Court revisional power of.*—During the pendency of proceedings before a Land Acquisition Collector, the property acquired was sold for arrears of revenue. The sale was confirmed after the Collector had made his award. At the instance of the defaulting proprietor, the Collector made

Parties to Suit—continued.**—2.—Adding Parties to Suits**—continued.

a reference to the Civil Court, upon a question of apportionment of the compensation. The purchaser applied to the Civil Court to be made a party to the proceedings but his application was refused. *Held*: that the purchaser at the revenue sale was entitled to be made a party to the proceedings, but he could urge only such objections as might have been taken by the defaulting proprietor. His special right, if any, as a revenue sale purchaser, must be asserted in a separate suit (34 C. 451, 12 C. W. N. 98, 12 C. W. N. 985, D.). *Held* also: that, when the Court below has improperly refused to join a person as a party to the proceedings, it is competent to the High Court to interfere. **PROMOTHA NATH MITRA v. RUKHAL DAS ADDY**, 11 C.L.J. 420 = 6 Ind. Cas. 546, (21 C. 539, F.; 13 C. 90, D.)

(27)—*Death of respondent after hearing but before judgment—Practice—Addition of necessary parties.*—The respondent, a widow and heir, died pending an appeal to the Privy Council after it has been argued and in consequence, the inheritance ceased to be represented in the suit and there was no person, in whose presence the accounts directed against the widow could properly be taken. The Privy Council added the testator's heir to the record and thought it unnecessary to delay the decree, but let it rest with the plaintiff to apply to the Court below for all such parties as are necessary for this purpose to be brought on the record. **SURENDRA KESHAV ROY v. DOORGA SUNDAR DASSEE**, 19 C. 513 = 19 I A. 108, P. C. = b Sar. 150. [F., 21 A. 314 = A. W. N. 1899, 86; R., 21 B. 314, 26 M. 101 = 12 M.L.J. 435, 6 C.L.J. 547, 12 C.W.N. 597 = 8 C. L. J. 369.]

(28)—*Practice—Parties—Persons not parties to suit not to be added in appeal.*—A person who is not a party in the original suit is not entitled to have himself added as an appellant in the appellate Court. **R. WATSON AND CO. v. RANEE SHURNO MOYEE**, 9 W. R. 259.

(29)—*Civ. Pro. Code, 1882, ss. 32, 582—Appeal—Appellant—Addition of party, power of Court to order.*—There is no power in the Civ. Pro. Code, to make a party to the suit a co-appellant. The power given to the appellate Court, by combining ss. 32 and 582 of the Civ. Pro. Code, 1882, would be to strike out the name of a party, or to direct new parties to be added to the suit, whether as plaintiffs or defendants; because, where the words "plaintiff" "defendant" and "suit" are intended, as in Ch. XXI to include "appellant" "respondent" and "appeal," the Code expressly provides for it; and there is no such provision in the present instance. **VASUDEV BALKRISHNA v. SALUBAI**, 10 B. 227. [R., 7 Bom. L.R. 622.]

(30)—*Assignment of interest pending suit—Adding assignee as party.*—After the dismissal of the plaintiff's suit, and pending a regular appeal to the High Court, the plaintiffs applied for leave to add the name of a party to whom

Parties to Suit—continued.**—2.—Adding Parties to Suits**—continued.

a share of their rights in the subject-matter had been assigned subsequently to the dismissal of the suit in the Court below. The Court refused the application. **JAMEELA v. MAHOMED HOSSEIN, Marsh 251=2 Hay 111.**

(31)—*Appeal—Addition of respondent by Court*—*Civ. Pro. Code, s. 559.*—Where a suit against two defendants is decreed against one of them, the other being exempted, and the plaintiff does not appeal in respect of such exemption, the appellate Court cannot, in the appeal of the unsuccessful defendant, add the other defendant as a respondent and pass a decree against him. S. 559 of the Civ. Pro. Code does not empower an appellate Court virtually to make an appeal for a party who has refrained from availing himself of his privileges under the law, by introducing for him respondents as against whom he has not chosen to seek any remedy. Moreover, it cannot be said that the defendant who has been exempted was interested in the result of the appeal, as his position was already secure by the fact that there was no appeal as against him. **ATMA RAM v. BALKRISHN, 5 A. 266=A.W.N. 1883, 24.** [*Diss.*, 25 C. 565, 26 C. 109; *Not F.*, 31 C. 643, F.B.=8 C.W.N. 496; *F.*, 27 A. 23=A.W.N. 1904, 155=1 A.L.J. 358, 31 M. 442=18 M.L.J. 452=4 M.L.T. 104; *R.*, 13 A. 78, 26 C. 114, 6 O.C. 159; *D.*, 18 B. 520, 3 Bom. L.R. 172.]

(32)—*S. 559, Civ. Pro. Code, 1882—Adding respondent—Power of appellate Court.*—It is quite open to the appellate Court, with reference to s. 559, Civ. Pro. Code, to add a party as respondent to an appeal when no appeal had been made against him. The exercise of the power under s. 559, is not limited by the provisions of the Limitation Act. **UPENDRA LAL MUKERJEE v. GIRINDRA NATH MUKERJEE, 25 C. 565=2 C.W.N. 425.** (9 C. 355, 18 B. 520, *R.*; 5 A. 266, *D.*) [*F.*, 26 C. 109, 35 C. 538=12 C.W.N. 720; *R.*, 26 C. 114, 17 P.L.R. 1901=23 P.R. 1901; *D.*, 16 C.P.L.R. 42, 30 C. 655, 31 C. 643=8 C.W.N. 496, F.B.; *Not F.*, 31 M. 442=18 M.L.J. 452=4 M.L.T. 104.]

(33)—*Second appeal, when Court could add party to*—*Civ. Pro. Code, 1882, s. 559.*—It is not competent to a Court on second appeal to bring in a person under s. 559, Civ. Pro. Code, as party-respondent, unless he had figured as a party to the first appeal, even though he had been a party in the original suit in the Court of first instance. **CHUNNI v. LALA RAM, 16 A. 5=A.W.N. 1893, 141.** [*Diss.*, 19 M. 151=5 M.L.J. 279, 6 O.C. 159.]

(34)—*Civ. Pro. Code, ss. 32, 559, 587—Addition of parties in second appeal.*—It is competent to the Court in second appeal to add parties who were defendants in the Court of first instance, though not brought on the record in the lower Appellate Court. **PAYA MATATHIL APPU v. KOVAMEL AMINA, 19 M. 151.** [*F.*, 6 O.C. 159.]

Parties to Suit—continued.**—2.—Adding Parties to Suits**—continued.

(35)—*Civ. Pro. Code, 1882, ss. 372, 582 (= O. XXII, rr. 10, 11, new Code)—Decree, appeal pending against—Creditor attaching decree, not entitled to be made party to appeal.*—An attaching creditor has no right to be heard as to the merits of the decree attached by him which is *sub judice* in appeal, i.e., where the creditor of a decree-holder has attached the decree against which an appeal was pending, he is not entitled to be joined as a party respondent to the appeal either under s. 372 or under s. 582 of the Civ. Pro. Code. **Wallis v. Smith, 51 L.J. Eq., 577, D.)** The test in such a case is whether the applicant is a person in whose favour or against whom a decree can be made in the appeal. **CHAIL BEHARI LAL v. RAHMAL DAS, 20 A. 38=A.W.N. 1897, 194.**

(36)—*S. 559, Civ. Pro. Code, 1882—Appellate Court's Power to add parties as respondents.*—It is quite open to the appellate Court, with reference to s. 559, Civ. Pro. Code, 1882, to add a party as respondent to an appeal when no appeal has been made against him, when such person is "interested in the result of the appeal." **HUDSON v. BASDEO BAIJPE, 26 C. 109=3 C.W.N. 76.** (5 A. 266, *Diss.*; 9 C. 355, *R.*; 25 C. 565, *F.*) [*F.*, 3 Bom. L.R. 172, 35 C. 538=12 C.W.N. 720; *Appr.*, 31 C. 643, F.B.=8 C.W.N. 496; *R.*, 14 C.P.L.R. 46; 23 P. R. 1901=17 P.L.R. 1901, 28 M. 229=15 M. L.J. 212, 4 M.L.T. 104=18 M.L.J. 452=31 M. 442.]

(37)—*Appellate Court, power of, in acting under s. 32 of the Civ. Pro. Code.—Procedure—Remand to the lower Court.*—A person who has been a stranger to the suit in the Court of first instance, ought not to be brought on to the record of an appeal, unless he is so brought on as a representative under the section relating to the bringing in of representatives in case of the death of a party to the suit or the devolution of title. When an appellate Court thinks it necessary to have as a party before it, in appeal, a person not appearing in a representative capacity, and who is not a party to the suit in the Court of first instance, it should remand the case to the lower Court, and direct that Court to bring on the particular person as a defendant, or as a plaintiff if he consented, to give him time to put in his defence and prove the same, and to try the issues raised between him and the opposite party. **MIHIN LAL v. IMITIAZ ALI, 18 A. 332=A.W.N. 1906, 91.** [*F.*, 1 L.B.R. 252, 2 L.B.R. 277, 1 S.L.R. 90; *R.*, 23 A. 167, 32 C. 483, 69 P.R. 1906=118 P.L.R. 1906.]

(38)—*Non-joinder of parties—Effect of—Adding parties in appeal.*—When the cause of action is jointly in favour of a number of persons, and not solely in favour of one, they must all be made parties. Failure to do so would involve the dismissal of the suit. [*Appr.*, 14 A. 524=A.W.N. 1892, 104; *D.*, 9 B. 311; *R.*, 7 B. 217, 17 B. 6] Though, in some instances, parties are allowed to be added in appeal, yet

Parties to Suit—continued.**—2.—Adding Parties to Suits—continued.**

in a case, where the party seeking the addition has elected to go to trial without the amendment, the appellate Court may refuse to allow the addition of parties. *DCLAR CHAND v. BALRAM DAS*, 1 A. 453. [R., 156 P.R. 1889, F.B., 159 P.R. 1889, F.B., 18 M. 33.]

(39)—Act IV of 1840—Act VIII of 1852, s. 14—Survey award—Act IV of 1840, order of Magistrate under—Adjudication by competent authority.—Neither an order by a Magistrate under Act IV of 1840 as to possession of lands nor an award by a surveyor is a decision by a competent authority. Where a plaintiff sued in the Court of B, for the recovery of certain lands and the defendants objected that the lands in question were not in the District of B. *Held* that the Court had power, under s. 14, Act VIII of 1859, before it proceeded to try the suit, to enquire and determine whether the lands were in B or not. The rejection of a plaint under the same section cannot give jurisdiction to a Court which does not otherwise possess it. *HURRONATH ROY v. R.W. SCOTT*, B.L.R. Sup. 636, F.B. = 7 W.R. 200.

(40)—Act VIII of 1859, s. 73—Suit to recover possession—Third parties in possession—Burden of proof.—Where, in a suit to recover possession of certain land, the defendants denied their liability and repudiated all connection, alleging the land to be in possession of third parties who were thereupon made defendants by the Court under s. 73 of Act VIII of 1859, it was held that these persons were distinctly interested both in the subject matter and in the result of the suit and were therefore rightly made defendants, and that, even if they were wrongly made parties, the *onus* would not, under the circumstances, be shifted, but would remain on the plaintiff. *RAM TARUCK GHOSAL v. RADHA BULLAB SIRCAR*, 15 W.R. 97.

(41)—Possessory suit—Plea of land being partially held by parties not before Court—Parties defendants.—In a suit for possession where defendants plead that the land sued for is partially held by third parties not before the Court, held that the Court ought not to insist on these third parties being added as defendants as against the plaintiff's will who may like to relinquish, as against the original defendants, her claim to the property in which alone the third parties are interested. *LATOREE BIBEE v. BUKSH ALI*, 24 W.R. 100.

(42)—Application for the addition of a defendant—Civ. Pro. Code, s. 28.—On an application in time by the plaintiff, the alleged agent of the defendants, against whom relief is proposed to be prayed for in the alternative, can be added as a defendant under s. 28 of the Code, and on the authority of *Child v. Stenning*. (L.R. 5 Ch. D. 695). *BUDREE DOSS v. HOARE MILLER AND CO.*, 8 C. 170. [R., L.B.R. 1893-1900, 61, 29 M. 50 = 16 M.L.J. 39, 31 M. 252 = 18 M.L.J. 238.]

Parties to Suit—continued.**—2.—Adding Parties to Suits—continued.**

(43)—Principal and agent—Suit against principal for acts of agent—Necessity for agent being made party—Onus of proof.—Where one person sues another as liable for the acts of the accredited agent of the latter, it is not necessary that the alleged agent should be made a party to the suit. The *onus* lies on the plaintiff to prove that the alleged agent was the duly accredited agent of the defendant in reference to the transaction the subject of the claim. *HUTTEE RAM v. GOVIND RAM*, 3 Agra 131.

(44)—S. 32—Civ. Pro. Code, 1882—Power to add parties. Suit by Benamidar—Addition to plaintiffs.—S. 32, C.P.C., is so wide as to meet cases of defect of parties. The power to add parties must be exercised with reference to the interests which those parties have at the time when the addition is being considered. It is impossible to hold that a suit by a *benamidar* can, to no extent, be properly instituted, although it may be partially defective. Where a *benamidar* sued and afterwards the assignees were brought in, as plaintiffs under s. 32, the joinder was legal. *BHOLA PERSAD v. RAM LALL*, 24 C. 34. (6 C. 373, D.) [F., 22 B. 672; R., 1 O.C. 10, 13 C.P.L.R. 33, 21 A. 380 = A.W.N. 1899, 130, 7 C.W.N. 229; D., 30 C. 265.]

(45)—Benamiee purchase—Mortgage by benamidar—Suit by real owner against benamidar—Parties—Test of benami purchase—Purchase in name of infant son—Presumption.—Suit by a father against his son to have it declared that the property in dispute belonged to him. The plaintiff alleged that he had purchased the property with his own money in the name of his son when the son was 2 or 3 years old, that he had remained all along in possession, that when he left for Mecca, he left the title deeds with his son and entrusted him with the management of his affairs, and that the son fraudulently refused to give back the title deeds. The son did not appear, but two persons who alleged that they were mortgagees from the son were made parties and they contended that the son was the real and beneficial owner of the property. These added defendants were not in possession of the property. *Held* that the lower Court did not exercise a sound discretion in allowing such parties to be added as defendants in the cause. The criterion in cases of benamiee purchases in India is to see from what source the money required for the purchase came. Where a father makes a purchase in the name of his infant son aged 2 or 3 years, and there is no suggestion that the latter has any separate funds of his own, the presumption is always in favour of the father that the purchase is benamiee for him. *AKBUR ALI v. MAHOMED FAIZ BUKSH*, 15 W.R. 12.

(46)—Act VIII of 1859, s. 77—Amendment of plaint—Guardian of minor plaintiff arrayed as co-plaintiff.—Plaintiff's deceased husband died leaving a son and a daughter. Plaintiff remarried and sometime after, her son also died. She then sued the step-brother of her deceased

Parties to Suit—continued.**—2.—Adding Parties to Suits**—continued.

husband for the estate of her deceased son. Plaintiff first instituted this suit as guardian of her minor daughter; but, finding that she had a personal right in the estate claimed, and that she was likely to be affected by the result of the suit, she applied to be made a co-plaintiff, and her application was complied with. *Held* that the character of the suit was not changed by the amendment, nor did it affect the merits of the case or the jurisdiction of the Court, and that the lower Courts had rightly arrayed the plaintiff amongst the parties to the suit under s. 77 of Act VIII of 1859. **OKHORA SOOT v. BHEDEN BARAIANEE, 10 W.R. 34.**

(47)—*Civ. Pro. Code, Act VIII of 1859, ss. 73, 81, 86, 246—Attachment before judgment—Claim—Claimant made party to suit.*—Where the plaintiff applied for the attachment of a house before judgment as belonging to defendants, under s. 81 of the C.P.C., 1859, and a third party intervened claiming the house as belonging to him by purchase previous to the commencement of the suit, and the first Court let in the intervenor under s. 73, and holding the sale to be valid, dismissed the claim as against the intervenor, exonerating the property from the claim, *held*, that the intervenor ought not to have been made a party under s. 73, but that his objection should have been entertained under ss. 86 and 246 of the C.P.C., 1859. **RAM RUTTUN DASS v. GOBIND DASS, 2 Agra 141.**

(48)—*Suit for specific performance of contract of sale of land—Subsequent purchaser intervening and made defendant.*—Plaintiffs sued to enforce the performance of a contract of sale of land, alleging that the defendant had received the consideration-money but had refused to execute the conveyance. A third party intervened alleging a subsequent registered conveyance of the same property to him. The suit was dismissed by the Court of first instance, but was decreed against both the parties by the lower appellate Court. *Held*, that the placing of the intervenor as a defendant upon the record and the deciding of an issue between him and the other parties to the suit, was wholly irregular. The decision should therefore be so modified as to strike out the name of the intervenor from the decree and to reduce the decree to its proper dimensions as a decree simply in favour of the plaintiff against the defendant for the execution of the conveyance. But the intervenor would not be entitled to his costs as he brought this result by his own ill-judged intervention. **GUDADHUR CHATTERJEE v. RAJ KRISTO ROY, 13 W.R. 73.**

(49)—*Joint contractors—Suit for portion of debt.*—Where the whole of a mortgage-debt is due to the persons claiming under the original mortgage, jointly and not severally, a person entitled to a moiety of the mortgage-debt cannot demand that moiety to be paid, but this principle has no application to a case where all the parties are before the Court, and the

Parties to Suit—continued.**—2.—Adding Parties to Suits**—continued.

matter can be finally dealt with by the decree in the suit. **KHADIR MOIDEN v. RAMA NAIK, 17 M. 12=4 M.L.J. 48. [R., 19 M.L.J. 221=5 M.L.T. 209.]**

(50)—*Joinder of defendant under s. 32 of the Civ. Pro. Code (X of 1877)—O. XVI, Judicature Act, cls. 13 and 18.*—In a suit for damages by a vendee of goods that the goods supplied did not correspond with the sample, the vendors could not apply to have their own vendor, from whom they purchased on the same sample, added as a defendant in the suit under s. 32 of the Civ. Pro. Code (of 1877), on the ground that the same question was involved as between them also, inasmuch as the original vendor's presence was not necessary for the decision of the question involved between the parties to the suit. [*Appl. and F., 2 A. 738; D., 27 C. 493; R., 13 C. 90; 118 P.R. 1890.*]—S. 32, Civ. Pro. Code, is taken *verbatim* from cl. 13 of order XVI, which does not allow of the original vendor, under such circumstances, being added as party, although such addition might be possible under cl. 18 of the Order. **MAHOMAD BADSHA v. NICOL FLEMING, 4 C. 355=2 C.L.R. 330.**

(51)—*Civ. Pro. Code (1882), s. 372—Champer-tor, application by, to be made party to suit—Assignments to champertor, disputed.*—A person had made advances to the plaintiff for the purpose of carrying on the suit and had obtained an assignment from her of half her interest in the suit. As it was alleged that the plaintiff was about to compromise the suit behind his back, he desired to be made a party therein as assignee from the plaintiff. The assignment was disputed by the plaintiff. *Held*, the assignee could be allowed to be a party only with the object of preventing his interest from being prejudiced, and not to interfere and raise issues between himself and the assignor. **SM. RAJARANEE DASEE v. DEBENDRA NATH SHAW, 3 C.W.N. 754.**

(52)—*Suit for removal of trustee—Issue as to mode of appointment—Necessary parties.*—In a suit for the removal of the trustee of a temple and for the appointment of somebody else in his place, the plaintiff alleged that the custom was that the trustee was elected in a particular way, but the defendant contended that succession to the office was by the rule of primogeniture; and one of the issues framed in the suit was as to who should be appointed, and whether any scheme for the management of the *debutter* properties should be framed, in case of the removal of the defendant. *Held*, that the eldest son of the eldest son (then deceased) of the defendant who applied to be made a party should be added as a party to the suit, and that his presence was necessary in order to decide the matter effectively and completely between the parties. **SAILAJANANDA DUTTA JHA v. UMESHANANDA DUTTA JHA, 4 C.W.N. 462.**

Parties to Suit—continued.**—2.—Adding Parties to Suits—continued.**

(53)—*Suit for damages for collision—Plaint originally presented against owners of ship, whether could be subsequently amended joining ship as defendant.*—In this suit for damages for loss incurred by plaintiffs on account of a collision between their steamship and a steamship of the defendants, the plaint was originally filed against the owners of the ship and not against the ship as well. Plaintiffs subsequently put in this application to amend the proceedings by adding the defendant's ship also as an additional defendant in the suit. *Held*, such amendment was permissible according to the practice and procedure of the High Court where it is often usual to make the ship and her owners defendants in cases of damage arising out of collision. There was no room for the contention of the defendants that in a proper case the initial proceedings cannot be so amended as to bring them into the form which they would have assumed in the first instance had it not been for the supposition that the ship was not amenable to the process of the Court. The word "defendant" used in s. 28 of the Code was *held* to include a vessel which, for the purpose, should be deemed as invested with a *persona*, and the amendment sought for by way of adding the ship as a defendant along with its owners who had alone been impleaded as defendants on the record at the time the plaint was filed, was therefore allowable. **THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LIMITED v. MESSRS SHEPHERD AND HAJI ISMAIL HOSSAIN, 12 B. 237.**

(54)—*Suit by joint Mitakshara family—Dissenting co-sharer.*—Where a sum of money is due to a joint Mitakshara family, one of whom refuses to join in suing a debtor, the proper procedure for the other co-sharers is to sue the debtor for the whole amount, making the dissenting co-sharer a defendant. **GURU PRASHAD ROY v. RAS MOHUN MUKHOPADYA, 1 C.L.R. 431.**

(55)—*Malabar Law—Suit by one of the co-urulars—Non-joinder.*—A co-urular is entitled to be consulted and to be joined as a plaintiff, failing which, a suit by one of the urulars alone, the others being made defendants, is bad for non-joinder. **PARAMESHWARAN v. SHANGARAN, 14 M. 489.**

(56)—*Malabar law — Civ. Pro. Code, s. 30—Joinder of parties — Decree against Karnavan—Suit anandravan—Res judicata.*—Individual members of the tarwad, as regards tarwad property, have no rights vested in them separate from the tarwad, and they can only sue as regards tarwad property in a suit, when all the members of the tarwad are either joined as plaintiffs or are made parties as defendants to the suit, or by following the procedure prescribed in s. 30 of the Code of Civil Procedure. [*R.*, 9 C.L.J. 623]. A decree passed against the Karnavan can only bind the tarwad when it is shown by the record itself that the decree passed against him was in his capacity

Parties to Suit—continued.**—2.—Adding Parties to Suits—continued.**

as Karnavan, and when the anandravans fail to prove that the decree debt is not binding on the tarwad. The nature of the debt is not *res judicata* in the subsequent suit. Observations on the tarwad system. **MOIDIN KUTTI v. KRISHNAN, 10 M. 322.**

(57)—*Civ. Pro. Code, s. 32—Suit by father for joint property—Transportation of father—Sons to be added as co-plaintiffs.*—Where a father, the plaintiff in a suit for recovery of family property, was transported for life, the joinder of his sons as co-plaintiffs was not improper, having regard to the fact that sons are co-owners with the father in the ancestral estate. **NARAKKA v. NARAYANA, 6 M. 331.**

(58)—*Hindu Law—Alienation by widow—Suit to set aside alienation—Plaintiff found not to be entitled to property.*—Where the plaintiffs sued only on their own behalf to recover possession of property which they alleged a widow had improperly alienated, and the Court, having found, that the plaintiffs were not entitled to possession, because the property was the property of the minor, unrepresented in the suit, nevertheless went on to declare the alienation made by the widow void as not having been made for good and sufficient cause, and set it aside, *held*, that the suit ought to have been dismissed without deciding the propriety of the alienation ought to be set aside by a suit instituted by a person suing as a guardian or permitted by the Court to sue as a guardian on behalf of the minor. **GOSAIEN SHIVA RAM v. RUGHO RAI, 2 Agra 44.**

(59)—*Civ. Pro. Code, Act VIII of 1859, s. 73—Suit by Hindu widow—Addition of after adopted son as co-plaintiff.*—A Hindu widow, after instituting a suit, adopted a son. Thereupon she prayed that the suit might be continued by the adopted son or that he might be added as a co-plaintiff. *Held* that under s. 73, Civ. Pro. Code, Act VIII of 1859, the Court could add the adopted son as an additional plaintiff to the suit. **PARVARTANI v. AMBALAVANA PILLAI, 1 M.H.C. 197. [R., 16 B. 119; D., 4 M.H.C. 22.]**

(60)—*Addition of plaintiffs—S. 32 of the C.P. Code.*—S. 32 of the Code does not enable a plaintiff who has brought a suit without having any right to do so, to add the name of a person who has the right to sue. Thus in a suit by the only son and heir of a deceased Hindu, the deceased's widow who had taken out letters of administration to the estate could not be added as co-plaintiff. **CHUNDER COOMAR ROY v. GOCOL CHUNDER BHUTACHARJEE, 6 C. 370. [D., 24 C. 34, 2 L.B.R. 246; R., 20 B. 537.]**

(61)—*Suit for share of estate, Court not competent to convert. into suit for general administration—Act VIII of 1859, s. 73.*—In the Court of the Recorder of Moulmein, one son of a deceased Chinaman sued another son who had obtained a certificate under Act XXVII of 1860 to recover his share of the deceased's estate.

Parties to Suit—continued.**—2.—Adding Parties to Suits—continued.**

The Recorder submitted the case for the opinion of the High Court adding his own opinion that it was competent to him to convert the suit into one for general administration of the estate. But the High Court answered that the Recorder had no power to transform the suit into a general administration-suit. Plaintiff was suing for his own share and not for general administration of the estate of the deceased. At the hearing of the suit, if all persons claiming some share or interest in the portion for which the plaintiff was suing, were not found to be parties to the suit, the Court may, by virtue of s. 73, Act VIII of 1859, order them to be made parties. *OH LING TEE v. AWKINIFEE*, 10 W.R. 86.

(62)—O. I, r. 8, *Civ. Pro. Code*, 1908—*Parties, addition of—Administration suit—Practice.*—If a person, belonging to a body of persons on whose behalf the suit has been filed, claims to be added as a party, he must show that his interests will be seriously affected to his prejudice if he is not allowed to come in. He must show that the conduct of the suit is not in proper hands or that action is being taken by the parties, who purport to represent him, in some way which is prejudicial to his interests. In an administration suit, it is extremely undesirable that individual creditors should be added as parties, unless they show some very strong reason that the person, who has filed the suit on their behalf, is not conducting it in the proper way. It is not enough that they should be willing to bear their own costs. There is considerable delay caused by a fresh party coming in, and the costs of other parties consequently are increased. *VASANJI TRICAMJI & CO. v. ISMAILBHAI SHIVJI*, 11 Bom. L.R. 1054=34 B. 420.

(63)—O. I, r. 10 (1), *Civ. Pro. Code*, 1908—*Party—Addition and substitution of accounts, suit for—Bona fide mistake—Mistake of fact or in law—Administration, order for, when relates back—High Court's power of interference—Interlocutory order.*—O. I, r. 10, sub r. (1) of the Code of Civil Procedure is applicable only to cases where it is established that the suit has been improperly instituted through a *bona fide* mistake, but such mistake may be one of fact or of law. Three of the five heirs of the testator, viz., A, B. and C, after the decision by the lower Court as to the invalidity of the will in a suit for construction of the will, and during the pendency of an appeal against that decision, instituted a suit against the representatives in interest of the executor and the other heirs for accounts. After the suit for construction of the will was withdrawn, owing to adverse decision of the question by a Full Bench, A and D, one of the shobaitis under the will, after obtaining letters of administration, applied in the account suit that they be substituted or added as parties and that B and C might either be removed from the suit or transferred to the category of defendants. *Held*, that A and D were to be

Parties to Suit—continued.**—2.—Adding Parties to Suits—continued.**

added to and substituted for the parties, and they were entitled to maintain the suit. Although an act done by a party, who afterwards becomes administrator, to the prejudice of the estate, is not made good by subsequent administration, yet if the act is for the benefit of the state, the order relates back, so that, by virtue of the appointment, the administrator is able to recover against such persons as have interfered with the estate, and thereby to prevent it from being prejudiced and despoiled. It is within the powers of the High Court to interfere with interlocutory orders, if the Court is satisfied that such interference is needed in the interests of justice. *CHARU CHUNDER DUTT v. SARAT CHUNDER SINGH*, 12 C. L. J. 537=8 Ind. Cas. 87.

(64)—*Rent suit—Intervenor—Claim to share of property—Party defendant.*—In a suit for rent, an intervenor, who lays claim to a share of the property on the ground of acquisition may be made a defendant at the discretion of the Court. *MUSST. CHOWRASEE KOORER v. BOKHOOREE SINGH*, 24 W. R. 350.

(65)—*Act VIII of 1859—Intervenor—Suit for possession by foreclosure of mortgage.*—Where an intervenor comes in, whose title is adverse to that set up both by plaintiff and defendant, he may be made defendant under s. 73, Act VIII of 1859, if his interest in the subject-matter of dispute is likely to be affected by the decision between them. *SARODA PERSHAD MITTER v. KYLASH CHUNDER BANERJEE*, 7 W. R. 315. [*Cons.*, 11 W. R. 361; *R.*, 2 A. 738.]

(66)—*Parties—Addition of plaintiff after period of limitation—Civ. Pro. Code, (Act XIV of 1882), ss. 27, 32—Whether suit barred—Estates Partition Act (VIII B.C. of 1876), s. 54—Evidence Act (I of 1872), s. 35—Batwara khasra—Measurement papers—Proof.*—A claim for rent is not barred because one of the plaintiffs was added to meet possible future objections, after the period of limitation (14 C. 400, 22 B. 672, *F.*) *Batuara Khasra* or measurement paper prepared under s. 54 of the Estates Partition Act 1876, does not come within s. 35 of the Evidence Act as a public record (25 C. 90, *F.*) But it may be proved in some other way. *BHOLA ROY v. JUNG BAHADOOR*, 8 Ind. Cas. 890.

(67)—*Civ. Pro. Code, s. 73—Suit in ejectment—Right to be added as parties—Nature of suit.*—In a suit for ejectment by a landlord against his alleged tenant certain other persons setting up a title adverse to the landlord were, at their request, made parties under s. 73 of the Code. *Held*, that they could not, by introducing themselves as defendants, cause an essential change in the nature of the litigation as already constituted between the plaintiff and his alleged tenant, or give themselves the advantages of defending instead of attaching parties. The proper course for them is to bring

Parties to Suit—continued.—2.—**Adding Parties to Suits**—continued.

a separate suit to establish their superior title. **GANU bin HANMANTRAV v. MORO GANESH, 10 B.H.C. 429.**

(68)—*Addition of, after remand—Landlord and tenant—Ejectment suit—Parties—Suit by some of the landlords not maintainable.*—After a case is remanded under s. 566 of the Civ. Pro. Code, the Court, to which the case is remanded, is not competent to add parties to the suit. A suit for ejectment against the tenants, filed by some of the landlords only, is not competent. **HARGULAL v. KHUSAL, 20 P.L.R. 1907.**

(69)—*Suit for ejectment—Added defendants.*—Where, in a suit for ejectment against C, certain parties were added who could not be affected by any decision against C, and the lower Court concluded that C was not in possession, but that the added defendants were his tenants, *held*, that there had not been a fair and complete trial as between plaintiffs and the added defendants as to any question of tenancy. The suit was dismissed without prejudice to any other suit plaintiffs might bring against the latter. **KARTICK NATH PARRAY v. CHUMMUN ROY, 21 W.R. 51.**

(70)—*C.P.C. Act VIII of 1859, s. 73—Suit for khas possession—Intervention, effect of.*—In a suit for khas possession of a share of an estate bought by plaintiff, the vendor pleaded that as the purchase money had not been paid, the purchaser was not entitled to get possession. Subsequently, certain persons, alleging that they held a *dur-mokurruree* under the vendor, before the alleged sale, intervened in the suit and were added as defendants under s. 73 of Act VIII of 1859. The right to khas possession being the main issue tried by both the lower Courts, the plaintiff's suit was dismissed on the ground that he was not entitled to possession after the grant of the *dur-mokurruree* by the vendor. *Held* that, although it was *prima facie* unnecessary for the intervenors to appear in the suit at all yet, as the subsequent conduct of the case had shown that the plaintiff really did intend that they should be affected by the decree, the High Court in special appeal could not, at that stage of the proceedings, remove the intervenors from the list of defendants, or treat the suit as if they had not been made parties and that the plaintiff was entitled to a decree as against the original defendant-vendor only without prejudice to the rights of the intervenors, the *dur-mokurrureedars*. **KEWUL SAHOO v. ISSUR DYAL ROY, 12 W.R. 334.**

(71)—*Act VIII of 1859, s. 73—Parties—Butwara, suit for.*—In the absence of any decision on the question whether the lands which plaintiff alleged the defendant had encroached upon were *ijmalee* lands as stated by the plaintiff, or the self-acquired property of the defendant's son as alleged by the defendant, the *butwarra*, which had been made on the footing that the lands were *ijmalee* lands, cannot be sustained. To this suit for the *butwarra*, the defendant's

Parties to Suit—continued.—2.—**Adding Parties to Suits**—continued.

son must be made a party under s. 73 of Act VIII of 1859. **JOY KISHEN MOOKERJEE v. RAJ KISHEN MOOKERJEE, 16 W.R. 101.**

(72)—*C.P.C. Act VIII of 1859, s. 73—Meeras or perpetual lease—Suit for partition by holder of meeras—Transfer of lessors from role of defendants to plaintiffs.*—Suit for partition by the holder of a *meeras* or perpetual lease, who had been entitled to claim partition under the lease, against the owner of the remaining share. The plaintiff's lessors had been made co-defendants in the suit. *Held* that the lessors could properly have been made co-plaintiffs. The High Court directed the first Court to transfer the lessors under s. 73 of Act VIII of 1859 from the role of defendants to that of plaintiffs. **GOUR CHURN SOOR v. JUGOBHUNDHOO SEN, 22 W.R. 437.**

(73)—*Co-sharers with plaintiff in suit for rent, application by, to be made parties—Order of Court making them parties, operating nunc pro tunc—Plaintiff not to suffer owing to delay of Court.*—The Court of first instance, in a suit by the plaintiffs as co-sharers in certain rent due by the defendant, dismissed the application of the other co-sharers to be made parties in the suit, and also dismissed the suit for want of parties; and the lower Appellate Court made an order making the co-sharers co-plaintiffs but dismissed the suit on the ground that, at the time the co-sharers were made plaintiffs (3rd July, 1890, the date of the lower Appellate Court's decree), the suit was barred by limitation. On appeal to the High Court, *held* that, as the co-sharers made their application during the hearing of the suit, *i.e.*, on the 24th January 1899, to be allowed to adopt what the plaintiffs had done and to be made co-plaintiffs, the order of the lower Appellate Court allowing the application, which had been refused by the Court of first instance, should be treated as operating *nunc pro tunc*, and that the other sharers should be regarded as having been made parties to the suit when the application was made; that the delay between 24th January, 1889, when the application was made, and the decision of the Court of appeal, was attributable to the act of the Court, and the plaintiffs should therefore not suffer from it. **RAMKRISHNA MORESHWAR v. RAMABAI, 17 B. 29. [R., 19 B. 807, 127 P.R. 1906 = 10 P.W.R. 1907.]**

(74)—*Suit to cancel under-tenures—Right to sue—Act XI of 1859, s. 37—Parties.*—The purchaser, with another, of an estate at a revenue-sale, who has since created a *patni* of his eight annas in favour of others, cannot sue, under s. 37 of Act XI of 1859, to cancel or vary the under-tenures within that *patni*, as he has previously parted with all his rights as *Zemin-dar*. Nor can the purchasers (*patnidars*) of such share bring such a suit, as they are not "purchasers of an entire estate." (15 W.R. 481, *F.*) [*Appr.*, 24 C. 334.] The Court cannot, in the above case, add the purchasers

Parties to Suit—continued.**—2.—Adding Parties to Suits—continued.**

of such share as plaintiffs in the suit by the original purchaser, who has himself no cause of action, and so introduce a right of action which did not previously exist. **DWARKA-NATH PAL v. GRISH CHUNDER BUNDO-PADHYA, 6 C. 827.**

(75)—*Civ. Pro. Code (Act VIII of 1859), s. 73—Limitation.*—No person ought, under s. 73, Act VIII of 1859, to be added as a plaintiff whose right of action is barred by the law of limitation. **KISHEN LOLL CHOWDHRY v. CHUNDER COOMAR ROY, W.R. 1864, 152.**

(76)—*S. 32, Civ. Pro. Code, 1882—Adding defendant—Question of limitation.*—When a Court, of its own motion, adds a party defendant, under s. 32, Civ. Pro. Code, 1882, who, it thinks, is necessary for the disposal of the suit, the question of limitation does not arise. **GRISH CHUNDER SASMAL v. DWARKA NATH DINDA, 24 C. 640.** (12 C. 642, F.) [*Overruled*, 35 C. 519, F.B.=11 C.W.N. 350=5 C.L.J. 242=2 M.L.T. 137; F., 27 C. 540; *Discussed*, 5 Bom. L.R. 618; R., 23 B. 11; *Cons.*, 9 C.W.N. 421=32 C. 582; *Disappr.*, 74 P.L.R. 1903=25 P.R. 1903, 33 C. 613=10 C.W.N. 551=3 C.L.J. 576.]

(77)—*Civ. Pro. Code, s. 559—Addition by Court of respondent in an appeal, whether subject to rule of limitation.*—The exercise of the powers of a Court, as to adding a respondent, under s. 559, Civ. Pro. Code, is, so far as limitation is concerned, distinguishable from the analogous power exercisable by Courts of first instance under s. 32 of the Code. It is competent to the Appellate Court to proceed to add a person as party respondent, under s. 559, of the Code, even when, at the time of his being added as such, the period of limitation within which an appeal could have been presented against him had elapsed. No period of limitation has been specified by the Limitation Act, for the action of the Court in such matter. **BINDESHRI NAIK v. GANGA SARAN SAHU, 14 A. 154, F.B.=A.W.N. 1892, 13.** [F., 1 Ind. Cas. 518; D., 14 A. 524.]

(78)—*Civ. Pro. Code, 1882, s. 559(=O. XLI, r. 20, new Code)—Addition of parties—Limitation—Addition as respondent of party arrayed on same side with appellant in original suit.*—The powers under the section regarding the addition of parties may be exercised by a Court *suo motu*, so long as it is seized of the case and is empowered by the Code to secure that the parties to the appeal are properly arrayed; and the action of the Court under the section is not subject to any such rule of limitation as would fall within the purview of the Limitation Act, 1877. [*Appl.*, 14 A. 154, F.B.; R., 11 O.C. 208.] The Court can, under s. 559 of the Code, make a person a respondent who, in the original suit, was arrayed on the same side with the appellant. **SOHNA v. KHALAK SINGH, 13 A. 78=A.W.N. 1891.**

Parties to Suit—continued.**—2.—Adding Parties to Suits—continued.**

(79)—*Limitation—Addition of parties—Order disallowing objection of party added—Appeal—Civ. Pro. Code, s. 32.*—An order making the appellant a defendant in the suit was passed on the 8th February 1882. The appellant objected to her being made a defendant. An order disallowing her objection was passed on the 8th May, 1882. An appeal was preferred against the latter order by the appellant. *Held* that the appeal was barred by limitation because it was instituted after the expiry of the limitation calculated from the 8th February, 1882, when the order to add the appellant as a party to the suit was made. **DEO AMMA KUAR v. SADA SHEO, A.W.N. 1883, 8.**

(80)—*Civ. Pro. Code, ss. 73, 246—Limitation—Addition of defendant.*—The proprietrix of an estate divided it into seven shares, giving two to each of her two sons, one to each of her two daughters and retaining the seventh for herself. Her share was afterwards increased according to the provisions of Mahomedan Law by a portion of what had been given to one of the sons who died. Subsequently, her rights in the estate were sold in the execution of a decree and bought by B. The rights were eventually purchased from B's vendee by one K in the name of his two sons, and K brought a suit in the name of his two sons against certain parties who held the whole estate in *zuripeshgi* from the original proprietrix and her family, but obtained a decree for one-seventh only giving him possession conditionally on his payment to the *zuripeshgidars* in possession his proportion of the loan. The decree was confirmed on appeal and K was made liable for the costs of the defendants in respect of whom his claim was dismissed. One P who had previous to this obtained a decree against K's father took out execution against K and applied for sale of his rights in the above mentioned estate. K's objection that the suit whereby he got possession of the share of the estate was in the name of his sons was overruled and the decree-holder purchased the property in Court auction. Subsequently one of the successful defendants in K's suit for possession of the estate to whom costs had been allowed applied for execution and the objection by P's son under s. 246, Civ. Pro. Code, having been summarily rejected for want of prosecution by the claimant, the estate which K had obtained was once again sold in execution and one A bought the same. P's son, the claimant, then brought the present suit within one year to set aside the sale, and to have his own title declared. The suit was brought against the purchaser A and against the representatives of the *zuripeshgidars*, but on the petition of L, one of the female heirs of the original proprietrix, her name was added to the list of defendants. The Court of first instance gave the plaintiff a decree and on appeal the lower Appellate Court found that the plaintiff's case was barred by limitation, in respect of L, the supplementary defendant, on the

Parties to Suit—continued.**—2.—Adding Parties to Suits—continued.**

ground of non-possession within 12 years, and that therefore no right remained to K that could be sold. *Held* (1) that, as the case presented under s. 246, Civ. Pro. Code, was not prosecuted by the plaintiff, the defendant was not prevented from pleading that whatever title the plaintiff might have had at sometime previous, that title had been extinguished by his having had no possession for the 12 years preceding the suit; (2) that L was properly added as defendant as she was interested in the result of the suit; (3) that the plaintiff's right which he derived from K, was not a right to sue, but the right to execute a decree obtained against K, and sixty years' limitation would not apply **RAM SURUN SINGH v. MAHOMED AMEER, 13 W.R. 78.**

(81)—*Civ. Pro. Code, 1882, ss. 27, 32—Limitation Act, XV of 1877, s. 22—Suit by manager of firm—Addition of other partner as co-plaintiff on objection taken by defendant.*—A suit was brought on the 21st November 1884 to recover a debt due to the firm of K.S. The suit was based on a document dated 1st December 1881. In the plaint, the plaintiff was described as "the firm of K. S. by its manager S.S." The defendant objected that the plaint did not disclose the names of all the partners in the firm of K.S., that one M was a partner in the firm, and that he should also be joined as a co-plaintiff. M was accordingly made a co-plaintiff on the 27th January 1888. It was then contended, on behalf of the defendant, that the suit was barred by limitation under s. 22 of the Limitation Act. *Held* that the case was one of misdescription and not of non-joinder as the action was brought in the name of the firm by the manager, and the manager did not sue in his own name, that when the defendant objected that the name of the other partner should be disclosed, the Court should not reject the suit under s. 32, Civ. Pro. Code, but should order that the new party be added, and that, as the other partner was added as a co-plaintiff and as it was found that S.S. was entitled to sue for the firm, the addition of M's name came under the provisions of s. 27, Civ. Pro. Code. **KASTURCHAND BAHIRAVDAS v. SAGARMAL SHRIRAM, 17 B. 413.** [*F.*, 27 B. 157; *R.*, 18 M. 33, 20 B. 767, 127 P.R. 1906 = 10 P.W.R. 1907 = 58 P.L.R. 1907, 3 O.C. 347, 7 C.W.N. 817, 149 P.R. 1907, 1 S.L.R. 191; *D.*, 21 B. 580.]

(82)—*Suit for partnership accounts—Joint agreement—Omission of parties—Non-joinder of parties—Limitation—Effect of subsequent addition.*—When there are a certain number of persons who, under one and the same agreement amongst themselves, are entitled to share in the proceeds of a fund which they hope will be brought into existence, all those persons must be necessary parties to a suit, the object of which is to take an account necessary for the purpose of ascertaining the assets of the fund and dividing them. [*F.*, 7 C.L.J. 266.] If a suit is brought by certain persons as plaintiffs, and they omit in the first instance to join with

Parties to Suit—continued.**—2.—Adding Parties to Suits—continued.**

them as co-plaintiffs persons who are necessary parties, and these parties are afterwards added as plaintiffs at a time when for them the claim is time-barred, the whole suit must be dismissed. And there is no distinction in principle between the case of one who ought to have been originally a plaintiff and the case of one who ought to have been originally a defendant. **RAMDAYAL v. JUNMENJOY COONDOO, 14 C. 791.** [*F.*, 21 B. 154; *Cited*, 69 P.R. 1902; *R.*, 25 C. 285, 31 C. 487, P.C.; *D.*, 3 C.L.J. 576 = 10 C.W.N. 551 = 33 C. 613, 6 C.L.J. 558 = 11 C.W.N. 84.]

(83)—*Partnership—One alone of several surviving partners, whether can sue for firm's outstandings—Civ. Pro. Code, s. 32, power of Court to add parties under—Non-joinder—Limitation Act, 1877, s. 22.*—Where a contract is made with or a debt incurred to a firm consisting of several partners and one of them dies, a suit against the contractors or debtors cannot be maintained by one alone of the surviving partners, except possibly in the case of an assignment having been made to him by the other surviving co-partners. (1 A. 453, 9 A. 486, *R.*) [*Not F.*, 27 C. 540; *F.*, 15 A. 407, 6 M.L.J. 27; *R.*, 21 B. 154, 25 P.R. 1903 = 74 P.L.R. 1903, 29 A. 311 = A.W.N. 1907, 58 = 4 A.L.J. 194, 11 C.W.N. 350 = 5 C.L.J. 242; *D.*, 25 C. 285, 25 A. 378, 32 C. 582 = 9 C.W.N. 421.] Where an objection as to non-joinder of parties is taken in proper time by the defendants, and limitation had run in respect of those who should have been joined as plaintiffs and had not been joined, the whole suit must be dismissed. The same will be the result where a Judge acting under s. 32 of the Civ. Pro. Code, adds a person as a necessary plaintiff after the period of limitation for a suit by him alone or with others has expired. S. 22 of the Limitation Act, 1877, would clearly apply to the right of suit of the person so added, and the suit could not be maintained without him. Limitation cannot deprive the Court of its power to act under s. 32, but the Court's power to add a party is a different matter from its duty to dismiss the suit as barred by limitation. **IMAM-UD DIN v. LILADHAR, 14 A. 524 = A.W.N. 1892, 104.** (6 C. 815, 7 B. 217, *R.*; 12 C. 642, *Diss.*) [*Not F.*, 27 C. 540; *F.*, 15 A. 407, 6 M.L.J. 27; *R.*, 21 B. 154, 25 P.R. 1903 = 74 P.L.R. 1903, 29 A. 311 = A.W.N. 1907, 58 = 4 A.L.J. 194, 11 C.W.N. 350 = 5 C.L.J. 242; *D.*, 25 C. 285, 25 A. 378, 32 C. 582 = 9 C.W.N. 421.]

(84)—*Practice—One party died pending the filing of an appeal—Legal representative not brought on record—Procedure.*—Where a suit for partition was disposed of and before the filing of an appeal one of the respondents died and the appeal was decided without the legal representatives being brought on record: *held* in second appeal that, as nothing appears on the record to show that the legal representatives are not necessary parties, the procedure is to reverse the decree of the Appellate Court and

Parties to Suit—continued.**—2.—Adding Parties to Suits**—continued.

ask it to dispose of the appeal afresh. It is difficult to see how a decree for partition could be passed without the legal representatives of a deceased party. **SHEIK FARIED SAHIB v. KULSAM BEEBI, M.W.N. 1912, 825.**

(85)—*Practice—Parties — Partition-suit — Death of plaintiff—Defendant, legal representative—Substitution of parties—When allowed—Revision—Civ. Pro. Code, (1908), s. 115.*—Where, in a suit for partition, the plaintiff died and some of the defendants happened to be his legal representatives who applied to be made as his legal representatives. *Held*, that they should be substituted in the place of the deceased plaintiff. The case may be different if there was any contest between the deceased plaintiff and those defendants. The primary question in such cases must be taken to be what are the substantive rights of the parties and whether the right of any one of them survives to the others. The law of procedure must then be so adjusted as to give effect to the rights in controversy, and substantive rights cannot be allowed to be affected by any universal rule to the effect that a defendant cannot be recognised as the representative of the plaintiff or *vice versa* (25 B. 606, 2 C. 997, 15 M.L.J. 142, R.) Where the lower Court refused to allow the defendants to be substituted in the place of a deceased plaintiff, whose legal representatives they were, on the ground that it had no power to do so: *Held*, that the Court failed to exercise a jurisdiction vested in it of bringing on record the heirs of the deceased plaintiff, and that the High Court could, under s. 115, Civ. Pro. Code, 1908, interfere with that order in revision. **KHATIJA BI v. BABU SAHEB, 11 M.L.T. 409=14 Ind. Cas. 544.**

See **ABATEMENT OF SUITS, 12 B.H.C. 257.**

See **BEN. ACT X OF 1859, s. 77, 2 B.L.R., A.C., 160.**

Assignment pendente lite — Addition of assignee as co-defendant after the period of limitation—See PUN. ACT XVI OF 1887, ss. 53 and 60, 3 P.R. 1907, Rev.=4 P.W.R. 1907, Rev.=44 P.L.R. 1908.

Suit on mortgage—Parties—One defendant also assignee from another defendant—Not necessary to be again made party as assignee—See ASSIGNMENT, 9 M.L.T. 410=9 Ind. Cas. 643.

Agreement to purchase equity of redemption pending litigation—Application by purchaser to be added as defendant—Right of purchaser to be made party—See CHAMPERTY, 8 B. 323.

*Suit commenced by wrong plaintiff—Order of Appellate Court to dispose of suit after substituting new plaintiff—Right of defendant to claim *de novo* trial after remand—See CIV. PRO. CODE, 1908, O. XVIII, r. 15, 9 Ind. Cas. 254=9 M.L.T. 324.*

Parties to Suit—continued.**—2.—Adding Parties to Suits**—concluded.

Addition of—Appellants — Tests—See CIV. PRO. CODE, 1908, O. XXI, rr. 11 (2), 22, 5 C. L.J. 434.

Power of Appellate Court to add a respondent after expiry of period for appeal—See CIV. PRO. CODE, 1908, O. XLI, r. 20, 1 Ind. Cas. 518

Addition of, by District Court—See CIV. PRO. CODE, 1908, O. XLI, r. 20, 3 Bom. L.R. 172.

See CIV. PRO. CODE, 1908, O. XLI, r. 20, 15 M. 362=2 M.L.J. 175.

See CONSIDERATION, 7 B.H.C., A.C., 10, 2 B.H.C. 194.

*Suit by donee of property by sonless Hindu —Question whether document under which donee claimed was deed of gift or will—Adoption of son by donor *pendente lite*—Whether adopted son to be added as party—See HINDU LAW—GIFT, 5 B. 630.*

See LIMITATION ACT, 1908, s. 5, 9 C. 355=11 C.L.R. 430.

See SALE—SALE IN EXECUTION OF DECREE —MISCELLANEOUS, 13 B. 22.

See ss. 11 AND 12—VIC. C. 21, 1 B.H.C. 251.

—3—Substitution of Parties to Suit.

See CIV. PRO. CODE, 1908, O. XXII, rr. 1 to 12.

(1)—*Civ. Pro. Code, s. 32—Striking off of name of party-defendant, to be done only before first hearing of suit.*—Under the second clause of s. 32 of the Civ. Pro. Code, which relates to the addition and transmutation of parties, the discretion given to the Court is one unlimited in point of time and not requiring that the Court should be moved thereto by any of the parties. But in ordering, under the provisions in the first paragraph of that section, "that the name of any party, whether as plaintiff or defendant, improperly joined, be struck out," the Court must look to the three conditions precedent to the striking out which appear from the section *viz.*:—first, there must be an application by one party or the other, secondly, the suit must not have progressed beyond the first hearing, and thirdly, the Court must be satisfied, that the party had been improperly joined. So, where such striking out of the name of a party has not taken place on or before the first hearing, such name could not be properly struck out afterwards. **ABBASI BEGAM v. IMDADI JAN, 18 A. 53=A.W.N. 1895, 156.**

(2)—*Civ. Pro. Code, s. 73—Parties—Power of Appellate Court to strike out and add.*—There is certainly nothing in the provisions of s. 73 of the Civ. Pro. Code, which gives an Appellate Court authority to strike out a respondent's name, and in lieu of it to make other parties defendants in the suit, and then send the case down to the lower Court, in order that it might be re-tried as against those parties. **BAL GOBIND TEWAREE v. HUREENATH PERSHAD SAHOO, 16 W.R. 183.**

Parties to Suit—continued.**—3.—Substitution of parties to suit—*ctd.***

(3)—*Suit for possession by Hindu widow—Death of plaintiff—Co-plaintiffs, as representatives—Suit, abatement of—Survival of cause of action—Irregularity—Consent of parties cures—Judgment written by Judge who heard case—Pronouncement by successor—Validity of judgment.*—On the death of the plaintiff in a suit for possession by a Hindu widow as heir to her deceased husband, two persons, as her legal representatives, were made co-plaintiffs. *Held* that the suit would not abate, the cause of action being one which, from its very nature, survived on plaintiff's death. *Held* further, that, although it was irregular to allow the two co-plaintiffs to be brought on record as legal representatives, the irregularity was cured by the consent of the parties, because it was for their advantage that the case should go on to trial and that the co-plaintiffs should be left in possession of any decision in the suit which they might obtain against the defendants and should be left to settle the questions arising between themselves in other proceedings. A judgment written by the Judge who heard the case, but pronounced by his successor in office, is not invalid. *MUSSAMUT PARBUTTY v. MUSSAMUT HIGGIN*, 17 W.R. 475. [*F.*, 35 C. 756 F.B., = 7 C.L.J. 666 = 12 C.W.N. 682 = 4 M.L.T. 33; *R.*, 34 C. 293 = 11 C.W.N. 501, 6 C.L.J. 547 = 12 C.W.N. 90.]

(4)—*Defendant dead at time of suit—Suit not to go on against dead man—Fresh proceedings—Written statement from person not party to suit—Impleading party against whom no relief sought.*—As soon as it is proved that a defendant was dead at the time when a plaint was filed, the Court ought to refuse to proceed further in that suit and leave plaintiff to begin *de novo* against the person against whom alone he could legally move. A Court is not at liberty to receive a written statement in a suit from any one not a party to it, or to permit him to appear at the hearing to contest plaintiff's demand. Further it ought not to allow introduction into a suit of a party against whom no relief is sought. *MOHARANEE SURNO MOYEE v. BYKUNT CHUNDER MUSTOFOE*, 25 W.R. 17. [*R.*, 5 M. 52.]

(5)—*Deceased defendant—Application to substitute representative—Issue—Party sued in representative capacity—Suit against Hindu widow on mortgage—Substitution of representative without enquiry and decree—Subsequent declaratory suit by representative—Civ. Pro. Code, 1882, ss. 13, 244.*—On an application by the plaintiff to substitute a person on the record as the heir of a deceased defendant, an issue should be raised as to whether such person is the heir of such defendant. A party sued in a representative character is not necessarily a party within the meaning of s. 244 of the Civ. Pro. Code for all purposes, and irrespective of the nature of the representative character in which such person is a party. (18 W.R. 185 = 11 B.L.R. 149, P.C.

Parties to Suit—continued.**—3.—Substitution of parties to suit—*ctd.***

cons.) The decree in a suit upon a mortgage against a Hindu widow, on whose death, *pendente lite*, a certain person was substituted on the record as her representative without deciding whether he was such representative, would not bar, either as *res judicata* or under s. 244 of the Civ. Pro. Code, a subsequent suit by such representative to have it declared that the mortgage and decree covered only the widow's life interest. *KANAI LALL KHAN v. SASHI BHUSON BISWAS*, 6 C. 777 = 8 C.L.R. 117. [*F.*, 17 C. 57; *D.*, 16 C. 603; *Diss.*, 7 A. 547 = A.W.N. 1885, 132; *Expl.*, 16 C. 1; *R.*, 8 A. 626 = A.W.N. 1886, 228, 3 O.C. 273.]

(6)—*Sale in execution—Death of judgment-debtor after attachment—Sale without bringing the representatives on record, effect of.*—A sale held, in pursuance of an attachment effected, during the life time of the judgment-debtor, and after his death, without bringing the legal representatives on record, is illegal and must be set aside. *RAMASAMI v. BAGIRATHI*, 6 M. 180. [*Diss.*, 12 A. 440, F.B.; *Appr.*, 15 M. 399, 22 M. 119; *R.*, 19 B. 276, 19 M. 219, 21 B. 424, 20 P.R. 1898; *D.*, 12 M. 90, 19 M. 219, 12 M. 211.]

(7)—*Civ. Pro. Code—Order for possession—Subsequent death of judgment-debtor, effect of.*—Where a judgment-creditor had obtained an order for possession prior to the death of the judgment-debtor, there was no necessity for him to bring any other person on the record between the date of that order and the date on which it was executed, *BIYYAKKA v. FAKIRA*, 12 M. 211. (6 M. 180, *D.*)

(8)—*Civ. Pro. Code, ss. 234, 368—Execution-sale after death of judgment-debtor—Representative not joined.*—Where a judgment-debtor dies after the sale proclamation has been made, and the actual sale takes place thereafter without bringing the legal representative on the record, the sale is invalid and liable to be set aside. *KRISHNAYYA v. UNNISSA BEGAM*, 15 M. 399. [*Not F.*, 23 C. 686; *F.*, 22 M. 119; *Appr.*, 19 M. 219; *R.*, 19 B. 276, 21 B. 424, 20 P.R. 1898, 19 M.L.J. 671.]

(9)—*Civ. Pro. Code, 1882, ss. 234, 298—Execution of decree—Death of judgment-debtor before sale but after proclamation—Legal representatives not brought on record—Legality of sale.*—In execution of certain decrees, a debt due to the judgment-debtor was ordered to be sold. The judgment-debtor died after the proclamation and before sale. The sale, however, was conducted without the legal representatives of the deceased being brought on record. Subsequently, the Administrator-General having assumed the management of the estate of the judgment debtor applied to be brought on record and to have the sale set aside. *Held* that the sale was not valid. The only thing sold was the right of a dead man which passes no property, as the dead man had no right at the time of the sale, his rights being then in his legal representatives, and their rights were not sold or

Parties to Suit—continued.**—3.—Substitution of parties to suit—*ctd.***

in any way affected, because they were not on the record. The sale could be set aside without recourse to a separate suit. *GROVES v. ADMINISTRATOR-GENERAL OF MADRAS*, 22 M. 119=8 M.L.J. 288. [R., 12 M.L.J. 24.]

(10)—*Application for costs against estate of deceased appellant—Civ. Pro. Code (Act X of 1877), ss. 366, 582.*—Even in the absence of an express direction in s. 582 of the Civ. Pro. Code to the effect that "plaintiff" in s. 366 shall include "appellant," the power conferred by the latter section, on the Court of original jurisdiction, to award costs against the estate of a deceased plaintiff, may be taken to be conferred also on the Appellate Court. *Per Mitter J., (Garth, C. J., doubting.) RAJMONEE DABEE v. CHUNDER KANT SANDEL*, 8 C. 440=10 C.L.R. 437. (4 B. 654, F.) [R., 11 C 694, 7 A. 693=A. W. N. 1885, 169, 10 A. 223, F.B.]

(11)—*Civ. Pro. Code, Act XIV of 1882, s. 365—Legal representative.*—The executor of a will left by a plaintiff who has obtained a decree for possession and died after presenting the appeal against other portions of the decree, can be brought on the record as his legal representative. *PAYYATH NANU MENON v. THIRUTHIPALLI RAMAN MENON*, 20 M. 51.

(12)—*Appeal—Death of respondent—Procedure—Civ. Pro. Code, s. 368.*—The Civ. Pro. Code, makes no provision for the procedure to be followed in the case of the death of a respondent in an appeal. By reason of s. 582 of the Code, the procedure laid down in s. 368 must be applied in the case of the death of a respondent. The appellant, like a plaintiff, is to be at liberty to select any person whom he may think fit, as the proper person to defend the appeal. No person other than the person selected by the appellant has a right to force himself into the proceedings and to claim to have his name entered as representative of the deceased respondent, against the appellant's consent. *LAKSHMIBHAI v. BALKRISHNA*, 4 B. 654. [F., 8 C. 440=10 C.L.R. 437; R., 9 B. 151, 8 M. 300, 7 A. 693, F.B., 10 A. 223, F.B., 13 B. 22, 19 M.L.J. 33=4 M.L.T. 227, D., 10 B. 663.]

(13)—*Civ. Pro. Code, ss. 32, 368—Death of respondent pending appeal—Rival claims to represent deceased—Powers of Court.*—The Court has the same power to make parties to an appeal as it has to make parties to a suit. Therefore, though it is true that the Court must place on the record the person indicated by the appellant as the representative of a deceased respondent, yet, where there appears a substantial doubt whether the person indicated by the appellant is the representative of a deceased respondent or a representative for all purposes connected with the matters in litigation, and a person other than the person indicated lays claim to the representative character and on good *prima facie* grounds, and where, if he be not allowed to join, the interests of the person entitled to

Parties to Suit—continued.**—3.—Substitution of parties to suit—*ctd.***

the estate of the deceased may be prejudiced, the Court ought to proceed under s. 32 to make him a party to the appeal. *ATHIYAPPA v. AYANNA*, 8 M. 300. [Diss., 10 A. 223, F.B., 10 A.W.N. 21; R., 13 B. 22, 26 M. 230=12 M.L.J. 368, 4 M.L.T. 227, 19 M.L.J. 33.]

(14)—*Civ. Pro. Code, 1882, ss. 368, 372—Respondent dying during pendency of appeal—Right of representatives to be brought on record—Extent of rights of appellant.*—The provisions of s. 368 of the Civ. Pro. Code, generally extend to appeals, and the appellant may choose his own respondent as the representative of one deceased. The rule in s. 368, however, should be taken to have been intended for the case in which the death, and the death only, of the defendant, constitutes the change in the circumstances. So, where there has not only been the death of the respondent, but also an alleged prior conveyance by him of the property awarded to him by the decree appealed against, the case becomes one of an assignment or creation of an interest pending the appeal, *plus* the death of the assignor; and so embraces a fact more than that contemplated by s. 368. In such a case, s. 372, containing the more general or residual rule, is alone sufficiently inclusive and must therefore be applied. Generally, it is the plaintiff who chooses his allegations and the persons whom he desires to make responsible. He is looked to as the person to take the requisite steps for continuing the suit against persons who might have become newly responsible. The same reasons would apply to an appellant who, however, may only determine who shall be the respondent, but not that any particular person shall not be a respondent. The choice of respondents made by the appellant may be erroneous or defective through ignorance or fraud and the real representative of the original respondent cannot justly be refused an opportunity of maintaining the decision sought by the appeal to be upset. *RAJARAM BHAGWAT v. JIBAI*, 9 B. 151. [F., 16 B. 27; R., 20 B. 167, 22 A. 231=A.W.N. 1900, 79, 27 B. 31, 19 M.L.J. 33; D., 7 O.C. 78.]

(15)—*Death of defendant—Appeal—Legal representative of defendant not brought on record—Civ. Pro. Code, 1859, s. 104—Decision in appeal—Validity.*—Where defendant's death was notified to the Court, and the plaintiff in appeal did not attempt, under s. 104, Civ. Pro. Code, 1859, to bring in the heirs of the deceased or to have him in any way represented during the trial of the appeal, the Appellate Court's decision was held to be incorrect in law. *MONEE LALL v. KAZEE FUZOL HOSSEIN*, 14 W.R. 337. [R., 21 B. 314.]

(16)—*Death of plaintiff—respondent pending appeal—Execution of decree against plaintiff—Representatives.*—On the dismissal in appeal of a suit, decreed in the first Court, after death of plaintiff, his representatives not having conspired to keep the appellant in the dark,

Parties to Suit—continued.**—3.—Substitution of parties to suit—*ctd.***

the difficulty of executing a decree against a dead man was got over by the High Court ordering the lower Court to try the appeal *de novo*, making the dead man's representatives respondents. **SHAMA PUDDO MOITRO v. DINO NATH BAGCHEE**, 25 W.R. 108.

(17)—*Civ. Pro. Code*, 1882, s. 32 [= O. I, r. 10 (2)], 365, 366, 367, 368 [= O. XXII, rr. 3 (1), (2), 5 (4)], 582 [= s. 107 (2) and O. XXII, r. 11], 587 [= s. 108]—*Plaintiff respondent dying pending appeal—Rival legal representatives—Power of Appellate Court to determine who is the true legal representative.*—Pending a second appeal concerning a claim for declaration of title to immoveable property, and for possession and mesne profits thereof, the plaintiff respondent died, and his widow was, on her own application, substituted as his legal representative; and the defendants-appellants applied to have the father of the deceased substituted as such representative, alleging that he and not the widow was the true heir and legal representative of the deceased. The father did not object to such proposed substitution, and both parties admitted that either the widow alone or the father alone can be such representative; it was held by the Full Bench (*Mahmood J. dissenting*) (7 A. 693, 9 A. 447, 4 B. 654, 8 C. 440=10 C.L.R. 437, 2 A. 738, 8 M. 300, R.) (a) that s. 32 of the Code did not apply to a case like this (8 M. 300, Diss.); (b) that the latter portion of s. 582 did not limit the words of the earlier section so as to make only s. 368 applicable to the case; (c) that ss. 365, 366 and 367, having regard to the words "as nearly as may be" and "as far as may be" in s. 582, may be applied, and in any event analogically, to the present case, to enable the real legal representative of the deceased to be brought on the record; (d) that, whatever view of s. 582 might be taken, there was still an inherent power in a Court of record to ascertain whether or not it has before it the proper parties to a first or second appeal, if the question substantially raised; and (e) that the question as to whether the father or the widow was the legal representative should, either before or at the hearing of the appeal, and as a preliminary point, be ascertained and determined for the purpose of the prosecution of the appeal. *Held by Mahmood, J., (diss.)*—(a) that the defendants-appellants must in this case be treated as plaintiffs, and the deceased plaintiff-respondent as a defendant, and therefore as there was no question of the death of a plaintiff in the case, ss. 363 to 367 had no application; (b) that s. 368 read with ss. 582, 587 was fully applicable, and therefore on the application of the appellant, the Court should enter the name of any person whom he desires to implead, as the legal representative of the deceased respondent; (c) that, under s. 32 which also applied to the case, the widow was entitled to be on the record as the legal representative; (d) that there is no authority in the Code either to require or permit the decision of disputes as to the legal

Parties to Suit—continued.**—3.—Substitution of parties to suit—*ctd.***

representation of a deceased plaintiff-respondent; and (e) that, therefore, without adjudicating upon the question whether the father or the widow was the proper representative, both must be brought upon the record as parties respondents to the appeal, and the appeal decided after hearing both of them. **MUHAMMAD HUSAIN v. KUSHALO**, 10 A. 223, F.B.=A.W.N. 1888, 98 [F., 10 A. 270; R., 10 A. 260, 66 P.R. 1894, 1 S.L.R. 41.]

(18)—*Hindu Law—Mayukha-stridhan proper and improper—Devolution—"Sons and other heirs and "sons and the rest," meaning of—Hindu law—Decree for maintenance in favour of wife—Appeal by husband—Death of wife—Daughters of deceased—Legal representatives—Practice.*—If during the pendency of an appeal by a husband against whom a decree for maintenance of his wife had been passed by the Court of first instance, the wife dies leaving daughters, the latter (and not the husband) are the legal representatives of the deceased for purposes of the appeal, the arrears of maintenance decreed to the wife being her stridhan property. **MANILAL REWADAT v. BAI REWA**, 17 B. 758. [R., 28 M. 1.]

(19)—*Civ. Pro. Code (Act XIV of 1882)*, ss. 368, 582—*Representatives of sole respondent deceased, application to be placed on record put in by, not entertainable.*—S. 368 of the Civ. Pro. Code, enables the plaintiff in a suit to have the representatives of a deceased sole defendant placed on the record, so that he may continue his suit against them, but, there is no section in the Code which provides for the representatives of a sole defendant deceased being placed on the record at their own request, and, therefore, s. 582 can supply no such procedure in the case of the death of a sole respondent in an appeal. An application, therefore, put in by the representatives of such a deceased sole respondent, is liable to be dismissed on the ground that it is not one authorised by the Civ. Pro. Code. **BAIJAVAR AND MAGAN DAVLAT v. HATHISINGH KESRISINGH**, 9 B. 56. [R., 7 A. 693=A.W.N. 1885, 169, F.B., 19 M.L.J. 33.]

(20)—*Civ. Pro. Code—Death of appellant—Application by several persons to prosecute appeal—Determination of party entitled to appeal.*—Where, on the death of an appellant, several persons apply to prosecute the appeal, the Court is bound to determine which of the parties is so entitled. **KATAMA NACHIYAR v. THE RAJA OF SIVAGANGA**, 2 M.H.C. 146, Note, P.C.

(21)—*Civ. Pro. Code*, 1882, ss. 365, 366—*Reg. VIII of 1827, s. 10—Administrator of property appointed under, whether could be placed on record as representative of deceased appellant.*—On the death of the appellant, in this case, the Nazir appointed administrator of his property under s. 10 of Reg. VIII of 1827, asked to be placed on the record of the appeal as legal representative of the

Parties to Suit—continued.**—3.—Substitution of parties to suit—*ctd.***

deceased appellant, and an *ex parte* order was made granting the application. Objection, however, having been taken at the appeal that, as under s. 365 of the C.P.C., 1882, no application was made by any person who was the real legal representative to have his name entered on the record in place of the deceased appellant, the appeal must abate. Under s. 366 of the Code, it was *held* that such objection must prevail. By appointment, the administrator could not be deemed to have in any way become the representative of the deceased person but was merely the custodian of the property in existence and in hand, for a time, until the rightful owner appeared or the property was sold under the section. **MALAPA v. DEVI, 21 B. 102.**

(22)—*Substitution of parties—Death of party before execution.*—If a party dies before execution, the Court has power to substitute the legal representative of the deceased. The substituted party will be bound by the proceedings which had taken place and he will be precluded from questioning the correctness of the order for substitution. **NARENDRA NATH PEHARI v. BHUPENDRA NARIN ROY, 23 C. 374. (8 C. 51, 6 A. 269, F.)**

(23)—*Sale of plaintiff's interest in suit—Substitution of purchaser for original plaintiff—Appeal.*—Where a plaintiff, who sued on the part of himself and his minor brother to recover possession of certain ancestral property which he alleged had been improperly alienated by his father, sold, pending the trial of the suit in the first Court, his rights and interests in the suit to one S, and upon petition presented by him to the Court of first instance, that Court substituted S's name in the place of the original plaintiff, it was *held* that the substitution of S for the plaintiff in respect of a part of his share in the subject-matter of suit was invalid, and had not the effect of making him a party to the suit, and he had acquired no status which would enable him to appeal. **SAHEB ROY v. CHONEE SINGH, 9 W.R. 487. [D., 12 W.R. 87; Cons. and Expl., 2 C.L.R. 297.]**

(24)—*Substitution of party to suit—Special appeal.*—It is not correct to substitute the assignee of the original plaintiff as the plaintiff on the record, the proper course being to add him as party plaintiff if he desires it. Where, however, the substitution was made before judgment in the first Court and was not objected to, and there was no allegation that any party had been prejudiced thereby, the error would not be considered in special appeal. **SHUSHEE BHOOSUN, VAKEEL v. MUDDUN MOHUN CHATTOPADHYA, 2 C.L.R. 297. (9 W.R. 309, 9 W.R. 487, Expl.)**

(25)—*S. 588, Civ. Pro. Code, 1882—Appeal—Order of substitution.*—An appeal lies against an order directing substitution of parties under s. 372. Such an order is practically the same

Parties to Suit—continued.**—3.—Substitution of parties to suit—*ctd.***

as an order disallowing objections to substitution. **SOURINDRA MOHUN TAGORE v. SIROMONI DEBI, 28 C. 171=5 C.W.N. 307.**

(26)—*Civ. Pro. Code, 1882, s. 33 (=O. I, r. 10, cls. 4 and 5, present Code)—Addition or substitution of parties—Limitation—Limitation Act, XV of 1877, s. 22*—In a suit to recover the price of work done to the Government, the party sued was described originally as the Executive Engineer of P.W.D. of Jajpur, no individual being named as defendant. The plaint was subsequently amended by making a Mr. H, the then Executive Engineer, a defendant, who was described as the Executive Engineer of P.W.D. of Jajpur. When that was done, the suit was within time. After the expiry of the period of limitation, the Secretary of State for India in Council was made a party and Mr. H was still retained on record and the plaintiff asked for a decree against him and the Government, both or either of them. Under these circumstances, it was *held* that the addition of the Secretary of State for India in Council was not a rectification or substitution of the original defendant, and for the purpose of limitation against the Secretary of State, the suit should be considered to have been instituted on the date when he was made a party. **MANDARDHAR AITCH v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 6 C.W.N. 218. (2 A. 296, 7 A. 264, R.)**

(27)—*Addition or substitution of parties—Powers of Appellate Court.*—An Appellate Court can add or substitute new appellants or respondents, even after the expiry of the period of limitation. **THE COURT OF WARDS v. GAYA PRASAD, 2 A. 107.**

(28)—*Civ. Pro. Code, 1882, s. 32—Adding party whose right barred—Cause of action.*—An order passed under Civ. Pro. Code, s. 32, making a defendant a co-plaintiff, is bad, if, at the time of the order, such party's right to sue has become barred, or if the cause of action which gives him the right to sue is different from that of the plaintiff who instituted the suit. **KRISHNA v. MEKAM PERUMA, 10 M. 44. [R., 35 C. 1065=8 C.L.J. 286=13 C.W.N. 186=5 M.L.T. 91; D., 17 M. 12=3 M.L.J. 176.]**

(29)—*Civ. Pro. Code, 1882, s. 372—Application for revival of suit—Application in pending suit—Limitation.*—In a partition suit, a preliminary decree was made in 1887. Without taking any steps to carry out the decree, the plaintiff died in 1891, leaving the petitioners, his sons, who now applied to have the suit revived in their names and in the names of the representatives of each of the original defendants who had died, with the object of proceeding with the partition of the property. *Held* that the application was one made in a pending suit, and though falling within s. 372, Civ. Pro. Code, was not time barred, the right to apply being one which accrued from day to day (8 C. 420, **UNREPORTED SUIT No. 265 of 1882, (SALE,**

Parties to Suit—continued.—3.—Substitution of parties to suit—*cld.*

J.), *F.*). The question as to whether the defendant was aware of the proceedings could not be considered at that stage of the case. **RAM NATH BHATTACHARJEE v. UMA CHARAN SIRCAR**, 3 C.W.N. 756. [*F.*, 7 C.W.N. 517 = 30 C 609; *Rel. on*, 4 N.L.R. 158; *R.*, 7 C.W.N. 517 = 3 O.C. 609.]

(30)—*Lease—Boundary dispute—Suit—Expiration of lease—Appeal.*—A lessee from the Government filed a suit against a certain person concerning a boundary dispute. In this suit, the Government was made a formal defendant. The suit was dismissed after the expiration of the lease term. The Government sought to appeal against the decree. *Held* that the lessor could not, after the expiration of the lease, appeal from the dismissal of the lessee's suit. **THE COMMISSIONER OF SOONDURBUNDS v. CHUNDER COOMAR GHOSE**, 3 W.R. 175.

(31)—*Act X of 1859, s. 77, locus standi of intervenor under, only when in receipt of rent prior to suit—Bringing fresh respondent on record—Discretion of Judge—Error relating to stamp no ground of appeal—C.P.C., s. 350*—The lower Appellate Court had distinctly found it as a fact that the special appellant had never been in the receipt of rent at any time prior to the commencement of the suit; and this finding was quite sufficient to throw him out of Court. S. 77 of Act X of 1859 distinctly lays this down to be the only point for enquiry as between a plaintiff and an intervenor, and, if this point is not established in favour of the latter, he has got no *locus standi* in Court. The Judge has jurisdiction to allow an appeal to be filed after the expiration of the prescribed period; while so, there is no reason why he could not exercise similar discretion in the matter of adding a fresh respondent to the record where the latter has been a party to the original suit. An error on a matter of stamp does not constitute a sufficient ground for appeal. It is a technical objection which does not affect the merits of the case, and therefore does not afford a reason for interfering with the decision of the Court below under s. 350 of the Code. **SHOWDAMINEE DOSSEE v. RAM ROODROO GANGOOLY**, 8 W.R. 367.

(32)—*S. 73, Act VIII of 1859—Parties to appeal.*—If a Judge thinks that a co-defendant (who was a co-sharer with the plaintiff in the property in dispute) was a necessary party as respondent in the appeal, he should have taken measures under s. 73, Act VIII of 1859, to have caused that person to be made a respondent instead of dismissing the appeal. **ACHUMBAH PAUREY v. RAM SAHEY PAUREY**, W.R. 1864, 136.

See **ABATEMENT OF APPEALS**, 11 A. 408 = A.W.N. 1888, 111, 16 A. 211 = A.W.N. 1894, 22.

See **BOM. ACT XVII OF 1879, ss. 49-a and 74**, 19-B. 202.

Parties to Suit—continued.—3.—Substitution of parties to suit—*cld.*

See **CIV. PRO. CODE**, 1908, s. 50, O. XXI, r. 90, 12 A. 440 = A.W.N. 1890, 103, F.B.

See **CIV. PRO. CODE**, 1908, O. XXII, r. 10, s. 104, O. XXII, r. 11, 22 A. 231 = A.W.N. 1900, 79.

Person obtaining interest during pendency of appeal, competency of, to be made a party—See **CIV. PRO. CODE**, 1908, O. XXII, r. 10, s. 107 (2), O. XXII, r. 11, 18 A. 285 = A.W.N. 1896, 45.

Assignment of subject-matter of suit after High Court's decree in assignor's favour—Decree reversed in appeal—Assignee cannot be made party in execution of appellate decree—See **CIV. PRO. CODE**, 1908, O. XXII, r. 10, s. 141, 10 A. 97 = A.W.N. 1887, 288.

See **LIMITATION ACT**, 1908, arts. 171, 172, A.W.N. 1890, 21.

See **PLAINT—AMENDMENT OF PLAINT**, 7 B.L.R. App., 65.

See **WAIVER**, 12 W.R. 87.

—4—Suit by representatives of a class.

(1)—*Suit, many persons interested in—Representation by some—Effect of decree.*—Convenience, if not necessity, requires that in suits where there is community of interest amongst a large number of persons, a few should be allowed to represent the whole; and if the whole body be represented in the suit, then it is proper that the whole body should be bound by the decree, though some members of the body are not parties named in the record. **SRIKANTI NARAYANAPPA v. INDUPURAM RAMLINGAM**, 3 M.H.C. 226. (2 M.H.C. 1, D.) [*R.*, 4 M.H.C. 108, 12 M. 356, 20 M. 129.]

(2)—*Ss. 26 and 30, Civ. Pro. Code, 1882—Suit for injunction—Member of a community excluding the rest—Parties.*—Ss. 26 and 30, Civ. Pro. Code, 1882, are only enabling sections. Where the defendant's taking a certain action in respect of certain property affected the rights of the plaintiffs in their individual capacity, as also in their capacity as members of a certain community, *held*, the plaintiffs may sue, jointly in their individual capacity for an injunction restraining the defendant from taking the action complained of. It is not necessary, in such a case, that the plaintiffs should obtain the sanction of the Court, under s. 30 Civ. Pro. Code, nor is s. 26, Civ. Pro. Code, a bar to be plaintiffs' suit. **BAJU LAL PARBATIA v. GULAK LAL PATHUK**, 24 C. 385. [*Rel. on.*, 113 P.L.R. 1901 = 91 P.R. 1901; *R.*, 1 S.L.R. 145, 78 P.L.R. 1903 = 52 P.W.R. 1908.]

(3)—*Civ. Pro. Code, s. 30.*—The section is designed to allow one or more persons to represent a class having special interests, and not to allow such persons to sue on behalf of the general public to which the notice prescribed

Parties to Suit--continued.**—4.—Suit by representatives of a class**
—continued.

by that procedure would be inapplicable. **ADAMSON v. ARUMUGUM**, 9 M. 463. [Appr., 20 C. 397; R., 9 M.L.J. 93, 33 C. 905 = 10 C.W.N. 867.]

(4)—*Vendor and purchaser—Landlord and tenant—Sale subject to rights of tenants—Notice to purchaser—Suit by tenants to enforce rights against purchaser—Civ. Pro. Code, 1882, s. 30 (= O. I. r. 8 (1), new Code).*—S. 30, Civ. Pro. Code, authorizes some of the raiyats of a village to sue the proprietor of it on behalf of themselves and the other raiyats for a declaration of their general rights, and for an injunction restraining the proprietor from interfering with their enjoyment of those rights. In 1806, a certain village was granted to A by the East India Company subject to the customary rights and privileges of the raiyats which were embodied in Reg. I of 1908. But the deed of conveyance was not executed until 1819, when it was executed by the said Company to the executors of the Will of A, who died in 1810. In this deed, no reference was made to the rights and privileges of the raiyats. In 1868, defendant purchased the said village from its then legal owners. In 1889, plaintiffs instituted the present suit for themselves and on behalf of the other raiyats of the village to enforce their rights. The defendant contended that as no reference was made to those rights in the deed of conveyance of 1819, he was not bound by them. *Held* that the defendant ought to have made inquiry as to their rights, as the lands were in the occupation of the raiyats at the time of the conveyance of the village to the defendant. Having failed to do this, he took subject to such rights as the tenants had, just as if they were specially mentioned in the conveyance to him. *Held*, also, that as there had been no denial of plaintiff's right until shortly before the suit, it was not barred by limitation. **AHMEDBHAY HABIBBHAY v. BALKRISHNA MUKUND**, 19 B. 391. [R., 33 C. 905 = 10 C.W.N. 867.]

(5)—S. 30, Civ. Pro. Code, 1882—*Suit by some of a class as representatives of class—Permission must be obtained before suit.*—In suits where permission under s. 30, Civ. Pro. Code, is required, *held*, that such permission must be obtained prior to suit and cannot be given subsequently. Where the plaintiffs were suing as representatives of the residents of certain villages and had not obtained the permission of the Court under s. 30 of the Code to institute the suit, *held*, that the suit was not maintainable. **HARADHON DASS v. RAMDOYAL RAI**, 21 C. 181, (Note 1). [R., 33 C. 905 = 10 C.W.N. 867.] See also **NITYANUND GHOSE v. MOHENDRO KRISTO GHOSE**, 21 C. 181, Note 2.

(6)—S. 30, Civ. Pro. Code (1882)—*Some of a class as representatives of class filing a suit—numerous plaintiffs—Permission to institute*

Parties to Suit--continued.**—4.—Suit by representatives of a class**
—continued.

suit.—S. 30, Civ. Pro. Code, does not require an express permission to be recorded by the Court; if the permission can be well gathered from the proceedings of the Court in which the suit was instituted, an Appellate Court, on objection being taken that no permission was given for instituting the suit, ought to hold that such permission was really granted. So the grant of permission under s. 30 may be inferred from the circumstances of the case. **DHUNPUT SINGH v. PARESH NATH SINGH**, 21 C. 180. (5 A. 602, Diss.) [F., 29 C. 100; R., 33 C. 905 = 10 C.W.N. 867.]

(7)—*Parties to suit—Suit by Association—Civ. Pro. Code, s. 30.*—An association of persons that has *per se* no status in law cannot institute a suit in its own name by its secretary. If its members empower one or more of their number to act for them in the manner provided in s. 30 of the Civ. Pro. Code, they may perhaps be permitted to sue in such manner. **THE MUHAMMADAN ASSOCIATION OF MEERUT v. BAKSHI RAM**, 6 A. 284 = A.W.N. 1884, 76. [R., 14 B. 286, 20 A. 167.]

(8)—*Persons having common cause of action, institution of suit by—Civ. Pro. Code, 1882, s. 30—Decree declaring title of plaintiff—Perpetual injunction.*—The plaintiffs were 208 in number and they filed the present suit under s. 30 of the Civ. Pro. Code, 1882, under the following circumstances:—The plaintiffs were the hereditary priests attached to the plaintiff temple and they had the right to conduct their patrons to the temple, perform worship on their behalf and obtain remuneration for the services thus rendered. The defendants, who were the ministers of the idol issued certain rules which prohibited people from entering into certain sacred precincts within the temple, except on payment of certain fees. The plaintiffs alleged that the rules infringed their immemorial right of entering into the temple with their patrons and receiving the remuneration given to them and accordingly they brought the present suit for (1) a declaration that they were entitled to free access within the sacred chambers of the temple for purposes of worship and (2) for a perpetual injunction restraining the defendants from interfering with their rights. The plea of the defendants was that there was no cause of action for the plaintiffs, that the plaintiffs cannot sue jointly, that they had no right to obtain a declaratory decree under s. 42 of the Specific Relief Act and that no injunction can be granted against them. *Held*, (1) that the suit was rightly brought under s. 30 of the Civ. Pro. Code, the plaintiffs having a common cause of action against the defendants who interfered with the immemorial rights of the plaintiffs by the promulgation of the rules; (2) that, under s. 42 of the Specific Relief Act, the plaintiffs were entitled to a declaratory decree, as the effect of the rules was a denial of their title to free access to

Parties to Suit—continued.**—4.—Suit by representatives of a class**
—continued.

the temple; (3) that the defendants had no authority to issue the rules in question; and (4) that the prayer of the plaintiffs in respect of perpetual injunction must also be granted. **KALIDAS JIVRAM v. GORPARJA RAMHIRJI**, 15 B. 309. [R., 33 C. 789=10 C.W.N. 581.]

(9)—*Remand of suit—Date for re-hearing—Duty of Court—Purchaser of claimant's rights—Party to suit.*—When a case is remanded for re-trial, some date should be fixed for the re-hearing, thus giving the parties an opportunity to appear and take measures for carrying on the suit. A purchaser of the rights of the claimant, as next heir to the previous owner, must be made a party to the suit. **HARADHUN CHUCKERBUTTY v. PROTAP NARAIN CHOWDHRY**, 14 W.R. 401.

(10)—*Dharmakarta—Suit against—Parties.*—In a suit by a Temple Committee against a Dharmakarta for possession of the temple and its properties, all the members of the Committee should join as parties. **VIRASAMI NAYUDU v. ARUNACHELLA CHETTI**, 2 M. 200.

(11)—*Civ. Pro. Code, 1882, s. 39—Suit for declaration by some of the worshippers at a temple—Omission to obtain leave to sue, not fatal to suit.*—Some of several worshippers at a temple can maintain a suit for a declaration that the defendants are not the duly elected dharmakartas of the temple, and the Advocate-General is not a necessary party to such a suit. The only consequence of the course prescribed by s. 30 of the C.P.C. not having been followed is, that the judgment in the suit would not be binding on those whose names are not on the record. To obviate such a result, it is competent to the Court, with the view of adjudicating definitively and completely on the matter in dispute, to require an amendment of the plaint. The omission to apply under s. 30 of the Code is not by itself a ground for dismissing the suit, but, when the objection has been taken, the suit ought not to be allowed to proceed except on the terms of the plaint being amended, and the requisite leave under s. 30 being obtained. **SRINIVASA CHARIAR v. RAGHAVA CHARIAR**, 23 M. 21=7 M.L.J. 281 (8 C. 32, 8 B. 432, Cons.) [Appr., 25 M. 399, R., 24 M. 219, 9 P.R. 1904, 16 C.P.L.R. 161, 33 C. 905=10 C.W.N. 867, 78 P. L. R. 1908=52 P. W. R. 1908.]

(12)—*Suit by some members of a caste for declaration of exclusive right to worship at temple, cognisability of, by Civil Court—Reg. II of 1827, s. 21—Limitation.*—Plaintiffs as the members of their caste, sued for a declaration of their exclusive right to worship an idol in the sanctuary of a temple and for an injunction against the intrusions by the defendants. Overruling the defendant's plea that the suit was not maintainable in a Civil Court, as involving a caste question, it was held that

Parties to Suit—continued.**—4.—Suit by representatives of a class**
—continued.

there was no such question but a civil right fit for adjudication by the Civil Court. The meaning of s. 21 of Reg. II of 1827 is that the internal economy of a caste is not to be interfered with by the Courts, not that no possible matter of litigation in which a question of caste, usage or right or privilege may arise can be taken cognizance of. Also, such a suit could not be taken to be barred by time merely because the first act of intrusion by the defendant might have taken place prior to a certain period. There is no provision of the law of limitation which prevents the establishment of a right connected with worship or a religious institution merely because the first interference with it was more than a particular number of years before the institution of the suit. **ANANDRAV BHIKAJI PHADKE v. SHANKAR DAJI CHARYA**, 7 B. 323. [R., 21 C. 463, 23 B. 122, 30 M. 15=16 M.L.J. 471=1 M.L.T. 423, 33 C. 789=10 C. W. N. 581, 30 M. 185=17 M.L.J. 240=4 A.L.J. 333=11 C.W.N. 585=5 C.L.J. 566=9 Bom. L.R. 663, P.C., 19 M.L.J. 743=5 Ind. Cas. 76; D., 11 M.L.J. 215.]

(13)—*Civ. Pro. Code, s. 30—Advertising—Application for execution of a scheme by a person interested, but not of the plaintiff's class.*—In a suit for the management of a temple by some *Tengalai* Brahmans, an order was made for an advertisement which invited all persons interested to come in as parties or be otherwise represented. A person not on record and not a *Tengalai* applied to the Court to compel the surviving defendant to carry out the provisions of the decree, claiming some interest in the temple: *held*, no permission had been given to the plaintiffs to sue for others having the same interest with themselves in the manner required by s. 30, and further, the applicant could not come in to execute the decree, because he did not appear, from the decree sought to be executed, to be interested, in the same way as the plaintiffs were. **RAGAVA v. RAJARATNAM**, 14 M. 57. [F., 16 C.P.L.R. 161; R., 23 M. 28=7 M.L.J. 281, 33 C. 905=10 C.W.N. 867.]

(14)—*Worshippers, interference with rights of, suit maintainable on—Suit for land maintainable by trustee only.*—It is competent to the worshippers at mosque to maintain (irrespective of ss. 30 and 539, Civ. Pro. Code), an action against any person improperly interfering with their rights to worship. Even where they are entitled to set aside a lease complained of, they cannot go further and claim possession of the property, the trustee being the only person entitled to such possession. **SUBBARAYADU v. ASANALI SHERIFF**, 23 M. 100, Note. (7 A. 178, R.) [R., 23 M. 99, 33 C. 789=10 C.W.N. 581.]

(15)—*Suit to recover land belonging to mosque, trustee alone entitled to maintain—Suit not maintainable by individual worshipper.*—An individual having the right to worship in a

Parties to Suit—continued.**—4.—Suit by representatives of a class**
—continued.

mosque does not thereby become entitled to sue by himself for recovery of possession of land alleged to belong to the mosque. Where there is a trustee of the mosque continuing to hold his office as such, he is the only person (irrespective of s. 30, Civ. Pro. Code), entitled to sue for the recovery of land belonging to the institution. **KAMARAJU v. ASANALI SHERIFF, 23 M. 99.** (5 A. 497, R.) [23 M. 100, Note, R.]

(16)—*Religious endowment—Mosque—Right to sue—Form of suit—Civ. Pro. Code, ss. 30, 539.*

—Every Muhammadan, who has a right to use a mosque for purposes of devotion, is entitled to exercise it without hindrance, and has a right of action against any one who interferes with its exercise. Ss. 30 and 539 of the C. P. C., have no application to such a case. S. 30 of the C. P. C., applies to cases in which many persons are jointly interested in obtaining relief, and not to cases in which the rights of an individual are violated. **JAWAHRA v. AKBAR HUSAIN, 7 A. 178, F. B. = A.W.N. 1884, 325.** (5 A. 497, 8 C. 32, D.) [*F.*, 33 C 789 = 10 C.W.N. 581; *Appr.*, 20 C. 810; *R.*, 18 A. 227, 24 C. 385, 24 B. 170 = 1 Bom. L.R. 649, 2 C.L.J. 460, 33 C. 905 = 10 C. W.N. 867, 1 S. L. R. 145; *D.*, 11 A. 18.]

(17)—*Suit by Mutwali—Trust for religious and charitable purposes—Civ. Pro Code, 1882, s. 539—Act XX of 1863—Civ. Pro. Code, 1882, s. 30, permission under necessity for.*—Where, according to the plaint, in a suit to recover possession, as *mutwali* of certain parcels of land, on the allegation of their dedication as *waqf*, the trust is one partly (*i.e.*, for the feeding of wayfarers and travellers) for charitable, and partly (for lighting the mosque and shrine, etc.) for religious purposes, the suit, if framed neither in compliance with s. 539 of the C.P.C., which would govern it so far as it related to charity, nor with Act XX of 1863, governing religious endowments, would not be maintainable. [*F.*, 16 B. 626, 24 C. 418; *Appr.*, 11 A. 18, F.B.; *Diss.*, 10 C. W. N. 581 = 33 C. 789; *D.*, 2 M. L. J. 251; *R.*, L. B. R. (1893-1900), 645, 2 C. L. J. 460.] It was also held in the above suit that, even if the endowment came under neither of the two specified enactments, the plaintiff would not be entitled to sue alone without leave of the Court and without having otherwise complied with the requirements of s. 30 of the Civ. Pro. Code, as it appeared on the face of the plaint, that there were other persons interested in the trust besides herself. **LUTIFUNNISSA BIBI v. NAZIRUN BIBI, 11 C. 33.** [*R.*, 20 C. 810.]

(18)—*Encroachment on burial ground—Suit by some members of a community against others for removal of—Maintainability—Permission of Court under s. 30, C. P. C., 1882, if necessary.*—Where the property in dispute was a burial ground used by the members of a certain community in a village, a suit brought by certain members of the community against certain

Parties to Suit — continued.**—4.—Suit by representatives of a class**
—concluded.

other members of the community for removing a wall built by them on the burial ground, must be regarded as one in which the plaintiffs claim to restrain the defendants from violating the common interest they all had in the land, and, as such, the permission of the Court under s. 30 of the C.P.C., 1882, need not be obtained for the institution of the suit. *Held* also that the plaintiffs were entitled to bring the suit, as the land was held in common by all, and as the defendant's conduct in erecting the wall in question so as to exclude the plaintiffs from a part of the common land, amounted to a violation of the plaintiffs' rights. **TANUDIN v. PANDU, 18 B. 699.** [*R.*, 105 P. R. 1901, 91 P. R. 1901 = 113 P. L. R. 1901, 52 P. W. R. 1908 = 78 P. L. R. 1908 = 18 P. R. 1908.]

(19) *Specific Relief Act, I of 1877, s. 9—Suit for possession of exclusive right of fishing in creek—Right of fishing, whether immoveable property within s. 9—Objection under s. 30, C. P. C.*—Plaintiffs in this suit who were some of the fishermen of a village, claimed, for the fishermen of that village, the exclusive right of fishing in a creek between high and low water mark within the limits mentioned in the plaint, and sought, under s. 9 of the Specific Relief Act, to recover possession of that right from the defendants, alleging dispossession by the latter within six months before the filing of the suit. The first Court ordered possession to be given to plaintiffs. The High Court, in revision, overruled the contention of the defendants that the matter was beyond the jurisdiction of the first Court, by reason of the right of fishing not being immoveable property within the contemplation of the said s. 9 of the Specific Relief Act. The right claimed was the right of excluding the public from a particular part of the sea, and constituted the technical common of fishery and, being a private, right of fishery, came under the denomination of immoveable property. It was not the intention of the Legislature to exclude incorporeal rights from the section. The first Court, therefore, had acted within jurisdiction in having ordered that possession should be given to the plaintiffs. Another objection raised by the defendants, that the suit should have been instituted in accordance with the provisions of s. 30 of the C. P. C., was held to be well-founded but, as it was still open to the applicants to establish their rights by suit, the irregularity was not such as to call for the exercise of the powers of the High Court under s. 622 of the C. P. C. **BHUNDAL PANDE v. PANDOLPOS PATIL, 12 B. 221.** [*R.*, 13 M. 54, 19 C. 544, F. B., 5 M. L. J. 95, 57 P. L. R. 1903, 33 C. 1905 = 10 C. W. N. 867; *R.*, 10 C. L. J. 30.]

See CIV. PRO. CODE, 1908, O.I, r. 8 (1), 3 O.C. 351.

See CO-SHARERS—SUIT BY CO-SHARERS, 12 B.H.C. 85.

Parties to Suit—continued.— 5.—*Transposition of parties to suit.*

(1)—*Appeal—Power of appellate Court to transfer parties from roll of defendants to plaintiffs—Suit for arrears of rent.*—Certain persons, alleging themselves to be co-sharers, intervened in the course of the suit and were made co-defendants by the first Court. The Appellate Court, however, transferred them from their situation as defendants to the side of the plaintiff, not only without their concurrence, but entirely against their will. *Held* that it is a general rule that a person cannot be made a plaintiff against his will, in the absence of any equity in favour of third persons enabling them to ask the Court to compel the intervenor to take up the part of the plaintiff. As there was no such equity in the present case, the order of the lower appellate Court transferring the intervenors from one side to the other was illegal. **BEHAREE LALL DOSS v. RADHA NATH DOSS, 22 W.R. 229. [R., 22 W. R. 394.]**

(2)—*Civ. Pro. Code, Act X of 1877, s. 32—Plaintiff in partnership suit seeking withdrawal or dismissal of suit—Application by defendants to be made plaintiffs—Practice.*—Where a plaintiff in a partnership suit applies for leave to withdraw or for getting the suit dismissed, but some of the defendants objecting to such a course apply under s. 32 of the Civ. Pro. Code, praying that they may be transposed as plaintiffs, the plaintiff being made a defendant, such application of the defendants should be granted. In an ordinary suit, the question of the addition or transposition of parties arises on the allegations made by the plaintiff, and so, where the plaintiff withdraws, the allegations being withdrawn, no question remains for the Court to decide. But a partnership suit is a suit of a peculiar character, and the parties to such a suit do not stand to each other precisely in the same relation as parties to suits generally. If a plaintiff in a partnership is to be allowed to withdraw, the defendants in such a suit will never be safe unless they file separate suits, for, the plaintiff may delay his withdrawal until the period of limitation has expired, and then they will be without a remedy. **EDULJI MUNCHERJI WACHA v. VULLEBHOY KHAN-BHOY, 7 B. 167.**

— 6.—*Miscellaneous.*

(1)—*Civ. Pro. Code, Act VIII of 1859, s. 73—Dismissal of suit—Defect of parties—Powers of Court in such cases.*—The dismissal of a suit merely for defect of parties was opposed to the spirit of the Procedure Code as the Courts under s. 73 of the Code have been given the power to include all persons having an interest in the subject-matter of a suit as parties to it. **RUCHPAUL v. JOHUREE, 1 Agra 147.**

(2)—*Position of—Suit—Procedure—Practice.*—A person who ought to be but is not a party to a proceeding is not ordinarily bound by any decree or order passed therein. **SURSANGJI v. PARTAPSANG, 5 Bom. L.R. 937=28 B. 209.**

Parties to Suit—continued.— 6.—*Miscellaneous—continued.*

(3)—*Non-attendance in Court—Appearance by agent.*—A Rajah instituted a suit under Beng. Act X of 1859 through an agent appointed in that behalf. The Deputy Collector cited the Rajah himself to appear and be examined. He excused himself, on the ground of privilege under Act VIII of 1859, s. 22, and, at the same time, petitioned that the evidence of his general agent might be taken. The Deputy Collector, without examining the general agent, dismissed the suit, on the ground that the suit ought to have been instituted by the general agent; and that the Rajah himself was bound to obey his citation. *Held*, that the Deputy Collector was bound to receive evidence of the general agent and to decide the case upon the evidence which was tendered; and that the refusal of the Rajah, who had the privilege he claimed, and his appointment of a special agent or muktear for the purposes of the suit instead of his general agent, were no grounds for dismissing the suit. **JUGGUD INDUR BUN-WAREE v. SURJCOOMAR CHOWDHRY, Marsh 627.**

(4)—*Ladies of rank—Personal appearance in Court—Discretion.*—A Judge is wrong in insisting upon the personal appearance in open Court, of a Mahomedan lady of position who is willing to admit the Court to an interview at her own residence within the town in which the Court holds its sitting. **ZOHURUTOOL-LAH CHOWDHRY v. ASALOODEEM CHOWDHRY, 15 W.R. 129.**

(5)—*Statement of facts—Inferences.*—A party professing to state facts in Court has no right to give his own inferences as facts, but ought to disclose the real facts and leave the Court to make its own inferences. **SURAJMAL v. MANEKCHAND, 6 Bom. L.R. 704.**

(6)—*Witnesses—Parties as witnesses on their own behalf—Court's duty to compel attendance—Practice and procedure.*—Every party to a suit should go into the witness box to prove his allegations and to submit to cross-examination. If either party fail to do so, and the other party wishes to call him, every possible effort should be made by the Court to compel attendance. **SUBBAJI v. SHIDDAPA, 4 Bom. L.R. 86=26 B. 392.**

(7)—*Partnership—Practice—Parties—Same person both plaintiff and defendant.*—Where the plaintiff, as heir of his mother, sued a firm in which he was himself a partner, *held* that there was no objection to the frame of the suit on the ground of the plaintiff being also a defendant, as he was made a defendant in a totally different capacity. **PREMJI LUDHA v. DOSSA DOONGERSEY, 10 B. 358. [2 Ind. Cas. 597.]**

(8)—*S. 30, Civ. Pro. Code, 1882—Some of a class as representatives of the class filing suit—Permission to institute suit.*—Where the plaintiffs have applied for permission under s. 30, Civ. Pro. Code, for bringing a suit on behalf of

Parties to Suit—continued.—6.—**Miscellaneous**—continued.

all parties, and where in fact, such leave has been granted and notices have been issued accordingly, the simple fact that the order granting such permission has not been recorded in the order sheet, does not vitiate the proceedings. **KALUR KHABIR v. JANMEAH**, 29 C. 100. (21 C. 180, F.) [R., 33 C. 905 = 10 C.W.N. 867.]

(9)—*Mother succeeding as heir to last male-holder—Gift of property by person having right of maintenance—Whether legal as against reversioner.*—G succeeded as heir to the property of her son who was the last male holder. R who had a right of maintenance in the property joined G, in suing the present plaintiff who was the next reversioner, to establish that the property was the self-acquired property of G's husband. She was also allowed by G to be in possession of certain property in lieu of her maintenance, and she made an absolute gift of the property to her daughter. In a suit by the plaintiff reversioner to set aside the deed of gift and for possession, held, (1) that the mere joinder of R in the suit of G against the reversioner did not confer on her any rights in excess of those she already had or adverse to those of other persons; (2) that the deed of gift by R was void and in-operative against the plaintiff who was entitled to a declaration to that effect, but not to possession during the life-time of G. **MUSSUMAT PARBUTEE v. RAJAH KRISHAN PURTAB BAHADOOR SAHIE**, 1 N.W.P. 44.

(10)—*Temple managed by three sabhas, suit to recover land belonging to, whether maintainable by members of two sabhas only.*—A suit to recover lands belonging to a temple managed by three sabhas jointly, was brought by some of the members representing two only of the sabhas. There was no allegation that the other sabha had been consulted, or had repudiated the right of the plaintiffs to sue in conjunction with itself. Permission under s. 30 of the Civ. Pro. Code, to sue as representing all the members of all the sabhas was refused. It was held that it was not competent to the plaintiffs to maintain such suits by themselves. **PURAMATHAN SOMAYAJIPAD v. SANKARA MENON**, 23 M. 82. [R., 26 M. 649, F.B.]

(11)—*Civ. Pro. Code (Act VIII of 1859), ss. 208, 224—Assignment of decree in terms of compromise—Party impleaded in former suit not impleaded in subsequent suit.*—H and D were brothers. Some property which had been exclusively acquired by the former with his own funds was sold in execution of a decree and bought by B. H ostensibly transferred possession of it to D. B having failed to obtain possession of the property sold it to S who obtained a decree against H and D for possession of the property on the 10th August 1858, without any detriment to the rights against S of the present plaintiffs who had purchased B's rights at a judicial sale in September 1856. The present plaintiffs sued alleging that the sale to S was collusive, and obtained a decree in conformity with the terms of a compromise on the 26th

Parties to Suit—concluded.—6.—**Miscellaneous**—concluded.

July 1859 whereby the defendants consented to the plaintiffs being put in immediate possession of the property. They were eventually put in possession of the property in 1864 in conformity with s. 224, Civ. Pro. Code. In 1866, the Commissioner ordered their names to be expunged from the registers, and that of D to be re-entered therein. The plaintiffs then brought the present suit to recover possession of the property from which the above order had the effect of ousting them. Held that the plaintiffs in executing their decree of the 26th July, 1859 were executing the decree of the 10th August 1858 which was passed directly against D, as the execution of the latter decree in effect involved that of the earlier one, which had virtually merged in the other and the rights of the decree-holder under the first having been conveyed to the holders of the second decree according to s. 208, Civ. Pro. Code. **DOORGA PERSHAD SINGH v. LALLA JUG-GUNNATH PERSHAD**, 1 N.W.P. 31.

Defect of parties, ground of, in special appeal—See APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 3 C. 26.

Remand for adding fresh parties—See CIV. PRO. CODE, 1877, ss. 32, 562, 563, 569, A.W.N. 1881, 49.

Suit for recovery of debt accrued due to partnership in lifetime of deceased partner—Representatives of deceased partner, not necessary parties to suit—See CONTRACT ACT, 1872, s. 45, 17 B. 6.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 6 W.R. 66.

See EVIDENCE—PAROL EVIDENCE, 11 B. 644.

Suit to recover a debt due to a firm—Family business—Necessity to join all members as parties—See HINDU LAW—JOINT FAMILY, A.W.N. 1907, 58 = 4 A.L.J. 194 = 29 A. 311.

See MAHOMEDAN LAW—WAKF, 18 B. 401.

Mortgagees of separate shares of joint-owners, suit for partition between, not maintainable without impleading mortgagors—See PARTITION—RIGHT TO PARTITION, 18 A. 476 = A.W.N. 1896, 158.

See PARTITION—RIGHT TO PARTITION, 18 A. 334 = A.W.N. 1896, 82, 6 M. 90.

Recognised agent of party not himself a party—Names of parties to be correctly entered in proceedings—See PARTNERSHIP—GENERAL, 4 L.B.R. 23.

Partition.

See ACT IV OF 1893.

See BUDDHIST LAW—PARTITION.

See BURDEN OF PROOF—PARTITION.

See CIV. PRO. CODE, 1908, O. XXVI, rr. 13, 14.

Partition—continued.

See HINDU LAW—IMPARTIBLE ESTATE.

See HINDU LAW—INHERITANCE.

See HINDU LAW—PARTITION.

See IMPARTIBLE ESTATE.

See MAHOMEDAN LAW—PARTITION.

See MALABAR LAW—PARTITION.

1.—GENERAL.

2.—EFFECT OF PARTITION.

3.—FORM OF PARTITION.

4.—PARTITION, HOW EFFECTED.

5.—PRIVATE PARTITION.

6.—RIGHT TO PARTITION.

7.—SUIT FOR PARTITION AND JURISDICTION OF CIVIL COURTS IN.

8.—MISCELLANEOUS.

—1.—General.

(1)—*Partition*—All the joint property must be put into hotch potch—A plaintiff's suit for partition is not maintainable when he keeps back property in his own possession; for all the joint property must be put into the "hotch potch." *HAFIZ MAHBUB BAKHSH v. ABDUL RAHMAN*, 84 P.L.R. 1912=4 P.W.R. 1912=13 Ind. Cas. 816.

(2)—*Decree for partition, form of.*—In a suit for partition, the decree is not like a decree for money or for the delivery of specific property—a decree in favour of the plaintiffs only. In such a suit, the decree is, or ought to be, a joint declaration of the rights of the persons interested in the property of which partition is sought, and is a decree in favour of each sharer. It decides what interest each of the sharers has in the property, the subject of partition, whether those sharers be plaintiffs or defendants, and renders unnecessary any subsequent suit by any of such sharers for a declaration of his interest in the property. *DOST MUHAMMAD KHAN v. SAID BEGAM*, 20 A. 81=A.W.N. 1897, 199. (3 C. 551, 11 B. 216, R.) [F., 23 P.R. 1905=13 P.L.R. 1905.]

(3)—*Form of suit—Partition suit—Change into suit for redemption—Permissibility.*—Where in a suit for partition it was found that the plaintiff was bound by the mortgages impeached by him and that he was entitled only to redeem those mortgages, the plaintiff could not be allowed to change the suit into one for redemption, as doing so was to effect a change in the whole character of the suit. *VIRARAGHAVA AIYANGAR v. RAMASAWMI AIYANGAR*, 10 M.L.J. 242.

(4)—*Jurisdiction of Civil and Revenue Courts—Act XIX of 1873, ss. 132, 241—United Provinces Land Revenue Act (III of 1901, Local), s. 233 (k).*—Where the whole of a village was under partition in the Revenue Court, and that Court directed that the village should be divided into 26 mahals, one of which, the mahal of the non-applicants for partition, should consist of 12 pattis, but rightly or

Partition—continued.

—1.—General—continued.

wrongly land which should have formed part of the mahal of the non-applicants was allotted to one of the other mahals, held, that this was a question relating to the partition or union of mahals, and the remedy of the party aggrieved was an appeal against the order confirming the partition and not a suit in the Civil Court. *TIRBENI SAHAI v. JAGANNATH*, 5 A.L.J. 725=A.W.N. 1908, 274. (A.W.N. 1900, 11, D.)

(5)—*Abadi—Village site—Partition—Jurisdiction—Powers of Civil Court—Right of each proprietor to share in vacant land—Mode of partition—Area for partition—Plaintiffs representing majority and residing in another village—Appeal—Some defendants representing small shares appealing—Appeal on behalf of all defendants—Civ. Pro. Code (Act V of 1908), O. XLI, r. 4.*—In suits for partition of the whole village site, though the Civil Courts may technically have jurisdiction to go into the question of partition, they are usually well-advised to decline to attempt what is an almost impossible task. There is no basis for the theory that each individual proprietor is entitled to a certain portion of the *abadi* area calculated with reference to village shares whether determined by pedigree or revenue payments. The only safe ground to take is that the distribution of such vacant land as there may be attached to the *abadi* should be left in the hands of the *lambardars* who alone can determine whether it should be divided up or kept intact for the common purpose of the village. Where the area of the vacant land attached to the *abadi* is unusually large, and plaintiffs, who represent a large majority of the village but reside in another village, bring a suit for partition of the village *abadi*, against defendants who own the remaining share in the village and are alone the regular residents of the village, certain portions of the *abadi* should be blocked off for the use of the plaintiffs or the defendants, after leaving out so much as is required for general village purposes including the necessities of the non-proprietary residents. In an appeal against a decree for partition of the village *abadi*, where only some of the defendants representing a very small share in the village appeal on the ground that the lower Courts have not rightly determined the area which should be divided, the appeal cannot be treated as an appeal under r. 4, O. XLI, Civ. Pro. Code, as one on behalf of the whole body of the defendants. The question what area should be divided must be settled by the majority of the proprietary body. Where the majority are satisfied with a partition effected by the lower Courts, and the appellants-defendants have no such special grievance that their wishes should prevail as against the wishes of the majority of the proprietors, the partition should not be reopened so as to re-consider what area should be divided. *HIRA SINGH v. MOHAR SINGH*, 2 P. L. R. 1912=12 Ind. Cas. 605.

Partition—continued.**—1.—General—continued.**

(6)—*Jurisdiction of Civil or Revenue Court—Partition suit regarding land—Question of title involved—Proper procedure—Punjab Land Revenue Act (XVII of 1887), Chap. IX, s. 117, 158 (xvii.).*—A suit for the partition of land is cognizable only by a Revenue Court, notwithstanding that, upon the defendant's plea, a question of title arises. In so far as the claim for partition is concerned, the jurisdiction of a Civil Court is clearly excluded by law. A suit for partition must in the first instance be instituted in the Revenue Court, and if that Court, in taking the pleas of the defendant, finds a question of title involved in the case, it may refer a party to the Civil Court for a decision on the question of title or it may resolve itself into a Civil Court and hear and decide that question. The function of a Civil Court in partition cases is simply to decide the question of title pure and simple. **AUTAR SINGH v. SURAIN, 10 Ind. Cas. 902.**

(7)—*U. P. Land Revenue Act (III of 1908), s. 118—Partition—Site of a building of one co-sharer allotted to another—Owner of the building failing to express his intention to retain the building by application to the Collector on payment of a ground rent—Right to keep the house after partition—Adverse possession—Usufructuary mortgagee, possession of.*—At the partition of a village, the site of a building occupied by one of the co-sharers was allotted to another co-sharer. No application was made on behalf of the occupant of the house to the Collector expressing his intention to retain the building on payment of a ground rent: *Held*, after the partition he was not entitled to remain in possession of the building. When a partition has been effected by the Revenue Court, the parties are bound by the provisions contained in the order of partition, and they cannot, in a subsequent civil suit, go behind the partition. The possession under a usufructuary mortgage is referable to the contract of the parties and cannot be regarded as adverse. **SUBU-NANADAN PAT TEWARI v. RADHA KESHUN KALWAR, 5 Ind. Cas. 674.**

(8)—*Partition suit—Civ. Pro. Code (Act XIV of 1882), ss. 13, 371, 544—Res judicata—"Heard and finally decided"—Representatives of one of the respondents not brought on record—Abatement of appeal—"Cause of action," meaning of—Limitation—Plea of adverse possession—Defendant not himself in possession—Jurisdiction.*—A brought a suit for partition against F and others. The Court of first instance decreed the suit. Two separate appeals were preferred against the decree to the District Judge. Both these appeals were dismissed on practically the same ground. One of the defendants, who was an appellant in one of the two appeals but was no party to the other, preferred a second appeal to the High Court. No second appeal was filed from the decree in the other appeal; *Held*, that, there being no claim for partition among

Partition—continued.**—1.—General—continued.**

the defendants *inter se*, the Court had no jurisdiction to divide off their shares. The appellant's appeal to the High Court was not barred by *res judicata*, by reason of his not having appealed against the decree in the other appeal to which he was no party. If, during the pendency of an appeal, one of the respondents dies and his representatives are not brought on the record, the whole appeal does not abate for that reason. A brought a suit against Z and Y for joint possession. The Court of first instance dismissed the suit. The plaintiff appealed to the District Judge. During the pendency of the appeal, Y died and his representatives were not brought on the record. The District Judge decreed the appeal as against Z, and held it to have abated as against the representatives of Y. Subsequently, the heirs of A brought a suit for partition against the heirs of Y and others: *Held*, that the subsequent suit was not barred by *res judicata*, either under s. 13 or s. 371 of the Code of 1882. The appeal in the former suit having abated, it could not be said to have been heard and finally decided. "Cause of action," in s. 371 of Act XIV of 1882, should be taken to mean the facts constituting the infringement of right, and not those constituting the right itself. In a suit for partition, the defendant, who himself is not in actual possession of the property, cannot say that the suit is barred by limitation. **SYED FARHATT HUSAIN v. MAHOMED IBRAHIM ALI, 5 Ind. Cas. 325.**

(9)—*Court, power of, to take into consideration facts subsequent to commencement of partition suit as death of a party to suit, etc.*—In a suit for partition, the proportionate share to be decreed to the plaintiff must be that to which he is entitled on the date of the final decree. Although, ordinarily, the rights of parties must be ascertained as they stood at the date of the institution of the suit, a suit for partition under the Hindu Law is treated as an exception, and the Courts have to take into consideration matters subsequent to the commencement of such a suit. Consequently, upon the death of a party to a suit for partition during the pendency of the appeal, the Court will have to alter the shares and allotments. **SANGILI v. MOOKAN, 16 M. 350=3 M.L.J. 137. [R., 11 C.W.N. 732=6 C.L.J. 74; D., 21 M. 288.]**

(10)—*Party—Partition suit—Tenant under owner of half share of proprietary title suing for partition—Owner of other half share alone made defendant—Whether plaintiff's landlord ought to be made party.*—The plaintiffs sued for the partition of certain *jamas*, to a half share of which they are entitled as tenants under M, the owner of a half share of the proprietary title. The title to possession of the remaining half share of the *jamas* was in S, the owner of the remaining half share of the proprietary title. The proprietors as between themselves were undivided in respect of the *jamas*. The suit

Partition—continued.— 1.—**General**—continued.

had been brought against S alone. The first Court decreed the suit, but the lower appellate Court set aside the decree and remanded the suit for the purpose of giving the plaintiffs an opportunity to bring M on the record: *Held* that M was, if not a necessary party, at least a proper party to the suit, as his presence was necessary in order to enable the Court effectually and completely to *adjudicate upon and settle all the questions* involved in it, and that the order of the lower appellate Court was right. **INDU BHUSHAN ACHARYA v. SAILAJA SUNDARI BARMANYA**, 7 Ind. Cas. 382.

(11)—*Partition suit — Parties, necessary—Hindu wife, if unnecessary party—Unknown person and his heirs to be made parties—Service of summons—Civ. Pro. Code (Act XIV of 1882), s. 82—Court's power to regulate procedure—Appeal, valid, requisites of—Indian Evidence Act (I of 1872), s. 107—Presumption.*—Ordinarily only such persons should be added as defendants in a partition suit as are owners of the interest to be partitioned. But if it cannot be ascertained with precision whether some of the owners are alive, then both the unascertained owners and their legal representatives should be added as defendants, and service of notice effected on the unascertained owners in the manner prescribed by s. 82 of the Code of Civil Procedure (1882). The only presumption enacted by s. 107 of the Indian Evidence Act is, that the party is dead at the time of suit, but there is no presumption as to the precise time of his death. The Court has inherent power to regulate its procedure in such manner as may shorten litigation and result in substantial justice to the litigant parties. The requisites of a valid appeal are, *first*, that no one can appeal from a judgment or decree unless he was a party to the action or was treated as such or is the legal representative of a party, or has privity of estate, title or interest, apparent on the face of the record: *secondly*, that the appellant has an interest in the subject-matter of the suit, and *thirdly*, that the appellant is prejudicially affected by the decree complained of. A Hindu wife's right to maintenance is attributed to a kind of identity with her husband in proprietary right though her right may be of a quite subordinate character. When a partition takes place, the share of the husband may be made to his wife, to be held by her on his behalf during his absence. **SRINATH DAS v. PROBODH CHUNDER DAS**, 11 C.L.J. 580 = 6 Ind. Cas. 244.

(12)—*Partition—Mortgage of undivided share—Suit for partition by mortgagors co-sharer—If mortgagee necessary party—Security transferred to separate share allotted to mortgagor—Fraud, allegation of, in plaint—Negligence, case of, not to be allowed to be raised in appeal—Pleadings.*—A partition can be effected, without making the mortgagee of a share a party, when the suit is brought by the mortgagor's co-sharer, so that the mere fact that the mortgagee was not

Partition—continued.— 1.—**General**—continued.

a party to the partition suit in no way invalidates the proceedings. A mortgagee of an undivided share, when there is a subsequent partition, ordinarily has, as his security after the partition, the separate share allotted to his mortgagor in place of the undivided share. Where the mortgagee in his plaint alleged that the partition was effected fraudulently, but in appeal tried to make out a case of negligence on the part of his mortgagor in the conduct of the partition suit, the High Courts did not allow such a case to be raised as it was not made in the pleadings, nor raised by the issues. **NARENDRA CHANDRA LAHIRI v. SARODA KANTO MOITRA**, 6 Ind. Cas. 829.

(13)—*Partition, suit for—Party—Co-putnidar and not darputnidar necessary party.*—A person holding a permanent interest, though an interest of an inferior grade, may bring a suit for partition, as against persons who hold interests of a superior grade. (24 C. 575, 1 C.L.J. 40, 5 C.L.J. 643, *Rel. on.*) In a suit for partition by putnidars against darputnidars under his co-putnidars, the co-putnidars must be made parties; but a darputnidar is not a necessary party in a suit for partition (3 C.L.J. 205, *R.*) if his putnidar is made a party and if such a putnidar does not wish to avoid the responsibility which attaches to a party in a partition suit, that is, to see that the partition is carried out in a fair and equitable manner. **UPENDRA CHANDRA SINGHA ROY v. MAHOMED FAIZ CHOWDHRY**, 7 C.L.J. 449 = 12 C.W.N. 670.

(14)—*Joint property—Portion omitted by mistake—Fresh suit for partition or joint possession if maintainable—Co-owner, adverse possession by.*—Where, in a suit for the partition of joint property, by reason of a mistake of the parties which was shared by the Commissioner who was appointed to make the partition, a certain portion of the property was omitted from the report and the final decree did not deal with the lands comprised in that portion. *Held*—That the effect of the decree was to leave unaffected the joint title and possession of the parties in the lands omitted in the decree. That such lands may be partitioned in a subsequent suit at the instance of one of the parties. A mere determination of the shares by the preliminary decree is not tantamount to partition. The entry into and possession of land under the common title by one co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all. A co-tenant will not be permitted to claim the protection of the statute of limitation, unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him. It must further be established that the fact of the adverse holding was brought home to the co-owner. The possession of a wrong-doer cannot be constructively extended over lands not actually in his possession. **JOGENDRA NATH ROY v. BALADEB DAS MARWARI**, 12 C.W.N. 127 = 6 C.L.J. 735 = 35 C. 961.

Partition—continued.**—1.—General—continued.**

(15)—*Partition—Existence of no joint interest—Suit for partition not maintainable.*—A partition suit is not maintainable between parties, among whom there is no existing joint interest of any kind. (24 C. 575, F.B.=1 C.W.N. 406, 12 A. 51, P.C.=16 I.A. 186, R.) Where the holdings of the plaintiff and the defendant are not undivided shares of parcels of land, and the parties themselves are not co-owners, no suit for partition lies between them. **BALIKANTA DOS v. RAM TAHAL DOS, 2 Ind. Cas. 670.**

(16)—*Partition by arbitration—Award not binding on the heirs who were not parties to the agreement—Minor.*—It is a fundamental principle that no one is bound by any contract or by a decision in any proceeding to which he, or some one through whom he claims, was not a party. A partition by arbitration may be binding on a minor, but only when he is not injuriously affected thereby, when it is fair and when he has been duly represented. **MA GYI v. MAUNG PO HMYIN, 8 Ind. Cas. 439.**

(17)—*Partition decree—Effect of—Minor—Death of the minor—Execution of the decree—Effect of a decree obtained by a minor in.*—A minor sued for partition and obtained a decree which ordered that he should receive a certain amount of income every year during his minority and that when he became a major he should recover his share of the land. The minor then died and his widow presented a *darkhast* to execute the decree: *Held*, (1) that the effect of the decree was clearly to make the minor a divided member of the family; (2) that the heirs of the minors could, in the execution proceedings, recover the arrears of the allowance up to the death of the minor; (3) that his heirs could not claim in the execution proceedings either the share or the subsequent allowance as awarded in the decree, which would be recoverable only by a separate suit. **LAXMAN v. NARAYAN, 1 Bom. L.R. 777=24 B. 182.**

(18)—*Partition—Land allotted to minor—Adult member remaining in possession—Nature of possession, not adverse—Onus of proof—Presumption.*—Where, after partition, an adult member of the family held possession of the property that fell to the share of a minor member, *held* that the presumption would be that the possession was held on behalf of the minor, and that the *onus* lay on the person in possession to show that his possession was adverse. **THANDAVARAYA ODAYAN v. NARAYANA GOUNDAN, 9 M.L.T. 387=9 Ind. Cas. 505.**

(19)—*Res judicata—Consent decree—Lands—Character of impartibility—Special tenure—Custom—Impartibility cannot arise merely by agreement—Compromise—Public policy—Joint responsibility to pay Government assessment—Tenancy-in-common—Civ. Pro. Code (Act XIV of 1882), s. 462—Terms of compromise—Minor's benefit.*—In a suit for partition, the plea of *res-judicata* was raised and it was urged that the

Partition—continued.**—1.—General—continued.**

lands had become impartible, because of the terms of a consent decree in a previous suit for partition, the parties having by a compromise agreed to divide the profits hereditarily. *Held*, that the mere fact that the parties settled among themselves by compromise that the lands should not be divided, but that they should enjoy the profits, could not in law impart the character of impartibility to the estate. Impartibility must arise out of some special tenure or some general, family or local custom. Parties cannot make an estate impartible which is partible. That is opposed to public policy. Where tenants-in-common are jointly responsible to Government for the land-revenue payable to the latter, the lands do not by that circumstance alone become impartible, for no arrangement settling the relations between Government and the tenants-in-common can be regarded as determinative of the relations between the tenants *inter se*. Where the guardian presented an application on behalf of a minor defendant to the effect that he had no objection to keep all the lands joint provided the minor got his share of the profits, the Court made thereon the endorsement "the application has been allowed and filed in the suit." *Held* that no sanction had been obtained in the manner prescribed by the provisions of s. 462, Civ. Pro. Code, as to the terms of the compromise being for the benefit of the minor. **PIROJ-SHAH v. MANIBHAI, 13 Bom. L.R. 963=12 Ind. Cas. 543=36 B. 53.**

(20)—*Partition, partial—Co-owners, not members of joint family—Suit, if maintainable.*—One of the co-owners of an estate sued the other co-owners for partition of chowkidari chakran lands of one village only of the estate. *Held*, that the reasons against the partial partition of joint family property did not apply to such a case and the suit was maintainable. **SYED HABIBUR RASUL ABDUL FAIZ v. ASHITA MOHAN GHOSH, 12 C.W.N. 640. (28 A. 39, F.; 7 C. 577, Commented upon; 1 C.L.J. 40, Rel. on.)**

(21)—*Partial partition—Trustee or Manager of minor's property, mixing his own property with that of the other, effect of—Onus of proof.*—A suit for partial partition of an estate is not maintainable. But the Court may decide such a suit, if the defendant is willing that the rights of the parties in respect of the property be decided in that suit. If a trustee or agent mixes or confuses the property which he holds in a fiduciary character with his own property, the *onus* lies heavily on him to prove the extent of his property. If he fails to do so, and the two properties cannot be distinguished or separated with perfect accuracy, the whole must be considered as belonging to the other party. **BURUGAPALLI SRIRAMULU v. NANDIGAM SUBBARAYADU, 10 Ind. Cas. 57.**

(22)—*Partial partition—Suit for share of produce in respect of undivided property against*

Partition—continued.

—1.—General—continued.

co-sharer—Maintainability.—Where the plaintiff sued for a share of the produce of certain land, for one year, which land she alleged to be undivided family property, and where the defendant denied that the plaintiff had any subsisting interest in the land. *Held*, that the suit was one for partial partition and that such a suit was not maintainable. **NGA PO CHEIN v. MI PWA THEIN, U.B.R. 2nd Quarter, 1909, Civ. Pro. p. 21.** (U.B.R. 1902–1903, II Civ. Pro. Code., p. 3, *Affirm*; U.B.R. 1897–1901, II, p. 229, U.B.R. 1904–1906, II, Civ. Pro. 1, 15 M. 98, 17 C. 707, 7 B. 272, 12 C. 566, 22 M. 538, 24 B. 128, 14 M. 324, 14 C. 122, R.)

(23)—*Partition proceedings—Co-sharers mortgaging their interests pending—Sale under such mortgage—Purchaser, position of.*—Where co-sharers mortgage their interests pending partition proceedings, a sale under such mortgage is subject to, and the purchaser will be bound by, all the proceedings in the partition suit. **JOGEN-DRA NATH GOSSAIN v. DEBEDNRA NATH GOSSAIN, 26 C. 127=3 C.W.N. 90.** [R., 34 C. 427=11 C.W.N. 1=4 C.L.J. 495.]

(24)—*Partition—Appeal—Appeal against preliminary decree—Final decree passed since the appeal—No appeal against final decree.*—In a suit for partition, an appeal which challenges the preliminary decree and not the final decree, will not lie, although the final decree may have been passed after the filing of the appeal. **NARAIN DAS v. BALGOBIND, 8 A.L.J. 604.** (32 A. 225, *Appl. & Expl.*)

(25)—*Partition—Joint estate—Subordinate tenure under one co-sharer—Effect of partition.*—An estate was held in three equal shares. Plaintiff obtained settlements, from all the co-owners, of one of the shares, and then granted leases to the defendant. The parent estate was subsequently partitioned under Act V of 1897 (B.C.), but the co-sharers, to whom the lands in suit were allotted, took no steps against the plaintiff or the defendant, nor, did they disturb the defendant's possession nor dispute the plaintiff's title. *Held*, the defendant was in no way entitled to withhold payment of rent to the plaintiff. **AIMANADDI PATTARI v. NABI CHANDRA GOPE, 11 C.L.J. 95=5 Ind. Cas. 307.**

(26)—*Civ. Pro. Code, 1882, s. 396—Execution—Stage at which a partition decree becomes capable of execution.*—The final decree in a partition suit is made only when the Court passes a decree after perusing the report of the Amin in cases where such a report is necessary. When, after the Court has confirmed the report, the parties apply to the Court to be put into possession of the particular areas, shares, houses etc., allotted to them, the proceedings taken thereon will be proceedings in execution of the partition decree. **ZUBAIDA JAN v. MUHAMMAD³ TAIEB, A.W.N. 1898, 99.** (A.W.N. 1898, 45, 22 C. 425, R.) [F., 21 A. 409.]

Partition—continued.

—1.—General—continued.

(27)—*Decree for partition without allotment of shares—Execution of decree—Civ. Pro. Code, s. 244—Appeal—Revision*—Where a Court made a declaratory decree in a suit for partition, but instead of completing such decree by allotment of specific shares proceeded to entertain an application for execution of the declaratory decree and to pass various orders under s. 244 of the Code of Civil Procedure, the High Court, acting under s. 622 of the Code, set aside the orders of the Court below subsequent to the passing of the declaratory decree and remanded the case for disposal according to law. **SHEO KUMAR SINGH v. BISHESHAR DIAL SINGH, A.W.N. 1899, 124.** (20 A. 311, F.)

(27-a)—*Hindu Law—Partition—No written instrument required—Transfer of Property Act (IV of 1882), s. 118—Partial private partition allowable—Property not partitioned is liable to be partitioned—Partition acted upon—Partition when to be set aside on ground of mistake—Properties to be partitioned to be ascertained by Court, and not to be left to Commissioner for determination—Executors—Liability of each—Costs of partition suit.*—A partition of joint property is not an exchange within the meaning of s. 118 of the Transfer of Property Act, and is not by law required to be effected by an instrument in writing. (25 C. 210=2 C.W.N. 91, 4 M.I.A. 137, 7 W.R. 35, P.C.; F.; 4 M.L.T. 304, 19 M.L.J. 228, 3 Ind. Cas. 321, D.) Although there cannot be a partial partition by suit, partial partition by private arrangement is allowable. (12 C. 566, 14 C. 122, 4 M.I.A. 137, 7 W.R. 35, P.C., R.) If the private partition be partial, the property which had been excluded from partition continues to be joint and so liable to be partitioned. (9 C.L.J. 133, 13 C.W.N. 309, 3 Ind. Cas. 241, F.) A partition or family arrangement, made in settlement of a disputed or doubtful claim, effecting a division of the family properties, which was carried out and acted upon by them for sometime, is a valid and binding arrangement, which the parties to it cannot deny, ignore or resile from. (4 C.L.J. 323, F.) Therefore, where a partition was effected with the consent of defendants Nos. 1 and 2 and the father-in-law of the plaintiff who acted as the guardian of his son-in-law, the possession had been delivered in accordance therewith, and the plaintiff on attainment of majority confirmed the transaction, and the parties had effected improvements on the property and granted long leases to tenants, and the defendants had, since the time of the partition, ceased to keep accounts of the joint-estate: *Held*, that the partition was valid and binding upon the parties. A family arrangement concluded in honest error is binding, but not so if either party has been misled by the concealment of material things, or if founded on mistake of either party to which the opposite party was an accessory. Where an arrangement was made, at the time of the partition, that accounts

Partition—continued.

—1.—General—continued.

should be taken within a certain time: *Held* that failure to carry it out does not invalidate the partition. The specific properties to be partitioned must be ascertained by the Court before the preliminary decree is made, and not left to be determined by the Commissioner. A *devastavit* by one of two executors or administrators will not charge his companion, provided he has not intentionally or otherwise contributed to it. Therefore, where the accounts of an estate are taken, with regard to each disputed transaction, the conduct of each of the executors must be examined, and his special liability, if any, determined. Ordinarily in a suit for partition, the parties are to bear their own costs up to the stage of preliminary decree. (12 W.R. 160, 5 C.L.J. 642, *F.*) But where the defendant contests the right of the plaintiff to claim partition, he may be made liable for costs unnecessarily incurred by reason of his unfounded opposition. **SATYA KUMAR BANERJEE v. SATYA KIRPAL BANERJEE, 3 Ind. Cas. 247 = 10 C.L.J. 503.**

(28)—*Partition suit, scope of—Partition—Portion of joint estate, suit for—When maintainable.*—A suit for partition, properly framed, does not include within its scope a property, in which some only of the parties are interested as owners. Therefore, a suit for partition of a portion of a joint estate is maintainable, when such portion is the only property held jointly by the plaintiffs and defendants, although the defendants may be jointly interested with persons other than the plaintiffs in the remaining portions of the estate. **KAILASH CHANDRA DAS v. NITYANANDA DAS, 3 Ind. Cas. 21 = 11 C.L.J. 384. (1 C.L.J. 40, *F.*)**

(29)—*Partition decree—Non-execution—Limitation—Application to Taluqdari officer to effect partition under decree.*—In 1863, the plaintiff obtained a partition decree. He never executed it. In 1888, he presented an application to the taluqdari Settlement Officer under s. 10 of Bombay Act VI of 1888 for partition under the decree. *Held* that, as the execution was barred when the Act was passed and as no fresh suit could have been brought against the defendant upon the right declared by the decree, the application should be rejected. **JAM-SANG DEVABHAI v. GOYABHAI KIRKABHAI, 16 B. 408.**

(30)—*Partition Act (IV of 1893), ss. 2, 4—Cases to which applicable—Procedure by Court—When to be applied.*—S. 4 of the Partition Act (IV of 1893) relates only to cases where the transferee sues for partition. In cases where s. 4 is applicable, it is the duty of the Judge to make a valuation of the share of the transferee and direct its sale to the sharer of the dwelling-house. [*R.*, 12 C.L.J. 525 = 7 Ind. Cas. 436]. S. 2 of the Partition Act (IV of 1893) applies where the suit is brought by the sharer against the transferee. **BALSHET v. MIRAN SAHIB, 23 B. 77.**

Partition—continued.

—1.—General—continued.

(31)—*Dwelling-house owned by an undivided Hindu family—Sale to stranger—Re-acquisition by members of such family after sale—Partition Act (IV of 1893), s. 4—Applicability.*—S. 4 of the Partition Act (IV of 1893) applies only to cases where, at the time of sale to the stranger, the dwelling-house belongs to an undivided family. Four brothers K, R, V and P, who formed an undivided Hindu family, originally owned a dwelling-house. In January 1874, the shares of K and P therein were sold in execution of a decree against them and were purchased by T, and in 1877, by some successive sales, the shares of the other two brothers became the property of the plaintiff. The house had all along been in the common occupation of the four brothers. The present suit was brought by the plaintiff against T for partition, and a decree was obtained by him. But pending execution of the decree, T conveyed his moiety of the house to the two brothers R and V. V, thereupon, made an application under s. 4 of the Partition Act (IV of 1893) to be allowed to purchase the plaintiff's share by paying him the value of it. *Held* that V was not entitled to the benefit of the section because, after the sales in 1877, the house did not belong to the undivided family. Although V and his brothers were in occupation, they were only tenants in the house or trespassers. The house was not the property belonging to the undivided family at the time when the shares therein which had not been sold to T were transferred to the plaintiff. After the sale to plaintiff, the plaintiff and T became the owners in common of the house, as between whom s. 4 of the Partition Act did not apply. R and V, having subsequently purchased the interest of T, cannot have more rights than their vendor had. The property was in their hands re-acquired ancestral property but not property belonging to an undivided family within the meaning of s. 4. **VAMAN v. VASUDEV, 23 B. 73. [R., 12 C.L.J. 526 = 7 Ind. Cas. 436.]**

(32)—*Partition Act (IV of 1893)—Plot built on by co-sharer, not convenient for division—Partition of tank—Court's discretion to refuse partition and to allow the party in possession to buy the other party out—Equity.*—The defendants in a suit for partition had built a dwelling-house on a plot of 7 *cottahs* of land without opposition from the plaintiff, who was a stranger and owned only a one-tenth share in it and in an adjoining plot of 1 *bigha*, 6 *cottahs*. The lower appellate Court, finding that it would be every inconvenient for all parties concerned if these plots were divided by metes and bounds, allowed the defendants to buy up the plaintiff's shares at a proper valuation: *Held*—That, whether s. 4 of Act IV of 1893 applied to the case or not, it is a well-known principle of equity, which must be adopted in all partition cases, that, when it is inconvenient to divide a property, that property must be left in the possession of the person in occupation, and the other person, who cannot

Partition—continued.—1.—**General**—continued.

conveniently get actual possession, compensated. A tank covering one *bigha* in which plaintiff owned a 1-20th share was left joint, the lower appellate Court holding that it was not convenient to divide it. The High Court affirmed that decision. **BASUNTA KUMAR GHOSH v. MOTI LAL GHOSH**, 15 C.W.N. 555.

(33)—**Partition**—*Property not conveniently divisible—Sale among co-sharers to highest bidder—Partition Act (IV of 1893), s. 4.*—Where the nature of the property to be divided in a partition suit is such that a division thereof amongst all the share holders cannot reasonably or conveniently be made, the proper course to follow is to direct a sale of the property among the co-sharers; and it should be given to that share-holder who offers to pay the highest price above the valuation made by the Court. The defendant cannot be compelled to transfer his share at a valuation to the plaintiff, merely because the latter happened to have possession of the property at the time when he commenced the action. **DEBENDRA NATH BHATTACHARJEE v. HARI DAS BHATTACHARJEE**, 7 Ind. Cas. 844.

(34)—**Suit for—Decree for money in favour of one co-sharer—Right of other co-sharers—Cross-objections in appeal—Maintainability—Award of money decree—Partition Act (IV of 1869)—Discretion—Plaintiffs right to insist on partition.**—Where, in a suit for partition, the Court merely awarded a money decree in favour of plaintiff, a co-sharer. *Held*, that the other co-sharers cannot treat the money-decree as for an equivalent sum in their own favour, and were consequently incompetent to file cross-objections in appeal from that decree. (23 P.R. 1905, D.) *Held* that there is absolutely no law or authority now in force to justify a money decree being passed in a partition suit, in the exercise of the Court's discretionary powers, independently of the provisions of the Partition Act (IV of 1893). *Held*, also, that a plaintiff is entitled to insist on a partition, in the absence of any application to take action under the provisions of the Partition Act. **MUKERJI v. ALFRED**, 36 P. R. 1909=1 Ind. Cas. 697. (10 C. 675, D.)

(35)—**Partition suit—Decree by consent amongst some of the parties, effect of—Compromise, validity of, if can be questioned in appellate Court.**—Where a decree is passed by consent of parties, the question as to whether or not the compromise decree is valid cannot be gone into on an appeal against that decree. (5 C.W.N. 877, R.) When a suit is for partition of joint property, a decree by consent amongst some only of the parties cannot be maintained. **NITYAMONI DAS v. GOKUL CHANDRA SEN**, 3 C.L.J. 16=9 Ind. Cas. 210.

(36)—**Of joint property, suit for—Costs appeal for—Appeal, if and when maintainable—Principle, matter of—Proprietors and lessees, interest as—Allotment of shares in proprietary**

Partition—continued.—1.—**General**—continued.

and leasehold interests—Costs up to the preliminary decree by whom payable—Rateable distribution—Costs, subsequent to preliminary decree, by whom to be borne—Lessor and lessee, liabilities of, to pay costs—Apportionment.—An appeal will lie upon a question of costs, when a matter of principle is involved (12 C. 179, 12 C. 271, R.) As the plaintiff in a partition suit commences it for his own advantage, convenience and security, and as the defendant, as joint owner, holds his undivided share always subject to the right of the plaintiff to demand partition, the parties must each bear their own costs of the suit, up to the stage of the preliminary decree, and the costs of the partition should be divided between the parties in proportion to their respective shares in the estate. (12 W.R. 160, R.; 21 C. 904, D.) If, however, there has been a frivolous contest, the party, by reason of whose opposition unnecessary costs are incurred, may be made liable. A lessee, who accepts a lease of a share in joint property, does so with full knowledge that the subject matter is liable to partition, and if he finds himself a defendant in a partition suit, it is by reason of his own voluntary act, and, in such a suit, each party must bear his own costs up to the first hearing or preliminary decree, and the costs of the partition should be borne by the parties in the proportion of their interests. If the lessee took no part in the partition proceedings, and neither claimed nor obtained the benefit of a separate allotment, he could not be called upon to contribute to the costs of the partition. But if he did, the costs must be borne by him rateably with the other parties, according to his interest in the premises. A permanent lessee may be regarded as a purchaser and will be entitled to similar privileges and subject to similar liabilities. The costs of the partition should, as between the lessor and the lessee, be borne by them in proportion to their respective interests in the share covered by the *mokurari* (lease). **NAWAB DILDAR ALI KHAN v. BHOWANI SAHAI SINGH**, 5 C.L.J. 642=34 C. 878. [R., 12 C.W.N. 670=7 C.L.J. 449; F., 10 C.L.J. 503=3 Ind. Cas. 247.]

(37)—**Partition, suit for—Ministerial Act—Measurement of plots—Delegation of power—Whether entire proceedings void—Costs—Principle of assessment.**—When a joint judicial act is to be done, it ought to be done, by the parties jointly; but this principle has no application when the act is of a ministerial character. Therefore, the proceedings before Commissioners, appointed in a partition suit, are not vitiated in their entirety, by reason of the failure of one of the Commissioners to be present when measurements were taken in respect of some of the plots. In a suit for partition, in so far as the costs up to the stage of the preliminary decree are concerned, the parties must pay their own costs. In so far as the costs subsequent to the preliminary decree and up to the stage of the final decree

Partition—continued.

—1.—General—continued.

are concerned, the costs must be borne by the parties in proportion to their respective shares. **MOTI LAL GHOSHI v. GIRISH CHANDRA GHOSH**, 6 Ind. Cas. 109 = 12 C.L.J. 346.

(38)—*Mortgage of undivided share—Allotment of property on partition—Charge for owelty money—Priority.*—In the absence of any suggestion or evidence that the partition of a joint estate was unfairly or improperly made to defeat the claims of creditors, the sharers thereof, who have to receive sums of money by way of owelty from a co-sharer under a partition decree, creating a charge on the allotment made to him, have priority over the mortgagees of his undivided share in the joint estate. The fact that the mortgagor co-sharer entered into possession of the allotment-made to him, before paying the owelty-money for which there was a charge created, did not alter or affect the position. **SHAHEBZADAH MAHOMED KAZIM SHAH v. ROBERT SAVI HILLS**, 12 C.W.N. 373 = 35 C. 388.

(39)—*Partition—Mode of partition—Shareholder's right to retain possession—How to deal with occupancy holding—Act XVII of 1887, ss. 110 & 116—Mouza Pakki Bhathi, Tahsil Fazilka.*—In the partition case of a joint holding of land in Mouza Pakki Bhathi, Tahsil Fazilka: *Held*, that possession should be respected up to the extent of each shareholder's share in each of the different classes of land, and, as regards the area occupied by hereditary tenants, the holding of each tenant should not be split up into pieces, but that each such holding should go as a whole. **CHANDAN KHAN v. FATAH MOHAMMAD**, 2 P.W.R. 1908, Rev.

(40)—*Partition between co-sharer and ijaradar of other co-sharers—Similarity of possession—Temporary lease—Occupancy raiyat—Relinquishment of holding in favour of ijaradar—Expiry of ijara—Right of landlord to recover khas possession—Costs.*—Where a lessee of lands in the occupation of raiyats, who had jote rights, obtained khas possession of the lands, with the consent of the raiyats, for the purpose of indigo cultivation: *Held* that the lessee, being merely a landlord in occupation, did not acquire occupancy right in the lands, and the lessor became entitled to khas possession on the expiry of the lease. A lessee held certain lands in a village under three separate temporary leases from three undivided co-sharers of the village. On the expiry of one of the leases, the lessor in question sued for khas possession, on partition of his separated share. His other co-sharers, who, with the lessee, had been made parties to the suit, raised no objection. *Held* that there was no bar to a decree for partition being made in the case. (24 C. 143, R.) But the plaintiff ought to pay the entire costs of the partition, as a fresh partition of the entire mouzah may be necessary on the expiry of the other leases. **RAM LOCHI KOERI v. HERBERT COLLINGRIDGE**, 11 C.W.N. 397 = 5 C.L.J. 307. (24 C. 575, 1 C.L.J. 40, Appr.) [D., 35 C. 807 = 7 C.L.J. 483.]

Partition—continued.

—1.—General—continued.

(41)—*N.W.P. and Oudh Land Revenue Act (III of 1901), ss. 111, 112, 131—Partition proceedings—Objection as to title—Title decided by the Assistant Collector—Final order of confirmation—Assistant Collector's decision on title not given effect to—Subsequent suit for ejectment—Assistant Collector's order prevails.*—The parties were co-sharers. Partition proceedings took place between them. In those proceedings, the appellants filed objections alleging the plots in dispute to be their exclusive *khudkasht*. The Assistant Collector in charge of the partition proceedings decided in favour of the appellants. In the final order of the Collector, confirming the partition proceedings, the order of the Assistant Collector was not given effect to. On the strength of the final confirmation order, the respondents sought ejectment of the appellants: *Held*, that, the Assistant Collector's order, not having been set aside in appeal or otherwise, must be given effect to. The final order of the Collector was due to mistake and inadvertence. It would be wrong to perpetuate the consequence of such mistake. **RAM BARAN MAN v. JANKI MAN**, 4 Ind. Cas. 60.

(42)—*Common village land for tethering cattle, whether open to partition among proprietors.*—Common land in a village, which the co-sharers have been in the habit of tethering cattle on, is not to be regarded as land dedicated as such to a common purpose. So, though the Record of rights, describing such lands as joint property, is silent as to their liability to partition, yet from the right of transfer of such lands provided for by the said Record, a right to bring them to partition is impliedly inferrible. **MAKHAN SINGH v. ISHAR SINGH**, 136 P.R. 1906 = 118 P.L.R. 1908.

(43)—*Partition—If mokuraridar of share may sue proprietors of remaining share—Forfeiture, liability to, if affects right to partition.*—The right of partition exist when two parties are in joint possession of land under permanent titles, although those titles may not be identical. A mokuraridar of a share, whose interest is liable to forfeiture in events which have not occurred, is entitled to sue the proprietors of the remaining share for partition. Whether the right exists in any other case, their Lordships expressly refrained from indicating. **LALA BHAGWAT SAHAI v. BEPIN BEHARI MITTER**, 14 C.W.N. 962, P.C. = 12 C.L.J. 240 = 8 M.L.T. 228 = 7 Ind. Cas. 549 = 7 A.L.J. 1137 = 20 M.L.J. 907 = 12 Bom. L.R. 997.

(44)—*Partition, suit for—Lands held jointly by plaintiff and defendants—No necessity for including lands jointly held by plaintiff, and other persons.*—A plaintiff is entitled to bring a suit for partition of the lands held jointly, in their entirety, by himself and the defendants; and he need not include in that suit lands held by him jointly with the defendants and other persons. **JOGENDRA CHANDRA SHAHA CHOWDHURY v. SRISH CHANDRA SHAHA CHOWDHURY**, 1 Ind. Cas. 110.

Partition—continued.

—1.—General—continued.

(45)—*Share in specie—Money value of the shares.*—It is a leading principle of law in cases of partition that where several persons are co-owners or co-sharers of immoveable property partition should be effected between them by giving to each his share *in specie*, as far as is practicable. The right of each sharer is to his slice of the property, not merely its money value. What has to be borne in mind in effecting a partition decreed by a Court is not the convenience of one party but the convenience of all the parties and the partition should be made so as to be equitable to all of them. **MAHOMED V. HAJI, 7 Bom. L.R. 482.**

(46)—*Partition deed—Agreement between partners to divide debts.*—Where the partners in a partnership business by a deed divide between themselves certain debts of the firms to be collected and appropriated, but remain joint regarding the other items of business, the deed must be construed as a partition deed and not as a deed for the dissolution of partnership for the purposes of the Indian Stamp Act, 1899. **CHOTURAM V. GANESH, 3 Bom. L.R. 132.**

(47)—*Court-fees—Defendant seeking to recover his share in execution.*—The defendant in a partition suit is entitled to seek the execution of the decree ordering partition so far as it is in his favour; and he cannot be made by the executing Court to pay Court-fees over his share, when the decree itself imposes no such term. **NAWAB MIR SADRUDIN V. NAWAB NOVRUDIN, 6 Bom. L.R. 834=29 B. 79.**

(48)—*Suit by a Mahomedan co-sharer for, and separate possession of his share—Obligation on other co-owners to come to partition—Fresh suit by another co-sharer for separate possession of his share, maintainability of—Res judicata.*—If a Mahomedan co-sharer files a suit for partition and separate possession of his share, there is no obligation on the other co-sharers to come to a partition also. This principle, applicable to a section among Hindus, applies also to a suit among Mahomedans. (6 Bom. L.R. 35, R.) And the fact that, in a suit brought by one co-sharer for partition and separate possession of his share, the share of the others has been ascertained in the judgment of the Court, with a view to deciding what share should be allotted to him, cannot be pleaded as a bar to a fresh suit by another co-sharer to have his share partitioned off and delivered into his separate possession. **WADERO AYUB KHAN V. MUSAMAT WADUK, 3 S.L.R. 93=3 Ind. Cas. 899. (23 B. 188, R.)**

(49)—*Res judicata—Partition suit—Parties in subsequent suit arrayed on same side in previous litigation—Effect of.*—A suit for partition was brought by R against the plaintiffs and M, the husband of the defendant. The Court of first instance passed a decree and defined the rights of the defendants in the suit. M died during the pendency of the suit. The plaintiffs brought this suit for declaration of their right to the property of M. *Held* that, having regard

Partition—continued.

—1.—General—continued.

to the decision in the suit of R against the plaintiffs, it was no longer open to the plaintiffs to bring the present suit, inasmuch as in the previous suit a decree ascertaining and declaring the rights of the parties was passed. The nature of partition suits discussed. **PUR-SOTAM RAO TANTIA V. RADHA BAI, 7 A.L.J. 451=6 Ind. Cas. 692=32 A. 469.**

(50)—*Declaratory decree—Suit for partition—Prayer that previous solenamah and decree may be declared invalid—Consequential relief—Court Fees Act (VII of 1870), sch. II, art. 17, cl. (iii) and cl. (vi). s. 7, cl. (iv) (c).*—Where a plaintiff prayed to have an arrangement, carried out under the terms of a previous decree reversed, and to bring into hotchpot, for the purpose of making a partition, the properties which, since that arrangement, had been in the exclusive possession of one or other of the defendants and also to have certain additional properties brought into partition: *held*, that the plaintiff asked that the decree might be declared invalid and that, as a consequence of that declaration, the properties might be restored to their original state as joint property and then brought under partition; that the suit, therefore, was for a declaratory decree and for consequential relief, and that an *ad valorem* Court-fee was payable on the plaint under s. 7, cl. iv (c). **HARO GOWRI SAHA V. DUKHI SAHA, 5 Ind. Cas. 582.**

(51)—*Court-fee—Partition, suit for—Joint possession, not proved—Partition award, construction of—Vested interest—Inheritance.*—Where the plaintiff rested her case on a complete partition made years ago, and it is proved that she had never possessed the property in dispute, she is not entitled to sue for, partition, without suing at the same time for possession of her share, a course entailing payment of Court-fees calculated *ad valorem* in the plaint. One B died leaving a widow A and five sons. During the lifetime of A the family property was partitioned by an arbitration award, which was in English and was drafted by a person familiar with conveyancing. The partition award prescribed "that the said garden, both *debutter* and *sarkari*, and the sum of Rs. 3,000 will, after the demise of the mother A, be divided among the then surviving heirs and representatives." One of the sons died during A's life-time and his widow brought a suit for partition of a fifth share in the garden and the sum of Rs. 3,000. *Held*, that the expression "the then reversionary heirs and representatives" in the partition award meant after A's death the property should go to the heirs whoever they might be. The partition award effected a complete severance in the interests of the various co-parceners, and accordingly the plaintiff's husband obtained a separate vested interest in the property in which A was given a life estate, which separate estate descended in due course to his widow. **RANGAMANI DAS V. JOGENDRA NATH MANNA, 9 C.L.J. 128=3 Ind. Cas. 304.**

Partition—continued.**—1.—General**—continued.

(52)—*Partition suit—Decree drawn up by mistake on Court-fee stamp—Inherent power of Court—Non-judicial stamp directed to be filed—Decree validated from date of decree—Civil Procedure Code (Act V of 1908), s. 158—Stamp Act (II of 1899), s. 52, sch. I, art. 45—Refund of value of Court-fee stamp.*—In a partition suit, the first Court directed the plaintiff to file a non-judicial stamp of Rs. 100 for the decree to be drawn up thereon in accordance with art. 45 of sch. I of the Stamp Act. By mistake the plaintiff filed a Court-fee stamp of that value and by mistake the Court engrossed the decree on the same. The defendant appealed and the appellate Court could not detect the mistake. Then the plaintiff applied for execution of the decree in the first Court, where the defendant took the objection that the decree could not be executed, not being drawn up upon a non-judicial stamp paper. The objection was allowed and the plaintiff moved the High Court. *Held*, that this is a fit case for the exercise of the inherent powers of the Court which have been saved by s. 151 of the Civ. Pro. Code, that the plaintiff should be allowed to put in a non-judicial stamp of Rs. 100 which would be defaced and attached to the decree already drawn up, and that this would be sufficient to validate the decree with retrospective effect from the date when it was drawn up, and the result would be to validate the appeal as well. S. 52 of the Stamp Act does not cover a case in which a Court-fee stamp has been erroneously used where a non-judicial stamp ought to have been used under the provisions of the Stamp Act. But the Revenue Officers, as a matter of indulgence, though not as a matter of right, may grant relief to the person who has made the error. *RAFI-UD-DIN v. LATIF AHMED*, 7 Ind. Cas. 94=14 C.W.N. 1101=12 C.L.J. 324.

(53)—*Appeal—Partition—Preliminary decree—Final decree—Appeal against preliminary decree after final decree—Not maintainable.*—Where, in a suit for partition, a final decree has been made, and the preliminary decree only is appealed against, *held* that the correctness of the decree cannot be challenged without an appeal against the final decree also. *KURIYA MAL v. BISHAMBHAR DAS*, 7 A.L.J. 210=5 Ind. Cas. 276=32 A. 225. [R., 12 C.L.J. 195.]

(54)—*Deed effecting or declaring partition—Registration Act (III of 1877), ss. 17, cl. (b), 49—Evidence Act (I of 1872), s. 91—Part performance, doctrine of—Specific performance—Improvements by co-owner upon common property, effect of, at partition—Question whether property is joint to be decided by Court.*—A deed, by which a partition of immoveable property is effected, or which declares such a partition previously effected by the parties, is compulsorily registrable under cl. (b) of s. 17 of the Registration Act. The essence of the matter is, whether the deed is a part of the partition transaction, or contains merely an incidental

Partition—continued.**—1.—General**—continued.

recital of a previously completed transaction. Where the intention of the parties was that the document should be the only repository and the appropriate evidence of the partition, the deed, if not registered, is not admissible in evidence, under s. 49 of the Registration Act, to establish the fact that the property was so partitioned, with the result that s. 91 of the Evidence Act excludes other evidence also in support of the transaction, because the written instrument is not collateral, but is of the very essence of the transaction. But, if there is part performance of verbal agreement, by the party seeking relief, and to the knowledge of the other party, proof will be admitted of the verbal contract in cases when an action for specific performance would lie. In other words, an act done by a party in pursuance of the parol agreement, in order to be a part performance of it, must not only be one which could not be done with any other view than to perform it, but must also be such as could not be undone without causing the party unliquidated damage. Hence, if it is possible to restore the parties to precisely the same position as they occupied before they entered into the parol agreement, the doctrine of part performance will not ordinarily be allowed to be invoked. If one joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity will take this fact into consideration upon a partition, and, in some way, will make an allowance to him, therefore, in addition to his rateable share of the property. And it is in recognition of such equitable right that to the co-owner, who has made the improvements, is assigned that portion of the property on which the improvements have been made, the division being made on the basis of the unimproved value. In a partition suit, the question whether a particular property, alleged to be joint, really possesses that character, must be determined before the preliminary decree is made; all questions involving the title of the parties and their right to any relief within the issues, are judicial in character, and must be determined by the Court. *UPENDRA NATH BANERJEE v. UMESH CHANDRA BANERJEE* 6 Ind. Cas. 346=12 C.L.J. 25.

(55)—*Act XXXIII of 1871, s. 65, cl. 2—Partition by Revenue authorities—Jurisdiction of Civil Courts to question partition.*—Where on the death without issue of *Gil got Jat* who owned a *putti* in a *taraf* in which some *putties* were held by the *Gil got*s, and the rest by Brahmins, the *Tabsildar* declared the estate of the deceased as the *shamilat* of the whole *taraf*, and then, on the application of certain persons, partitioned it as such *shamilat*, in spite of the objections of the *Gil got*s who said that the *Tabsildar* had no right to partition the estate, and that no part of it ought to go to Brahmins of the *putti* separate from theirs. *Held* that the

Partition—continued.**—1.—General—continued.**

order of the Tahsildar was purely an administrative act and did not operate as a bar under s. 65, cl. 2 of Act XXXIII of 1871, to a Civil suit by the *Gil gots* to recover from the Brahmins the portion allotted to them in the partition. Though s. 65 of Act XXXIII of 1871 forbids suits in regard to partition arrangements effected by the Revenue Officer, the section expressly saves the case of any dispute as to the principle on which division is to be effected. *DHAN SINGH v. GHAZI*, 17 P.R. 1877. [R., 61 P.R. 1897, F.B.]

(56)—*Land Revenue Act (XXXIII of 1871), s. 65, cl. 2—Common land, suit for partition of—Civil Court—Jurisdiction.*—A suit for partition of common land would lie in a Civil Court, notwithstanding cl. 2, s. 65, of the Land Revenue Act, in so far as it sought a determination of the plaintiff's shares and his right to a partition in accordance with such shares. If the Civil Court went further than determining the shares and the right to partition, and gave detailed directions as to the mode in which partition should be carried out, it would exceed its jurisdiction and intrude on the province of the Revenue Authorities. *SYAD ULLA v. PIRA*, 97 P.R. 1876. [F., 22 P.R. 1878, 131 P.R. 1882, 125 P.R. 1883, 24 P.R. 1885.]

(57)—*Partition—Purchaser from joint tenant.*—An agreement by a joint tenant that he will not sue out a right of partition does not prevent him from selling his interest in the estate, or bind the purchaser who becomes tenant in common, for partitioning it. *ANAND CHANDRA GHOSE v. PRANKISTO DUTT*, 3 B.L.R. O.C. 14=11 W.R.O.C. 19. [F., 6 C. 106, 7 B. 538; R., 2 Bom. L.R. 884; D., 8 B.L.R. O.C. 70.]

Suit for partition—Appeal—Valuation of suit—See ACT XII OF 1887, s. 21, 24 A. 381=A.W.N. 1902, 88.

See ACT XII OF 1887, s. 21, 25 A. 277=A.W.N. 1903, 73.

By Collector—Private partition—Butwara proceedings—Cause of action—See BEN. ACT VIII OF 1869, s. 15, 3 C.L.R. 453.

By amicable arrangement between co-sharers—S. 12, Partition Act (B.C. V of 1897)—See BEN. ACT VII OF 1876, ss. 42, 78, 30 C. 773,

See BEN. ACT VIII OF 1876, 36 C. 726=10 O.L.J. 189=1 Ind. Cas. 549.

Of revenue paying estates—Application—See BEN. ACT VIII OF 1876, s. 10, 11 C.L.R. 540.

Separate suits by landlords after partition for apportionment of consolidated rents arrear and future rent—See BEN. ACT VIII OF 1885, s. 188, 27 C. 479=4 C.W.N. 494.

Principles to be used as guides to Civil Court in making a—See BEN. ACT V OF 1897, ss. 64, 65, 6 Ind. Cas. 450.

Partition—continued.**—1.—General—continued.**

See C.P. ACT XVI OF 1889, 7 C.P.L.R. 54.

See MAD. ACT III OF 1873, 11 M. 197.

See PUN. ACT XVI OF 1887, s. 59, 11 P.L.R. 1903=6 P.R. 1902.

Widow's right to enforce—Separation of possession Jurisdiction—See PUN. ACT XVII OF 1887, s. 111, 100 P.L.R. 1909=155 P.W.R. 1909.

See PUN. ACT XVII OF 1887, ss. 115, 117, 119 P.L.R. 1903.

Partition proceedings—Question of title—Jurisdiction of Court to try—See PUN. ACT XVII OF 1887, s. 117, 146 P.L.R. 1902.

Partition proceedings—See PUN. ACT XVII OF 1887, s. 158 (2), 2 P.L.R. 1901=29 P.R. 1901.

See U.P. ACT XIX OF 1873, ss. 111, 113, 114, 2 A. 619.

See U.P. ACT XIX OF 1873, s. 113, 26 A. 225=A.W.N. 1904, 2.

See U.P. ACT XIX OF 1873, ss. 113, 114, 115, 131, 132, 241 (f), A.W.N. 1887, 185.

Order refusing to stay partition—Appeal to High Court—Jurisdiction—See U.P. ACT XIX OF 1873, s. 114, 25 A. 141=A.W.N. 1902, 221.

Revenue Courts if can partition buildings—See U.P. ACT XIX OF 1873, s. 124, 22 A. 329=A.W.N. 1900, 116.

Act III of 1901 (U.P. Land Revenue), s. 233 (k), N.W.P. Land Revenue Act, 1873, ss. 132, 241—Civil and Revenue Courts—Jurisdiction—See U.P. ACT XIX OF 1873, ss. 132, 241, A.W.N. 1908, 274=31 A. 41=1 Ind. Cas. 696.

See U.P. ACT XIX OF 1873, s. 135, A.W.N. 1882, 129.

Fraud in partition proceedings—See U.P. ACT XIX OF 1873, s. 241, 25 A. 19=A.W.N. 1902, 182.

See U.P. ACT XIX OF 1873, s. 241, A.W.N. 1883, 165.

See U.P. ACT XIX OF 1873, ch. IV, A.W.N. 1889, 169.

Title, adjudication of—Appeal—Court Fees Act, art. 1, sch. II—See U.P. ACT XVII OF 1876, ss. 70, 71, 74 and 75, 4 O.C. 289.

Decree-title, question of, decided in partition proceedings—Appeal—See U.P. ACT XVII OF 1876, ss. 74, 75, 4 O.C. 298.

Of revenue paying land—Duty of Court—See U.P. ACT III OF 1901, ss. 117, 125, 7 A.L.J. 553=6 Ind. Cas. 883=32 A. 523.

Case, transfer of—See U.P. ACT III OF 1901, ss. 191, 192, 7 O.C. 142.

See APPEAL—ACTS AND REGULATIONS, 1 Agra, Rev. 44.

Partition—continued.

—1.—General—continued.

Suit—Preliminary decree—Order appointing commission—See APPEAL—DECREES AND EXECUTION OF DECREES, 24 C. 725, F.B. = 1 C.W.N. 374.

See APPEAL — DECREES AND EXECUTION OF DECREES, 12 C. 273, 12 C. 275, 19 C. 463.

See APPEAL—MISCELLANEOUS, 2 Agra 251.

Award of arbitrators directing partition, signature of parties by way of assent to—Chargeable as instrument of partition—See AWARD, 9 B. 50.

Award directing partition — Effect — See AWARD, 11 Bom. L.R. 406 = 33 B. 401 = 2 Ind. Cas. 431.

See AWARD, 5 C.L.R. 338.

Construction of deed—Indefiniteness of description of property—Charge—Validity—See CHARGE, 7 M.L.T. 158 = 5 Ind. Cas. 917 = 20 M.L.J. 407.

See CIV. PRO. CODE, 1908, ss. 2, 11, 96, O. XXVI, rr. 13 and 14, 56 P.L.R. 1902 = 49 P.R. 1902.

Decree for possession—Proceeding while suit pending and before execution, result of—Succession suit for declaring that judgment-debtor's interest in parent estate passed by partition proceedings to another estate—See CIV. PRO. CODE, 1908, s. 47, 20 C. 260.

Made by the Collector, under a Civil Court decree, powers of the Collector—See CIV. PRO. CODE, 1908, s. 54, 5 Bom. L.R. 648, 5 Bom. L.R. 949 = 28 B. 238.

Appointment of a Commissioner to make a partition—See CIV. PRO. CODE, 1908, s. 107 (2), O. XXII, r. 11 and O. XXIII, r. 1, 6 Bom. L.R. 533 = 29 B. 13.

Partition decree—Execution—Death of plaintiff—Abatement of suit—Parties in partition suit—See CIV. PRO. CODE, 1908, O. I, r. 10, 13 Bom. L.R. 517,

Causes of action for suits for divorce and for partition—Whether it is necessary to claim partition in a suit for divorce—See CIV. PRO. CODE, 1908, O. II, rr. 1, 2, 8 A.L.J. 739, P.C.

See CIV. PRO. CODE, 1908, O. XXI, r. 63, 16 B. 608,

Death of one of several appellants—Effect on other appellants—Suit for partition—See CIV. PRO. CODE, 1908, O. XXII, rr. 1, 2, 3 (1), O. XLI, r. 4, s. 107 (2), O. XXII, r. 11, 25 A. 27 = A.W.N. 1902, 171.

Suit for partition—Preliminary decree—Appeal—Powers of appellate Court to stay subsequent proceedings—See CIV. PRO. CODE, 1908, O. XLI, rr. 5, 6, 1 C.W.N. 264.

Preliminary decree for—Appeal to Privy Council—High Court, if may stay further proceeding—See CIV. PRO. CODE, 1908, O. XLV, r. 13, 13 C.W.N. 690 = 9 C.L.J. 561 = 6 M.L.T. 11 = 1 Ind. Cas. 812.

Partition—continued.

—1.—General—continued.

Decree sent to Collector for execution—Collector not competent to refuse execution—Order of Collector *ultra vires*—See COLLECTOR, 14 B. 450.

Partition of shamilat-deb including the land which had been assigned to an *ala lambardar* in virtue of his office—Compensation for disturbance or improvements—Punjab Tenancy Act, 1887, ss. 69, 72—See COMMON LAND, 9 P. R. 1902, Rev.

See COMMON LAND, 15 P.R. 1892.

Prohibition against—Right to—See CONSENT DECREE, 13 Bom. L.R. 649.

Decree in partition suit—Subsequent decree for debt due by the parties to partition suit—Payment of decretal amount by one party—Right to contribution from the others—See CONTRIBUTION, SUIT FOR—PAYMENT OF JOINT DEBT BY ONE DEBTOR, 4 Ind. Cas. 872 = 19 M.L.J. 487.

Is a right incident to that of co-owners—Agreement not to partition for an indefinite period, not enforceable—See CO-SHARERS—ENJOYMENT OF PROPERTY BY CO-SHARERS, 5 A.L.J. 672 = A.W.N. 1908, 259 = 31 A. 3 = 1 Ind. Cas. 554.

Joint property—Co-sharer, if can improve his share—Consent of co-sharers—See CO-SHARERS—ENJOYMENT OF PROPERTY BY CO-SHARERS, 8 B.L.R. App. 46, Note.

Costs on unjustifiable partition suit—Civ. Pro. Code, 1859, s. 187—See COSTS—SPECIAL CASES, 1 Hyde 122.

See COSTS—SPECIAL CASES, 21 C. 904.

See COURT FEES, A.W.N. 1881, 13.

Stamp on appeal in suits for partition—See COURT FEES ACT, 1870, arts. 6, 17, sch. II, 8 C. 757 = 11 C.L.R. 95.

See CRIM. PRO. CODE, 1898, s. 145, 8 C.W. N. 485.

Registration of specified shares under the Land Registration Act—Effect—See CUSTOM, 3 Ind. Cas. 207.

See CUSTOMS—PUNJAB—INHERITANCE, 143 P.R. 1888.

Suit for—Arbitration—Decree on award—Direction in decree to deliver moveable property—Part of such property lost—Alteration of decree—See DECREE—ALTERATION OR AMENDMENT OF DECREE, 17 B. 657.

And account against Talukdar—See DECREE—DECREE, FORM OF, 14 C. 493 = 14 I.A. 37, P.C.

See DECREE—DECREE, FORM OF, 5 A. 520 = A.W.N. 1883, 151, 14 A. 500 = A.W.N. 1892, 62.

Land set apart for mother's maintenance—Clause providing for division of land after defraying her funeral expenses and contribution

Partition—continued.—1.—**General**—continued.

by each party towards the same—Forfeiture whether meant by the clause—*See* DEED—CONSTRUCTION OF DEEDS, 10 M.L.T. 276.

Instruments of compromise and—excluding possible question between parties as to the effect of words in will under which they took their rights—*See* DEED—CONSTRUCTION OF DEEDS, 20 C. 373, P.C.=20 I.A. 35.

Ejectment suit based on lease—Lease not proved—Decree for partition—Amendment of plaint—*See* EJECTMENT, SUIT FOR, 10 B. 451.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 12 C.L.R. 64.

Test of—Can take place only upon the assumption that both parties are interested in the subject-matter of litigation—*See* ESTOPPEL—ESTOPPEL BY JUDGMENT, 6 C.L.J. 621.

Unregistered partition deed—*See* EVIDENCE—SECONDARY EVIDENCE, 2 B. 635.

See EXECUTION OF DECREE—GENERAL, 8 M.L.J. 37, A.W.N. 1903, 187.

See EXECUTION OF DECREE—MISCELLANEOUS, 30 C. 142=7 C.W.N. 305.

Suit for division—Grant in name of head of family—Rights of other members—*See* GRANT—CONSTRUCTION, 2 M.H.C. 470.

Power of guardian to refer to caste panchayat question of customary—*See* GUARDIAN—DUTIES AND POWERS OF GUARDIANS, 2 M. H.C. 47.

Deshpande vatan, partition of—Custom of primogeniture—*See* HINDU LAW—CUSTOM, 10 B. 327.

Property acquired from zamindari funds and treated as zamindari property—Partibility of such property—*See* HINDU LAW—IMPARTIBLE ESTATE, 24 M. 562=11 M.L.J. 191.

Law applicable to Khoja Mahomedans in Bombay—Ancestral property—Sons' right to claim partition during life time of father—Custom—Wealth amassed in trade by individual, when ancestral—Evidence—Onus of proof—*See* HINDU LAW—JOINT FAMILY, 13 B. 534.

Contract of indemnity by managing member in course of family trade—Subsequent partition—Liability of divided son for loss caused subsequent to partition—*See* HINDU LAW—JOINT FAMILY, 24 M. 555.

Mortgage of undivided share—Partition, effect of, on mortgage—*See* HINDU LAW—JOINT FAMILY, 24 A. 483=A.W.N. 1902, 137.

See HINDU LAW—JOINT FAMILY, 2 P. R. 1892.

See HINDU LAW—WIDOW, 31 C. 214=8 C.W.N. 11.

Will—Gift of rent and profits—Disposition of corpus—Restraint on alienation and—construction—*See* HINDU LAW—WILL, 7 M.L. J. 184.

Partition—continued.—1.—**General**—continued.

Of vatan property appertaining to office of hereditary desai—Proper decree—*See* IMPARTIBLE ESTATE, 7 C.L.R. 1, P. C.=4 B. 494=7 I.A. 162=4 Sar. 154.

See INJUNCTION—INJUNCTION UNDER CIV. PRO. CODE, 6 B.L.R. 571.

See JURISDICTION—QUESTION OF JURISDICTION, 8 B. 31.

Injunction—Power of Civil Court to restrain Collector's partition—*See* JURISDICTION OF CIVIL COURTS, 3 C.L.R. 453.

Application for partition of mahal—*See* JURISDICTION OF CIVIL COURTS, 9 A. 429=A.W.N. 1887, 81.

What are not grounds for refusing—*See* KHORPOSH SANNAD, 9 C.L.J. 421=13 C.W. N. 611=2 Ind. Cas. 641.

Between co-owners, whether injuriously affects rights of tenants possessed before partition—*See* LANDLORD AND TENANT—EJECTMENT, 5 A.L.J. 237, F.B.=3 M.L.T. 371=A.W.N. 1908, 123=30 A. 282.

Between landlords—Whether it can affect the rights of tenant—*See* LANDLORD AND TENANT—MISCELLANEOUS, 2 A.L.J. 598=A.W.N. 1908, 123.

Effect of, on joint liability of tenants to pay entire rent to landlord—Separate suit for rent against each tenant, whether necessary—*See* LANDLORD AND TENANT—MISCELLANEOUS, 12 C.W.N. 568.

Right to claim—Limitation—*See* LIMITATION ACT, 1908, arts. 120, 96, 88 P.W.R. 1910=7 Ind. Cas. 528=122 P.L.R. 1910.

Suit by Mahomedan for, of immoveables—Limitation—*See* LIMITATION ACT, 1908, arts. 120, 144, 6 Ind. Cas. 579=8 M.L.T. 97=20 M.L.J. 964.

Application for effecting partition by metes and bounds—*See* LIMITATION ACT, 1908, arts. 181, 182, 22 C. 425.

See LIMITATION ACT, 1908, art. 182—MISCELLANEOUS, 3 C. 551=2 C.L.R. 187.

See LIS PENDENS, 1 C.W.N. 62.

See MAHOMEDAN LAW—DOWER, P.L.R. 1900, p. 333.

Mahomedan law—Suit for share—Partial partition—*See* MAHOMEDAN LAW—INHERITANCE, 14 M. 324=1 M.L.J. 529.

See MAHOMEDAN LAW—PRE-EMPTION—NATURE AND EXTENT OF RIGHT, 4 B.L.R. A.C. 139=12 W.R. 484.

See MESNE PROFITS—RIGHT TO MESNE PROFITS, 7 B.L.R. 113, P.C.=15 W.R. P.C. 38.

Security, substitution of—Joint property mortgaged—Other property falling to the mortgagor's share at partition—*See* MORTGAGE—GENERAL, 20 M.L.J. 393=8 M.L.T. 133=6 Ind. Cas. 991.

Partition—continued.—1.—**General**—continued.

See MORTGAGE—MISCELLANEOUS, A.W. N. 1882, 104.

See PLEADINGS, A.W.N. 1893, 103.

Partition suit—Costs incurred subsequent to decree—Order for execution—Practice—See PRACTICE AND PROCEDURE, 18 C. 199.

Mortgage by conditional sale—Accrual of right of pre-emption when sale becomes absolute—Wajib-ul-arz—Partition of Mahal—See PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-ARZ, 24 A. 493=A.W.N. 1902, 164.

Perfect partition, effect of, on covenants contained in wajib-ul-arz—See PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-ARZ, 7 A. 772=A.W.N. 1885, 263.

Pre-emption—Proceedings on application of vendee—Silence of pre-emptor—Waiver—See PRE-EMPTION—LOSS OF RIGHT TO PRE-EMPT BY WAIVER, ETC., 7 A. 442=A.W.N. 1885, 70.

Agreement—Partition suit—Relinquishment of right of pre-emption—See PRE-EMPTION—LOSS OF RIGHT TO PRE-EMPT BY WAIVER, ETC., 6 A.L.J. 687=3 Ind. Cas. 515.

Partition of village into separate mahals—New wajib-ul-arz framed for each mahal—Suit on one of them—See PRE-EMPTION—RIGHT TO PRE-EMPT, 11 A. 257=A.W.N. 1889, 79.

Pre-emption—Wajib-ul-arz—Partition on pre-emptive right—See PRE-EMPTION—RIGHT TO PRE-EMPT, 7 A. 720=A.W.N. 1885, 206.

See PRE-EMPTION—RIGHT TO PRE-EMPT, 20 A. 92=A.W.N. 1897, 202.

Of family dwelling-house by decree—Implied grant of easement—See PRESCRIPTION—EASEMENTS—LIGHT AND AIR, 3 C.W.N. 407.

Deed of partition not registered, value of—See REGISTRATION ACT, 1908, s. 17, 4 M.L.T. 354=19 M.L.J. 228.

Agreement to—Registration—See REGISTRATION ACT, 1908, s. 17, 6 Ind. Cas. 361.

Award signed by the parties—Partition deed—See REGISTRATION ACT, 1908, s. 17, P.L.R. 1900, p. 459.

See REMAND, 21 B. 325.

Proceedings—Determination of question of title—Res judicata—See RES JUDICATA—ADJUDICATIONS, 5 A. 280=A.W.N. 1883, 20.

See RES JUDICATA—ADJUDICATIONS, 5 B. 27, A.W.N. 1884, 2.

Among joint tenants—Legality and effect—Right of landlord—See RES JUDICATA—PARTIES, 7 A.L.J. 918=7 Ind. Cas. 398.

Suit for partition—Right to begin—See RIGHT TO BEGIN, 7 C.L.R. 274.

See SANAD, 5 C.L.R. 489, P.C.

Partition—continued.—1.—**General**—concluded.

Right of purchaser of portion only of shamilat land to claim partial—of it—See SHAMILAT LAND, 32 P.R. 1908=75 P.W.R. 1908=151 P.L.R. 1908.

Suit for—Prayer in the nature of an easement made in second appeal—Whether can be granted—See SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL, 6 Ind. Cas. 423=8 M.L.T. 87.

Refusal to act wholly on deed of partition—Suit for rights as they existed before deed—See SPECIFIC PERFORMANCE, 2 Agra 277.

Application to stay partition proceedings pending in Revenue Court—Temporary injunction—See SPECIFIC RELIEF ACT, 1877, ss. 54, 56 (b), 17 P.L.R. 1900.

Co-owners—Of properties in one district—Separate suit for the rest—See SPLITTING UP CAUSE OF ACTION, 162 P.R. 1884.

Instrument of—See STAMP ACT, 1862, sch. A, art. 54, 8 B. 299.

Document purporting to divide property—Instrument of partition—See STAMP ACT, 1879, s. 3 (11), 12 M. 198, F.B.

Written agreement between co-sharers to divide property according to award of arbitrators—deed—See STAMP ACT, 1879, s. 3, cl. 11, 15 B. 677.

Value of property partitioned, how computed for purposes of Stamp Act—See STAMP ACT, 1879, s. 3, cl. 11, sch. I, art. 37, 2 A. 664, F.B.

What is an instrument of—Release—See STAMP ACT, 1899, s. 2 (15), 12 Bom. L.R. 936=8 Ind. Cas. 632.

Maintainability of suit for partition by assignee from purchaser in execution-sale—Insolvency of judgment-debtor prior to execution sale—See ST. 11 AND 12 VIC., C. 21, s. 7, 4 M.L.T. 188=18 M.L.J. 487=31 M. 493.

See TRANSFER OF PROPERTY ACT, 1882, s. 99, 18 A. 325=A.W.N. 1896, 94.

—2.—**Effect of Partition.**

(1)—*Partition, decree for, what is.*—A decree for partition is a joint declaration of the rights of persons interested in the property sought to be partitioned, and is, if properly drawn up, in favor of each shareholder or set of shareholders having a distinct share. SHEIKH KHOORSHED HOSSEIN v. NUBBEE FATIMA, 3 C. 551=2 C.L.R. 187. [Rel. on, 13 P.L.R. 1905=23 P.R. 1905; Diss., 8 Bom. L.R. 758; R., 12 A. 506=10 A.W.N. 1890, 128, 20 A. 81, 22 M. 494=9 M.L.J. 37, 8 C.W.N. 30=31 C. 95, 8 Bom. L.R. 652=31 B. 271.]

(2)—*Title, evidence of—Commission of partition.*—Land in Calcutta was apportioned among the members of a family under a commission of partition, issued by the Supreme Court, the

Partition—continued.**—2.—Effect of Partition—continued.**

allotments being confirmed by a final decree. Many years after, the plaintiff claimed, through one of the family, a parcel of land, by reference to one of the allotments so made. The defence made by setting up a title through the widow was not proved; but the correctness of the area allotted being also in dispute, the appellate Court excluded part from the decree, made by the first Court for the whole. *Held*, that there was no ground for assuming that the members of the family, who were parties to the suit for partition, were under any mistake as to the property which belonged to their father, or that there was any error or want of due care, on the part of the Commissioners (whose proceedings had been perfectly regular) or that there was ever any adverse claim to any part of the allotted land. **SARODA PROSUNNO PAL v. SHAM LAL PAL**, 19 C. 618, P.C. = 19 I A. 75 = 6 Sar. 189.

(3)—*Suit for partition — Plea of previous partition—Onus of proof — Liability to account.*—Where, in a suit for partition of joint family property, the defendant pleads that a partition has already taken place, the onus of proving the alleged partition is on him. In a partition suit, before one brother can get his share of the joint property in the hands of another, the former must himself account for and come to a partition of all the joint property which has been in his hands. **GOOROO PERSHAD MOOKERJEE v. KALLEE PERSHAD MOOKERJEE**, 5 W.R. 121.

(4)—*Partition by Collector.*—A partition made by Collector does not alter the amount of revenue payable, it merely apportions that amount. There is no settlement of the revenue in any sense at the time of such partition. **KOOWAR SINGH v. GOUR SUNDER PERSHAD SINGH**, 24 C. 887.

(5)—*Rights of tenants — Butwara.*—A butwara does not extinguish the rights of tenants. If there was a tenant of the garden at the time of the butwara, that tenant continues to be tenant after the butwara, and the mere circumstance that one of the proprietors of the estate was himself the tenant does not destroy his tenant-right, because another of the proprietors has had the land allotted to him as part of his share of the divided estate. **NUTHOO LALL CHOWDHRY v. SADDAT LALL**, W.R. 1864, 271. [Diss., 26 C. 434.]

(6)—*Reg. XIX of 1814—Partition—Bits of land in joint occupation.*—Where partition was made under the provisions of the butwarra law, Reg. XIX of 1814, by the Collector, the fact that certain bits of land either through omission, neglect, or for convenience, have, in making the partition, been left in joint occupation, does not give the proprietor of the one estate any interest in the other. **SHAIKH BONDEY HOSSEIN v. LALLA PURIAG DUTT**, 16 W.R. 110. [F., 12 C.W.N. 176, Note.]

Partition—continued.**—2.—Effect of Partition—continued.**

(7)—*Partition—Allotment of land—Extinguishment of right—Subsequent possession.*—Whatever may be the plaintiff's position prior to partition, whether he personally cultivated the land in suit or made use of the services of others in its cultivation, the allotment of the land by partition to the defendants extinguished his rights in it altogether. If he has subsequently held it, he can only have held it as a trespasser, or a tenant at will. If, therefore, he has been dispossessed of it, his dispossession is not illegal, and he has no legal right of a suit for recovery of possession. **MUSST. NOWAB BEGUM v. RUSTUM KHAN**, 2 Agra 149.

(8)—*Private partition—Butwara by Collector subsequently—Mokurruridar, right of—Ejectment.*—By a private partition between the co-sharers of a certain estate, the land in dispute was allotted to A, one of the co-sharers. He granted a *mokurruri* of the same to another person. Subsequently, another *butwara* redistributing the shares was made by the Collector. *Held*, that, although the co-sharers must be taken to have consented to the redistribution, yet, A could not, by his consent, affect the right of his *mokurruridar*. **JUGGESSUR DOYAL SINGH v. BISSESSUR PERSHAD**, 12 C L R. 281 (13 W.R. 447, F., 1 I.A. 106 = 21 W.R. 223, 4 C. 510, D.) [App., 20 C. 285.]

(9)—*Partition—Land of co-sharer held by him in another puttee—Tenure—Arrears of rent.*—The proprietary right of one co-sharer to the land which has been transferred by partition to the *puttee* of another co-sharer, becomes extinguished, and he becomes a tenant only. A claim for arrears of rent is not sustainable in the absence of any agreement express or implied for payment of any definite sum. **ZALIM RAI v. DOORGA RAI**, 1 Agra, Rev. 69.

(10)—*Butwarrah—Joint and undivided estate—Private partition.*—Where a joint and undivided estate is subjected to private partition, and a portion of one share is granted by the owner in *mokurrari*, the grantee's *mokurrari* title cannot be got rid of by a regular *butwarrah* subsequently made. A joint undivided estate having been subjected to private partition, four bigahs, which were in the portion held by A, were granted by him in *mokurrari*. Subsequently, on the application of the parties, the Collector made a regular partition by which two bigahs of the *mokurrari* land were allotted to the other sharers, who refused to recognise the grantee's *mokurrari* rights for that portion of the land, contending that as, under the private partition, all the four bigahs were in the share of the grantor, the loss of rent should be on him and that the Collector's *butwarrah* could not transfer two bigahs with the *mokurrari* or smaller rental to the other sharers. *Held*, that the grantee's *mokurrari* title could not be got rid of by the *butwarrah*, and that he was entitled to recognition by the other

Partition—continued.**—2.—Effect of partition—continued.**

sharers. *SHEIK AHMEDULLA v. SHEIK ASHRUFF HOSSEIN*, 8 B.L.R. App. 73, Note. = 13 W.R. 447. [Diss., 26 C. 434 = 3 C.W.N. 209; F., 12 C.L.R. 281; Appr., 20 C. 285.]

(11)—*Arrangement between co-sharers of mahal—Assignment of particular shares to co-sharers—Payment of rent by cultivator to co-sharer—Right of co-sharer to sue for ejectment.*—The sharers of an undivided mahal had by arrangements between themselves assigned particular shares to different sharers. This arrangement had been acceded to by the defendant (cultivator of a specific share) who had been paying rent to the plaintiffs (the sharers to whom the above share had been assigned) to the exclusion of the other co-sharers. Held, in a suit by the plaintiffs against the cultivator for non-payment of rent, that the former were entitled to sue for ejectment, and that the defendant was estopped from questioning their competency to sue for the above relief as the relationship of landlord and tenant had been established between the plaintiffs and the defendant. *JANKEE DASS v. SYUD MAHOMED*, 1 N.W.P. 76. (2 Agra 282, D.)

(12)—*Rent — Enhancement — Howaldar — Occupancy ryot—Privilege.*—A person held part of a howalah and called himself a *Howaldar*. But in reality he was a mere cultivating ryot, and tilled the land he held with his own hands. Held, that he was not privileged to hold at lower rates than his neighbours. *ASMUTTOOLAH v. KALY PERSHAD DOSS CHOWDHRY*, 3 W.R. Act X, Rul. 11.

(13)—*Huq-e-lagaun—Heirs of sole proprietor, rights of—Butwarrah between heirs, effect of—Ryottee rights.*—In a suit to recover a *huq-e-lagaun* or the half share of the produce of certain trees planted by the plaintiff's ancestor A, on the ground that though, by a *butwarrah* entered into by A's heirs, these trees fell into the share of the defendants, the plaintiffs were still entitled to recover half of the produce as succeeding to the ryottee rights of A, held, that as A was the sole proprietor of the land on which these trees were planted, and not a mere co-sharer with others, all his heirs, both the plaintiffs and defendants, were co-proprietors also, according to their respective shares, and when the *butwarrah* was made, the division between them was of the proprietary right, and that no ryottee right existed. *MUSSAMUT AMEERUN v. MUSSAMUT SUNJEEDA*, 11 W. R. 226.

(14)—*Butwarrah, conclusive effect of, as between shareholders of only, holders of under-tenures not affected by.*—A *butwarrah* is only conclusive between the shareholders themselves, but not between them and other parties who may happen to have held under-tenures, etc., at the time. If they were fraudulent, or in any way invalid, the mere circumstance of the *butwarrah* could give them no validity. *WOOMASH CHUNDER MOJOMDAR v. DWARKANATH ROY*, 4 W.R. 80.

Partition—continued.**—2.—Effect of Partition—continued.**

(15) *Reg. XIX of 1814, s. 20—Butwarrah regularly carried out—Auction purchaser when a party.*—If a *butwarrah* is regularly carried out and is sanctioned in due course by the Commissioner and the Board of Revenue, under s. 20, Reg. XIX of 1814, all questions relating to the different shares are finally disposed of, and no suit for altering them can lie. A person who, purchasing the defaulting share, takes the place of the defaulting shareholder and objects to the *butwarrah* proceedings, is a party to the *butwarrah*, and the order passed thereon by the revenue authorities are by law final and conclusive. *SHAIK ZAKER ALI CHOWDHRY v. JUGDESSUREE*, 1 W.R. 323. [Appr., 2 B.L.R. App. 40; D., 16 W.R. 190.]

(16)—*Act XIX of 1863—Claim to cultivating right of occupancy—Determination conflicting proprietary titles—Seer land—Partition among co-sharers—Effect on cultivators.*—A question involving a claim to a cultivating right of occupancy is not one which could be properly decided in a suit for partition under Act XIX of 1863, under which only questions of conflicting proprietary title can be determined. Where an estate in which the proprietors have *seer* land is partitioned, such partition among the co-sharers in no way affects any cultivating rights which may be possessed by cultivators, not co-sharers in the estate, but it is also a well understood effect and consequence of partition that co-sharers retain no right of occupancy in respect of any *seer* land which may have passed under the partition into the share of the other co-sharers. As *seer* holder, a proprietor has no cultivating right distinct from, and independent of, his proprietary character, and when, therefore, by partition, he loses proprietary title to any particular land, any cultivating right which he had in virtue of his proprietary character necessarily ceases. *AMAN SINGH v. JEYGOPAL SINGH*, 3 Agra 164.

(17)—*Solenamah—Butwarrah.*—Rights created under a *butwarrah* in regard to certain lands are not affected by a decree for that land obtained on a previous *solenamah*. *RAKAB DOSS CHUCKERBUTTY v. SHUMBOO CHUNDER CHUCKERBUTTY*, 1 W.R. 285.

(18)—*Partition of parent-estate—Effect—S. 188, Bengal Tenancy Act, 1885.*—On the partition of the parent-estate, the original arrangement by which there was one tenancy under one holding of landlords comes to an end. The effect of the partitions is to create separate and distinct tenancies under the proprietors of each estate. It cannot be said that the proprietors of the several estates are joint landlords of the tenure, for the estates are separate, the share of the rent allotted to each forming a portion of the assets of that estate alone. So, a suit for enhancement of rent is maintainable by a proprietor of one of the estates in respect of the rent allotted to his estate. *HEM CHANDRA CHOWDHRY v. KALI PRASANNA BHADURI*, 26 C. 832. (22 W.R. 530, 5 C. 273, F.) [R., 10 C.W.N. 818.]

Partition—continued.**—2.—Effect of Partition—concluded.**

(19)—*Partition of joint property in Calcutta—Right to easements.*—Where a partition of joint property in Calcutta takes place by mutual conveyances, whether under the order of a Court or otherwise, the parties impliedly take their shares together with the easements of light and air according to the existing state of the premises. Where, in a suit for partition of a family dwelling house, the parties were directed to take their shares by mutual conveyances, with liberty to the plaintiff to raise a partition wall, but no conveyances were executed although the shares were allotted, *held* that the parties must in equity be considered to have taken as if under such conveyances, so far as the easements of light and air were concerned. *BOLYE CHUNDER SEN v. LALMONI DAS*, 14 C. 797. [R., 26 C. 516.]

Partition among co-proprietors and attornment by tenants—Each proprietor landlord of his patti—See C. P. ACT XVII OF 1889, 12 C.P.L.R. 66.

Effect of partition on the application of a vendee on the right of pre-emptor—See PUN. ACT IV OF 1872, s. 12 (a), 30 P.L.R. 1902= 32 P.R. 1902.

Effect of perfect partition on custom of pre-emption—See PRE-EMPTION, CONSTRUCTION OF WAJIB-UL-ARZ, 7 Ind. Cas. 572.

—3.—Form of Partition.

(1)—*Joint tenancy, severance of—Separate collections and management—Actual division of subject-matter not essential.*—The only point taken in this special appeal was, that the plaintiff's case ought not to have been dismissed until the defendants proved a complete and formal partition, and that a separate enjoyment of the collections was not sufficient. The lower Court had found, as a fact, that the collections and management were separate, in short, that ownership was exercised over the property in certain defined shares. It was, therefore, clear that the joint tenancy was severed though not immediately followed by a *de facto* actual division of the subject-matter. *MUSST. MOHROO KOOREE v. MUSST. GUNSOO KOOREE*, 8 W.R. 385.

(2)—*Declaration of title to enjoy separate possession of land—Suit for partition—Maintainability*—A plaintiff, who has obtained a declaration of title to continue to enjoy separate possession of certain land, cannot sue the same defendant again for partition of the same land. *ANDI v. THATHA*, 10 M. 347.

(3)—*Mode of partition—Principle—Improvements by one sharer.*—The correct principle to be observed in effecting a partition is to make every allowance for the trouble taken by the defendant in bringing the land to a cultivable state and to respect his possession as far as possible, permitting him to remain in possession of the lands improved by him, except where

Partition—continued.**—3.—Form of Partition—continued.**

land equal in original value could not be awarded to plaintiffs from the rest of the joint holding. *RAM JOWAYA v. AMRIT RAM*, 9 P.R. 1885, Rev.

(4)—*Partition Act, XIX of 1863, ss. 18, 43—Suit for possession of property by co-sharer—Partition whether complete or incomplete.*—In partitions under Act XIX of 1863, it is the Commissioner's decision that gives effect, that prior to it is merely the proposal of the Collector. Partition under the Act, whether by private arrangement or by arbitration, is subject to the confirmation of the Collector as *imperfect partitions*, depending on the consent of the parties, and effected from first to last only with their consent. The Courts in their judgments should bear in mind the very distinct character of the several kinds of partition, and until it has been ascertained with what description of partition they have to deal in each case, the question of the sufficiency of the sanction or confirmation which it may require cannot be determined. *MIRZA MUHUMDEE BEG v. MEER HOSSEIN ALI*, 2 N.W.P. 26.

(5)—*Suit for partition of lands and houses and recovery of rents and profits—Moveables not claimed originally.*—A person's claim was for the partition of certain immoveable property, and the profits of such property and the claim did not refer to moveables. The defendant in his account of the application of the income took credit for a sum as having been expended by him for jewels and clothes. *Held* that it followed on his (defendant's) own showing that the things so purchased (the purchase-money being charged against plaintiff) must belong to the plaintiff, and a decree declaring his right to obtain them may be supported though they were not originally claimed. *BULDEO SAHAI v. CHADEE LAL*, 2 N.W.P. 95.

(6)—*Suit for land—Plaintiff found entitled to a share—Partition.*—Plaintiff sued for the land in dispute as his own, on which defendant had trespassed and built a wall. Defendant claimed the land as his jointly with plaintiff. The lower Courts found that the land was in plaintiff's own share and that the defendant held his separately. *Held*, that no further formal partition was necessary. *MUDHOO SOODUN CHATTERJEE v. JUDDOOPUTTY CHUCKERBUTTY*, 9 W.R. 115.

(7)—*Agreement to pay each lambardar his proportionate share of rent—No partition of holding.*—The mere fact that a tenant has agreed to pay each lambardar his proportionate share of the entire rent has not the effect of partitioning the holding. The tenant continues to hold his land from the entire proprietary body. *SARJUPRASAD v. MURATLAL*, 14 C.P.L.R. 33. (5 W.R., (Act X, Rul. 78, F.).

(8)—*Partition of shamilat land—Waste.*—A partition of the shamilat waste land of an imperfect puttadari village should be allowed

Partition—continued.**—3.—Form of Partition—concluded.**

when there would remain other land incapable of division and the tenure of the village would not be altered. Even if there is no such other land, partition may be made reserving a portion from division as common land. *MIN v. BELA*, 1 P.R. 1873, Rev.

(9)—*Shamlat—Trees—Right of grower.*—In a partition of Shamlat, land containing trees grown in the shamlat by a share-holder can be given to such share-holder though such a principle of division should not generally be followed. *WARIS v. DARA*, 15 P.R. 1881, Rev.

(10)—*Waste — Common — Breaking up — Custom—S. 65, L.R. Act—Arbitrators—Court's interference.*—In a hilly broken country in the Punjab, shareholders who have broken up common waste land retain by custom at partition such cultivated land as their share of culturable waste, if other culturable waste of equal quality is available to make good the share of share-holders who have not broken up. The Court has power to modify the arbitrator's proposals as to the mode of partition under s. 65, L.R. Act. *SHARFU v. MALIK SULTAN MAHOMED*, 11 P.R. 1881, Rev.

—4.—Partition, How effected.

(1)—*Partition of joint property—Principle.*—The principle in suits for partition of property (e.g., a number of houses) is that, if a property can be partitioned without destroying the intrinsic value of the whole property, or of the shares, such partition ought to be made. If, on the contrary, no partition can be made without destroying the intrinsic value, then a money compensation should be given instead of the share which would fall by partition. *ASHANULLAH v. KALI KINKER KUR*, 10 C. 675. [R., 7 Bom. L.R. 482; D., 52 P.W.R. 1907, 36 P.R. 1909.]

(2)—*Partition—Property in possession of sharers—Transfer of sharers—Debts—Security.*—In affecting a partition, every sharer holding any joint property must bring it into account. But before any transfer of the shares to the sharers, security must be given by each to protect and indemnify the other co-sharers in respect of such portion of the debts, as the person giving security undertakes himself to discharge. *MIRZA ALI HOSSEIN v. MIRZA ALI HOSSEIN*, 2 Agra 96.

(3)—*Butwarra—Object of butwarra—Necessity to award in exact proportion to jumma paid.*—In every case of a butwarra, each party need not be awarded the same quantity of land. The object of a butwarra is to divide the lands in as compact a form as possible; consequently, the lands to be awarded to each party need not be in exact proportion to the amount of jumma paid by them respectively to the Government. *MEER AFTABOODDEEN v. SHUMSOODDEEN MULLICK*, 18 W.R. 461.

Partition—continued.**—4.—Partition, How effected—continued.**

(4)—*Execution of decree for partition of family property.*—It is not open to the Court, in executing a decree for partition of family property, to order that any part of the property should remain joint, unless all the co-parceners, who are parties to the suit, agree to such an order being passed—*Per White, J.* Where, however, some of the co-parceners desire to keep a part of the property undivided and entire and if such appears, from the nature of the property, (place of family worship for instance) reasonable, the Court would be disinclined to order it to be divided without giving them an opportunity of keeping entire by allowing them, for example, to purchase the interest of the other co-parceners in it. *Obiter.*—Courts are not precluded by the decree from keeping a part of the property entire as a family dwelling-house if they are of opinion that a fair and equitable partition of the part is impossible between the members—*Per Mitter, J.* *RAJCOOMAREE DASSEE v. GOPAL CHUNDER BOSE*, 3 C. 514.

(5)—*Irregular partition proceedings, how far effectual.*—Plaintiffs were proprietors to whose share certain lands in the village were allotted on partition. Defendants were hereditary cultivators recorded as such in the Settlement paper, but at the partition, they were entered as non-hereditary cultivators in respect of these lands. In a suit by the plaintiffs to eject the defendants from the said lands which continued in their possession, it was contended by the latter that the partition was not effected in a legal manner and as such not binding upon them. *Held* that the requirements of para. 12, s. 9, Part I, Punjab Civil Code, which provides that the several possessions should be maintained as much as possible, if parties require it, had not been observed in the partition proceedings, and that the partition could not be accepted as final and conclusive. *SURFURAZ KHAN v. EEDDOO KHAN*, 53 P.R. 1866.

(6)—*Partition suit—Arrangement inconvenient to party—Better arrangement not suggested—Right of party to demand different arrangement.*—Where, in a partition suit, division was directed to be effected in a particular way and a party complained that his convenience was not consulted in making the arrangement, the Court would not disturb the arrangement, unless some other arrangement is suggested which would better satisfy or would be more equitable for all parties than the arrangement made by the Court. *SUMMUN JHA v. BHOOBUT JHA*, 18 W.R. 498. [R., 7 Bom. L.R. 482.]

(7)—*Single co-sharer in sole enjoyment of plot—Procedure*—Where, in a suit for partition, it is found that a single co-sharer is in sole enjoyment of a certain piece of land, the latter should be given as a whole to that one or other of the joint-owners, without its being subdivided between them. *SREEMUTTY PUDDO MONEE DOSSEE v. DWARKANATH BISWAS* 25 W.R. 335.

Partition—continued.**— 4.— Partition, How effected—continued.**

(8)—*Necessity for all members of family being parties to suit.*—No partition can be effected by a decree of Court, unless all the members of the family entitled to a share are brought before the Court, either as plaintiffs or defendants. *UCHHAB NAIK v. LAKHAN NAIK*, 9 C.P.L.R. 93.

(9)—*Civ. Pro. Code, 1882, s. 265—Decree for partition sent up to Collector for execution—Duty of Collector to divide lands and deliver shares.*—The question referred for decision, in this case, was whether the Collector, to whom an application for execution of a decree for partition or separate possession of a share of land paying revenue to Government had been referred under s. 265 of the Civ. Pro. Code, was simply to make a division of land by measurement, or was also bound to deliver possession of the shares, as directed by the decree? *Held* that the Collector should, in such a case, after making the requisite division, proceed also to deliver possession of the divided shares. S. 265 of the Civ. Pro. Code, contemplates the "partition" being completely carried out by the Collector; and the circumstance that it does not provide for the Collector's reporting to the Court, as is the case in s. 396 with regard to lands not paying revenue to Government, points to the conclusion that the term "partition" in s. 265 is not confined to the mere division of the lands into the requisite parts, but includes the delivery of the shares to their respective allottees. This view is confirmed also by the language of ss. 113 and 114 of Bombay Act, V of 1879. *PARBHUDAS LAKHMIDAS v. SHANKARBHAI*, 11 B. 662. [R., 12 B. 371.]

(10)—*Suit for partition—Improvements made by one joint owner.*—If, in a suit for partition, it appears that the defendants, some members of the joint family, had improved and enhanced the value of the lands in their occupation, the partition ought to proceed on the basis of each co-sharer having an equal share of similar lands, compensation being allowed to each co-sharer for any expenditure in labour or otherwise by which it could be shown that the value of any portion of the partible property had been enhanced. If, on the partition, it should prove that the lands occupied by the defendants are not in excess of the share to which they are entitled, and that there are other lands of a similar description, out of which the plaintiff's share could be properly made up, the defendants may equitably be left in the enjoyment of the estate which they have reclaimed. If there are not other lands of a like character sufficient to make up the plaintiff's share, the portion necessary for this purpose must be taken from the lands reclaimed by the defendants, the plaintiffs in that case paying to the defendants whatever sum, it is shown, the defendants have expended on its reclamation. *KALLIAN BANERJI v. MODHUSUDUN BANERJI*, 8 C.L.R. 259.

(11)—*Partition—Joint estate—Ekrar to give land to co-sharer—Mode of carrying out ekrar.*

Partition—continued.**— 4.— Partition, How effected—continued.**

—Plaintiff and defendant were share-holders in a mouza. Subsequent to a partition among the share-holders, the defendant by an agreement (*ekrar*) undertook to give the plaintiff certain land from his own share. Then proceedings for partition of the entire mouza were instituted under Reg. XIX of 1814, and the plaintiff applied to the Collector to grant him the land given by the defendant in addition to his own share, but the Collector left the parties to settle the matter between themselves. The plaintiff alleged that the lands originally held by him under the *ekrar* fell into the defendant's puttee and was held by him, and that, in lieu of them, the defendant gave other land out of his puttee to the plaintiff. The defendant denied the allegation in a way. Subsequently, a further partition was made by the Collector, and the land which the plaintiff alleged he held in exchange for the original land given by the defendant went into the share of a third person entirely, unconnected with the agreement. Hence the present suit by the plaintiff to recover from the defendant land under the original agreement. *Held* that in a case of this kind the only principle that can be adopted is that the Court should ascertain the relative value of the land originally made over to the plaintiff by the defendant to the entire lands of the defendant's puttee and assign, out of the present share of the defendant, land having the same relative value to the whole that the former land bore. In making this decree the proceedings of the Collector under the Butwarra law by which new estates were defined and recorded should not be interfered with and the plaintiff should be brought in as a co-sharer to a certain limited extent in the land which has been assigned by the defendant. *OOMA DUTT CHOWDHRY v. HUNOOMAN CHOWDHRY*, 22 W.R. 453. *Appl.*, 23 B. 385.]

(12)—*Partition—Butwarra, evidence of—Regulation XIX of 1814—Division, mode of.*—Proceedings for partition having been instituted under Regulation XIX of 1814, it was proposed, in order to make equality of partition, that three villages should be divided in unequal proportions, and a *goshwara* was accordingly prepared by the Ameen, setting out in one column the extent of the shares to be allotted, and in another the assessed jumma of each share allotted. In a suit in 1873 by the representatives of one of the shareholders to recover portions of the three villages, the only evidence that the partition had been completed was an *istahar* of the Deputy Collector, dated October 1864, directing the nazir to require the ryots to pay their rents according to the extent of the shares as set forth in the first mentioned column of the *goshwara*; that is, according to the quantity instead of according to the quality and value which were the basis of the partition. *Held* (affirming the judgment of the High Court), that the plaintiff having failed to prove any order for partition drawn up, under s. 13

Partition—continued.**—4.—Partition, How effected—continued.**

of the Regulation by the Collector, was not entitled to recover according to the quantity of the land; but if at all, according to its value as ascertained in the column of the *goshwara* in which the assessed jumma was set forth. **HURRO SUNDARI DEBIA v. KESAB CHUNDER ACHARJYA, 5 C L.R. 257, P.C.**

(13)—S.128, *Bengal Act VII of 1876—Partition by Collector, effect of—Private partition—Incumbrances.*—If a co-sharer of an undivided estate mortgages any portion of the estate, and if, subsequent to such encumbrance, the Collector, partitioning the estate under the Estate Partition Act VIII of 1876, allots the encumbered portion to another co-sharer, the latter takes the portion allotted to him free from the encumbrance created by the first mentioned co-sharer. In the case of a private partition, it is otherwise. **JOY SANKARI GUPTA v. BHARAT CHANDRA BIRDHAN, 26 C. 434=3 C.W.N. 209. (1 C.W.N. 62, D.; 1 I.A. 106, P.C., F.)**

(14)—*Partition between partners—Separate possession taken with consent of other co-partners—Erection of wall—Injury to neighbours—Privacy—Right to light and air.*—Co-partners may, on partition, be allowed to retain possession of such joint lands as they may have taken separate possession of with the express or implied consent of all or at least of a majority of the co-partners. A person cannot be allowed to maintain a wall to the injury of his neighbours. [D., 14 W.R. 103] Where the plaintiff has built an upper-story to his house, overlooking the inner apartments of the defendant who thereupon built a wall which deprived plaintiff of light and air, held that even if it were shown that light and air had long been enjoyed by the plaintiff and had then been cut off by defendant's wall, still, as plaintiff had no right to build an upper-story, with reference to the circumstances of domestic life in India, so as to intrude on the privacy of the females of the defendant's family, the plaintiff would have no relief in this respect, as he was the first and greater wrong-doer. **SREENATH DUTT v. NAND KISORE BOSE, 5 W.R. 208. [D., 14 W.R. 103; Cons., 10 A. 358.]**

(15)—*Easements—Construction of grants—General words—Severance of tenement—Passing of continuous easements—Light and air—Interim injunction—Mandatory injunction.*—One of two houses, belonging jointly to several owners, possessed an easement of light and air over the other. Held, on a partition of the houses, the dominant tenement must continue to enjoy the easement, which was a continuous one, both by implication of law, and by the general words of the deed of partition. On a partition of a tenement, easements that are continuous will pass both by implication of law and by the general words of the conveyance. [R., 14 B. 452, 26 C. 516=3 C.W.N. 400.] Where there is an aperture capable of admitting light and air, such a fact will confer the

Partition—continued.**—4.—Partition, How effected—concluded.**

same legal right to light and air, whether it be used exclusively for the passage of light and air, and termed a window, or intended to be used as a means of communication and called a door. In a suit brought by the plaintiff to obtain an injunction to restrain the defendant from constructing a building, so as to cause obstruction to the ancient light of the plaintiff, the Court granted an interim injunction from further proceeding with the building, upon the terms of the plaintiff submitting to obey any order the Court might make as to loss or damage that might be caused to the defendant by making such order. Whenever it is shown that the comfort and enjoyment of a man or of his family in the occupation of his house is seriously interfered with, or when there is a material injury to that which is a clear legal right, and it appears that damages, from the nature of the case, would not be a complete compensation, the Court will interfere and grant an injunction. [R., 3 N L. R. 114, 7 Bom. L. R. 352.] The exercise of the power of granting mandatory injunctions is one that must be attended with the greatest possible caution. It is confined to cases where the injury done to the plaintiff cannot be estimated in money and cannot sufficiently be compensated by a sum of money, for example where the interference with light and air renders it in a material degree unsuitable for the purposes to which it is applied, provided of course there is nothing, in the circumstances of the case, inequitable in putting in force that remedy. **RATANJI HORMASJI BOTTLEWALLA v. EDALJI HORMASJI BOTTLEWALLA, 8 B. H. C. O. C. 181. [R., 2 B. 133.]**

(16)—*Allegation of previous private partition by widow—Reversioner objection by.*—In the case of an application by a widow to have a private partition, alleged by her to have been made by her husband during his life-time, recorded in the mutation register, an objecting reversioner should be allowed to prove that the husband had effected no such partition. **GHULAMI v. MUST. BANON, 6 P.R. 1396, Rev. (11 P.R. 1895, Rev., Appr.)**

(17)—*Stipulation in wajib-ul-arz—Consent—parties.*—A stipulation in a wajib-ul-arz for a general consent of khewatdars for partition will not bar a partition of the common land of a village with the consent of the majority of khewatdars. But if there is a dispute as to the extent of the shares, then the point must be decided by a regular suit, before the partition can take place. **SULLIMAN v. BULLUNDA, 17 P.R. 1867, Rev.**

See **COLLECTOR, 12 B. 371.**

Delivery of possession, what constitutes—Decree for—See **EXECUTION OF DECREE—MODE OF EXECUTION, 20 B. 351, F.B.**

See **EXECUTION OF DECREE—MODE OF EXECUTION, 20 C. 533, 6 A. 452=A.W.N. 1894, 165, 19 A. 194=A.W.N. 1897, 16.**

Partition—continued.—5.—**Private Partition.**

(1)—*Private partition—Effect upon co-parcenary and its members.*—A private partition is enough, and no partition by metes and bounds is necessary, before a co-parcenary can be said to have ceased to exist, and those who were co-parceners have become "strangers" to one another. *DIGAMBUR MISSER v. RAM LAL ROY*, 14 C. 761. (11 M. I. A. 75, *Rel. on.*)

(2)—*Butwarra Proceedings—Private arrangement—Onus of proof.*—When, admittedly, an independent arrangement was made between the four annas plaintiff-proprietors and the patnidars of the twelve annas share, by which, as between them, the whole estate was partitioned, and this arrangement was acted on by possession following according to the partition, then, the plaintiffs cannot set aside this arrangement by simply relying on a butwarra to which the patnidars were not consenting parties. They must show that the arrangement was of a limited and conditional character. It was quite within the power of the plaintiffs and of the patnidars to divide the estate between them, and once this division was made and acted on, no conduct of the plaintiffs with a third party can disturb it or affect its validity. *OBHOY CHURN SIRCAR v. HURI NATH ROY*, 8 C. 72 = 10 C.L.R. 81. [*Appr.*, 20 C. 285.]

(3)—*Butwarra—Joint and undivided estate—Private partition.*—Where a joint and undivided estate is subjected to private partition, and a portion of one share is granted by the owner in mokurrari, the grantee's mokurrari title cannot be got rid of by a regular butwarra subsequently made. A joint undivided estate having been subjected to private partition, four bigahs, which were in the portion held by A, were granted by him in mokurrari. Subsequently, on the application of the parties, the Collector made a regular partition by which two bigahs of the mokurrari land were allotted to the other sharers, who refused to recognise the grantee's mokurrari rights for that portion of the land, contending that as, under the private partition, all the four bigahs were in the share of the grantor, the loss of rent should be on him and that the Collector's butwarra could not transfer two bigahs with the mokurrari or smaller rental to the other sharers. *Held* that the grantee's mokurrari title could not be got rid of by the butwarra, and that he was entitled to recognition by the other sharers, *SHEIK AHMEDULLA v. SHEIK ASHRUFF HOSSEIN*, 8 B.L.R. App. 73, Note = 13 W.R. 447. [*Diss.*, 26 C. 434 = 3 C.W.N. 209; *F.*, 12 C.L.R. 281; *Appr.*, 20 C. 285.]

(4)—*Mere unity of possession not enough to have land partitioned—Right to partition, requisites of—Subordinate tenure-holder's right to partition against superior landlord—Joint property—to rule compelling plaintiff, when suing for partition to ask for partition of lands belonging to third parties.*—Mere joint possession is not a sufficient basis for entitling a person to

Partition—continued.—5.—**Private partition—continued.**

have the land partitioned by metes and bounds. In order that persons may be co-parceners, and so have a right to partition, it seems, that not only must they be in joint possession of the property but that, that joint possession must be founded on the same title. A person holding a subordinate interest in land has been held not to have a right of partition as against the superior holder. (4 B.L.R., App. 57, note, 7 C. 577; *R.*) [*Overruled*, 24 C. 575, F.B. = 1 C. W.N. 406; *R.*, 9 C.W.N. 699.] There is no rule which would compel a plaintiff, when suing for partition of lands, in which he and the defendants are jointly interested to ask for the partition of other lands in which third parties are also interested. *MUKUNDA LAL PAL CHOWDHRY v. LEHURAUX*, 20 C. 379. (12 C. 566, 6 B.L.R. 134, *R.*) [*F.*, 1 C.L.J. 40.]

(5)—*Private partition—Exercise of right for a long period—Subsequent butwarra of whole estate.*—The division of an estate into four puttees took place more than 50 years ago. Some of the defendants' ancestors sued the ancestors of the present plaintiffs upon it, and obtained a decree in 1815 for possession of the puttee which under it fell to their share, and all the co-sharers had exercised rights of ownership over their respective puttees quite independently of one another, some co-sharers having actually purchased portions from others as if they were dealing with entire strangers. This private arrangement remained in force till in 1847 the one-fourth proprietors (including the plaintiffs) by suit in the Civil Court, obtained a regular separation of their share, and in assigning to them their proper area of land and proportion of the assets, a quantity of land was withdrawn from the share up to that time enjoyed by the plaintiffs and their co-sharers in one-fourth of the whole estate. *Held* that the plaintiffs were not entitled to demand a butwarra of the whole estate and that the several co-proprietors being thus wholly separate in their rights and interests, the defendants were not liable to compensate the plaintiffs for losing what another litigant has obtained from them by action of the Court. *PERMESSUR DUTT SAHEE v. AUDH SAHAJEE*, 5 W. R. 40.

(6)—*Private butwarra binding parties—Not binding on Government.*—A private butwarra is certainly binding as between the parties to it and persons claiming title under them. Such a butwarra is no doubt not binding against the Government, or against a purchaser at a sale for arrears of Government revenue who derives his title directly from the Government. *TRIPOORAH SOONDORRE CHOWDHERANEE v. KALI CHURN ROY CHOWDHRY*, 18 W.R. 327.

(7)—*Right of suit—Butwarra—Annulment by decree—No eviction.*—Though a private partition might have been annulled by a decree of the Court, in the absence of eviction of the plaintiff consequent upon the decree, he has no cause of action to maintain a suit for possession

Partition—continued.**—5.—Private partition**—continued.

of his share in the estate. **POOROOSOTTUM CHUNDER v. NITYE SOONDER PANDEY, 22 W.R. 105.**

(8)—*Partition proceedings under Reg. XIX of 1814—Suit for stay—Nature of suit—Stamp—Power of collector—Proceedings in Revenue Courts under the regulation—Private partition no bar.*—An allottee under a private partition, suing for stay of subsequent partition proceedings under Reg. XIX of 1814 and for confirmation of possession, should not stamp the plaint on the value of the entire estate, the suit being one for a declaratory decree or for something in the nature of an injunction. The Collector's power to bring an estate under partition under Reg. XIX of 1814 depends upon whether it is "held in common tenancy;" if not, he would only be competent to make an assignment of the revenue, in proportion to the holdings of the shareholders. A private partition of such lands is no bar to proceedings in Revenue Courts under s. 30 of Reg. XIX of 1814. **JOYNATH ROY v. LALL BAHADOUR SINGH, 8 C. 126 = 10 C.L.R. 146.**

(9)—*Partition by Collector—Private partition—Butwarra—Reg. XIX of 1814, s. 30.*—It is not correct to say that, under s. 30 of Reg. XIX of 1814, the Collector is not at liberty to make any partition where the owners have already partitioned the lands amongst themselves. The true meaning of the section is that the Collector must be guided by the nature of the estate in applying the rules contained in the preceding sections of the Regulation; and that, where estates are not held in common tenancy, only a portion of those rules will apply. If the parties have divided the lands without agreeing as to the shares of the Government revenue to be paid by them respectively, all the Collector has to do when a partition has been applied for, is to make an assignment of the revenue in proportion to the interest of each shareholder. If they have divided the lands and arranged amongst themselves as to the portion of the Government revenue which each has to pay, it is open to the Collector to accept or reject that arrangement. The Civil Court has nothing to do with the matter. **AJODHIYA LALL v. GUMANI LALL, 2 C.L.R. 134.**

(10)—*Reg. XIX of 1814—Act XIX of 1863—Private partition of shamilat by consent of parties—Imperfect Revenue partition—Effect—Distinction between private and imperfect butwarra.*—A private partition of the shamilat made by the mutual consent of all concerned, is not any the less of binding effect than an imperfect partition conducted by the Revenue authorities under the rules. If a private partition has been completed and has taken effect, and it be established that a particular plot of land fell to a certain proprietor by that partition, then, the title of that proprietor in the land is as good as if he held it by a butwarra; and a subsequent partition, the absence of any agreement between the parties to that effect, alter-

Partition—continued.**—5.—Private partition**—continued.

ing the distribution of land previously divided among the proprietors by a private partition, complete in all its features as above explained, cannot legally be had. There is no difference in the effect of a private and an imperfect partition; but the main distinctions between such partitions and a regular butwarra under Reg. XIX of 1814 or Act XIX of 1863, where this Regulation or Act is in vogue, consists in the maintenance of the joint responsibility of the whole village for the Government revenue by the one, while it is put an end to by the other. **WALI v. GAMAN, 66 P.R. 1869.**

(11)—*Private partition of joint estate—Subsequent survey-proceedings not affected by partition—Survey demarcation proceedings valid without special sanction of Collector.*—In this case, the lower appellate Court had proceeded on the ground of a private partition being inconsistent with survey proceedings and having the effect of taking away any legal effect from them. *Held* that this view was wrong. There might well have been an anterior private partition as alleged by the plaintiff, and subsequently, when the survey officers came to demarcate the lands, the representatives of the parties concerned might have indicated one parcel to be separately demarcated, and marked in one colour as one portion of the property and another parcel to be separately demarcated and marked in another colour as another portion. And in order to make such demarcation effective, no further special sanction by the Collector is necessary than the general acceptance of the survey proceedings as correct. **HUNOOMAN CHOWBAY v. BINDOOTORABA, 10 W.R. 336.**

(12)—*Share-holders in Zamindari villages—Dispute among them—Partition—Compromise, construction of—"Hakh jethansi."*—A compromise made, on a dispute among proprietors of shares in zamindari villages as to the respective amounts of the holdings undivided till then, to which they were entitled, by their common ancestor's five sons, of whom the plaintiff's father was the eldest, and filed in proceedings prior to the suit, was construed to have assigned to the plaintiff's father, an additional share according to a custom recorded in the *khewut* at settlement, in virtue of which the eldest brother was entitled to a share greater than that allotted to the others—a right termed "*hakh jethansi*." **MANICKCHAND v. HIRA LAL, 20 C. 45, P.C. = 6 Sar. 235.**

(13)—*Mahomedan Law—Private partition—Holder of share in property sold, Right of pre-emption of.*—According to the Mahomedan law, a sharer in the property sold has the first or strongest right of pre-emption. On the facts, as found by the lower Court, it was conclusively settled that the plaintiffs were sharers in the particular puttee which was the subject of the sale, and that the defendants, the purchasers, were not. It was argued that the plaintiffs and the defendants who purchased had equal rights,

Partition—continued.—5.—**Private partition—concluded.**

because they were originally sharers in the whole village, and did not, by reason of the partition which took place, cease to be so in such a manner as to alter their title to claim the right of pre-emption, inasmuch as the partition was private, and not officially recognised in the Collectorate books or otherwise, but the High Court was of opinion that, so long as the partition was complete and final, as among the parties to it, it sufficed to alter their position as effectively, so far as regards the exercise of the right of pre-emption, as if it had been made and recorded in the most formal manner possible. *GOPAL SAHI v. OJODHEAPERSHAD*, 2 W.R. 47. [Appr., 14 C. 761; R., 11 W.R. 71, 35 C. 575.]

(14)—*Application for partition—Plea of private partition—“Question of title”—Entry in settlement record.*—The objection to an application for partition that the land had already been partitioned, though wrongly recorded as joint in the revenue records raises a “question of title” within the meaning of s. 116, Punjab Land Revenue Act, so that an appeal lay in such matters from the decision of an Assistant Collector to the Collector and not to the Commissioner. *MALANG v. MUSST. NAMITHI*, 4 P.R. 1898, Rev.

Direction to file civil suit—Limitation to file the suit—Private partition not given effect to—See U.P. ACT III of 1901, s. 111, 4 Ind. Cas. 404.

See CONTRACT, ACT, 1872, s. 23, 20 A. 219, F.B. = A.W.N. 1898, 47.

Co-sharers — Private arrangement among them resulting in the partition of certain lands, other lands remaining joint as before—One co-sharer granting putni lease of separate share—S. 128, Bengal Act VIII of 1876, subsequent partition proceedings by the Collector under—Putnidars proper parties—See PARTIES TO SUIT—GENERAL, 20 C. 285.

—6.—**Right to partition.**

(1)—*Joint ownership—Right to partition.*—In all cases of joint ownership, each party has a right to demand and enforce partition, in other words, a right to be placed in a position to enjoy his own right separately and without interruption or interference by others. *RANI SAMA SUNDARI DEBI v. JARDINE SKINNER*, 3 B.L.R. App. 120 = 12 W.R. 160. (S.D.A. Rep. 1853, 536; 6 W.R. 192, 8 W.R. 128, 9 W.R. 478, R.) [F., 13 W.R. 74; R., 9 C. 244, 24 C. 575, F.B. = 1 C.W.N. 406.]

(2)—*Civil Court—Jurisdiction—Joint estate—Suit by a share-holder to separate small portion—Declaration of right.*—The purchaser of a portion of a revenue paying estate from the owners thereof cannot bring a suit to recover a small portion of the estate, which he desires to occupy for his own convenience. His remedy is by a suit for a declaration of his share and for partition as provided by s. 5, Reg. XIX of

Partition—continued.—6.—**Right to partition—continued.**

1814. Taking into consideration the mode in which the suit was framed and the valuation put upon it, the High Court declined to have the suit treated as lone for a declaration of the plaintiff's share. *RUTTAN MONEE DUTT v. BROJO MOHUN DUTT*, 22 W.R. 333. [Expl., 14 C. 835; R., 7 C. 153, 20 M.L.J. 907; D., 24 W.R. 243.]

(3)—*Claim to partition—Portion of property in possession of claimant—Surrender of portion.*—Where the plaintiff in a suit for partition is in possession of any portion of the estate for his own use, he must surrender it for the purpose of a strict account being taken of the whole joint ancestral property before he can get a decree in his favour. *BABOO LALLJEET SINGH v. BABOO RAJ COOMAR SING*, 25 W.R. 353.

(4)—*Suit for partial partition—Partition of revenue—Paying land—Jurisdiction of Civil Court and Collector.*—A suit for khas possession by partition of a certain portion only of a revenue-paying estate will not lie. [R., 14 C. 122.] A partition of revenue-paying lands cannot be made by a Civil Court independently of the Collector. The Civil Court can only pass a decree for partition of a revenue-paying estate, but the decree must be carried into execution solely by the Collector. *RAM JOY GHOSE v. RAMRUNJUN CHUCKERBUTTI*, 8 C.L.R. 367. [R., 24 C. 725.]

(5)—*Joint property—Suit for partial partition.*—Where the plaintiff sued for partition of one only of three *khanabaris* to which, along with other property, he was entitled jointly with the defendant, *held*, the suit would not lie. *HARIDAS SANIYAL v. PRANNATH SANIYAL*, 12 C. 566.

(6)—*Suit for partial partition—Jurisdiction of High Court (original side).*—If a man sues for partition of joint property and the defendant alleges that there is other property, the plaintiff is bound to submit to partition of all the properties; and if he sued in the mofussil, he would either have to amend his plaint accordingly and pay the extra stamp duty, or have his suit dismissed. But there is no *ad valorem* fee in the original side of the High Court, and if the defendant claims that there is other property to be partitioned, and it turns out that there is other property, that is no reason for the dismissal of the suit. It is a reason for including the other property in the suit, if the Court has jurisdiction to deal with such property. Where one of the properties sought to be partitioned is outside the jurisdiction, and no leave has been granted under the charter to sue in respect of that property, the High Court in its original side can deal with so much of the land as is within the jurisdiction. *PUNCHANUN MULLICK v. SHIB CHANDER MULLICK*, 14 C. 835. (22 W.R. 333, Expl.) [F., 22 B. 922.]

(7)—*Suit by co-sharer in melvaram right for division of lands—Effect on liability to quit-rent—Who are parties to such suits—Partition—How carried out.*—Where the melvaram right, in

Partition—continued.**—6.—Right to partition—continued.**

certain villages in the actual enjoyment of permanent tenants, is owned by a number of co-sharers, it is open to one of those co-sharers to sue for the partition of the lands, though he cannot, without the consent of Government, put an end to his joint liability for the entire quit-rent. He must implead all the ryots whose rights he questions, but he need not implead other ryots whose rights and privileges are not questioned. [R., 18 M.L.J. 85.] The partition must be carried out by the Collector, and, therefore, when a preliminary decree has been made, it would be sent to the Collector, and, when partition is concluded by him, the final decree would be prepared. **RAMANUJA v. VIRAPPA**, 6 M. 90.

(8)—*Partition between subordinate tenure-holders—Landlords made parties—Joint proprietors—Contract.*—A was a *putnidar* of a four-anna share, and B of another similar share of an undivided eight-anna share of a *zemindari*, held as two separate estates by the two *zamin-dars*, one of whom gave the *putni* to B, and the other gave the *putni* to A. The lands of the entire eight annas were undivided. B sued for division and partition of lands, and brought his action against A, who had never entered into any contract with B or his landlord to divide the lands. The two landlords were made defendants. B's landlord gave his consent to the suit, and the other landlord did not appear. Held that there was no law that allowed one *putnidar* to sue another *putnidar* for a partition, there having been no contract between the two, or between the *putnidar* and his *zemindar*, to divide. **RIDAI NATH SANDYAL v. ISWAR CHANDRA SAHA**, 4 B.L.R. App., 57, Note. [F. 20 C. 379; R. 4 B.L.R. App. 55=13 W.R. 74, 20 M.L.J. 907=14 C.W.N. 962=12 C.L.J. 240=8 M.L.T. 228=7 Ind. Cas. 549=7 A.L.J. 1137=12 Bom. L.R. 997=37 C. 918, P.C.]

(9)—*Partition of joint-estate—Suit for—if maintainable—Ijardar if a necessary party.*—A suit for a partition of a portion of a joint-estate is maintainable when such portion is the only property held jointly by the plaintiff and the defendants although the defendants may be jointly interested, with or without other persons, in the remaining portion of the estate. (7 C. 153, 20 C. 379, 20 C. 682, F., 7 C. 577, 24 C. 125, D.; 24 C. 575, Disc.) [F., 5 C.L.J. 307=11 C.W.N. 397, 3 Ind. Cas. 21, 7 M.L.T. 155; Relied on, 12 C.W.N. 640; R., 34 C. 1026 12 C.W.N. 670=7 C.L.J. 449.] When the *malik* has been made a party to the suit, the *ijardar* under him is not a necessary party. **RADHA KANTA SHAHA v. BIPRO DAS ROY**, 1 C.L.J. 40. [R., 12 C.W.N. 670=7 C.L.J. 449.]

(10)—*Ancestral estate—Rajputs of Umballa—Right of son to compel partition.*—Found that no custom obtained among Hindu Rajput agriculturists of Naraingarh tahsil in Umballa by which a son can compel partition of ancestral estate against the will of the father. **RAJA RAM v. HANSARI**, 105 P.R. 1895.

Partition—continued.**—6.—Right to partition—continued.**

(11)—*Conditions to apply for partition—S. 111, Land Revenue Act.*—Even a land owner as defined in s. 3 (2), Land Revenue Act, will not be entitled to partition unless the conditions mentioned in s. 11 (a) or (b) or (c) are complied with. **SHER SINGH v. MULLAH SINGH**, 9 P.R. 1895, Rev.

(12)—*Application for partition—Ground for refusal—S. 65, rule 6, P.L.R. Act 1872*—Where, in partition proceedings before the commissioner, the parties made no general objection to partition, but attacked the principle and modes of partition as fixed by the Settlement Officer, and the Commissioner on the ground of faction disallowed partition under rule 6 framed under s. 65, P. Land Revenue Act, held that the said rule concerned only objections taken in *limine* by the parties and not to the present case. **JAHANGIR KHAN v. AKBAR KHAN**, 8 P.R. 1887, Rev.

(13)—*Revenue Court—Grounds for stay of proceedings.*—The only grounds on which a Revenue Court can stay proceedings to allow of a Civil suit being brought are those set forth in Rule E. II, 4 of the rules under the Land Revenue Act. All objections except those regarding the correctness of the entry in the record-of-rights upon which the shares to be assigned to parties or the mode of division to be adopted may depend must be decided by the Revenue Court. **SALIG RAM v. BADHAWA MAL**, 3 P.R. 1886, Rev. [F., 91 P.R. 1902.]

(14)—*Partition—Power of Revenue Courts—Discretion.*—Under the rules regarding partition framed under the Land Revenue Act, the Financial Commissioner held that Revenue Courts may order partition, whenever in their opinion it may be advisable to do so, even though a minority only desire it. **SUBA v. DOWLAT**, 12 P.R. 1885, Rev.

(15)—*Reclamation and planting of common land—Effect on partition.*—The fact that some of the proprietors of a village have reclaimed and planted out a large portion of the common land will not be a ground for them to resist a partition of such land. They can only claim to be maintained, in the division, as far as possible in the occupancy of the land they have planted out. **NUTHOOA v. SOBHA**, 8 P.R. 1868, Rev.

(16)—*Partition not satisfactory—Suit to revise whole partition—Rectification of part divided.*—Where a property has been partitioned, and one of the sharers was dissatisfied, he could only claim to have the whole partition revised, but could not ask for a rectification of a portion of the property so divided. **TREPOORA SUNDARI v. GOPAL NATH ROY**, 25 W.R. 358.

(17)—*Hindu law—Sale of share of immoveable property jointly owned by Hindus whether valid—Right of auction purchaser to sue for partition and separate possession.*—The interest of a Hindu in immoveable property jointly owned by himself alone with others is saleable. An

Partition—continued.—6.—**Right to partition**—continued.

auction-purchaser of such interest is entitled to partition and separate possession of the share purchased, by him unless it is shewn either that a partition is physically impossible or that the inconvenience arising from a partition is so utterly insupportable that justice imperatively demands that partition should not be effected. *BAJA KHAN v. BIRJU, DULA AND RATTALIA*, 15 P.R. 1878. (2 W.R. Mis., 30, F.) [R., 29 P.R. 1882.]

(18)—*Hindu Widow—Act XIX of 1873 (N.W. P. Land Revenue Act)*, s. 108.—A Hindu widow who has succeeded, as heir of her deceased husband, to his share of an estate which is a defined and separate share (though there has been no division by metes and bounds), who is in possession by inheritance, and not as an assignee of the profits of the share for her maintenance, and who is recorded as a co-sharer, is, under the terms of s. 108 of the Land Revenue Act, as such, entitled, as any other recorded shareholder would be, to claim a perfect partition of her share. The circumstance, that she might afterwards alienate her property contrary to the Hindu Law, so as to prejudice the rights of reversioners, would not bar her right as a co-sharer to partition. *JHUNNA KUAR v. CHAIN SUKH*, 3 A. 400.

(19)—*Hindu Widow—Suit for partition of revenue paying estate—Bengal Act (VIII of 1876)*, s. 10.—A Hindu widow succeeding to her deceased husband's share in a revenue-paying estate is not the holder of merely a life-estate within the meaning of s. 10 of the Act of 1876; and even if s. 10 were applicable, still a Civil Court would not be debarred from decreeing partition of such estate at her instance, if a proper case for passing such a decree be made out by her. Distinction between a life-estate and a Hindu widow's estate and principles that should guide Courts in decreeing partition at a Hindu widows' instance, stated. *MOHADEAY KOOER v. HAKAR NARAIN*, 9 C. 244. (9 M.L. A. 539, 9 W.R. 108, 2 I.A. 256, R.)

(20)—*Hindu law—Partition—Widow's right.*—By Hindu law, a widow taking possession of the share of her deceased husband in joint undivided property has only a limited interest therein for the term of her life. She cannot claim the partition of her late husband's share. When partition by the sons takes place after the father's death, his widow may claim a share but that is very different to a claim to enforce partition. *KAHN SINGH v. MUSSUMAT PREM KOUR*, 28 P.R. 1870. (Appr., 11 P.R. 1899, 100 P.L.R. 1909 = 155 P.W.R. 1909; R., 22 P.R. 1878; D., 27 P.R. 1879, 116 P.R. 1879.)

(21)—*Widow, co-sharer—Suit for partition—Discretion of officer—Guide to discretion.*—A widow having a life interest in a share of a joint holding may apply for partition which the Revenue officer has full discretion to grant or refuse. Such discretion will be exercised in her favour, only if it is found that private

Partition—continued.—6.—**Right to partition**—continued.

partition had been effected during her husband's lifetime or when the other co-sharers do not allow her due enjoyment of her share. *DAN SINGH v. MUSST. SUKHAN*, 11 P.R. 1895, Rev. [Appr., 6 P.R. 1896, Rev.]

(22)—*Hindu Law—Widow not entitled to claim partition, either in her own right or as representative of her son.*—One F left two widows; one of them was the plaintiff, and the defendants in the suit were the son and grandson of the other widow. Plaintiff claimed partition of one-third of the land left by her late husband, alleging that the defendants had separated from their father in his life-time and obtained two-thirds of his lands, when F retained for himself, as his share, the remaining one-third and afterwards bestowed it on his son by the plaintiff, which son had subsequently disappeared and not been heard of, and that defendants had obtained and cultivated the one-third that had formed the share of the plaintiff's husband on the partition. The defendants resisted the claim on the ground that the land was joint and had never been divided and the plaintiff was only entitled to maintenance. The first Court dismissed the suit on the ground that the land was never divided but joint, and holding that, on that account, as well as in accordance with the family custom of the parties, plaintiff was only entitled to maintenance. The Chief Court was of opinion that it was not clear whether the plaintiff claimed a partition in her own right or in that of her son as his representative, but that, in either case, her claim was untenable. *ATTUR SINGH v. MUSSAMAT PURTAPEE*, 93 P.R. 1869. [R., 22 P.R. 1878, 116 P.R. 1879, 100 P.L.R. 1909.]

(23)—*Mahomedan law—Custom—Widows—Partition.*—Where, according to local custom childless Mahomedan widows are entitled only to a life-rent without power of alienation except for legal necessity, they cannot, as a matter of right, claim partition also. *TALEWUND KHAN v. MUSSAMUT KHANZADEE*, 5 P.R. 1868. [F., 87 P.R. 1868, 11 P.R. 1899, 100 P.L.R. 1909 = 155 P.W.R. 1909.]

(24)—*Mahomedan law—Division of property—Disposition of property—Sons by different wives.*—It is not open to a son in Mahomedan law to compel his father to divide his property during his life-time and he cannot bring such a suit even as an objection to the distribution made by the father of his property among his sons by different wives. *PHULLEEKHAN v. FUZL KHAN*, 1 P.R. 1867.

(25)—*Reg. XIX of 1814—Co-sharers—Partition.*—One of the co-sharers of a joint estate suing conjointly with the others would, under Reg. XIX of 1814, be entitled to obtain a separation of a mouzah from the rest of the zemindari, and an assessment upon it of a proper portion of the total jumma of the zemindari. And having done this, he would alone be entitled

Partition—continued.**—6.—Right to Partition**—continued.

to have an order for partition of that mouzah as between himself and his co-sharers therein. Where the zemindari is so intermixed with the neighbouring zamindaris that the line of boundary cannot be identified, there is nothing in the law which entitles the plaintiff to call upon the Collector to make a new line of division between the zemindaris. But if the Collector has the means of ascertaining where the boundary between the zemindaris really lies, he is bound to carry out a partition between the parties, even though it may cost him some unusual trouble to effect it properly. **BHURRUT THAKOOR v. SYUD MEER MURTAZA, 21 W.R. 225.**

(26)—*Reg. XIX of 1814, s. 5—Allotment of share—Butwarra—Precept to Collector.*—Plaintiff sued for a declaration of his title and for an allotment of his share which was refused to him by the Collector under the butwarra proceedings. The Court found that the plaintiff's title was established. *Held* that the plaintiff was also entitled, under s. 5 of Reg. XIX of 1814, to a precept to the Collector directing him to award to the plaintiff a share corresponding with that title. **DEWAN ABDOL REZA v. JEBUNNISSA BIBEE, 16 W.R. 34.**

(27)—*Reg. XIX of 1814, s. 30—Estate held in separate possession—Butwara by one of the proprietors.*—Where an estate is not held in joint tenancy, but in separate possession, a butwara of the whole estate for the purpose of apportioning land in proportion to the jumma of the share-holders who had severally entered into engagements with Government for their respective portions of revenue, cannot be insisted upon by one of the proprietors under s. 30 of Reg. XIX of 1814. **BUJRUNJEE LAL v. SYUD VELAET HOSSEIN KHAN, 5 W. R. 186**

(28)—*Lakheraj lands—Partition of—Reg. XIX of 1814.*—In making a partition of a lakharaj tenure, a Civil Court may be guided by the rules of Reg. XIX of 1814, so far as they are applicable, though the partition itself could not be effected under the provisions of that Regulation. **JANOKEE BIBEE v. LACHMAN PERSHAD, 17 W.R. 137. [F., 6 Ind. Cas. 450.]**

(29)—*Purchase of land at Revenue sale—Butwara.*—Where plaintiff, the holder of a specific portion of the land of an estate separately registered under s. 11, Act XI of 1859 purchased the same at a revenue sale *held* he was not entitled to a butwara by a division of the whole lands and to obtain a share of the whole estate proportioned to the amount of the sudder Jumma paid by him. **FAKEER CHUNDER SHAHA v. NOBODEEP CHUNDER SHAHA, W. R. 1864, 59.**

(30)—*Court-yard, claim to, by village servant, if maintainable as against proprietor of village.*—A Court-yard whether regarded as part of the village abadi or appertaining to the house (which is within that Court-yard) belongs to

Partition—continued.**—5.—Right to Partition**—continued.

the village proprietors in proprietary right. A village servant occupying one of two houses, within a Court-yard, cannot claim to have it divided as against a proprietor in the village who inhabits the other house, as the former is not entitled to any proprietary right in the village. He is only entitled to a right of way and user, during his occupation, in the Court-yard, but he has no proprietary right, and on his ceasing to occupy, the Court-yard goes to the proprietor of the land. **BUTA SINGH v. CHANDAN, 120 P.R. 1876.**

(31)—*Permanently settled estate—Partition between owners of separate shares—Effect as against Government.*—Where two separate shares in a mouza were permanently settled at different dates, the purchaser of one of such shares at a revenue sale, may obtain a partition but cannot insist upon a partition of the estate under the Butwara Act, so as to bind the Government, also, except with its consent. **AJODHYA PERSHAD v. COLLECTOR OF DURBHUNGAH, 9 C. 419. [D., 16 B. 528.]**

(32)—*Partition by Collector—Private partition—Butwara proceedings—Cause of action—Act VIII of 1869, s. 15.*—Where there had been a private partition of an estate and the several share-holders had held their lands in accordance therewith, an application was made by some of the share-holders to the Collector to have a fresh partition made as if the whole lands were held jointly. Plaintiff, who was also a share-holder, objected, but his objection was overruled. Thereupon he brought a suit for confirmation of the partition and for an injunction to stay the partition pending before the Collector. *Held* that the plaintiff's cause of action against the defendants arose upon their moving the Collector to interfere with the first partition, and that the period of limitation in respect of such cause of action was the same as in any other suit for determining the rights of parties to immoveable property. **MUSSAMUT BEBEE KHOOBUN v. WOOMA CHURN SINGH, 3 C.L.R. 453. [D., 16 C. 117; R., 11 C.L.J. 291=14 C.W.N. 632.]**

(33)—*Partition of Revenue-paying estate by Collector—Bengal Act VIII of 1876—Partition of such estate under Civ. Pro. Code, 1882, s. 265—"Estate," Construction of.*—Where a portion of land, that was covered with water and unfit for cultivation, was not divided, but left joint during butwara proceedings, the revenue payable on the entire estate having been apportioned among the several divided estates, *held*, in a suit, brought after such land had become dry and cultivable, by a co-sharer, for partition of it, under Bengal Act VIII of 1876, that the Collector was not bound to make the partition under that Act, as the land in suit was not liable for the payment of one and the same demand of land-revenue and, therefore, not a joint undivided estate within the terms of s. 4, cl. (9) of the Act. **[R., 16 C. 598.]** The word "estate" as used in s. 265 of the

Partition—continued.**—6.—Right to Partition—continued.**

Civ. Pro. Code must be construed in its ordinary signification, and not in the restricted and defective sense in which it is used in the *butwara law* (Bengal Act VIII of 1876); hence a decree for partition could be made under s. 265 of the Civ. Pro. Code. **THE SECRETARY OF STATE FOR INDIA v. NUNDUN LAL, 10 C. 435.** (7 C. 153, *Appr.*) [*R.*, 16 C. 598; *Cons.*, 24 C. 725, *F.B.*]

(34)—*Suit for partition—Duty of plaintiff to bring into hotchpot property in his possession—Omission to get included property in different jurisdiction—Subsequent suit for partition barred by res judicata.*—As a general rule, a member of an undivided family cannot sue his co-sharers for his share in a portion only of family property, and he is bound to bring into hotchpot any undivided property in his own possession, in order that there may be a complete and final partition. The rule that every partition suit shall embrace all the joint family property, has been held to be subject to certain qualifications, as, for instance, where different portions of it lie in different jurisdictions, or where a portion is not available for actual partition as being in the possession of a mortgagee. But there is no authority for the proposition that a member who sues for partition of property in the hands of the defendant, can refuse to bring into hotchpot any undivided property held by himself, on the ground that it is situated within another jurisdiction. **HARI NARAYAN BRAHME v. GANPATRAV DEJI, 7 B. 272.** [*R.*, 18 B. 389, 22 B. 922, *U.B.R.* 1897—1901, Vol. II, 229, 23 B. 597, 24 B. 128 = 1 *Bom. L.R.* 620, 43 *P.R.* 1906 = 122 *P.L.R.* 1906, 10 *C.L.J.* 503 = 3 *Ind. Cas.* 247, *U.B.R.* 1909, 2nd *Qr.*, *Civ. Pro.* p. 21; *D.*, 22 *M.* 538.]

(35)—*Mortgagees of separate shares of joint-owners, suit for partition between, not maintainable without impleading mortgagors.*—Where plaintiff held, on usufructuary mortgage, a two-thirds undivided share of a certain land from the owner thereof, and, defendant was the holder of a similar mortgage from the owner of the remaining one-third share, the former was held to be not entitled to maintain a suit against the defendant, without impleading either of the mortgagors, for the purpose of getting the two-third shares that was mortgaged to him partitioned off from the one-third mortgaged to the defendant. **MANGLI PRASAD v. ISHRI PRASAD, 18 A. 476 = A.W.N. 1896. 158.** [*D.*, 119 *P.L.R.* 1903, 4 *A.L.J.* 253, *Note.*]

(36)—*Joint occupancy tenants, decree in suit for partition between, effect of, on mutual rights of landlord and tenant.*—In order to grant partition as between joint tenants of a holding, it is not necessary that the landlord should be a party to the suit. The decree for partition, however, which might be made in such a case, would be binding and effective only as between the joint-tenants, and could not bind the landlord or affect his rights as such: that is to say,

Partition—continued.**—6.—Right to Partition—continued.**

it would not split up, so far as regards the landlord, the holding, or the rent payable to him or his remedies for the non-payment of the full rent of the whole holding and for the ejectment of the tenants from the whole in case the full rent was not paid. Consequently, the partition effected under the decree, to which he was no party, could not have the effect of apportioning the rent as between himself and the joint-tenants who were alone parties to the decree. **MUHAMMAD BAKSH v. MANA, 18 A. 334 = A.W.N. 1896. 82.** (16 *I.A.* 186, 8 *W.R.* 12, *A.W.N.* 1895, 143, *R.*)

(37)—*Suit for partition—False claim to property set up by parties in possession.*—Where both the parties to a suit for partition set up a false claim thereto, *held*, that the suit was not maintainable merely by reason of the fact that they were in possession, for they had no estate in law which they could divide. **PARBATI v. SUNDAR, 8 A. 1 = A.W.N. 1885, 315.** [*Reversed*, 12 *A.* 51, *P.C.* = 16 *I.A.* 186.]

(38)—*Civ. Pro. Codes. 1859, 1882, ss. 225, 265—Raiyatwari estates—Raiyatwari holdings having been held, under s. 225 of the Code of 1859, not to be estates paying revenue to Government, a similar construction should be put on the provisions of s. 265 of the Code of 1882.* **MUTTUCHIDAMBARA v. KARUPPA, 7 M. 382, F.B.**

(39)—*Suit by mirasidars against co-mirasidars for partition—Former decree declaring impartibility of lands of village, binding nature of.*—In a suit by the mirasidars of a village held on pangavaly or share tenure, who represented half the shares into which the village was divided, against their co-mirasidars the owners of the remaining shares and others, the occupants of the lands in the village, for a partition of the common lands of the village and an allotment of specific parts thereof proportionate to their shares, it appeared that in a former suit to which all the present mirasidars had been parties either actually or as privies to those through whom they claimed, it had been decided that no right existed in any individual share-holder of the village to have allowed to him a distinct portion of the common lands in proportion to his share or shares. *Held* that the former decree declaring the impartibility of the common lands of the village was conclusive in the present suit between the present share-holders upon the same question of right. **SITARAMAIYAR v. ALAGIRY, 4 M.H.C. 285.**

(40)—*Partition—Suit for partition between superior landlord and subordinate tenure-holder.*—It cannot be laid down as a general proposition of law that there can be no partition as between parties, the interest of one of whom is subordinate to that of the others. The Court must in each case determine whether, having regard to the nature of the interest owned by the parties and to all other circumstances

Partition—continued.**—6.—Right to Partition**—continued.

necessary to be taken into consideration, the balance of convenience is in favour of allowing partition. If it determines that question in the affirmative, the mere fact of the parties owning interests which are not co-ordinate in degree, ought not to be a bar to partition. (*Baring v. Nash*, 1 V. and B. 551; *Heaton v. Dearden*, 16 Beav. 147, Appr.) So, a suit by plaintiff, the proprietor of the 16 annas of a zemindari, against defendants, putnidars under him of 6 annas of the zemindari, to have his 10 annas share of the land divided by metes and bounds from the 6 annas putnidars, would lie, and a decree for partition would be made in such a suit. *HEMADRI NATH KHAN v. RAMANI KANTA ROY*, 24 C. 575, F. B. = 1 C.W.N. 406. (20 C. 379, Diss.) [*R.*, 31, C. 214 = 8 C.W.N. 11, 9 C.W.N. 699, 5 C.L.J. 307 = 11 C.W.N. 397, 2 M.L.T. 265, 12 C.W.N. 670 = 7 C.L.J. 449; *D.*, 1 C.L.J. 40.]

(41) — *Butwara*—*Separate holdings by previous private partition*.—Where the parties are holding separate portions of a mouzah by private arrangement previously made, they are not in a condition to apply to the Collector for a butwara, if they subsequently disagree among themselves. *AJOODHYA PERSHAD v. KRISTO DYAL*, 15 W.R. 165. [*Diss.*, 8 C. 186 = 10 C. L.R. 146.]

(42) — *Partition between ryots*—*No distribution of putnee right*.—There is no statutory bar against the ryot's right to have a partition as between himself and his co-parceners, where he has not asked for such a declaration of the putnee rent as would bind the zemindar, or limit his right over the whole tenure as a joint one. *GOUREE SUNKUR ROY v. ANUND MOHUND MOITRO*, 9 W.R. 487. [*F.*, 13 W. R. 74; *R.*, 12 W.R. 160.]

(43) — *Inam village and cash allowance payable by Government*—*Co-sharer's right to claim partition*—*Right to manage imposed on particular branch of family by original grant*—*Family custom*.—Plaintiff sued for partition of an inam village and of a cash allowance payable by Government out of the revenue of another village. Plaintiff's right to a one-fifth share in the above was admitted but his claim was resisted by one of the defendants on the ground that he was entitled to manage the village, and to receive the cash allowance on behalf of all the co-sharers and to distribute the profits of the village and the cash allowance amongst them in proportion to their respective shares and that the plaintiff was therefore, not entitled to partition. Holding that the defendant had established the above position the Subordinate Judge decided in his favour. The High Court reversed his decree and held that the right to manage property on behalf of co-sharers may be a distinct interest in land when the land is held on *stranjam* or impartible tenure. In the present case, the village in suit was an ordinary inam village, and there was

Partition—continued.**—6.—Right to Partition**—continued.

nothing peculiar or impartible in the nature of the cash allowance. Although it may be that, even in such cases, the terms of the original grant can impose as a condition upon its enjoyment that the management of the property shall rest with a particular branch of the family of the grantees and that a long continued practice amounting to family custom may also operate to bring about the same result, the existence of such circumstances will have to be established by very clear and cogent evidence. In this case, on the other hand, neither by the terms of the original grant, nor by subsequent orders of the ruling power, nor by family custom, had the defendants' family acquired a right to perpetual management of the village in question or in consequence to resist its partition. *GOPAL HARI v. RAMAKANT*, 21 B. 458. [*Affir.*, 27 B. 353 = 7 C.W.N. 409 = 5 Bom. L.R. 408 = 8 Sar. 453 = 30 I A. 77, P.C.]

(44) — *Civ. Pro. Code, 1882, s. 265*—*Decree in suit for ejectment and possession, transfer of, to Collector for execution*—*Partition proceedings by Collector, ultra vires*.—In this case, there was no such decree as is contemplated by s. 265 of the Civ. Pro. Code which could give jurisdiction to the Collector to proceed to a partition. There was no decree for the partition of the family property or for the separate possession of a share against co-sharers as contemplated by the said s. 265. The proceedings before the Collector were, therefore, altogether *ultra vires* and plaintiff in this suit for recovering money by sale of the mortgaged property, impleading as defendants also the purchasers of the property at the Collector's sale, was held entitled to ignore the Collector's proceedings and assert his claim under his mortgage. But as the defendants were at any rate in possession, even though as purchasers under a void decree, they could not be ousted in this suit, because, they were entitled to say that plaintiff had not established his title to sell the specific lands mortgaged to him. *NARAYEN NAGERKAR v. VITHU JAKHOJI*, 8 B. 539.

(45) — *Shop jointly owned by two persons*.—*Suit for partition*—*Defendant's plea of injury likely to arise from partition*—*No legal injury where plaintiff legally entitled to partition*.—In a suit for partition of a shop jointly owned by himself and the defendant and for separate possession, the defendant urged that the plaintiff was not entitled to enforce partition of the shop to the injury of the defendant and that the shop was not capable of partition. Held that it was practicable to make a partition of the shop and that the plaintiff was legally entitled to have a partition effected and that therefore no injury in its legal sense would be caused to the defendant by the partition. *GOBIND v. NARAIN DAS*, 29 P.R. 1882.

(46) — *Partition*—*Zemindari and joint liability for Government revenue*—*Partition assented to by all parties concerned*—*Effect of partition*.

Partition—continued.**—6.—Right to Partition—continued.**

—A partition was made by the zemindars of their respective holdings and of their joint liability for the Government revenue. Though this partition was not carried out by the Revenue Court, it was acted upon by the Zemindars and the assignee of Government revenue also consented to such partition by accepting revenue from individual Zemindars and by holding them to be individually responsible for the amount due in respect of their several holdings. *Held*, that there was nothing to prevent the *maafeedar* who was the assignee of the Government revenue from assenting to any arrangement which the zemindars did make for the conversion of their joint into separate liability. **RANEE SARNOMUY v. RAM CHARUN SINGH, 3 Agra. 251.**

(47)—*Co-sharers—Suit for partition—Right of co-sharer to sue for partition of portion of joint estate.*—Where a co-sharer in a joint undivided estate sued to have his rights ascertained and partition made in respect of an orchard which formed part of the joint estate, the Civil Court was not entitled to decree partition or give possession of a separate share in the orchard, as there is no law which entitles a share-holder to obtain partition of a portion of an undivided estate against the will of the other co-sharers. **MITHOO LAL v. GHOLAM NUSEER-UD-DIN, 3 Agra 276.**

(48)—*Co-sharer of shikmee talook, suit for partition by—Jurisdiction of Civil Court.*—In this case plaintiff sued against his own co-sharer and his superior landlords, for a partition of his share of a certain *shikmee* talook. The lower appellate Court held that the Civil Courts could not of themselves decree the partition sought by plaintiff; they might direct the Collector to carry out the partition under the Revenue Laws of *butwarah*, and its decree conveyed such an order. On special appeal the defendant contended that the Civil Courts cannot order any partition either themselves or through the Collector; and that no such partition can be made without the consent of all co-parceners of the *shikmee* talook, and of the superior landlords also. But the High Court *held* that the declaration of a right to a share of any property is a civil right open to be sued for by civil action and such a suit as the present is therefore cognizable in the Civil Courts. Also, the consent of the landlord is not necessary, nor is he a necessary party where partition has been asked to be made only between the co-sharers and not so as to be binding upon the landlord. **MOTHOOR CHUNDER KURMOKAR v. MANICK CHUNDER BUNGO, 6 W.R. 192. [F., 9 W.R. 487; R., 12 W.R. 160, 13 W.R. 74.]**

(49)—*Butwara—Joint possession—Division of lands.*—Where the proprietors held the lands jointly realizing from the tenants their proportion of the rent according to their respective interests therein, the lands could not be divided under the *butwara* laws, nor could

Partition—continued.**—6.—Right to Partition—continued.**

a partition be made by the Civil Court irrespective of the revenue authorities. **DOORGA KANT LAHOORY v. RADHA MOHUN GOOHONEGY, 7 W.R. 51. [F., 8 W.R. 128; D., 13 W.R. 74.]**

(50)—*Shikmee tenure, partition of, when can be upheld.*—There can be no objection to an order for the partition of a *shikmee* tenure being made in any mode which does not affect the rights of the Government or of the zemindar or of the shikmeedars. **OMESHCHUNDER SHAHA v. MANICK CHUNDER BONICK, 8 W.R. 128.**

(51)—*Entry in *wajib-ul-arz* prohibiting partition—Question of title—Procedure.*—The question whether an entry in the *wajib-ul-arz* can operate to prevent partition is not a "question of title" within the meaning of s. 116 (a) P. Land Revenue Act but a matter to be determined by the Revenue officer. **TAJA v. TARA-CHUND, 11 P.R. 1896, Rev.**

(52)—*Civ. Pro. Code, 1908, O. 2, r. 2—Suit for possession of house—Question of title—Punjab Land Revenue Act, 1887, s. 117—Previous proceedings before Commissioner.*—The proceedings before a Commissioner, who intended to act in those proceedings as a Revenue Officer, and had jurisdiction over questions of title to the land only, would be no bar to a subsequent suit for possession. **HAKIM v. NADIM GUL, 30 P.R. 1898.**

(53)—*Act XIX of 1863, s. 47—Decree of Civil Court for partition—Decree not executed.*—A person who has obtained a decree from the Civil Court, declaring his right to certain sharers in the village, and directing a partition, and who has taken no proceedings to enforce his decree within the prescribed period of limitation, is not in the position of a sharer whose rights have been determined and who can be declared entitled to partition. His right having been determined, he is not a person entitled to partition under s. 47 of Act XIX of 1863. **KISHEN SINGH v. DABEER SINGH, 2 Agra 272. [D., 13 A. 309 = A.W.N. 1891, 117.]**

(54)—*Right of defendant to take out execution.*—In a suit for possession by partition, the decree is not one in favour of plaintiff only. In such a suit, the decree will be, or ought to be, for a joint declaration of the rights of the persons interested in the property of which partition is sought and is a decree in favour of each sharer. It decides what interest each of the sharers has in the property, the subject of partition. Such a decree renders a subsequent suit, by any of the sharers for a declaration of his interest in the subject of the partition suit, unnecessary. It is enough if the defendant's share is allotted to him in the decree, though it does not direct possession being given to him. Every one of the co-sharers, be he plaintiff or defendant, may execute the decree and take possession of the share allotted to him by the decree." **WASDEO v. RUP CHAND, 23 P.R. 1905 = 13 P.L.R. 1905. (20 A. 81, 23 B. 184, F.; 12 A. 506, D.)**

Partition—continued.**—6.—Right to Partition—continued.**

(55)—*Suit for partition by co-sharer—Survey-award—Limitation.*—The cause of action against a co-sharer for partition first arises when he got possession of the whole property under a survey award. **KALLY CHUNDER CHOWDHRY v. RAJAH JOGENDER NARAIN ROY, W.R. 1864, 323.**

(56)—*Act XIX of 1841, application under—Disallowance—Suit to establish right—Limitation.*—A suit for establishing one's right to a share in certain property as regard which an application under Act XIX of 1841 was disallowed, may be brought within 12 years from the date of the cause of action, and does not require to be brought within one year from the date when the said application was disallowed. Where the defendant in a case not only admits the plaintiff's claim within twelve years, but also asserts that he has satisfied it, he himself removes the bar to the plaintiff's claim, and the law of limitation does not affect it. **MUSSUMAT MOWEEDUNNISSA v. MAHOMED ALI, 1 W.R. 39. [Appl., 8 W.R. 126; R., 7 W.R. 199.]**

(57)—*Decree declaring plaintiff's right to share of common land—Partition and separate possession in execution refused—Suit against co-proprietors for value of share of profits, whether maintainable.*—On obtaining a decree from the Tahsildar for the fourth share of the common land of the village, plaintiff applied to the Revenue authorities for partition and separate possession of his share. This having been eventually refused, plaintiff brought the present suit against his co-proprietors for a fourth share of the profits. *Held* that in whatever way the suit might be regarded, it was not maintainable. The defendants were co-proprietors with plaintiff and others of the shamilat land of which the land in question was a portion; but even if the defendants be regarded merely as tenants-at-will, they were not liable in the present suit to pay the plaintiff a share of the profits which they made from the land. They did not hold their land as tenants for the plaintiff, and were consequently not liable to be ejected by him alone, nor was their rent liable to be enhanced in a suit brought against them by him alone. If the suit be looked upon as a suit for mesne profits or for a share of mesne profits, it could not lie, for the defendants were rightly in possession of the land under a well-defined and recognised title. **JAMUN SHAH v. AHMED SHAH, 65 P.R. 1879.**

Suit for division of land according to ancestral shares—*See* **ABSENTEE, 5 P.R. 1868, Rev.**

See **CIV. PRO. CODE, 1908, O. II, r. 1, 8 B.H. C.A.C. 205.**

See **COMMON LAND, 119 P.R. 1889.**

See **CO-SHARERS—SUIT BY CO-SHARERS, 77 P.R. 1887.**

See **DECREE—DECREE, FORM OF, 10 W.R. 487.**

Partition—continued.**—6.—Right to Partition—concluded.**

Religious offices, alienation and partition of, when valid—Partition by performance of duties of office in rotation—Alienation to qualified person in line of succession—*See* **HINDU LAW—PARTITION, 6 B. 298.**

See **LIMITATION ACT, 1908, art. 171, 7 B 373.**

—7.—Suits for partition, and Jurisdiction of Civil Courts in.

(1)—*Joint ownership.*—In all cases of joint ownership, each party has a right to demand and enforce partition. **SHAMA SOONDEREE DABIA v. JARDINE SKINNER & CO., 14 B.L.R. 167 Note. (S.D.A. 1853, 536, 6 W.R. 192, 8 W.R. 123, 9 W.R. 487, R.)**

(2)—*Partition—Plaintiff keeping back property in his possession—Suit not maintainable.*—*Held*, that a suit for partition is not maintainable, if the plaintiff is keeping back the property in his possession which must have been put into *hotch potch*. **HAFIZ MAHBUB BAKHSH v. ABDUL RAHMAN, 4 P.W.R. 1912 = 84 P.L.R. 1912 = 13 Ind. Cas. 819.**

(3)—*Partition, right to—Joint ownership in right of worship of idol.*—It is not necessary that there should be evidence of disputes and quarrels, or any question of pecuniary loss or gain, between joint owners of property, before a Court can interfere to make a partition nor does the circumstance that it is a right to perform the worship of an idol deprive a joint owner of the right to partition. **MITTA KUNTH AUDHICARRY v. NEERUNJUN AUDHICARRY, 14 B.L.R. 166 = 22 W.R. 437. [R., 13 B. 548, 11 M.L.J. 215, 6 Bom. L.R. 98, 5 S.L.R. 107; D., 19 A. 428.]**

(4)—*Partition suit.*—A suit for partition does not bar a subsequent suit for arrears of maintenance. **MALLIKARJUNA v. DURGA, 2 Bom. L.R. 945 = 24 M. 147 = 5 C.W.N. 74 = 10 M.L.J. 294 = 27 I.A. 151 = 7 Sar. 761, P.C.**

(5)—*Preliminary decree in partition suit—Appeal.*—The law allows an appeal from a preliminary decree in a partition suit. **BAFATUN v. BILAITI KHANUM, 30 C. 683. (19 C. 463, R.)**

(6)—*Preliminary order for partition.*—It is open to an appellant, in an appeal against the final decree in a partition suit, to question the correctness of the preliminary order or decree for partition when no appeal was preferred against such order within the time allowed by law. **MULLA ABDUL v. KHATIJA BEGAM, 10 Bom. L.R. 514.**

(7)—*Plaintiff precluded from withdrawing from a suit in appeal.*—When in a partition suit a defendant has by concession of the plaintiff acquired rights which otherwise could not have existed, it is not open to the plaintiff who has made that concession afterwards to annul its

Partition—continued.**—7.—Suits for Partition, and Jurisdiction of Civil Courts in—continued.**

effect by withdrawing from the suit in the appellate Court. *SATYABHAMABAI v. GANESH*, 6 Bom. L. R. 533=29 B. 13.

(8)—*Renunciation by co-parcener of his rights by registered document—Suit for partition.*—An arrangement embodied in a registered document by which the management of a joint undivided family was shifted from the elder co-parceners of the family on to the younger members, who were to take the management and enjoyment of all the property, and to pay the debts out of the property, and provide for the elder members, has not the effect of creating a partition of interests between the several members, and hence a suit for partition at the instance of the elder members will lie. *APPA v. RANGA*, 6 M. 71. [*Expl.*, 23 B. 146.]

(9)—*Partition suit—Possession of property by manager—His liability to account—Suit for partial partition—Plaintiff agreeing to bring in to hotch pot property not first admitted—Frame of suit.*—In a suit for partition against a brother who has been managing the family properties, where it is admitted that certain properties are not in the possession of the plaintiff and the defendant also admits the existence of those properties as joint family property, and cannot charge the plaintiff with possession of them, the defendant, as manager of the family, is primarily responsible for them and is bound to account for them. A suit for partition will not be converted into one for partial partition and so liable to be dismissed, merely by the failure of the plaintiff to disclose at the outset his possession of certain properties of the family though the plaintiff seeks a complete partition of the whole of the family property, if at an early stage of the case, the plaintiff expressed his willingness to bring those properties into hotch-pot. *VENKATA NARASIMHA NAIDU v. BHASHYAKARLU NAIDU*, 25 M. 367, P.C.=29 I.A. 76=6 C.W.N. 641=4 Bom. L.R. 543=8 Sar. 258, P.C.

(10)—*Taking of accounts in.*—In suits for account in partition suits, each party however arrayed formally becomes in turn either plaintiff or defendant: and a decree may be passed in favour of the defendant, although he has not claimed a set-off. *NANCHAND v. MUSSA*, 6 Bom. L.R. 692.

(11)—*Plaintiff's suit dismissed—One of the defendants in the suit applying to have his share partitioned off—Contention disallowed—Practice.*—Where a plaintiff who brings a suit for partition, fails to establish his right to partition, it is not open to any of the defendants to claim in that suit partition upon the ground that such defendant has a share in the property. *ASHIDBAI v. ABDULLA*, 8 Bom. L.R. 758=31 B. 271.

(12)—*Partition decree—Declaration of shares to which plaintiff entitled—Details to be worked*

Partition—continued.**—7.—Suits for Partition, and Jurisdiction of Civil Courts in—continued.**

subsequently—A step in the action and not a step in aid of execution—Limitation.—Where a decree merely states the shares in the immoveable property to which plaintiffs are entitled, and leaves these as well as all other necessary figures to be worked out and settled at some subsequent period, the decree is not a final or executable decree. Before there can be any final or executable decree, all these matters must be worked out and determined in the suit, and, therefore, an application for the partition of the immoveable property in the above case is merely a further step in the action to which no limitation applies. *RAMASAWMY NAICKER v. RAMASWAMY KAMAYA NAICKER*, 2 M.L.T. 265 (22 C. 425, 24 C. 575, 22 C. 488, 23 M. 127, R.)

(13)—*Suit for partition—Partial Partition—Transferee of interest in share of a co-owner.*—The transferee from one or more co-sharers of a portion of a co-tenancy cannot maintain a suit for partition of the portion transferred to him, whether for a term or in perpetuity, but the transferee of an interest in the share of a co-owner may, under s. 44 of the Transfer of Property Act, enforce a partition of the same so far as is necessary to give effect to such transfer. *RAMASAMI CHETTI v. ALA-GIRISAMI CHETTI*, 26 M. 361=14 M.L.J. 14.

(14)—*Partition between sharers—Courtyard enjoyed in common—Suit for partition of part of courtyard.*—Plaintiff owned a two-third share, and the defendant owned a one-third share in certain buildings. The buildings had already been divided between them. A Courtyard appertaining to the premises was not partitioned. The plaintiff brought a suit against the defendant alleging that his share in the courtyard was two-thirds, and praying that a certain portion might be assigned for common use, and a certain other portion might be partitioned and a portion thereof, representing his two-thirds share, might be assigned to his separate use. *Held* that the relief sought was peculiar, inconvenient and impracticable and that therefore it could not be granted. *PARAS DAS v. UMRAO SINGH*, A.W.N. 1887, 249.

(15)—*Suit for perfect partition—Haq Jethansi—Wajib-ul-arz—Custom—Oral evidence—Evidence Act (I of 1882), s. 92, proviso (3).*—In a suit for perfect partition, "haq-jethansi" was claimed by the defendant. The *wajib-ul-arz* contained a record of the custom, but declared that the amount was not fixed, but that the eldest son got whatever amount might be agreed upon. The matter was referred to the Tahsildar for report; but, before he could make a report, the parties presented a petition by way of compromise. The defendant prayed that the partition should be effected, in terms of the compromise. *Held*, that the *wajib-ul-arz*, whether prepared before or after Act XVII of 1876, is not necessarily to be accepted as sufficient proof

Partition—continued.**—7.—Suits for Partition, and Jurisdiction of Civil Courts in—continued.**

of a custom even when not rebutted by other evidence or not shown to have been irregularly prepared. It may be presumed of a *wajib-ul-arz* prepared under Reg. VII of 1822 or under the Circular Order of the Chief Commissioner in 1863 and 1864, until the contrary is shown, that it was regularly prepared and that it is a correct record of a local custom. The *wajib-ul-arz* must be taken to be as it stands, and it is not open to the Court to fix the amount of *Jethansi* when the record of the custom shows that no amount has been fixed. It is of the essence of a valid custom that it shall be binding upon the parties concerned and not binding only to the extent to which one of the parties may choose to submit to it: *Held*, that the petition, stating that the matter had been compromised, could not be said to contain the terms of a contract between the parties such as is referred to in s. 92, Act I of 1872; but, if it were such a contract, oral evidence as to the alleged conditions precedent would be admissible under proviso (3) of that section. **JANG BAHADUR SINGH v. JAGDEO BAKHSI**, 1 O.C. 301. [R., 4 O.C. 71, 6 O.C. 372.]

(16)—*Widow—Application for partition—Sue by other co-sharers—Jurisdiction of Civil Court—Question of title.*—Other co-sharers may sue in a Civil Court to set aside a partition granted to a widow by a Revenue officer on the ground that she is by custom not entitled to partition, as such objection is a "question of title" in the land sought to be partitioned. **BUTA v. MUSST. JIWANI**, 82 P. R. 1898, F.B.

(17)—*Suit for declaration of right to share larger than that allotted—Bengal Reg. XIX of 1814.*—Where a partition of an estate under Reg. XIX of 1814 has been carried out, and confirmed by the Revenue authorities, it seems that one share-holder cannot maintain a suit in the Civil Court to have it declared that he is entitled to a share larger than he claimed in the partition proceedings. **BABOO HARI PRASAD JHA v. MADDAN MOHAN THAKUR**, 8 B.L.R. App. 72=17 W. R. 217.

(18)—*Estate paying revenue to Government—Power of Collector to make partition of, under Reg. XIX of 1814—Right to partition determinable only by Civil Court.*—It is competent to a Civil Court only to determine whether a plaintiff has or has not a right to a partition of a revenue-paying estate where such right has been disputed. The Civil Court has no authority to make the partition itself and such partition of an estate paying revenue to Government can only be made by the Collector under Reg. XIX of 1814. That part of the order by which the lower Court in this case had directed the partition itself to be made, was consequently set aside by the High Court. **MOHSUN ALI v. NUZUM ALI**, 6 W. R. 15.

Partition—continued.**—7.—Suits for Partition, and Jurisdiction of Civil Courts in—continued.**

(19)—*Partition under Reg. XIX of 1814—Jurisdiction of Civil Court.*—Partition under Reg. XIX of 1814 means an apportionment by the Revenue Authorities of lands into shares, and an assignment of the fair and proportionate jummas and areas according to those shares. This partition is beyond the power of the Civil Court to make. **MUSSAMUT BHURTUN KOEREE v. TANGORE SINGH**, 18 W.R. 147.

(20)—*Partition effected under Reg. XIX of 1814—Suit, by share-holder in Civil Court for larger share*—On the effective carrying out of a partition of an estate under Reg. XIX of 1814, one share-holder is not entitled to maintain a suit in the Civil Court to have it declared that he is entitled to a share larger than he claimed in the partition proceedings. **RAMSAHAYA SINGH v. SYUD MUZAR ALI**, 2 B.L.R. App. 40 (6). (1 W.R. 323, 6 W.R. 75, *Cited & Approved*)

(21)—*Reg. XIX of 1814—Butwara—Finality—Right to sue—Cause of action—Jurisdiction of Civil Court—Act VIII of 1859.*—A *butwara* proceeding under Reg. XIX of 1814 may be final for fiscal purposes, but it cannot take away the right of suit conferred by Act VIII of 1859. Where a Collector declares the title of the defendant to an entire share of an estate, and proceeds to divide the share for him, such acts do cause an injury to and a slur upon the plaintiff claiming a fraction of the share, and give him a sufficient cause of action. **SHEO PERSHAD SOOKOOL v. SHUNKER SAHOY**, 16 W.R. 190. [R., 2 C.L.J. 351.]

(22)—*Partition of lakhiraj estate—Jurisdiction—Civil Court.*—The purchaser of a share in an undivided *lakhiraj* estate can sue his co-parceners for a *batwara* of his own portion. The cognizance of a suit of this nature by the Civil Court is not barred by any Act of Parliament or by any Regulation. The Collector could not make the *batwara* under the provisions of Reg. XIX of 1814. The Civil Court alone has jurisdiction, and the division must be made by the Court, either by the Munsif or by an officer of the Court. **FATTEH BAHADUR v. JANKI BIBI**, 4 B.L.R. App. 55=13 W.R. 74.

(23)—*Reg. XIX of 1814, s. 4—Partition by Collector.*—Where certain proprietors of estate held in common apply to the Collector for partition and the Collector partitions without objection being raised by any one, *held* that, so far as those shares were concerned, they were rightly and legally separated from the estate and cannot be re-united to it, by a suit in a Civil Court. Where the Collector has judicial notice of there being a dispute with regard to a certain share, he has no jurisdiction to make any separation of that share until the claim of the one or of the other has been disposed of by a Civil Court. In any suit to cancel the Collector's partition as regards such share, the

Partition—continued.**—7.—Suits for Partition, and Jurisdiction of Civil Courts in—continued.**

Collector should be made a party. *JOYMO-NEE DABIA v. IMAM BUKSH TALOOKDAR*, 13 W.R. 471.

(24)—*Partition of revenue-paying estate.*—No partition of a revenue-paying estate can be effected through the Civil Court; and, even if it could be so effected, it should not be left to be carried out in the course of the execution of the decree. *BADRI ROY v. BHUGWAT NARAIN DOBEY*, 8 C. 649 = 11 C.L.R. 186. [*D.*, 16 B. 528, 24 C. 725, F.B.]

(25)—*Partition suit—Right of each party to get his share divided by way of execution of decree.*—Held, that, where a suit originally framed for possession of certain property has been treated as a partition suit by the arbitrator to whom it was referred by the parties, and the decree based on the award allots a certain share to plaintiff as well as to each of the defendants, every one of them is entitled to get his own share divided by way of execution of the decree just like plaintiff. *NARPAT RAI v. DEVI DAS*, 16 P.W.R. 1912 = 14 Ind. Cas. 375 = 252 P.L.R. 1912. (12 P.W.R. 1911, R.)

(25-a)—*Partition of revenue-paying estates.*—Revenue paying estates must be partitioned by the Collector, and not by the Civil Court Ameen, by metes and bounds; and if the shares in such an estate are not themselves separate estates, but are mere fractional shares of integral estates, they cannot be partitioned in the absence of the other co-sharers. *DAMOODUR MISSER v. SENABUTTY MISRAIN*, 8 C. 537. [*R.*, 24 C. 725, F.B.]

(26)—*Joint owners of taluks—Possession of distinct parts within estates—Encroachment—Jurisdiction of Civil Courts.*—Case where it was held that a Civil Court had jurisdiction to effect a partition in a suit between joint owners of two talooks, who have been occupying and using separate and distinct parts of premises within the estate, where the object of the suit was to maintain the *statu quo* and to prevent further encroachment by defendants upon the part occupied by plaintiffs so that either party might occupy without dispute what they formerly occupied without any division of the Government revenue or alteration of the joint liability to pay that revenue. *KALEE MOHUN SEN v. RAM SOONDER SEN*, 24 W.R. 243. (22 W.R. 333, *D.*)

(27)—*Civil Court, Jurisdiction of, to give decree in such case.*—A Civil Court in the Punjab is competent to give a decree for the division of an estate or the separate possession of a share of an undivided estate paying revenue to Government, when the right to a share or the extent of the share is disputed; and such Court can direct that the person entitled to such decree may be put in possession thereof in accordance with the provisions of s. 225 of Act VIII of 1859. *MUTSADI MAL v. MUSSUM-MAT DHAN KOER*, 100 P.R. 1876. [*D.*, 12 P. R. 1899.]

Partition—continued.**—7.—Suits for Partition, and Jurisdiction of Civil Courts in—continued.**

(28)—*Act XIX of 1873, ss. 111, 113, 241—Partition by Collector, objection to—Jurisdiction of Civil and Revenue Courts.*—The procedure provided by s. 113 of Act XIX of 1873 does not become obligatory on a Collector or Assistant Collector in partition proceedings, unless an objection to the partition has been made by a co-sharer in possession, and unless such objection was made before the day specified in the notice which the Collector or Assistant Collector is bound to issue under s. 111, and not even then unless such objection raises a question of title. And when s. 113 does not come into application in partition proceedings, s. 241 of that Act prohibits the Civil Courts from exercising any jurisdiction in the matter of the distribution of the land or the allotment of the mahal by partition. And if a Civil Court could not alter that distribution of the land, it follows that it could not entertain a suit so far as it sought to set aside the deed of sale of land allotted in the partition to the parties who made the deed. *HARDEO SINGH v. NARPAT SINGH*, 20 A. 75 = A.W.N. 1897, 197. [*Not F.*, 23 A. 291, F.B.]

(29)—*Bengal Civil Courts Act (VI of 1871), s. 20—"Subject-matter in dispute"—Partition suit—Jurisdiction—Competency of Court to decree partition of defendants shares inter se.*—For the purpose of determining jurisdiction in a partition suit, the words "subject-matter in dispute" in the section must be taken to mean the share which the plaintiff asked to have partitioned, and not the entire estate. (3 C. 551, 8 C. 757, 8 M. 235, 11 B. 216, R.) [*Appl.*, 22 B. 315; R., 15 C.P.L.R. 81, 4 L.B.R. 279.] Where a member of a joint family institutes a suit for partition of his share of the family property and no partition among the defendants *inter se* is prayed for, the Court can decree for partition only of the plaintiff's share, and it has no jurisdiction to partition as amongst the defendants the residue of the property. *HIKMAT ALI v. WALI-UN-NISSA*, 12 A. 506 = A.W.N. 1890, 128. [*D.*, 23 P.R. 1905 = 13 P.L.R. 1905.]

(30)—*Ss. 154 (c) and 96, Assam Land and Revenue Regulation (1886)—Suit for "imperfect partition"—Jurisdiction.*—A suit for partition, without any division of the Government Revenue, of some lands held and owned jointly by the parties in four different estates governed by the Assam Land and Revenue Regulation, is one for "imperfect partition," according to s. 96. S. 154 (c) is a bar to the suit. *ABDUL KHALIQ AHMED v. ABDUL KHALIQ CHOWDHRY*, 23 C. 514. [*D.*, 32 C. 1036 = 1 C.L.J. 421.]

(31)—*S. 154, Assam Land and Revenue Regulation, 1886—Suit partition—Jurisdiction—Entire estate.*—When the plaintiffs bring partition suit, they by lumping together the lands of a number of taluks, cannot give the Court a jurisdiction which it could not exercise

Partition—continued.**—7.—Suits for Partition and Jurisdiction of Civil Court in—continued.**

in respect of any one of them, nor can they give it jurisdiction by excluding plots of land which properly appertain to them. Putting the narrowest construction on the Regulation, the Civil Courts are debarred from entertaining any claim for the division of an entire revenue-paying estate into two or more portions or from making any distribution of the land of such an estate. The plaintiff must show that the Court has jurisdiction to deal with the subject-matters of the suit. An estate does not cease to be an entire estate within the meaning of the Regulation, because a few plots of land are common to it and some other estate, or because they are *brahmutter* or *debutter*, or because they are held in some undefined way *ijmali* with other person. **SARAT CHANDRA PURKAYASTHA v. PROKASH CHUNDRA DAS CHOWDHURY, 24 C. 751.**

(32)—*Partition, suit for—Question of title—Dismissal of objection involving question of title—Appeal—Jurisdiction of Civil Court—Land Revenue Act, 1901, ss. 111 and 112—Decree.*—In a partition case, the appellant presented a petition in which he set forth certain objections to the proposed partition, one being that the property was not partible. The Court of first instance held that the question of title raised by the appellant had already been determined by a Court of competent jurisdiction and dismissed the petition. *Held*, that the order of the Court dismissing the petition was not a decree within the meaning of s. 112 of the Land Revenue Act, 1901, and that no appeal lay to the Court of the Judicial Commissioner. It is only when the Revenue Court goes into the merits of the objection that its order dealing with the objection is appealable as a decree. **SHAHAMAT KHAN v. MUSSAMMAT AZIZUN-NISSA, 7 O. C. 161.**

(33)—*Suit for partition and declaration of definite share in vatan—Maintainability—Act III of 1874 (Bombay Vatan-dars), s. 67—Kulkarni vatan—Collector's power under Act—Kulkarni vatan consisting of cash allowance from Government—Suit for declaration—"Money grant"—Pensions Act XXIII of 1871, s. 4—Jurisdiction of Civil Court.*—The plaintiffs sued for partition of their one-third share in a *kulkarni vatan* and for a declaration of their right to officiate as *kulkarnis* in alternative turns with the defendants. The latter contended that the Civil Court had no jurisdiction to entertain the suit under the Bombay Vatan-dars Act (III of 1874). *Held* that there was nothing in the Act, which took away the power of the Civil Court to make such a declaration as prayed for. The Act does not prevent the Court from declaring the plaintiff's right to the status of *vatan-dars* where the share defined is in respect of the share in the *vatan* belonging to their own particular branch and the declaration does not interfere with the rights of the Collector in any way as given him by the Act. In preparing

Partition—continued.**—7.—Suits for Partition and Jurisdiction of Civil Court in—continued.**

the register, the Collector's duty as determined by s. 67 of the Act is confined to specifying the names of the heads of families and the proportionate part possessed by each head, and is in no way concerned with the rights of the members of a particular branch *inter se*. [R., 20 B. 202, 29 B. 480=7 Bom. L.R. 497, 11 Bom. L.R. 1339; D., 25 B. 186.] Where a *kulkarni vatan* consists exclusively of a cash allowance from Government, a suit for a declaration of the plaintiff's right to a moiety therein is not a suit relating to a "money-grant" within the contemplation of s. 4 of the Pensions Act (XXIII of 1871), so as to make it one not cognizable by a Civil Court. **GOVIND SITARAM v. BAPUJI MAHADEV, 18 B. 516.**

(34)—*Punjab Land Revenue Act (XXXIII of 1871), s. 65, cl. 2—Jurisdiction of Civil Courts—Right of widow to sue for partition.*—In a suit for partition, although the extent of the share to which the plaintiff would be entitled is not contested, yet if the right to partition itself is contested, the cognizance of the suit by the Civil Courts is not barred by cl. 2, s. 65 of Act XXXIII of 1871. (97 P.R. 1876, R.) After the death of her father-in-law, a Hindu widow was recorded as owner of a $\frac{1}{5}$ th share of the *khata* in dispute and since then, she had been receiving from the defendants, her mother-in-law and brothers-in-law, who were recorded as owners of the remaining four shares, a fifth portion of the produce. The defendants having ceased to give her her share, she instituted a suit for partition. *Held* that she was entitled to a partition because "a separation in interest and right," though without "a *de facto* actual division of the subject-matter" had taken place between the parties and thus the joint family relation between them had been put an end to. (50 P.R. 1870, D.; 93 F.R. 1869, 1 B. H.C. 189, R.; 11 M.I.A. 75, 3 B.L.R. P.C. 41, F.) *Held* also that there was nothing inconsistent with the Hindu law or custom in holding that when there was a right to maintenance out of the ancestral estate and a continuous omission on the part of those actually managing it to discharge their obligation, a portion of the estate may be assigned to the widow in severalty upon the ordinary widow's tenure to secure that maintenance to her and render her in that respect independent of those who neglect to fulfil their duty towards her. **RANJHA v. MUSSUMMAT RAJJI, 22 P.R. 1878.** [R., 116 P.R. 1879, 115 P.R. 1893, 11 P.R. 1885, Rev., 4 P.R. 1903=119 P.L.R. 1903, 11 P.R. 1899; D., 107 P.R. 1886.]

(35)—*Limitation—Partition—Land allotted to a co-sharer—Recovery of—Suit within what period to be brought—Punjab Land Revenue Act (XVII of 1887), s. 122.*—Where a partition of land takes place between A and B and a particular field is allotted to B which remains in possession of A, A begins to hold adversely against B from the date of partition, and B

Partition—continued.**—7.—Suits for Partition and Jurisdiction of Civil Court in—continued.**

must, if he wishes to preserve his rights, take action within the time allowed by law. In the case of land coming under the Land Revenue Act of 1887, the remedy for the plaintiff in such a case is, at any time during the first three years, to apply under s. 122 of that Act to the Revenue Court to be put in possession of the field allotted to him, or thereafter, sometime during the following nine years, to bring a suit in the Civil Court for possession. **FATEH DIN v. NIKKA**, 81 P.R. 1911=13 Ind. Cas. 790=105 P.L.R. 1912.

(36)—*Defective mode of, and irregularities, in partition—No appeal preferred by persons injured against it—Power of Financial Commissioner to interfere in revision—Punjab Land Revenue Act (XVII of 1877), ss. 17, 110 and 117.*—When, in a partition case, many shareholders have not been consulted, possessions of almost all have been unreasonably disturbed, and several other material irregularities have been committed owing to the dishonesty of several Revenue Officials concerned therein, the proceedings are liable to be set aside on revision by the Financial Commissioner, although none of the injured or dissatisfied persons has appealed against the mode of partition. In partition cases it is essential that all possessions should be maintained as far as possible. **BAHAWAL v. NURKHAN**, 1 P.W.R. 1912, Rev.=13 Ind. Cas. 815.

(37)—*Suit for partition of revenue-paying estate in a Civil Court—Power to appoint Commissioner—Partition how effected?*—Where a suit for the partition of a revenue-paying estate is brought in a Civil Court, the Court has no power to appoint a Commissioner to make a partition of the property. According to s. 265, Civ. Pro. Code, the Court is bound to have the partition made by the Collector according to the law for the time being in force for the partition of estates. (16 C. 203, D.) S. 265, Civ. Pro. Code, is imperative in its terms. **MEHERBAN RAWOOT v. BEHARILAL BARIK**, 23 C. 679. [Overruled, 24 C. 725, F.B.]

(38)—*Civ. Pro. Code, ss. 265, 360—Execution by Collector—Jurisdiction of Court to hear objections.*—When a decree for partition has been transmitted under s. 265, Civ. Pro. Code, to the Collector for execution, the Court that passed the decree is not deprived of its jurisdiction to hear and decide objections to the division made by the Collector in execution. **CHINNA SEETHAYYA v. KRISHNAVANAMMA**, 19 M. 435. [R., 5 Bom. L.R. 648, 28 B. 238.]

(39)—*Partition suit—Court-fees Act (VII of 1870), sch. II, art. 17—Suit for declaration and possession—Amending plaint according to decision of Appellate Court—Appeal from order—Acquiescence—Conduct—Estoppel—Right to file appeal*—In a suit for partition, a preliminary decree was made by the first Court.

Partition—continued.**—7.—Suits for Partition and Jurisdiction of Civil Court in—continued.**

The District Judge on appeal considered that the Court-fee payable should be calculated *ad valorem* on the property in suit, and the case re-tried as a suit for declaration of title and recovery of possession. The plaintiff agreed to amend his plaint so as to make it one for a declaration of title as well as for partition and to pay the necessary Court-fee. The District Judge thereupon remanded the case to the first Court for re-trial. The plaintiff appealed from that order: *Held*, that, if the plaintiff has title to the property and was a co-owner of that property with the defendant, the suit was one for partition of joint property and not one for declaration of title and recovery of possession. (12 C.W.N. 37, 6 C.L.J. 651, 3 M.L.T. 33, *Rel. upon*.) *Held*, also, that the plaintiff is not precluded by his conduct in acquiescing in the decision of the District Judge and amending his plaint, from filing this appeal, if, on reflection, he thought that the action he had taken was injudicious. **SHASHI BHUSHAN v. JOTINDRA NATH ROY**, 10 Ind. Cas. 463=38 C. 681=15 C.L.J. 443.

(40)—*Partition suit—Valuation for purpose of jurisdiction—Court-fees Act, 1870, s. 7, cl (iv) (b)—Suits Valuation Act, 1887, s. 8.*—The value, for purposes of jurisdiction and of Court-fees, of a suit by a member of an undivided Hindu family for partition and delivery to him of his share of the joint family property, is the amount of the value of the plaintiff's share, and not that of the entire family property. **VELU GOUNDAN v. KUMARAVELU GOUNDAN**, 20 M. 289=7 M.L.J. 30.

(41)—*Execution of decree—Partition suit—Decree for possession of share of plaintiff—Final decree—Decree capable of execution.*—There is no reason why, in a partition suit, where claim is for a certain share in joint property, a final decree should not be passed in the first instance, specially where the subject-matter of the suit is a house and the share can be ascertained without difficulty in execution. A decree in a partition suit directing the plaintiff to receive possession by partition of a definite share in a house is not merely declaratory and is capable of execution. **SULTAN SINGH v. BAHADUR SINGH**, 246 P.L.R. 1912=17 Ind. Cas. 390.

(42)—*Decree for partition—Execution—Party to decree dissatisfied with execution, suit not proceedings—Fresh suit—Act X of 1877, s. 244—Appeal under s. 65, Act XXXIII of 1871.*—Where a decree has been passed for partition and the execution of it falls to be made by the Collector under s. 225 of the Civ. Pro. Code, the proceedings of the Collector are to be regulated by the rules framed under the Punjab Land Revenue Act (XXXIII of 1871), and any person dissatisfied with the proceedings has his remedy by way of appeal under the provisions of s. 65 of that Act and has no right to maintain a civil suit for the purpose. Such

Partition—continued.**—7.—Suits for Partition and Jurisdiction of Civil Court in—continued.**

a suit is moreover barred by the express provisions of s. 244 of the Civ. Pro. Code. The question at issue being one arising between the parties to the suit in which the decree for partition was passed and relating to the execution of that decree, it cannot be determined by a separate suit. *NIHAL SINGH v. MIHAN SINGH*, 126 P.R. 1879.

See MAD. ACT III OF 1873, s. 12, 8 M. 235, 15 M. 69=1 M.L.J. 481.

See U.P. ACT XIX OF 1873, s. 241, A.W.N. 1882, 80.

Question of title, decision of Revenue Court upon—Jurisdiction of Revenue Court—See U.P. ACT XVII OF 1876, ss. 74 and 75, 2 O.C. 351.

Possession of land as compensation for land allotted in—Suit for partition, jurisdiction of civil Court as to distribution in partition of land—See U.P. ACT XVII OF 1876, s. 219, cl. (d), 5 O.C. 140.

See U.P. ACT III OF 1901, ss. 110, 111 and 233 (k), A.W.N. 1907, 175.

Suit for partition—Preliminary decree—Final decree—Appeal—See APPEAL—GENERAL, 10 C.L.J. 113=36 C. 762=1 Ind. Cas. 413.

Suit for partition—Civ. Pro. Code, s. 562—Remand—Appeal—Court-fee—See APPEAL—ORDERS, A.W.N. 1903, 40=5 A.L.J. 545.

Suit for partition revived, after plaintiff's death, on behalf of his minor sons with permission of first Court—Appellate Court not competent to object to revival of suit—See APPELLATE COURT—POWERS OF APPELLATE COURT, 5 M.H.C. 193.

Of house sites by Revenue Court—Ouster—Suit for possession—Dismissal—Subsequent suit for partition—Whether barred—See CIV. PRO. CODE, 1908, s. 11, O. II, r. 2, 26 A. 501=1 A. L.J. 228.

Partition decree—Execution by Collector not subject to revision by Civil Court—See CIV. PRO. CODE, 1908, s. 54, 15 B. 527.

Suit for partition—Omission to include property, effect of—Subsequent suit for partition of that property—Whether barred—See CIV. PRO. CODE, 1908, O. II, r. 2, 9 Ind. Cas. 424.

Suit for, of a portion of joint property cannot lie—See CIV. PRO. CODE, 1908, O. II, r. 2, U.B.R. 1897—1911, Vol. II, 229.

Suit for partition—Preliminary decree in plaintiff's favour—Resistance to Commissioners—Refusal of plaintiff's application for re issue of commission—Court's power—See CIV. PRO. CODE, 1908, O. XXVI, rr. 13, 14, 7 A.L.J. 196=5 Ind. Cas. 872=32 A. 319.

Suit for partition, how long to be deemed to be pending—See CIV. PRO. CODE, 1908, O. XXVI, rr. 13, 14, 8 M.L.T. 295=8 Ind. Cas. 393.

Partition—continued.**—7.—Suits for Partition and Jurisdiction of Civil Court in—continued.**

Of lands not paying revenue to Government, suit for, pending till final decree passed under s. 396, Civ. Pro. Code, ordering division by metes and bounds—Competency of Court to pass such decree of its own accord—See CIV. PRO. CODE, 1908, O. XXVI, rr. 13, 14, 18 M. L.J. 23=3 M.L.T. 328.

Suit for—When relief will be given.—See CIV. PRO. CODE, 1908, O. XLI, r. 20, 7 M.L.J. 174=20 M.L.J. 364=5 Ind. Cas. 924.

Mortgage during partition suit—Right of mortgagee—See CIV. PRO. CODE, 1908, O. XLI, r. 27, 6 Ind. Cas. 196.

See COMMON LAND, 113 P.R. 1900.

Suit for by a co-parcener in joint possession—Court-fee—See COURT FEES ACT, 1870, s. 7, cl. 4, (b), and cl. 5 and sch. I, art. 1, and Sch. II, art. 17 (6), 8 Ind. Cas. 512.

Suit for partition and separate possession of joint family property—See COURT FEES ACT, 1870, s. 7 (iv) (b) and s. 7 (v), 11 Bom. L.R. 1074=33 B. 658=4 Ind. Cas. 242.

Amount of Court fee payable—See COURT FEES ACT, 1870, s. 7, cl. 4 (b), and sch. II, art. 17, 15 C.P.L.R. 120.

Suit for partition—Denial by defendant of plaintiff's title—Effect—Fixed fee or *ad valorem* fee—See COURT FEE ACT, s. 1870, sch. II, art. 17, 12 C.W.N. 37=6 C.L.J. 651=3 M.L.T. 33.

Plaintiff in joint possession—Suit to have share partitioned—Court fee—See COURT FEES ACT, 1870, sch. II, art. 17 (vi), 8 A.L.J. 1329.

Declaratory suit—No consequential relief—Maintainability—See DECLARATORY DECREE, SUIT FOR—GENERAL, 7 M. L.T. 164=5 Ind. Cas. 921=20 M.L.J. 759.

Suit for declaration of right to—Parties—See DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 6 A.L.J. 456=2 Ind. Cas. 3.

Plaintiff entitled to a share only of joint property suing in ejectment—Whether suit can be treated as one for partition—See EJECTMENT, SUIT FOR, 4 M.L.T. 215.

Suit for partition of property consisting of moveables and immoveables—Immoveables outside jurisdiction—See JURISDICTION—SUITS FOR LAND, 4 B. 482.

Suit for possession of land incomplete—By Revenue Court—Mistakes or omissions in order regarding partition proceedings held in Revenue Court—See JURISDICTION OF CIVIL COURTS, 1 O.C. 225.

Suit for partition—Claim for compensation for improvements and disturbance—See JURISDICTION OF CIVIL COURTS, 70 P.L.R. 1902.

Partition—continued.**—7.—Suits for Partition and Jurisdiction of Civil Court in—continued.**

Of common land—Suit in Civil Court—See JURISDICTION OF CIVIL COURTS, 125 P.R. 1883.

Revenue paying land—Civil Court—Jurisdiction—See JURISDICTION OF CIVIL COURTS, 16 B. 528.

Revenue paying estate, partition of—Exclusive jurisdiction of Collector—Cognisance of suit by Civil Court—See JURISDICTION OF CIVIL COURTS, 7 C. 153.

Suit for partition of isolated plots in a patti not maintainable—See JURISDICTION OF CIVIL COURTS, 10 A. 5=A.W.N. 1887, 218.

Under Reg. 19 of 1814—Revision by Civil Court—See JURISDICTION OF CIVIL COURTS, 4 C. 510.

Of revenue paying estate—See JURISDICTION OF CIVIL COURTS, 15 C. 198.

Of trees—See JURISDICTION OF CIVIL COURTS, A.W.N. 1882, 3

See JURISDICTION OF CIVIL COURTS, 4 C. L.R. 38, 24 C. 725, F.B.=1 C.W.N. 374, 7 A. 447=A.W.N. 1885, 71, 1 P.R. 1883, Rev., 104 P.R. 1900.

Partition proceedings—See JURISDICTION OF REVENUE COURTS, 14 O.C. 153.

Mahal paying Government revenue—Revenue Court—Suit for—See JURISDICTION OF REVENUE COURTS, A.W.N. 1887, 116.

See JURISDICTION OF REVENUE COURTS, A.W.N. 1898, 65, A.W.N. 1899, 49.

Of fruit trees—See LANDLORD AND TENANT—PROPERTY IN TREES, ETC., ON LEASED PREMISES, 5 C.W.N. 185.

Suit for—Limitation—See LIMITATION ACT, 1908, art. 13, 4 M.H.C. 281.

See LIMITATION ACT, 1908, art. 47, 5 B. 25.

Suit for partition—Plaintiff's participation in rents and profits, saving of—Limitation by—See LIMITATION ACT, 1908, art. 127, 11 B. 461, Note=P.J. 1876, p. 120.

Joint Hindu family, Suit for partition by member of—See LIMITATION ACT, 1908, art. 127, 7 B. 297.

Applicability of Limitation Act, art. 127, to suit for partition by Muhammadan—See LIMITATION ACT, 1908, art. 127, 14 B. 70.

Partition suit—Limitation—See LIMITATION ACT, 1908, art. 127, 12 M. 26, P.C.=15 I.A. 167=5 Sar. 254.

Suit for partition—Death of head of family twelve years before suit—Bar of limitation—See LIMITATION ACT, 1908, arts. 127, 128, 129, 2 M.H.C. 347.

Partition—continued.**—7.—Suits for Partition and Jurisdiction of Civil Court in—continued.**

Suit for partial partition when maintainable—See LIMITATION ACT, 1908, art. 144, 7 M. L.T. 155=5 Ind. Cas. 491=20 M.L.J. 323.

See LIMITATION ACT, 1908, art. 144, 4 M. H.C. 10.

See LIS PENDENS, 8 B.L.R. 474.

Mahomedan co-owners—Suit for partial partition, if lies—See MAHOMEDAN LAW—PARTITION, 15 C.W.N. 677.

Joint possession under decree of Civil Court—Taking of produce by one of the parties, not a dispossession within Mamlatdar's jurisdiction—Suit for account or partition, proper remedy between joint-owners—See MAMLATDAR, JURISDICTION OF, 21 B. 777.

Of joint family property—Suit for—Parties—See MISJOINDER OF PARTIES, 10 O.C. 32.

Mortgage of share of joint holding—Suit by co-sharer for recovery of land in mortgagee's possession—See MORTGAGE—GENERAL, 81 P.R. 1883.

Purchase by mortgagee of share in equity of redemption—Right of one joint mortgagor to redeem—Partition among mortgagors, if necessary—See MORTGAGE—REDEMPTION, 15 B. 24.

Mortgage—Prior and subsequent. Mortgagees—Subsequent mortgagees paying off part of prior mortgage—Suit for partition between subsequent and prior mortgagees—See MORTGAGE—MISCELLANEOUS, A.W.N. 1896, 171.

Suit for dissolution of partnership and for—See MULTIFARIOUSNESS, 5 M.L.T. 117=19 M.L.J. 102.

Suit for partition—Defect of parties—See PARTIES TO SUITS—GENERAL, 17 C. 906.

Suit for partition of joint estate—See RECEIVER, 17 C. 614.

Religious endowment—Suit for partition—See RELIGIOUS ENDOWMENT, 17 M. 406.

Suit for partition—Right of widow—Subsequent suit to get rid of partition—See RES JUDICATA—CAUSES OF ACTION, 3 Agra 137.

Previous suit for partition based on general right as co-parcener—Right to partition under previous award not included in plaint—Subsequent suit whether maintainable as based on award—See RES JUDICATA—CAUSE OF ACTION, 14 B. 31.

Decree amending fixed money allowance in lieu of maintenance—Subsequent suit for partition—See RES JUDICATA—ESTOPPEL BY JUDGMENT, 1 Agra, Rev. 36.

See RES JUDICATA—MATTERS IN ISSUE, 13 A. 309=A.W.N. 1891, 117.

Partition—continued.**—7.—Suits for Partition and Jurisdiction of Civil Court in—concluded.**

See RES JUDICATA—MISCELLANEOUS, A. W.N. 1899, 190.

Final order effecting—See STAMP ACT, 1899, s. 9, cl. 15, 2 A.W.N. 1911, 516.

Partition, suit for—Property in joint possession of plaintiff and defendant—Valuation of relief—Plaintiff's discretion—See SUITS VALUATION ACT, 1887, s. 8, 11 M.L.T. 155 =M.W.N. 1912, 199.

Partition suit—Computation of Court-fees in—See SUITS VALUATION ACT, 1887, s. 8, 21 M. 234.

Suit for—Valuation of purposes of Court-fees and jurisdiction—See SUITS VALUATION ACT, 1887, s. 8, 22 B. 315.

Partition suit—Value of suit—See VALUATION OF SUITS, 13 C.L.R. 253.

Suit for partition—Under valuation—Jurisdiction—See VALUATION OF SUITS, 1 C.W.N. 136.

Suit for partition and exclusive possession of specific moieties of property—See VALUATION OF SUITS, 4 M.L.J. 110.

See VALUATION OF SUITS, 13 B. 209, 8 P. R. 1887.

—8.—Miscellaneous.

(1)—*Equity to a partition*.—An equity to a partition is a right to apply to a Court of equity for a partition with a reasonable expectation that the application will be complied with. SADAGOPA v. JAMUNA BHAI, 5 M. 54.

(2)—*Saranjam—If partible—Its nature—Descent*.—Ordinarily, a *Saranjam* is impartible and descends entire to the eldest representative of the past holder. NARAYAN JAGANNATH DIKSHIT v. VASUDEO VISHNU DIKSHIT, 15 B. 247. [R., 5 Bom. L.R. 983.]

(3)—*N.W.P. Land Revenue Act, s. 113—Order for partition of mahal, objections raised subsequently to—Jurisdiction of Revenue Court—Appeal not to be made to the Civil Courts*.—On this application for the partition of a mahal, no objections were taken by the appellant until after the scheme of partition had been approved by the Assistant Collector and confirmed by the Collector. Objections so taken could not be regarded as having been made at such a stage of the Revenue Court proceedings in the matter of the partition, as would have made s. 113 of the N.W.P. Land Revenue Act applicable. They could only be regarded as objections taken to the mode and form of partition, so that an appeal from the order of the Revenue Officer would lie to the Commissioner and not to the District Judge. JOTARAM v. ISHUR DAS, 9 A. 445 = A.W.N. 1887, 76.

(4)—*Partition—Title, order of Revenue Court containing adjudication upon question of—Decree*

Partit on—continued.**—8.—Miscellaneous—continued.**

—*Appeal—Jurisdiction of Civil Court—N.W.P. and Oudh Act, III of 1901, ss. 107, 111, and 112—Court Fees Act, sch. ii, art. 1*.—The respondent made an application for partition under s. 107 of the N.W.P. and Oudh Act, III of 1901, against which the appellant filed a petition of objections to the effect that the village was impartible and that he was entitled to *haqq jethansi*. The Assistant Collector made an order that the parties should produce their documentary evidence and adjourned the hearing to another date, on which issues were to be fixed. The parties filed their documentary evidence and the Court after hearing their pleaders passed an order granting partition. In his order the Assistant Collector gave certain reasons for holding that the appellant was not entitled to *haqq jetnansi*, that it was unnecessary and improper to consider it a dispute regarding proprietary right under s. 111, Act III of 1901, and that the estate was partible. The appellant appealed to the Court of the Judicial Commissioner and the memorandum of appeal bore a court-fee label of Rs. 2. Held, that the Assistant Collector's order contained a formal expression of an adjudication upon the objections raised by the appellant and amounted to a decree and was appealable to a Civil Court. The word "decree" in s. 112, Act III of 1901, is not defined, but, having regard to the reference to the Code of Civil Procedure and to the injunction to follow the procedure prescribed by that Code, it must be held that the intention was to allow an appeal against an order which would amount to a decree as defined in that Code, so far as that definition can be applied. Held that the memorandum of appeal was sufficiently stamped. THAKUR BALDEO BAKHSI v. THAKUR BALBHADAR SINGH, 6 O.C. 372. (4 O.C. 289, F.) [Contended, 7 O.C. 161.]

(5)—*Partition suit—Title of plaintiff to share in many of the properties included in plaint denied—Court-fee payable*.—Where there was a dispute between the parties as to what constituted the joint family properties, and the title of the plaintiff's share in many of the properties included in the plaint was denied by the defendant, it was ruled on appeal to the High Court that the suit was maintainable upon payment of a Court-fee of Rs. 10. It was also pointed out that for the purposes of the stamp duty, the cause of action alleged in the plaint and that alone must be looked at. The appellate Court, however, differed in opinion as regards the question of costs. MOHENDRO CHANDRA GANGULI v. ASHUTOSH GANGULI, 20 C. 762.

(6)—*Preparation of butwarah—Question of title—Decision—Jurisdiction of Revenue Court, Reg. XIX of 1854*.—When, in preparing a butwarah under Reg. XIX of 1859 it is ascertained that the parties are at variance on a question of title, the proper procedure of the Collector is to stay the proceedings until all such questions of

Partition—continued.—8.—**Miscellaneous**—continued.

title are decided by a competent Court. The Collector has no authority to decide such questions, unless special power is given to him by the law. **MUDDUN MOHUN v. KARTICK NATH PANDAY**, 14 W.R. 335.

(7)—*Act XIX of 1863—Decision by Collector—Question of title—Objection by parties*—One of the plaintiffs made an application before the Collector long after partition had been ordered and while the process was going on praying that a certain item in the estate should be partitioned as being part of the joint property. *Held* that order of the Collector on the application was not open to appeal under s. 9 of Act XIX of 1863, as the objection taken did not fall under ss. 7 and 8 of the Act, not being urged prior to the order for partition. The Act contains no provision of the judicial decision by the Collector of objections raising questions of title arising in the course of the partition. **CHOWDHRY ZALIM SINGH v. SEETLOO**, 2 N.W.P. 404.

(8)—*Partition Act (XIX of 1863), ss. 8, 9—Application for partition—Objection—Disposal of case by Collector without regard to provisions of Act VIII of 1859—Appeal*.—A Collector before whom a party objects to a partition application under Act XIX of 1859, may either decline to grant the application or may himself proceed to enquire into the merits of the objection. In the latter case, he must follow the procedure prescribed in Act VIII of 1859. Under s. 8 of Act XIX of 1863, his omission to do so cannot change the form of appeal, and the parties aggrieved by such order passed in the enquiry in which Act VIII of 1859 was not followed have the same right of appeal to the District Court, as under s. 9 of the Partition Act, all orders, etc., under s. 8 for declaring the rights of parties are to be held to decisions and to be open to appeal. There is nothing said about procedure in s. 9 of Act XIX of 1863, but it is provided that when, of the two courses open to him, the Collector elects to determine the objection, his decision is open to appeal. **RAMESHAR RAI v. SUBHOO RAI**, 1 N.W.P. 134. [R., 2 N.W.P. 64; D., 2 A. 839.]

(9)—*Act XIX of 1863, s. 33—Partition—Defendant's house falling to share of plaintiff—Right of defendant to retain possession against plaintiff*.—Where upon partition the defendant's house fell within the plaintiff's lot, the plaintiff was entitled to sue to obtain possession of the house, and it lay on the defendant to prove that under s. 33, Act XIX of 1863, he was entitled to retain possession by having agreed to pay an equitable rent for the ground, which rent had been determined by the officer making the partition and had been stated in the paper of partition. **LAIKHRAM v. CHUMNEE**, 3 Agra 298.

(10)—*Act XIX of 1863—Claim to cultivating right of occupancy—Determination conflicting proprietary titles—Sir land—Partition among co-sharers—Effect on cultivators*.—A question involving a claim to a cultivating right of

Partition—continued.—8.—**Miscellaneous**—continued.

occupancy is not one which could be properly decided in a suit for partition under Act XIX of 1863, under which only questions of conflicting proprietary titles can be determined. Where an estate in which the proprietors have *seer* land is partitioned, such partition among the co-sharers in no way affects any cultivating rights which may be possessed by cultivators, not co-sharers in the estate, but it is also a well understood effect and consequence of partition that co-sharers retain no right of occupancy in respect of any *seer* land which may have passed under the partition into the share of the other co-sharers. As *seer* holder, a proprietor has no cultivating right distinct from, and independent of, his proprietary character, and when, therefore, by partition, he loses proprietary title to any particular land, any cultivating right which he had in virtue of his proprietary character necessarily ceases. **AMAN SINGH v. JEYGOPAL SINGH**, 3 Agra 164.

(11)—*Mortgage by co-parcener—Partition—Reg. XIX of 1814*.—P, L, B, K, and others were owners of a Zemindari called S, L, B, and K, mortgaged their 2-anna share in Mauza Kishoopore, one of the component parts of the Zemindari S to D. At the time when this mortgage was executed, the mortgagors were fully entitled to the 2-anna share above referred to. Subsequently, by virtue of a partition made under Reg. XIX of 1814, P, one of the share holders, got a 13-anna share in village Kishoopore in lieu of his entire interests in the zemindari; and of the three mortgagors, two, B and K, got their shares in other villages of the mehal. P brought a suit against D to recover possession of a 1-anna 15 dams share of mauza Kishoopore out of the 2-anna share held by him under his mortgage. *Held* that P had no cause of action against D and that the butwara was a butwara under Reg. XIX of 1814 and made no difference. If P chose to take his share in a village already burdened with a valid mortgage, he had to thank himself for it and whatever his remedies might be he could have no cause of action whatever against D who had an undoubted right to hold possession of the property mortgaged to him until his lien over it had been determined in due course of law. **BABOO NISHAN SINGH v. BABOO JUJDEO SINGH**, 4 B.L.R. App. 97.

(12)—*Reg. XIX of 1814—Partition—Suit for confirmation of possession*.—To a partition effected by the revenue authorities under Reg. XIX of 1814, the plaintiff presented a petition of objection, in which he alleged that his share had been included in and declared to be part and parcel of defendant's share. Plaintiff's petition of objection was rejected by the Collector. In a suit for a declaration of his right to the share claimed by him, and for confirmation of possession thereof, both the lower Courts gave a decree for the plaintiff. On special appeal, an objection was taken that the plaintiff's suit would not lie, no application having been made in it for the annulment of the *butwara* proceedings.

Partition—continued.**—8.—Miscellaneous—continued.**

which had definitely included the property sued for in defendant's share. *Held* that the suit would lie; that there was no necessity for the plaintiff, who claimed to be in possession of his proper share, and sued only for a declaration of his title thereto, to include in his plaint an application for the renewal of the partition proceedings; and that those proceedings were final. **INDRABATI KUNWARI v. MAHADEO CHOWDHRY, 1 B.L.R.S.N. 6.**

(13)—*Reg. XIX of 1814, s. 9—Land made over under butwarrah—Ejectment—Rate in butwara papers—Division of parent estate—Ryot.*—In a suit for khas possession of certain land which fell to the plaintiff's share as per a butwarrah conducted under the provisions of *Reg. XIX of 1814*, it was alleged that the defendant, who was a co-sharer in the estate, had withheld possession. The defendant pleaded adverse possession for more than 12 years and on the merits contended that, as the land claimed was occupied by gardens made by his ancestors, he was entitled to hold possession, paying a fair rent to the plaintiff, and was not liable to ejectment. *Held*, that s. 9 of *Reg. XIX of 1814* did not in any way apply to this land. That section referred to the dwelling-houses of the co-sharers, and to the offices, buildings, and ground immediately attached to these dwelling-houses, which the lands in dispute were not shown to be. Where the defendant never held the disputed lands as a ryot, the mere fact of a division of the parent estate does not reduce him to the position of a mere ryot. Where he held the land as the plaintiff held lands of a similar description until the butwarrah which awarded the land to the plaintiff's share, he is clearly entitled to possession of it in ejectment of the defendant, whose occupancy is not that of a ryot. The rate given in the butwarrah papers is not the fair rate for the lands; for, under s. 19, *Reg. XIX of 1814*, the gross produce of each village is calculated with the proportion of the public jumma assessed thereon. **LULEET NARAIN SINGH v. GOPAL SINGH, 9 W.R. 145.**

(14)—*Butwarrah proceedings—Application to Collector—Suit for declaration of right to property—Suit based on baseless apprehensions—Cause of action—Reg. XIX of 1814, s. 20, Applicability of.*—Plaintiff was the owner of an estate called S. Defendant was a sharer in a neighbouring estate called B alias S. When the defendant applied for a butwarrah of his share in the latter mouzah, the Collector ordered it to be made. Thereupon the plaintiff being apprehensive that the land of his estate S would be incorporated with the lands of the defendant's mouzah, applied to the Collector for a declaration that the former land had nothing to do with the latter. On the rejection of his application which was confirmed by the Revenue Commissioner on appeal, the plaintiff brought a suit to set aside the order and to have a declaration of his rights in mouzah S, and

Partition—continued.**—8.—Miscellaneous—continued.**

obtained decree in the Court of first instance which was however reversed by the lower appellate Court. On appeal to the High Court, *held* that the suit had been properly dismissed, as it had been clearly proved that the estates of the parties (plaintiff and defendant) were separate and distinct and were separately recorded in the towjee with distinct areas and sudder jummas, and that the plaintiff had no cause of action as the defendant did not dispute the plaintiff's ownership of the estate S, and the plaintiff did not state that any of the lands of his estate had been incorporated by the butwarrah in the estate of the defendant. S. 20 of *Reg. XIX of 1814* applied to orders of the Board of Commissioners on the paper of partition and with reference to disputes between co-sharers, and had no reference to a case in which no partition had been yet made, and in which the plaintiff was a third party and not a co-sharer. **FOOLBASHEE KOWAR v. ARZUN SAHOO, 12 W.R. 134.**

(15)—*Land assigned under legal butwara, dispossession of party from—Suit for restoration to state before butwara not maintainable.*—Where a party has been dispossessed from land that had been assigned to him under a butwara legally made, though such dispossession may amount to a wrongful act, it is not competent to the party so dispossessed to maintain a suit for being restored to the old state of things prior to the butwara. Although he is at liberty to take any steps allowed by law to set aside the butwara itself, yet, until such a step has been taken, he is bound by the butwara, and the present suit instituted as on the ground of the wrongful act of the party dispossessing is not sustainable as such. **HURO PERSHAD ROY v. MOHUNT RAMCHURN SINGH, 6 W.R. 314. [R., 15 W.R. 353.]**

(16)—*Partition of jama—Act XI of 1859, ss 10, 11, 13—Sale for arrears of revenue—Separation of shares—Private—Butwara—Auction-purchasers' rights.*—Where a partition of the jama is made of a revenue-paying mehal under Act XI of 1859, s. 10, in the Collector's books, but no corresponding butwara under s. 11, though there was a private partition: *Held*, that the sale by the Collector passes to an auction-purchaser the share of the defaulters as it was registered in the Collector's books, that is, an undivided share in the entire state. **GUNGADEEN MISSER v. KHEEROO MUNDUL, 14 B.L.R. 170 = 22 W.R. 449. [Rel. on., 29 C. 223; R., 7 C.L.J. 1, 12 C.W.N. 528.]**

(17)—*Putni estate—Holder of fractional share in a mouza of the estate—Right to partition that mouza without partitioning other mouzas.*—A putnidar of a fractional share of a mouza can partition his share in it, held jointly by himself and some of the defendants, although the defendants may be jointly interested with or without other persons in the remaining mouzas of the Zamindari provided that such partition does not place the defendants in a position

Partition—continued,**—8.—Miscellaneous—continued.**

of inconvenience. *UMA SUNDARI DEBI v. BENODE LAL PAKRASHI*, 34 C. 1026.

(18)—*Partition—Building—Unconditional division.*—On partition of an undivided mahal, the plot in question with a "chabutra" belonging to the appellant fell to the share of the respondent. When the latter attempted to remove the "chabutra" the appellant objected. *Held* that, in the absence of any reservation in the appellant's favour entitling him to maintain the "chabutra" on the land which fell to the lot of the respondent on partition, he could not object to its removal. *MULCHAND v. BHO-LANATH*, A.W.N. 1883, 136.

(19)—*Suit for share in inheritance—Partition of charges against estate—Separate suit—Unsecured debt.*—A plaintiff will not be allowed by merely framing a suit for partition to evade his obligation to submit to a partition of the charges against the estate and the co-heirs could not be driven to a separate suit to recover their share of the debt, merely because the debt was not secured upon some specific portion of the estate. *RUKEN DIN v. KUTAB DIN*, 179 P.R. 1883.

(20)—*Partition alleged under decree prior to judgment-creditor's collusion*—A partition set up by the sons of a judgment debtor under a partition order alleged to have been obtained against their father on the ground of the property being ancestral anteriorly to a bond under which a judgment-creditor came in, where it was found that execution had not been taken out of the partition decree, was held to be collusive. *BEHARYLALL v. JUGDEO PERSHAD*, 25 W.R. 538.

(21)—*Unexecuted decree for partition—Prior mortgage of share—Suit by stranger—Execution purchaser for partition.*—The existence of a decree for partition between A and B, two joint owners in equal shares of certain property, no actual partition having been come to thereunder, would not preclude a person, who has purchased B's share in execution of decree upon an English mortgage executed by B to A previous to the above partition suit, from bringing a suit for partition of such share against A. *KIRTY CHUNDER MITTER v. ANATH NATH DEY*, 10 C. 97 = 13 C.L.R. 249.

(22)—*Partition—Common land—Grant of waste land to Malikan-i-qabza—Co-sharer's land submerged—Right to share—Mauza Pakku Sandila, District Muzaffargarh.*—In 1877, Government made a grant of waste land to the *Malikan-i-qabza* of Pakku Sandila village, Muzaffargarh District, to be divided *hasab rasad raqba*. In 1899, the Revenue Court declined to allow plaintiffs any share on partition on the ground that they were not then the owners of any land in the village. It appeared that, in 1854, the plaintiff's family owned 140 *bighas* of land which was carried away by river in that year or soon after. In 1880, a great portion of the village lands that had previously

Partition—continued.**—8.—Miscellaneous—continued.**

been carried away re-appeared and the plaintiffs took possession of some land and continued to remain in possession of it on the allegation that it belonged to them, though their right to it was not admitted by other landholders of the village. *Held*, that the plaintiffs were entitled to a share in the land in proportion to their original land in the village for their rights as owners were not lost by submersion of their land. *AHMADYAR KHAN v. SULTAN*, 128 P.L.R. 1904.

(23)—*Suit for partition—Preliminary and final decrees—Appeal—Question re preliminary decree in appeal from final decree.*—In an appeal against the final decree in a partition suit, it is open to the appellant to question the correctness of the preliminary order or decree for partition, when no appeal was preferred against such order within the time allowed by law. *KHADEM HOSSEIN v. EMDAD HOSSEIN*, 29 C. 758, F.B. = 5 C.W.N. 617. (23 C. 279, *Overruled*; 23 C. 406, *App.*) [*F.*, 10 Bom. L.R. 514; *R.*, 5 C. W.N. 177, 13 C.W.N. 493 = 9 C.L.J. 367, 10 C.L.J. 336.]

(24)—*Decree for partition directing final partition by arbitrator—Application for partition, nature of—S. 396, Civ. Pro. Code, 1882.*—Where a decree for partition directs the final partition to be effected by an arbitrator, an application for the partition is a proceeding in the suit itself, and not one in execution of the decree, no formal application being necessary and the Court being bound to proceed with the suit and make a final decree after the final partition by the arbitrator. *DWARKA NATH MISSER v. BARINDA NATH MISSER*, 22 C. 425. (21 W. R. 212, 22 W.R. 328, 4 C. 629, 14 C. 50, 19 C. 132, F.B., *R.*) [*R.*, 24 C. 725, F.B., 25 M. 244, F.B., 7 C.W.N. 572, 47 P.R. 1906 = 86 P. L.R. 1907, 2 M.L.T. 265, 18 M.L.J. 23 = 3 M. L.T. 328.]

(25)—*Decree for partition—Rights of all parties to suit not declared by decree—Execution of decree limited by its terms—Partition referred to Commissioner—Court executing decree, not bound, if Commissioner exceeds his powers.*—A suit was brought by R for partition of his share of certain common property, and his claim was decreed; but there was no decree declaring the respective shares of the defendants, or ordering the partition of such shares. *Held* that the latter cannot, in consequence, have their shares ascertained and partitioned in the execution of this decree. In execution of the partition decree mentioned above the partition of R's share was referred to a Commissioner who, however, by consent, made a partition of the bulk of the estate among all the parties interested. On an application by the defendants in execution of this decree, to be allowed their share thus allotted by the Commissioner, *held* that the duties of the Commissioner had ceased, and that the Court executing the decree had no power to go beyond its terms,

Partition—continued.—8.—**Miscellaneous**—continued.

which did not declare the rights of the defendants or direct a partition generally of the assets among all the parties to the suit. **BALKISHUN DAS v. SITA RAM, A.W.N. 1884, 215.**

(26)—*Partition, preliminary decree for*—Civ. Pro. Code, s. 396—*Commissioners, Number of*—*General Clauses Act (I of 1868)*.—Though s. 396, Civ. Pro. Code, 1877, says "Commissioners," still, by force of the General Clauses Act, the word may be read in the singular number, and only one Commissioner may be appointed under a preliminary decree for partition. **GYAN CHUNDER SEN v. DURGA CHURN SEN, 7 C. 318=8 C.L.R. 415 [R., 124 P.R. 1893; Diss., 6 Bom. L.R. 586.]**

(27)—*Specific Relief Act, ss. 39, 40*—*Separate possession*—*Suit holding*—*Evidence of partition*—*Transfer by one co-sharer*—*Suit by the other to declare it void and the holding joint*.—The fact that each co-sharer had dealt with specific portions of a joint holding is no proof of partition though it may be evidence of separate possession and enjoyment. A purchaser of a specific portion in such land does not become a co-sharer. Where one of the co-sharers transferred his portion to a third person and the other sharer sued to have the deed cancelled and declare the holding to be still joint and his right therein; *held* that the suit was not one for cancellation of deed under s. 39, but a declaratory decree under s. 40, Specific Relief Act. **MATU v. HIRDE, 44 P.R. 1894.**

(28)—*Abadi*—*Right of user for trade purposes*—*Partition*—*Survival of right*—*Custom*.—In a suit by certain weavers, who had established weaving holes in a portion of the *abadi* for purposes of their trade, to establish their claim to occupy and use the land for their trade, as against the proprietor to whom that portion of the *abadi* was allotted on partition, and who opposed the plaintiff's right, the lower Courts found that the plaintiffs had been in occupation for more than 12 years, and were entitled by custom, to the right claimed. *Held by Boulnois and Campbell, JJ.* The lower Courts having distinctly found that the plaintiffs acquired the right by custom, their claim must be admitted without further enquiry. The same custom which prevails as to houses occupied by *kamins* should prevail as to land occupied by their workshops, even though the latter be not roofed in. *Held by Lindsay, J.*, that there was no satisfactory proof of custom nor any proof of easement, and the case should be remanded for determination whether the plaintiffs had acquired an easement, and if not, whether there was satisfactory evidence of custom. *Per Boulnois, J.* It is open to the proprietary body, in whom the right of property in the whole of the common land of the village subsists, to allow persons to occupy portions of that land for their use and benefit in such a way as to acquire a right of user, and, under some circumstances, especially after a long

Partition—continued.—8.—**Miscellaneous**—continued.

lapse of time, it is not open to the proprietary body or individuals claiming under it after a partition, to oust the occupants. **DEWA SINGH v. BILLA, 4 P.R. 1877, F.B. [Appr., 11 P.R. 1879, 36 P.R. 1882; Cited, 73 P.R. 1883.]**

(29)—*Limitation*—*Partition of land*—*Adverse possession*—*Persons recorded as owners in the Revenue papers*—*Denial of their right by co-sharers*—*Objectors referred to file civil suit*—*Their failure to do so*—*Dropping of partition proceeding for over 12 years*—*Fresh application*—*Article 144 of Act IX of 1908*.—Where certain persons, who were recorded as owners by purchase in the Revenue papers, applied for partition of their share in the joint holding to the Revenue Authorities, and the co-sharers who denied the right of the petitioners were referred to bring a civil suit which they failed to file, but the partition proceedings were dropped for about 17 years, and it was not proved that, during this period, the petitioners ever exercised any right of ownership and paid Government Revenue: *Held*, that the objectors' second suit on fresh application for partition being made and being again referred to file a civil suit was maintainable and that their possession commenced to become adverse from the date of the first denial and that, after expiry of 12 years from that date, the right to demand partition had become barred by limitation. **MAN SINGH v. RASUL, 239 P.W.R. 1912=75 P.L.R. 1913=18 Ind. Cas. 750.**

Estate partition—Maximum expenditure
This Circular allowed a maximum expenditure of 36 rupees in partitioning an estate of 100 acres. **REV. CIR. NO. 6, 20 W.R. Rev. Cir. p. 9.**

This circular draws attention to a decision of the High Court, in a suit for partition. **REV. CIR. NO. 5, 24 W.R. Rev. Cir. p. 26.**

Partition under C.P. Land Revenue Act—By whom partition to be effected—*See C.P. ACT XII OF 1898, s. 16 and r. 30, 15 C.P.L.R. 153.*

See PUN. ACT XVII OF 1887, s. 158 (2), (xvii) 2 P.R. 1895, Rev.

See BURDEN OF PROOF—MISCELLANEOUS, A.W.N. 1881, 12.

See CUSTOMS—PUNJAB—INHERITANCE, 30 P.R. 1873.

English law on implied grant of easements upon severance of tenements—*See EASEMENT, 26 C. 516=3 C.W.N. 409.*

See HINDU LAW—JOINT FAMILY, 6 B. 225.

See HINDU LAW—MAINTENANCE, 8 M. 557.

See JOINT PROPERTY, 109 P.R. 1879.

See JURISDICTION OF CIVIL COURTS, 14 P.R. 1876, 48 P.R. 1877.

Suit for possession of *shamilat* land—Wrong entry in Revenue Records—*See LIMITATION ACT, 1908, art. 120, 151 P.L.R. 1906.*

Partition—concluded.— 8.—**Miscellaneous**—concluded.

Hindu Law—Property reserved for future partition—Limitation—See LIMITATION ACT, 1908, art. 127, 18 M. 418.

See LIMITATION ACT, 1908, art. 127, 6 B. 741.

See LIMITATION ACT, 1908, art. 164, 20 A. 311 = A.W.N. 1898, 45.

Suits for partition by heirs of Muhammadan—Misjoinder—See MISJOINDER OF PARTIES, 22 M. 494.

Subsequent to mortgage of a share—Suit for redemption—Mortgagor entitled to decree for possession of an undivided share only and not specific plots—See MORTGAGE—REDEMPTION, A.W.N. 1906, 7.

See MORTGAGE—SALE OF MORTGAGED PROPERTY, 18 M. 500 = 5 M.L.J. 197.

Co sharers of estate—Partition of portion thereof—Parties to suit—See PARTIES TO SUIT—GENERAL, 7 C. 577 = 9 C.L.R. 170.

Maintainability of suit for, between lessees from different co-sharers—See POSSESSION—GENERAL, 11 C.W.N. 143.

Registration of award operating as instrument of—See REGISTRATION ACT, 1908, s. 17, 160 P.L.R. 1906.

Suit for partition—Award, effect of—See RES JUDICATA—ADJUDICATIONS, 19 M. 290.

See RIGHT OF OCCUPANCY—MISCELLANEOUS, 1 P. R. 1895.

See SPECIFIC RELIEF ACT, 1877, s. 42, 16 C. 117.

See SPECIFIC RELIEF ACT, 1877, ss. 54, 56, 57 P. R. 1899.

Partition deed—List of divided property—Agreement to divide outstandings—See STAMP ACT, 1879, s. 3 (11), 7 M. 385, F.B.

Suit for, jurisdiction value of, is the value of the entire estate sought to be partitioned—See SUITS VALUATION ACT, 1887, s. 11, 4 C.L.J. 509.

See SUITS VALUATION ACT, s. 11, 14 M. 183 = 1 M.L.J. 234.

Partition suit—Valuation for purpose of jurisdiction—See VALUATION OF SUIT, 15 C.P.L.R. 8.

Partition-deed.

Compulsorily registrable but unregistered—Relating to both moveables, and immoveables, whether Court can refer to portion of, relating to moveables only—See REGISTRATION ACT, 1908, s. 17, 119 P.L.R. 1906.

See STAMP ACT, 1879, s. 3, cl. 11, s. 29 (e), 15 M. 164, F.B.

Stamp on—See STAMP ACT, 1899, s. 2 (15), 7 Bom. L.R. 308 = 29 B. 366.

Partition Estate.

See BEN. ACT VIII OF 1876.

See BEN. ACT V OF 1897.

Partition of Revenue-paying Estates.

See ACT XIX OF 1863.

Partitions, Remuneration of Amins effecting.

See ACT XI OF 1838.

Partition Suit.

Omission to ask for partition of certain lands, effect of—Subsequent suit for partition of such lands not maintainable—See CIV. PRO. CODE, 1908, O. II, r. 2, 7 B. 182.

See LIMITATION ACT, 1908, art. 47, 5 B. 27.

See PARTIES TO SUIT—GENERAL, 1 333.

Partition Wall.

(1)—*Open space of ground—Partition wall.*—When open spaces are spoken of, "partition walls" do not mean blocks of buildings, but such walls as are used for partitioning open spaces. *BOLYE CHUNDER SEN v. LALMONI DAS*, 14 C. 797.

Adjacent tenements—Common partition wall Enjoyment—See EASEMENT, 31 M. 528 = 5 M.L.J. 136 = 19 M.L.J. 309 = 4 Ind. Cas. 619.

Partners.

See PARTNERSHIP.

(1)—*Liability, joint—Joint liability of—One of the defendants admitting the claim—Consent decree against him—Plaintiff's right to carry on the suit against the other defendant—Joint liability.*—Where a plaintiff files a suit against both the partners jointly, but recovers judgment only against one of them on his admitting the claim, he is not thereby barred from carrying on further proceedings in the suit against the other partner. *DICK v. DHUNJEE*, 3 Bom L R. 234 = 25 B 378.

(2)—*Co-sharers, position of—Partners.*—Co-sharers in immoveable property in this country do not occupy the same position towards each other as partners under English Law. *RAM LOLL MOOKERJEE v. DEBENDER NATH CHATTERJEE*, 8 C.8 = 9 C L.R. 337.

Partnership.

See COMPANY.

See FIRM.

1.—GENERAL.

2.—DISSOLUTION OF PARTNERSHIP

3.—PARTNERSHIP, WHAT CONSTITUTES.

4.—RIGHTS AND LIABILITIES OF PARTNERS.

5.—SUITS RELATING TO PARTNERSHIP.

6.—MISCELLANEOUS.

Partnership - continued.

— 1.—General.

See CONTRACT ACT, 1872, ss. 239 to 265.

See HINDU LAW—JOINT FAMILY.

See LIMITATION ACT, 1908, art. 106.

See PARTIES TO SUIT—GENERAL.

(1)—*Partnership—Debt paid out of profits.*—To constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common. The relation of principal and agent ought not to be implied, any more than that of partnership, from the fact of a commission on profits and powers of control being given, when such relation is opposed to the real agreement and intention of the parties. Agreement in writing entered into between W. & Co., British merchants, carrying on business at Calcutta with a Hindu Rajah, by which, in consideration of moneys already advanced and which might be thereafter advanced by the Rajah to them, they agreed to carry on the business subject to the control of the Raja in several particulars; stipulating that the Rajah should receive a commission of twenty per cent. on all profits made by the firm, until the whole amount of the debt due to him should be paid off, with twelve per cent. interest upon all cash advances which had been or might be thereafter made by him to the firm. Further advances having been made by the Rajah to the firm, W. & Co. executed to him a mortgage of certain tea plantations, to secure the then amount of his advances, and the Rajah by a deed released his right to commission and interest under the original agreement between them. No proceeds of the business were ever received by the Rajah, and though he was credited in the books of the firm with a considerable sum, that sum was never received by him and was afterwards written back in the books of the firm. The Rajah did not interfere or exercise any such control in the business as to make him an ostensible partner in the firm. *Held* having regard to the restrictions and modifications made of late in the rule of law formerly prevailing, that participation in the net proceeds of a business made the participant liable as partner to third parties, and looking at the whole scope of the agreement, the primary object was to give security to the Rajah as a creditor of the firm of W. & Co., and that the participation given in the net proceeds of the business was not sufficient to establish a partnership between W. & Co., and the Rajah, as regards third parties. Although a right to participate in the profits of trade is a strong test of partnership and there may be cases where, from such participation alone, it may, as a presumption, not of law, but of fact, be enforced, yet, whether that relation does or does not exist, must depend on the real intention and contract of the parties. In the absence of any law or established custom existing in India in respect to partnership transactions, the law of England is to be resorted to for principles and rules to guide the Courts. At the same

Partnership—continued.

— 1.—General—continued.

time, the usages of trade, and habits of business of the Indian community, so far as they may be peculiar or differ from those in England, are to be taken into consideration. *MOLLWO MARCH v. COURT OF WARDS*, 10 B.L.R. 312, P.C. = 18 W.R. 384 = I.A. Sup. Vol. 86 = 3 Sar. 168 = 9 Moo.P.C.N.S. 214. [F., 10 C. 166, 23 C. 406, 10 C.W.N. 313; R., 8 B. 105.]

(2)—*Managing partner—Position of.*—The law of partnership is, no doubt, a branch of the law of agency, but the position of the partners *inter se* cannot be altered because one partner chooses to take no part in the business, nor can he acquire greater rights on that account against his partners. Managing partners are principals as well as agents and cannot be compelled to prove payments made by them in the same way as an agent. *DAJI ABAJI KHARE v. GOVIND NARAYAN BAPAT*, 10 Bom. L.R. 811.

(3)—*Inheritance—Hindu Law — Widow's right to inherit her husband's joint property—Hindu khatris residing in towns—Hindu family — A brother making other brothers partners in his business—Nature of partnership—Death of one partner dissolves the partnership—Suit by widow for an account of partnership property—Limitation of such suit—Res judicata—Previous suit for partnership debt—Widow as co-plaintiff — Presumption of union—Separation—Re-union—Power of a Hindu over self-acquired property—Share of profits in agricultural land — Jurisdiction of Civil or Revenue Courts—Application of old or new Civ. Pro. Code on the question of Res judicata—Contract Act, ss. 238 and 253 (10)—Indian Limitation Act, XV of 1877, s. 5 and art. 106—Punjab Tenancy Act, XVI of 1887, s. 77 (3) (k)—General Clauses Act, X of 1897, s. 6—Civ. Pro. Code (Old) Act XIV of 1882, ss. 13 and 32 and of new Civ. Pro. Code, (Act V of 1908), s. 11.—*Held* that: (1) Where a Hindu governed by Mitakshara Law is the sole proprietor of a business and makes his brothers or nephews his partners, and by way of gift assigns to each a certain share in that business and they are allowed to have such shares in that business ever since and to take its profits to the extent of their respective shares, the relationship thus created is that of partners of an ordinary partnership as defined by s. 238 of Act IX of 1872, but not of a hereditary trading partnership contemplated by Hindu law, and it dissolves under s. 253 (10) on the death of the donor or any of the other partners. (2) (A) A suit brought by the representative of one of the partners on his death praying the following reliefs is practically a suit for an account of a dissolved partnership and is governed by the three years limitation prescribed by art. 106, Limitation Act (XV of 1877). (a) It may be declared that the plaintiff is representative and heir of Lala Nathu Mal, her husband, and as such is entitled to the entire property left by her husband and also to two-thirds of the*

Partnership—continued.**—1.—General—continued.**

entire property acquired with the joint capital of the shop after the death of the plaintiff's husband, no matter in whose name it is acquired. Defendants Nos. 1 and 2 may be ordered to render account of the entire property and the business of the shop mentioned in paras 7 and 8 of the petition of the plaintiff from the date of the starting of the said firm up to 23rd April 1900, and the subsequent period up to the institution of the suit and (the plaintiff) may be awarded two-thirds share of the entire property, viz, cash, valuable securities of every description, shares in firms and companies, decrees passed by Courts and all other moveable and immoveable property of every kind acquired with the capital of the said firm or belonging to it, together with interest up to the date of realization; the *bahis* and all other documents are in possession of defendants Nos. 1 and 2 and the plaintiff cannot, therefore, give detail of such property. According to s. 7, cl. IV of the Court Fees Act, she has fixed the value of this relief at Rs. 15,00,000. (b) The defendant may be ordered to file in Court the *bahis*, account registers relating to the account of property in dispute belonging to the said firm and shown in the list marked (E), she (the plaintiff) may be awarded two-thirds of them, she may be ordered to obtain copies of the rest; the defendant may be ordered to file in Court other papers and documents of every kind relating to the property in dispute, a clue to which may be found from the registers and *bahis* shown in list marked (E) or which are proved in some other way to be in possession of the defendants, and she (the plaintiff) may be awarded documents and certificates relating to the property which is awarded to her by the Court, or some other order which the Court deems proper for protection of her (plaintiff's) rights and to do justice may be passed; according to s. 7, cl. IV, the value of this relief is fixed at Rs. 1,00,000. (c) She may be awarded possession of the houses shown in list marked (A) and valued at about Rs. 30,000. The buildings mentioned at No. 8 of the list are in possession of defendants Nos. 3 to 5, as stated in para 14, consequently they have been made defendants. (d) She may be awarded possession as manager of the property entered in list marked (C) valued at Rs. 10,200-10-0 an account of the income thereof may be prepared and the amount realized by defendants Nos. 1 and 2 may be awarded. (e) Any other orders that may be necessary for grant of the above relief may be passed or any other relief to which the plaintiff may be found entitled under the circumstances of the case and according to law and justice may be granted and the defendants may be ordered to pay the costs of this case. (B) Every suit involving a claim to account of the general partnership property and its share in the same and its profits is governed by the said art. 106. (C) Where a suit relating to the general account of a partnership business is barred by this

Partnership - continued.**—1.—General—continued.**

article, it is equally barred in respect of the assets of the business, acquired within three years of institution. 3. Even in the absence of plea of limitation by defendant, both the first and appellate Courts are bound to see *suo moto* whether the claim, as laid down in the plaint, is barred by limitation in whole or in part. 4. Where, in a previous suit brought by a widow's husband's brothers for recovery of joint debt, the widow was impleaded under s. 32 of the Civ. Pro. Code, as co-plaintiff and, on an issue specially raised, it has been finally decided that she is entitled to the share to which her husband would have got, if alive, the widow is also entitled to get share in the rest of the property, and the question of widow's right therein becomes *res judicata* in a subsequent suit between the widow and her husband's brothers as regards that property, provided that all the other ingredients of the rule of *res judicata* are not wanting. 5. As the question of *res judicata* involves a substantive and real right within the meaning of s. 6 of Act X of 1897, its decision is to be governed by the provisions of the Civ. Pro. Code in force at the time of instituting the suit, although it has been repealed by another Civ. Pro. Code, before the appeal is decided. But the principle as to the competency of the appellate Court is confined to the ordinary Courts established in this Province and does not apply where, having regard to the value of the two suits, one of them is appealable to their Lordships of the Privy Council and the other is not. 6. The Civil Court is not debarred under s. 77 (3) (k) of the Punjab Tenancy Act (XVII of 1877), from taking cognizance of that portion of the claim which relates to the share in profits of agricultural land entered in the books as part and parcel of the partnership property. 7. Among non-agricultural *khatris* residing in towns, brothers are presumed to be members of a joint family. But where one of them becomes separate and upon such separation shares of others are fixed, there is virtually a separation of all, and without proving that rest of the members agreed to remain united there is no presumption of re-union. 8. According to the text of Vrihaspati (Mitaksbara, Ch. 11, s. 9) a re-union in estate, properly so-called, can only take place between persons who were parties to the original partition. 9. A Hindu has full power to dispose of, as he likes, the acquired property. **MUSSAMMAT NEHAL DEVI v. KISHORE CHAND, 142 P.W.R. 1910=97 P.R. 1910=8 Ind. Cas. 999.**

(4 & 5)—*Production of documents*.—One partner represents others.—A partner of a firm represents the other partners, for the purpose of production of documents. **Haji Jakaria v. Haji Casim, 1 B. 496.**

(6)—*Suit by surviving partners*.—Debt due to partnership—Whether representatives of deceased partner necessary parties. The representatives of a deceased partner are not necessary

Partnership—continued.**—1.—General—continued.**

parties to a suit for recovery of a debt which accrues due to the partnership in the lifetime of the deceased. *K. V. P. L. PERIANEN CHETTY v. ARMUGA PATHER*, 4 L.B.R. 99. (18 C. 86, Diss.; 17 M. 108, 20 M. 232, 19 B. 338, F.)

(7)—*Parties—Partnership firm—Debt due to—Representatives of a deceased partner—Not necessary parties—Contract Act, s. 45—Application of.*—Money was advanced to the defendant by a partnership firm consisting of B and H. The only surviving member of the partnership at the date of suit was one M. He, together with the representatives of B, brought this suit for recovery of the money. Held that the representatives of a deceased partner were not necessary parties to a suit for recovery of a debt, which accrued due during the lifetime of the deceased partner. Held further that s. 45, Contract Act, does not apply to a suit for recovery of a debt due to a partnership firm. *UGAR SEN v. LAKHMI CHAND*, 7 A.L.J. 759 = 6 Ind. Cas. 840 = 32 A. 638.

(8)—*Practice—Parties—Suit on a pro-note in favour of firm—Joinder of partners at the time of contracting the obligation—Necessity—Subsequent retirement of a partner—Effect—Negotiable instrument—Oral assignment—Invalidity—Ss. 130, 137, Transfer of Property Act.*—The proper parties to a suit on a pro-note executed in favour of a firm are the members of the firm when the obligation was contracted, and the fact that one of them has retired makes no difference and he is still a proper party to join in the suit, just as a fresh partner who is brought in would not be a proper party. Even if such actionable claims as a negotiable instrument ought to be considered as capable of transfer otherwise than by methods recognised by mercantile law, it can only be by treating them as actionable claims within the meaning of s. 130, Transfer of Property Act, and ignoring their character as mercantile documents, and their transfer can be effected only by an instrument in writing signed by the transferor. S. 137 of the Act does not render oral transfer of such documents valid. *R.M.A.R. RAMAN CHETTY v. P. NAGARATHNA NAICKER*, 11 M.L.T. 246 = 15 Ind. Cas. 380. (17 M.L.J. 393, F.)

(9)—*Suit between partners—Decree in favour of one partner against a debtor of the firm—Debtor not party to suit—Right of debtor to show that the sum is not due.*—In a suit among partners, a decree was passed in favour of one of them for a certain amount as being due from a person who is not a partner. This latter person was not given an opportunity to show that such an amount was not due by him. Held that he had the right of showing that the sum was not so due. *SHEIK MIRAN SAIB v. THE COMMERCIAL BANK OF INDIA, LTD.*, 8 M.L.T. 344 = 8 Ind. Cas. 490.

(10)—*Presentation of plaint by managing member of the partnership—Non-joinder of necessary parties—Effect—S. 263, Contract Act*

Partnership—continued.**—1.—General—continued.**

—*Civ. Pro. Code, s. 27.*—Though, under s. 263, Contract Act, the rights and obligations of partners continue, after the dissolution of the partnership, in all things necessary for the winding up of the business, yet it is only agents of a special kind that are recognised by the Civ. Pro. Code, as having authority to make an appearance, or application, or do an act, on behalf of party to the suit. No ordinary agent is recognised, nor has a partner, as such, any power to act for, or represent, a co-partner, except for the purpose of accepting service of summons (s. 74, Civ. Pro. Code). Hence, a plaint, which purports to be in the individual names of the partners, but is signed and verified by one of them as managing partner, and which is presented by a pleader having a vakalatnama from and after the dissolution of the partnership, is not duly filed or presented. Such a presentation is not a mere irregularity which can be cured by an amendment. S. 27, Civ. Pro. Code, only applies where a suit has been instituted in the name of the wrong person as plaintiff, or, where it is doubtful whether it has been instituted in the name of the right plaintiff, and it is not intended to cover the case of the non-joinder of a necessary party. Where a claim is time-barred at the time the necessary party expresses his willingness to be joined as a party, or comes forward to repudiate his interest in the claim, the suit must be dismissed. *RELUMAL DEVLARAM v. CHELLARAM JODHARAM*, 1 S.L.R. 191.

(11)—*Practice—Parties—Suit by a partnership—Non-joinder of some partners—Effect.*—A suit by one partner alone on behalf of a firm is bad for non-joinder of the other partners. *SUBRAYA KINI v. A. RAMACHANDRA PAI*, 7 M.L.T. 432 = 6 Ind. Cas. 438.

(12)—*Suit for dissolution of—Necessary parties—Party, death of—Substitution of heirs, not made in time—Abatement of suit.*—A suit for dissolution and winding-up of a partnership involves the determination of the plaintiff's share and the taking of accounts, and the plaintiff's share could not be determined definitely without making all the parties interested in the partnership, parties to the suit, and the accounts could not be properly taken in the absence of any of them. If, on the death of one of the defendants, his heirs are not made parties to the suit by substitution in time, the whole suit is to be dismissed, even where no relief against the deceased defendant or his heirs was asked for specifically. *SRINATH PAL v. HARI CHARN PAL*, 7 C.L.J. 266. (14 C. 791, R. & F.)

(13)—*Suit by or against firm, maintainability of—Partners—Recognised agent of party not a party to suit—Court's error in entering names of parties to proceedings.*—A firm cannot sue or be sued: only the partners can sue or be sued. The recognised agent of a party is not, as such, a party himself. In proceedings, generally, and in judgments and decrees especially, Courts

Partnership—continued.**—1.—General—continued.**

must take care to enter the names of parties correctly, as any error or neglect of such points may lead to needless confusion and expense and delay to suitors. *MUTU RAMAN CHETTI v. MYAT NYEIN*, 4 L.B.R. 23.

(14)—*Suit for money by one partner against another.*—Where a partner sued a customer, for recovery of price of jewellery sold and, also, made his co-partner a defendant praying that, if the latter had received the money, the decree might be passed against him: *Held*, that one partner cannot sue another in this wise; that, if one partner thinks that his co-partner has not been treating him properly, his proper remedy is to apply for the dissolution of the partnership and to have its accounts taken. *BHUT NATH DAS MALAKAR v. GIRISH CHANDRA BANERJEE*, 11 C.W.N. 311.

(15)—*Partnership carried on by two persons—Partnership debt, pro-note executed by one partner for—Cause of action—Effect of note on original liability.*—If two partners are indebted on the partnership account and one of them alone gives a promissory note for the debt and it is not alleged or shown that the creditor intended to substitute the liability of the one giving the promissory note for the joint liability of the two, the partner who has not joined in the promissory note will continue liable only on the original cause of action, and he cannot be sued upon the promissory note. *DARGA-VARPU SARRAPU v. RAMPRATAPU*, 25 M. 580. [R., 27 M. 540.]

(16)—*Maintainability of suit by one partner on pro-note given him by another.*—The proper remedy of one partner against the other members of the firm is ordinarily a suit for a dissolution of partnership, and one partner is not entitled to maintain a suit, other than a suit for dissolution against, the other members of the firm in respect of the partnership transactions, on the ground that the plaintiff as a member of the firm would be a necessary defendant and that a man cannot maintain a suit against himself. (25 B. 606, *Expl.*) But this rule does not bar a suit by one member of the firm, upon a promissory note given him by two other members of the firm, in respect of an advance made by him to the firm and interest thereon. *VALLAMKONDU SUBBIAH v. MALUPEDDI VENKATRAMIAH*, 4 M.L.T. 195 = 18 M. L.J. 347 = 31 M. 343. (23 M. 597, R.)

(17)—*Wrongful attachment of partnership property—Right of individual members to sue for damages.*—Any member of a firm, whose property has been wrongfully attached by a Court-bailiff, must necessarily suffer some damage to his business reputation, and distress of mind. He has, therefore, a right to maintain a suit for damages against the attaching creditor. *MAGHANMAL ROCHIRAM v. TIKAMDAS HOTCHAND*, 2 S.L.R. 26.

(18)—*Fraud by co-partner—Hatchitta—Material alteration by a partner to set up exclusive title to debt—Suit on behalf of firm—*

Partnership - continued.**—1.—General—continued.**

Maintainability—Claim, if to be disallowed to the extent of the interest of the fraudulent partner—Apportionment, before dissolution.—A fraud committed by a partner while acting on his own separate account and not as agent for the firm is not imputable to the firm although he had not been connected with the firm he might not have been in a position to commit the fraud. Where one of the partners of a firm sued to recover a debt which was really due to the firm on the allegation that it was due to himself and not to the firm and his suit was dismissed on the ground that he had materially altered the *hatchitta* executed by the debtor by striking out the other partner's name without the debtor's consent. *Held*, that the other partners were not precluded from suing for the debt on behalf of the firm, making the first-mentioned partner a defendant in the suit. (33 C. 812, D.) That it was not open to the Court in such a suit to give them a decree for such portion only of the claim as represented their share in the firm. Questions regarding the share of the debt to be allocated to the partners *inter se* can only be decided when the accounts of the partnership are taken. *MUNSHI BASIRUD-DIN MULLICK v. SURJA KUMAR NAIK*, 12 C. W.N. 716.

(19)—*Partnership—Conversion of partnership property—Right of creditors.*—*Held*, that when partners transfer partnership property to one or more members of the firm, the transfer is valid and binding on the firm and its creditors if it is made *bona fide*. *HAZARI MAL v. NARSINGH DAS*, P L.R. 1900, p. 477.

(20)—*Deceased partner—Surviving partner's right to bind representatives of deceased.*—A surviving partner cannot bind the representatives of a deceased partner unless he is authorized to do so. The fact that the partnership is being wound up is not of itself sufficient to authorize a surviving partner to bind the representatives of a deceased partner by acknowledging a debt. *RAJAGOPALA PILLAI v. KRISHNASAMI CHETTI*, 8 M.L.J. 261.

(21)—*Hindu joint family trading firm—Contract by managing member.*—Where the managing member of a joint Hindu family which was carrying on a trading business, entered into a partnership with another firm, and the evidence showed it was on behalf of the family firm, *held* that not only the contracting member but the whole firm was bound by the contract of partnership. *AJUDHIA PRASAD v. LALMAN*, 25 A 38 = A.W.N. 1902, 178.

(22)—*Pro-note executed by member of partnership firm, not as agent of partnership—Liability of other partners.*—Where a member of a partnership firm executed a promissory note to a stranger and signed his own name on the promissory note and neither signed the name of the firm nor described himself as a mere agent, the other partners are not liable to be sued on the promissory note, though the promissory

Partnership—continued.—1.—**General**—continued.

note was executed for partnership purposes. It is a settled rule of law that on the one hand, the agent is liable as principal where he does not sign a promissory note as a mere agent, whilst on the other, his other partners are not liable unless the name of the firm is signed. No body is liable upon a promissory note unless his name or the name of some partnership or body of persons, of which he is one, appears on the note. Where the pro-note was executed for partnership purposes, a suit on the pro-note could be brought against the partnership upon the consideration for the promissory note. *BASIVI REDDI v. TAMMANNA*, 4 M L J. 76.

(23)—*Single partner's power to mortgage immoveable property of the firm — English and Indian Law — Mahomedans living as joint family — S. 251, Contract Act.*—The English doctrine that a single partner cannot mortgage the immoveable property of the firm appears to be due to the technical rule of English Law that an agent cannot execute a deed on behalf of his principal unless so authorised by deed. In India one partner can effect a legal as well as an equitable mortgage of partnership property (5 C. 792, F.; 4 A. 437, Diss.). Power to borrow is incidental to power to trade and power to pledge the business assets is incidental to power to borrow. Where, therefore, some Mahomedan brothers entered into a partnership in the nature of a joint family business, the eldest brother has power as manager to mortgage the business, and the express mention of a power to mortgage certain properties in a later deed would not restrict the power to sell or mortgage other properties, which may be inferred from the power to borrow given by a prior document. S. 251, Contract Act, does not apply in the absence of any agreement between the parties restricting the partner from executing a mortgage. *T.P. ASAN KANI RAVUTHAR v. ARU ARU, SOMASUNDARAM CHETTIAR*, 4 M.L.T. 66 = 31 M. 206.

(24)—*Partnership—Right of creditor of a partner to attach assets of partnership.*—When under a deed of partnership one of the partners is to supply the capital and to realize the assets of the partnership, and distribute profits among the partners to which they might be entitled on settlement of accounts, a creditor of the other partners is not entitled to recover debts due by them to him by attachment of any of the assets of the partnership, e.g., a cheque issued in the names of other partners for work undertaken and done in pursuance of the partnership deed. *DEWAN DAS v. SEWA RAM*. 158 P.L. R. 1903. (14 C. 384, 20 C. 693, R.)

(25)—*Practice—Pleading—Partnership—Suit by partners on a joint claim—Counter-claim against individual partners, whether could be set up—Court's discretion to refuse—Test—Madras High Court rules (Original side), 1902, r. 47.*—When two or more plaintiffs sue for a joint claim, the defendant may set up, as

Partnership—continued.—1.—**General**—continued.

against each individual plaintiff, separate counter-claims. In order to avoid multiplicity of suits, questions of this character should be disposed of in one action, unless any inconvenience would arise by their being so disposed of. If any inconvenience would arise, the Court has a discretion, under r. 47, Madras High Court Rules, 1902, to decline to allow the counter-claims to be set up. *R.M.M. RAMANADAN CHETTY & CO. v. K M. ABDUL KARIM SAHIB*, 8 M.L.T. 73 = 7 Ind. Cas. 267.

(26)—*Dissolution—Civ. Pro. Code, ss. 17, 215 and 215 A—Amendment of plaint—Jurisdiction.*—K and others sued J. and others for recovery of a debt alleged to have been advanced for working a cotton and flour mill. The plea was that, under an agreement with their father, the plaintiffs became partners in the factory to work which they advanced capital, their share being fixed at one-fourth of the profit and losses, and the rate of interest on their advance at 6 per cent. per annum. The Lower Court on this plea held that the plaintiffs were not entitled to sue as for recovery of a loan, but that their proper remedy was to sue for an account of the partnership. It ordered amendment of the plaint accordingly, and, after inquiry, decreed the full amount with interest. *Held*, (1) that the amendment of the plaint, as being approved of by the Chief Court in appeal from that order, could not further be discussed; (2) that s. 215-A, Civ. Pro. Code, is imperative and a preliminary decree for dissolution of partnership must have been passed before the accounts could be gone into. Suit remanded on this point (27 A. 374, F.)—(3) that the suit being one arising out of contract, the agreement of partnership being written and executed at Ferozepur, and the defendants being British subjects of the Ludhiana District, subject to the law of British India, it did not matter that the factory, which was the subject matter of the partnership, was situated in a foreign territory, and, hence, that the Ferozepur Court had jurisdiction to try the suit. (11 W.R. 141, F.) (5) Methods that may be applied against the party bound by the decree to furnish accounts pointed out and held also that the party may be treated as in default, if, after being allowed suitable opportunities to furnish accounts, the party fails to do so. *JAGNANDAN SINGH v. KISHORE CHAND*, 100 P.W.R. 1908.

(27)—*Dormant partner — Shikmi Sharik—Notice of dissolution on retirement of dormant partner whether necessary—His liability—Contract Act, ss. 249 and 264—Evidence Act, s. 105.*—The phrase *Shikmi Sharik*, by its etymological sense, means a partner whose name is not disclosed, that is, a dormant partner. Therefore, on the retirement of a *Shikmi Sharik*, no notice of the dissolution of the partnership need be given. But he is liable to all the claims on the partnership till the date of his retirement. The onus of proving that he has retired from the partnership at a specific period

Partnership—continued.**—1.—General—continued.**

lies on him, on general principles as well as under s. 105, Evidence Act. *HASHMAT ALI v. LACHMI NARAIN*, 75 P.R. 1908 = 122 P.W.R. 1908.

(28)—*Debt due from the firm—Liability of assignees of a partner on admission—Contract Act*, ss. 140, 251.—Where the plaintiff paid sums on a security bond, executed by him on behalf of a partnership firm, the assignees of a partner admitted into the partnership by the other partners would also be liable to re-imburse the plaintiff, although the creditor had not absolved the assignor or accepted the assignment. It is not open to a partner in a firm, who is himself alone under a certain liability to an outsider, to engage on behalf of the whole firm that all its members shall be subject to that liability, unless he obtains authority from his partners so to engage. *NIHARKU v. MADHO*, 107 P.R. 1907. (4 A. 437, R.)

(29)—*Partnership—Debtor—Payment to one partner, whether payment against all—Setting off amount due from one partner to debtor against amount due by latter to firm, whether binding on other partners.*—Although a payment made by the debtor of a firm to one of the partners is a good payment against all, yet one partner cannot discharge a separate debt of his own by setting it off against a debt due to his firm, to the prejudice of his co-partners; that is, a payment by a debtor to one of the partners cannot be treated as a good payment binding upon the firm, when no money is paid by the debtor, and all that happens is that the partner sets off the amount due from him to the debtor against the amount due by the latter to the firm. But if the partner has already been made liable by his other partners for the amount set-off by him against the partnership debt due from the debtor, the latter will be entitled to a credit. *BAIKUNTA NATH v. HARA LAL*, 9 Ind. Cas. 116 = 13 C.L.J. 234. (19 W.R. 710, 19 M.L.J. 221, 5 M.L.T. 209, 1 Ind. Cas. 200, Rel. on.)

(30)—*Company's paper endorsed in blank—Partnership transaction—Assets—Right to share.*—Partnership property partly consisting of Company's paper was endorsed in blank by the deceased son of the testator shortly before his death, and handed over by him to his brothers. Held, that it was a mere ordinary partnership transaction, for the purpose of carrying on the business, and that they formed part of the partnership assets, in which the deceased son was entitled to share after the expenses of the partnership were discharged. *BISSONATH CHUNDER v. SREEMUTTY BAMA-SOONDERY DOSSEE*, 12 M.I.A. 41.

(31)—*Contract Act*, s. 253—*Distribution of assets—Contribution to losses.*—Under s. 253 of the Contract Act, the share of each partner in the partnership property is the value of his original contribution, and partners must contribute equally to losses sustained by the partnership. In the absence of a contract to

Partnership—continued.**—1.—General—continued.**

the contrary, the share of loss or profit is ascertained by dividing the total loss or profit by the number of partners. The rule laid down is, that, if the assets of the partnership will not suffice to pay the amount of capital to be credited to each partner, the deficiency is a loss of capital, and is to be borne or made good by the partners. *NAM RAJ v. GOKAL CHAND*, 40 P.R. 1908. (26 C. 281, R.)

(32)—*Settled accounts—Error—Re-opening—Surcharge and falsification—General words of release—What passes.*—B. and S, partners, had the partnership accounts strictly adjusted, and Rs. 39,465-7-0 was found due to B. By a deed of assignment, B, in consideration of Rs. 34,000 assigned and released his share in the firm to S. By common mistake, Government promissory notes for Rs. 7,000 were omitted from the accounts. On discovery of the mistake, B. sued for a share of the notes. Held, either the whole account may be re-opened, or leave may be given to B. to surcharge and falsify. The latter is the more proper course on the facts of this case (5 M.I.A. 372, R.). General words of release in a deed can only operate to pass what the parties had in contemplation, and not something with which they had no intention of dealing. *BANEY MADHUB MULLICK v. SUBAL CHUNDER LAW*, 11 C.W.N. 776.

(33)—*Partnership accounts—Dissolution of firm—Deceased partner—Right of representatives to have an account—Dissolution does not affect liability of firm for subsisting contracts—Duty of surviving partners to take steps for completion of unperformed engagements—One member not competent to refer to arbitration unless authorised by the other members—Production of account books—Presumption if books not produced.*—The right to call for an account upon the dissolution of a firm is mutual, and each partner is entitled to an account from his co-partners of their partnership dealings and transactions, unless he has legally waived or parted with such right. The personal representatives of a deceased partner are entitled to an account from the surviving partners. As the surviving partner is bound to account to the representatives of the deceased partners, they are bound to account when the deceased partner had the management or control of the assets of the firm. Before the accounts are taken, therefore, it is necessary to determine the precise extent to which each partner took part in the management of the firm. The dissolution of a partnership does not affect the liability of the firm for subsisting contracts, and it is, therefore, the duty of the surviving partners to take all steps necessary for the completion of their unperformed engagements. It is incompetent to one of the members of a partnership to bind the firm by a submission to arbitration, unless there be some special delegation of authority to that effect, either formal or informal. It is the duty of the surviving partners of a firm to produce the account books, so that the accounts may be

Partnership—continued.

—1.—General—continued.

properly adjusted; and if the accounting party does not produce them, or destroys them before the matters have been finally adjusted, the Court will presume everything, most unfavourable to him, consistent with established facts. **HAZI MOHAMMAD AKBAR v. RAI DWARKA NATH SARKAR BAHADUR**, 6 Ind. Cas. 63 = 11 C.L.J. 658 = 14 C.W.N. 1106.

(34)—*Expulsion of one member by others, if causes dissolution—Contract Act (IX of 1872), s. 253 (7)—Suit for account or dissolution by excluded partner—Limitation—Limitation Act (XV of 1877), sch. II, arts. 106 and 120.*—Under the Indian law, there is no dissolution of partnership, when one partner expels the other. A suit by the expelled partner for account or for dissolution of partnership and a share of the profits is not governed by art. 106, but by art. 120 of sch. II of the Limitation Act, and is within time, if brought within six years of the date of expulsion. Under the Indian law, a partner can be expelled only by an order of the Court. **DWARKA DAS KARNANI v. CHUNI LAL DAGA**, 12 C.W.N. 455.

(35)—*Partnership—Suit against manager for accounts without asking dissolution of partnership.*—It is a sound general principle that one partner should not be allowed to sue a co-partner for an account without, at the same time, claiming a final settlement of all questions between them, and a dissolution of partnership. But the general rule is clearly subject to exceptions. Where the parties were partners in respect of certain contracts, and in addition to being a partner, the defendant was also manager, receiving remuneration for his services as such, and the plaintiffs sued him to have an account rendered of his stewardship, alleging that he had not acted straightforwardly in respect of his management of the partnership affairs, held, that the suit was maintainable, and it was not necessary for the plaintiffs to have prayed for a dissolution of partnership. **BABU AZIM KHAN v. MUHAMMAD RIAZ-UD-DIN**, 4 P.L.R. 1902.

(36)—*Contract Act, s. 253 (10)—Partnership business carried on after death of partner on the assumption of representative continuing as partner—Widow of deceased, a purdanashin lady, not taking any part in business and not examining accounts—Accountability of working partners—Accounts to commence from beginning of partnership, if accounts not settled—Partnership money, diversion of—Accounting with interest or profits—Remuneration to working partner—Balancing of accounts, effect of.*—Where, on the death of a partner, the business was carried on on the assumption that his widow was a partner.—Held that the conduct of the parties showed that there must have been a contract between the original parties that the partnership would not be dissolved by the death of a partner within the meaning of cl. (10) of s. 253 of the Contract Act,

C. VII—74

Partnership—continued.

—1.—General—continued.

but should be continued with the representative of the deceased as a partner. The mere balancing of account in a book of account does not of itself constitute an account stated, much less does it constitute an account settled which the parties cannot re-open. In a general account of partnership dealings, the time from which the account is to begin is the commencement of the partnership, unless some account has since that time been settled by the partners, in which case the last settled account will be the point of departure. Where one of the partners, having the right to examine the partnership accounts, did not for a long time exercise the right; held, that, unless fraud was established, purchases and sales in respect of the business by the working partners should not be challenged, but they were bound to account for sums withdrawn from the partnership business and applied for purposes unconnected therewith, with the profits realized therefrom, or with interest at the option of the partner demanding the account. Where one of the partners wilfully leaves the others to carry on the partnership business unaided, the Court may, upon dissolution, decree an allowance in favour of the partner who had carried on the business alone. **GOKUL KRISHNA DAS v. SAHIMUKHI**, 16 C.W.N. 299 = 15 C.L.J. 204 = 13 Ind. Cas. 23.

(37)—*Criminal breach of trust—Dishonest conversion by partner—Liability of partner to account for partnership money.*—In a partnership, it is open to a partner to spend the money he receives and to account for it in dealing with the partnership; and such a partner is plainly entitled to be called upon for an account of the expenditure of the money which he has received. In a case where it was not satisfactorily made out that this was not done, and it could not be made out in the absence of a proper demand for an account, it was held that no dishonest conversion could be found, which would justify the conviction of the partner under s. 406, Penal Code. **DEBI PRASAD BHAGAT v. NAGAR MULL**, 35 C. 1108.

(38)—*Dissolution—Partner's remedy for general account against co-partner barred—Co-partner recovering a particular item of partnership assets—Right to recover share therein—Maintainability of suit.*—A partner, whose remedy against his co-partner for a general account is barred, can recover by suit his share of a particular item of partnership assets which the co-partner received after dissolution of the partnership. **TIRUVENGADA MUDALIAR v. S. SADASIYA MUDALIAR**, 8 M.L.T. 231 = 7 Ind. Cas. 811 = 20 M.L.J. 987.

(39)—*Lease—Agreement by one partner on behalf of firm—Suit by lessor—Proper parties—Right to sue other partners for use and occupation.*—The fact that a partner of a firm took a lease of premises in his own name on behalf of the partnership and with the assent of his partners, will not entitle the lessor to sue the other

Partnership—continued.

—1.—General—continued.

partners directly for the rent reserved by the lease. A lease is not a mere contract; it is a conveyance, and effects a transfer of property. The lessee can only be the person named in the lease. If he becomes a lessee on behalf of some one else—as he may do—the law regards him as a trustee for that other person and does not consider that other person the lessee, for the simple reason that there is no demise or conveyance to him. It is true that a lease usually contains a covenant or agreement to pay rent and that such agreement may be made on behalf of a person different from the one named in the instrument, provided it is not under seal. But so far as the lessor is concerned, the only person directly liable to be sued on such a covenant is the person to whom the demise is made. The lessor in the above case cannot make the other partners liable for use and occupation of the premises occupied by them. A claim for use and occupation can arise only when immoveable property is occupied by the defendants by the permission of the plaintiff. The lessor, having transferred or demised the land to one partner cannot have, during the continuance of the lease, any power to suffer or permit any one to occupy the same. Therefore, the foundation of a claim for use and occupation was necessarily wanting in the case. *RAGOONATH DAS GOPAL DAS v. MORARJI JUTHA*, 16 B. 568. [Diss., 19 M. 471.]

Suit by one partner against another for accounts—No prayer for dissolution of—Maintainability—See ACCOUNTS—SUIT FOR ACCOUNTS. A.W.N. 1887, 67.

Persons holding license for sale of opium—Admitting stranger as partner—Legality—Suit for dissolution of—Maintainability—See ACT I OF 1878, ss. 4, 5, 9, 11, 9 M.L.T. 459=21 M.L.J. 425=1 M.W.N. 1911, 371.

See BOM. ACT III OF 1875, s. 7, 20 B. 668.

Agreement of partnership between licensee to vend toddy and licensee to vend arrack—Rule prohibiting such agreement—Legality of agreement—See MAD. ACT I OF 1886, 24 M. 401.

Suit for dissolution of—Order determining a certain defendant, a partner—See APPEAL—DECREES AND EXECUTION OF DECREES, 23 C. 406.

Value of suit—Suit for dissolution of partnership and rendition of accounts—Suits Valuation Act, 1887, ss. 8, 11—Cause of appeal—Punjab Courts Act, 1884, s. 39—See APPEAL—FORUM OF APPEAL, 58 P.R. 1902.

See ARBITRATION—PRIVATE ARBITRATION, 8 A. 340=A.W.N. 1886, 107.

See ASSIGNMENT, 77 P.L.R. 1903=23 P R 1903.

Decree against one partner—Joint property of firm if liable—See ATTACHMENT—SUBJECTS OF ATTACHMENT, 4 B. 229, Note.

Partnership—continued.

—1.—General—continued.

Debt, attachment of—See ATTACHMENT—SUBJECTS OF ATTACHMENT, 14 C. 384.

See ATTACHMENT—SUBJECTS OF ATTACHMENT, 4 B. 227, Note 1, 20 C. 693, 5 B.L.R. 386.

See AWARD, 3 C.L.R. 357.

Agreement as to shares in—See BURDEN OF PROOF—MISCELLANEOUS, 26 C. 281.

Partnership entered into at one place—Business carried on at another—Suit brought in a third place—Return of plaint, for presentation to proper Court—See CIV. PRO. CODE, 1882, s. 20, 5 A.L.J. 88=A.W.N. 1908, 46.

See CIV. PRO. CODE, 1882, sch. IV, forms 113, 132, 133, A.W.N. 1883, 220.

Suit for winding up of—Order for taking accounts—High Court's order on remand for fresh taking of accounts—Effect—See CIV. PRO. CODE, 1908, s. 109, cl. (1), 7 Ind. Cas. 622.

Suit against firm—Partners not on record—Execution of decree—See CIV. PRO. CODE, 1908, O. I, r. 8, O. XXI, r. 50, 1911, 2 M.W.N. 534.

Suit—Defendant failing to produce accounts, as required by Court—Power of Court—See CIV. PRO. CODE, 1908, O. XVI, r. 20, 4 M.H.C. 142.

Dissolution—Application for winding up—Return of plaint—Jurisdiction—See CIV. PRO. CODE, 1908, O. XX, r. 15, A.W.N. 1883, 205.

Property of partnership cannot be attached under certain circumstances—See CIV. PRO. CODE, 1908, O. XXXVIII, r. 5, 9 Bom. L.R. 540.

Director's—Acting as solicitor for Company—Remuneration for work done—See COMPANY—POWERS AND LIABILITIES OF DIRECTORS, 6 B.L.R. 278.

Death of partner right to wind up partnership concern—See COMPANY—WINDING UP OF COMPANY, 1 Bom. L.R. 42.

Suit to recover debt due to a—under a contract with one partner only—Right of such partner to sue by himself—See CONTRACT ACT, 1872, ss. 44, 45, 127 P.R. 1906=10 P.W.R. 1907=58 P.L.R. 1907.

Suit for recovery of debt accrued due to partnership in lifetime of deceased partner—Representatives of deceased partner, not necessary parties to suit—See CONTRACT ACT, 1872, s. 45, 17 B. 6.

Suit to recover debt due to partnership, representatives of deceased partner, not necessary parties to—Civ. Pro. Code, s. 26—See CONTRACT ACT, 1872, ss. 45, 46, 9 A. 486=A.W.N. 1887, 133.

One of the partners signing plaint on behalf of the firm—Suit for winding up—Effect—See CONTRACT ACT, 1872, s. 73, 9 Ind. Cas. 470.

Partnership—continued.—1.—**General**—continued.

Position of partner—Partnership suit—Defendant entitled to get what is due to him without payment of Court fee—See CONTRACT ACT, 1872, ss. 182, 239, 240, 163 P.L.R. 1911.

Liability of the heir of a deceased partner—See CONTRACT ACT, 1872, s. 261, 8 Bom. L.R. 8.

Liability, acknowledgment of—A partner signing an acknowledgment of liability after dissolution of partnership—See CONTRACT ACT, 1872, s. 264, 3 Bom. L.R. 484=26 B. 42.

Partnership debt—Suit for contribution—Burden of proof—See CONTRIBUTION, SUIT FOR—GENERAL, 11 M.L.T. 188=M.W.N. 1912, 384.

Suit against partnership for debt—Some partners denying debt—Costs as between defendants—See COSTS—SPECIAL CASES, 6 C. 811.

Suit for dissolution of—Appeal—Court-fee—COURT FEES ACT, 1870, s. 7, sch. II, cls. 3, 4, 7 A.L.J. 546=32 A. 517=6 Ind. Cas. 832.

See COURT FEES ACT, 1870, s. 7, cl. 4 (f), 7 B. 125.

Suit for breach of contract to admit into partnership—Partnership for specified time—See DAMAGES—MEASURE AND ASSESSMENT, 2 Agra 351.

Dissolved—Decree for account, form of—Taking of accounts—Necessity for appointment of receiver—See DECREE—DECREE, FORM OF, 20 M. 313.

See DEED—CONSTRUCTION OF DEEDS, 58 P.L.R. 1904.

See EVIDENCE—ACCOUNTS AND ACCOUNT BOOKS, 4 B.L.R. P.C. 31=13 W.R. 36=13 M. I.A. 365.

See EVIDENCE—PRACTICE, 5 W.R. 53, P.C.=1 M I.A. 420

Suits—Production of Income-tax returns—See EVIDENCE—MISCELLANEOUS, 26 C. 281.

Decree dissolving partnership and ordering defendant to pay plaintiff a definite sum of money—Death of defendant before execution—Right of plaintiff to execute against widow and undivided brother of defendant—Civ. Pro. Code, 1882, s. 234—See EXECUTION OF DECREE—MISCELLANEOUS, 27 M. 106.

Application to set aside *ex parte* decree—Applicant sued as partner but not served personally—See EX PARTE-DECREE, 8 Ind. Cas. 448.

See FOREIGN COURT—JUDGMENT OF, 20 M. 112=7 M.L.J. 76.

Joint Hindu family—Suit by one member for debt due to firm—See HINDU LAW—JOINT FAMILY, 8 A. 264=A.W.N. 1886, 89.

Partnership, what constitutes—See HINDU LAW—JOINT FAMILY, 5 B. 38.

Partnership—continued.—1.—**General**—continued.

Joint Hindu family carrying on trade in partnership—Suit by members—See HINDU LAW—JOINT FAMILY, 6 C. 815=8 C.L.R. 457.

Suit for dissolution and winding up of—Parties—See HINDU LAW—JOINT FAMILY, 7 M.L.T. 211=5 Ind. Cas. 362=20 M.L.J. 308=33 M. 423.

Trading partnership between a son and father to the exclusion of the other members of the joint family—See HINDU LAW—JOINT FAMILY, 2 S.L.R. 13.

Difference between co-parcenary and—Suit on contract by partners—Rules for joinder of parties—See HINDU LAW—JOINT FAMILY, 4 S.L.R. 2=7 Ind. Cas. 584.

Joint family, members of, starting new business—Presumption—See HINDU LAW—JOINT FAMILY, 3 C.W.N. 134.

Difference between joint family firm and ordinary partnership—See HINDU LAW—JOINT FAMILY, 4 S.L.R. 260.

See HINDU LAW—JOINT FAMILY, 59 P.R. 1893.

Dissolution of—Insolvency before term of partnership—Effect—See INSOLVENCY—GENERAL, 9 M.L.T. 147=8 Ind. Cas. 1067.

See INSOLVENCY—GENERAL, 1 Bom. L.R. 42.

Insolvency of trading—Trading partnership assigning all assets by mortgage, for present and future advances—Effect—See INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR, 19 C. 223=19 I.A. 15.

See JOINDER OF PARTIES, 140 P.R. 1889.

See JURISDICTION OF CIVIL COURTS, 7 A. 227, F.B.=A.W.N. 1885, 18, 1 Agra 226.

See JURISDICTION OF REVENUE COURTS, 80 P.R. 1904.

See LETTERS OF ADMINISTRATION, 3 C.W. N. 186=23 B. 549, P.C.

See LIMITATION ACT, 1908, s. 19, 2 Agra 370.

Reference to arbitration by partners of a dispute as to winding up, if an acknowledgment—See LIMITATION ACT, 1908, s. 19, 3 S.L.R. 53=2 Ind. Cas. 370.

One partner signing acknowledgment or making part payment—Effect upon liability of the firm—See LIMITATION ACT, 1908, s. 18, expl. II and s. 21, 9 M.L.T. 473.

Acknowledgment signed by one of several partners—See LIMITATION ACT, 1908, s. 21 cl. 2, 10 A. 418=A.W.N. 1888, 93.

Partnership—Acknowledgment given by one partner when binding on firm—See LIMITATION ACT, 1908, s. 21, cl. 2, 10 B. 358.

Partnership—continued.

—1.—General—continued.

See LIMITATION ACT, 1908, arts. 64, 116, 14 M. 465=1 M.L.J. 482.

Dealings by some members of a Mahomedan family—Liability of other members—Joint family—Partnership among heirs—See MAHOMEDAN LAW—GENERAL, 7 Ind. Cas. 108=8 M.L.T. 253.

See MAHOMEDAN LAW—MARRIAGE, U.B. R. 1902—1903, Vol. II, Mahomedan Law, p. 1.

No evidence as to terms of—Rights and liabilities of partners—See MAHOMEDAN LAW—WILL, 8 Ind. Cas. 431.

Liability of a partner for malicious prosecution by its managing partner—See MALICIOUS PROSECUTION, 5 Bom. L.R. 940=28 B. 226.

Implied authority of one of the partners to create mortgage—See MORTGAGE—REDEMPTION, 10 Ind. Cas. 776.

Pro-note executed and signed by only one partner—Liability of the other partners—See NEGOTIABLE INSTRUMENTS—PROMISSORY NOTES—FORM OF, 8 Ind. Cas. 851.

Dishonour of hundi after acceptance—Notice of dishonour—Omission to give notice—Burden of proving absence of damage consequent on omission to give notice—Partnership between drawer and drawee—Acceptor's liability barred by limitation—Drawer whether discharged—See NEGOTIABLE INSTRUMENTS ACT, 1881, s. 98 (c), 26 M. 239=12 M.L.J. 267.

Suit for accounts by partner against representative of deceased partner—Receiver of deceased partner's estate, whether necessary party—See PARTIES TO SUIT—GENERAL, 7 Ind. Cas. 75=12 C.L.J. 368.

Hindu family trade—One member alone suing—Non-joinder—See PARTIES TO SUIT—GENERAL, 18 M. 33=4 M.L.J. 283.

Trading partnership—Suit to recover partnership debt—Parties—Death of partner pending suit—Representative need not be added as party—See PARTIES TO SUIT—GENERAL, 20 A. 365=A.W.N. 1898, 73.

Partners—Refusal to join as plaintiffs—See PARTIES TO SUIT—GENERAL, 2 Ind. Jur. N.S. 203.

Suit against one partner for money due by firm, not bad for non-joinder—See PARTIES TO SUIT—GENERAL, 21 M. 256.

See PARTIES TO SUIT—GENERAL, 3 M.I. A. 175; Bourke O.C. 350, Cor. 90.

One alone of several surviving partners, whether can sue for firm's outstandings—See PARTIES TO SUIT—ADDING PARTIES TO SUIT, 14 A. 524=A.W.N. 1892, 104.

See PARTIES TO SUIT—MISCELLANEOUS, 10 B. 358.

Partnership—continued.

—1.—General—concluded.

Suit by partners—Plaint—Signature—Verification—See PLAINT—VERIFICATION AND SIGNATURE, 5 B.L.R. App. 89.

See POSSESSION—SUITS FOR, POSSESSION, L.B.R. 1893—1900, 398.

See PRE-EMPTION—RIGHT TO PRE-EMPT, 3 B.L.R. App. 142 (a).

Claim to recover ascertained sum found due on taking partnership accounts—Whether a Small Cause suit—See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 25, sch. II, art. 29, 195 P.L.R. 1911.

Partnership-deed entitling parties to a right to come into existence in future—Registration—See REGISTRATION ACT, 1908, s. 17, 89 P. R. 1908=145 P.W.R. 1908.

See REGISTRATION ACT, 1908, s. 17 (b), 30 C. 1016, P.C.=30 I.A. 230=7 C.W.N. 861=13 M.L.J. 329=5 Bom. L.R. 975.

See REGISTRATION ACT, 1908, ss. 17 AND 49, 17 B. 235.

See RES JUDICATA—ADJUDICATIONS, 22 C. 692.

Power of a partner to change the joint liability of his co-partner into a joint and several liability—See RES JUDICATA—MISCELLANEOUS, 1 Bom. L.R. 534=24 B. 77.

Partnership holding lease—Acquisition of occupancy rights—See RIGHTS OF OCCUPANCY—ACQUISITION OF RIGHT, 11 C. 501.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 35 P.R. 1886.

Agreement to share in profits and loss in consideration of amount advanced—Agreement—Amount of stamp duty—See STAMP ACT, 1860, sch. A, cl. 20, 1 M.H.C. 226.

Transfer of lease—Transfer of share of a—See STAMP ACT, 1879, art. 21, 12 C. 383.

Jurisdiction of Court—See St. 11 and 12 Vic., c. 21, s. 5, 10 Ind. Cas. 786.

Service on co-partner for—See SUMMONS, 1 Hyde 97.

See SUMMONS, 11 B.L.R. App. 26, 7 B.L.R. App. 58.

Suit by partners—A partner has right to sue for the name of the firm when no stipulation about good will is made at the time of the dissolution of partnership—See TRADE NAME, 2 Bom. L.R. 1026.

Surviving partner—Rights and liabilities of—See TRUSTS ACT, 1882, ss. 88, 95 (a) and 96, 9 Bom. L.R. 606.

—2.—Dissolution of Partnership.

See LIMITATION ACT, 1908, art. 106.

See PARTNERSHIP—SUITS RELATING TO PARTNERSHIP.

Partnership—continued.**—2.—Dissolution of Partnership—contd.**

(1)—*Partnership—Dissolution—Adultery with co-partner's wife.*—The adultery of one partner with his co-partner's wife is a sufficient ground for dissolving the partnership. *ABBOT v. CRUMP*, 5 B.L.R. 109.

(2)—*Partnership—Dissolution of partnership on death of one of the partners—Non-liability of his representatives before new partnership is formed—Indian Contract Act, s. 253 (10).*—*Held*, that a partnership dissolves on the death of a partner, and unless a new partnership is formed, the representative of the deceased partner cannot be made jointly liable with the surviving partners. *NATHU v. SHEO NARAIN*, 60 P.W.R. 1911.

(3)—*Suit for dissolution of partnership and for accounts—Limitation Act, 1877, art. 106.*—Where the business of a partnership entered into for a specific period was not continued subsequent to the expiration thereof, held that it terminated on the date of the expiry of such term and that a suit by a partner for an account of such partnership fell under art. 106, Limitation Act, 1877. *RAM CHAND v. SUBBAN BAKSH*, 69 P.R. 1902.

(4)—*Partnership—Death of one partner and introduction of another—Dissolution—Keeping of separate account-books.*—In this suit, the defendant firm produced three account books and explained that this was due to the death of one partner and the introduction of another. *Held* that it was necessary to get the defendant to explain what effect the retirement of one partner and the introduction of another had upon the partnership, and, if this change caused no dissolution of the firm, why separate accounts were kept. It was also necessary that the defendant should explain his accounts with the plaintiff from the beginning. *MOOST. ROOKMA v. MOOLCHUND*, 94 P.R. 1866.

(5)—*Partnership accounts—Banking concern, joint—Deposit by a partner payable with interest—Suit to recover deposit if maintainable—Suit if maintainable when suit for dissolution and accounts previously instituted—Civ. Pro. Code (Act V of 1908), s. 10.*—Where it was arranged between the mother and guardian of plaintiff, a minor partner of a banking concern, and his co-partners, that each of the partners would be entitled to draw a certain fixed monthly allowance from the bank for personal expenses, but the minor's allowance was by arrangement not taken out but permitted to accumulate with interest in the bank, and in a suit for dissolution and accounts by the plaintiff, he applied for an order on the Receiver appointed in the suit to pay the amount of the deposit with interest, but the decision of the Court being adverse, he instituted a fresh suit for the recovery of deposits with interest less one-third, the proportion recoverable from himself as a partner, but the suit was dismissed, and pending an appeal from the order of dismissal the plaintiff obtained an order of the

Partnership—continued.**—2.—Dissolution of Partnership—concl'd.**

High Court in revision directing an account to be taken of the amount alleged to be in deposit if plaintiff's appeal should fail: *Held*, that the suit was rightly dismissed as barred by the provisions of s. 10 of the Civ. Pro. Code, as the matter in issue in the suit was directly and substantially in issue in the previously instituted suit. To stay the suit according to the strict language of s. 10 until by the decision of the previous suit the matter would be *res judicata* was needless. *Obiter*—Though, on general principles, the claim of a partner against a joint banking concern must, in course of winding-up proceedings, be postponed to those of outsiders, there may be cases in which the complete solvency of the bank is admitted and a partner might sue, like any other customer, for the taking separately of his private account as a customer and for the recovery of the balance found standing to his credit. Relief in such a case will only be refused when a partial account will work injustice to the other partners. *MOHADEO PROSAD SHAHU v. GAJADHAR PROSAD SAHU*, 16 C.W.N. 897 = 16 Ind. Cas. 459. (32 M. 76, *Rel. on.*)

—3.—Partnership, what constitutes.

(1)—*Elements of—Participation of profits—Existence of partnership.*—The right to control the property, the right to receive the profits, and the liability to share in losses are the elements of partnership. Participation in profits is no conclusive evidence of the existence of a partnership, but it is one of the circumstances and a very strong one, which is to be taken into consideration for the purpose of seeing whether or not a partnership exists. *VADILAL v. KHUSHAL*, 4 Bom. L.R. 968 = 27 B. 157.

(2)—*Partnership—Participation in profits.*—It is a fallacious argument that, because a man is interested in the profits of a partnership, he is therefore a partner. Participation in profits does not of itself constitute a partnership. The true question is not whether the person sought to be made liable participated in the profits, but whether the trade has been carried on by persons acting on his behalf. There is no rule of law which imposes partnership liability on a person who advances money to others for carrying on their business and in return secures to himself a share of the profits which may arise from the employment in the business of the money so advanced by him. *RAJA PRATAP CHANDRA SINGH BAHADUR v. MOLLWO, MARCH AND CO*, 3 B.L.R. A.C. 238 = 12 W.R. 56. [*Affirmed*, 10 B.L.R. 312, P.C. = 18 W.R. 384.]

(3)—*Loan to a person engaging in trade or undertaking—Act IX of 1872 (Contract Act), ss. 239, 240.*—By s. 239 of the Indian Contract Act, partnership is defined to be "the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits thereof between them." But where there is no such

Partnership—continued.**—3.—Partnership, what constitutes—*ctd.***

combination of property, labour, or skill, and one of the parties simply finances the other to enable him to engage in any trade or undertaking, upon a contract with such person that the lender shall receive interest at a rate varying with the profits, or that he shall receive a share of the profits (of the trade of undertaking which is solely conducted by the borrower), such a transaction does not of itself constitute the lender a partner, or render him responsible as such, even though the agreement between the parties may describe them as partners and may itself be designated a partnership agreement. **BHAGGU LAL v. DE GRUYTHER, 4 A. 74 = A. W.N. 1881, 122.** [R., U.B.R. 1903, 4th Quarter, Contract, 240, 58 P.L.R. 1904.]

(4)—*Test of partnership—Borrowing of money—Equity in favour of the lender.*—It is the carrying on of a business, and not an agreement to carry it on, which is the test of partnership. Hence, where the carrying on of the business of a partnership has already commenced, heavy liabilities have already been incurred, and some expenditure has been made, the mere delay in the formal execution of the deed of partnership is immaterial. Where money borrowed by one partner in the name of the firm but without the authority of the co-partners has been applied to paying off the debts of the firm, the lender is entitled in equity to repayment by the firm of the amount which he can show to have been so applied and the same rule extends to money *bona fide* borrowed and applied for any legitimate purpose of the firm. **LAKSHMISHANKAR v. MOTIRAM, 6 Bom. L.R. 1106.**

(5)—*Sharing of gross returns—Effect of.*—The sharing of gross returns does not of itself create a partnership. **GANOO v. MUKUND KRISHNA BRAHMIN, 14 C.P.L.R. 12.**

(6)—*Ship—Co-owners—Partners.*—The several co-owners of a ship are not partners on that account. There is a distinction between co-ownership and co-partnership. **HYDERALI v. ELAHEE BUX MALOOM, 8 C. 1011 = 10 C.L.R. 606.**

(7)—*Sub-letting different from partnership.*—In principle there is material difference between sub-letting and admitting to partnership. **BHAKTO BEHRA v. BAINCHHA BEHRA, 11 C. P.L.R. 62.** (20 B. 668, F.) [R., 14 C.P.L.R. 1.]

(8)—*Family firm not partnership—Member—Drawing of hundis.*—A partner in a trading firm may draw, endorse, etc., hundis for the purpose of partnership. A family firm is not a partnership within the meaning of the Indian Contract Act, because such an association requires the individual assent of all the members to it. **HAJI NOOR MAHOMED v. MECLEOD, 9 Bom. L.R. 274.**

(9)—*Joint Hindu family—Partnership—Manager—Account.*—In the ordinary case of a

Partnership—continued.**—3.—Partnership, what constitutes—*ctd.***

joint Hindu family, the manager of the whole or any portion of the family property, is not, by reason of his occupying that position, bound to render any accounts whatever to the members of the family. There is no analogy whatever in this respect between the members of a joint Hindu family and the members of a partnership. An arrangement amongst the members of a joint Hindu family, that the accounts of a banking business carried on by them should be kept on the understanding that the profits, when realised, should be divided amongst the individual members in certain proportions, and that the expenses of each member should be credited and charged in the name of each member, is in the nature of a partnership. In such a case, an account will be decreed. **S. M. RANGANMANI DAS v. KASHINATH DUTT, 3 B.L.R. O.C. 1 = 13 W.R. F.B. 76, Note.** [R., 1 B. 561, 5 B. 589, 19 B. 532; Cons., 17 B. 271.]

(10)—*What constitutes partnership—Cultivating partnership—Advance of working capital sufficient—No actual tilling by owner of land necessary.*—To constitute a cultivating partnership, as distinguished from a tenancy, it is not essential that the person who provides the land should himself actually take part in tilling it. Where a *Malguzar* undertakes to provide, not only the land but a portion of the working capital on condition of receiving a proportion of the produce corresponding to the proportion of the capital, which he provides, a relation of partnership becomes constituted thereby. **DEOPURI v. ARJUN, 10 C.P.L.R. 29.** (6 C.P.L.R. 117, *Expl.*)

(11)—*Partnership arrangement—Rent payable to one partner from the firm—Rent portion of capital—Act VIII of 1859, s. 377—Appeal by one of several defendants—Decree reversed against all.*—Where the plaintiff and the defendant entered into a contract of partnership to work certain mines in a certain *dur-putnee* belonging to the plaintiff and it was agreed between the parties that the plaintiff was to receive a sum of money as a *bonus* and also a certain sum yearly as rent for the land, and that the parties were to share the profits and bear the losses in certain proportions, and it was further stipulated that, in case coal should not be discovered beneath the soil, the plaintiff was to refund to the defendant both the amount of the *bonus* and also any sums which might have been received on account of rent: *Held* that this was a partnership arrangement and that the rent payable was to form part of the working expenses of the concern, after which the profits were to be divided in the agreed proportions, and that the payment of rent, or the money which went by the name of rent, was not a payment to be made as by a tenant to a landlord, but was in the nature of a fixed sum to be received by the plaintiff in consideration of the land which she brought into the concern, and which in fact, represented her

Partnership—continued.**—3.—Partnership, what constitutes—*ctd.***

portion of the capital. When any one of the defendants is enabled to appeal at any time against the judgment of the Court below, the appellate Court may, under the circumstances set forth in s. 377 of Act VIII of 1859, reverse the judgment appealed against, in favour of all the defendants. **SREEMUNJUREE DOSSEE v. POORUSUTTUM DOSS, 9 W.R. 499.**

(12)—*Document creating partnership—Determination of partnership.*—Where a document creating a partnership for a particular business is silent as to the date at which the partnership is to commence and end, *held* that the partnership is conterminous with the business for the purpose for which it was created. **BUDDREENATH v. ISREE PERSHAUD, Cor. 114.**

(13)—*Partnership not sanctioned by law—Suit to recover capital invested in such a partnership.*—Plaintiff sued defendant and two others for the dissolution of a partnership claiming a certain share of money including capital and profits. The partnership related to opium and ganja contracts. Defendant pleaded that the partnership was illegal on account of the terms of the license which prohibited partnership: *Held*, that the suit to recover even the money advanced as capital for the purposes of a partnership which was partly illegal was not maintainable at law. **GOPAL-RAV v. KALLAPA, 3 Bom. L.R. 164.**

(14)—*Power of nominating successor in firm, devise by Will not exercise of—Failure to nominate successor, effect of.*—This suit was brought by the widow of a deceased partner in a firm to recover a share in the profits made by the firm since the death of her husband. One of the original partners becoming involved in pecuniary difficulties, transferred his interest in the firm to the other partners H and S: so that, henceforward, they were the only partners in the firm, —H being entitled to sixty shares of the profits and S to forty shares. The widow of H now claimed her husband's share of the profits. The first question to be determined in the case was whether the Will of H operated as an exercise of the power of nominating a successor given by the partnership agreement. If it did, then, the plaintiff was entitled to the relief claimed by her. It was, however, *held* that the Will of H did not operate as an exercise of the power of nominating his successor, and did not constitute the plaintiff a partner in the firm. Looking at the nature of the duties of the agents as defined by the articles of association coupled with the language of the agreement constituting the firm, and the circumstance that there was no capital employed in the business, it was clear that it was intended that, in default of nomination of a successor by a retiring or a deceased partner, the agency should be carried on by the continuing or surviving partners or partner. Under these circumstances, though the plaintiff was entitled

Partnership—continued.**—3.—Partnership, what constitutes—*ctd.***

to an account up to the death of H, her contention was not upheld that she was entitled to share in the "good-will" of the business as an asset of the firm. In this case, a receiver had been appointed for deceased H's estate to "get in the outstandings due to the deceased." This receiver figured as a co-plaintiff with the widow of H, the executrix, and it was thereon contended on behalf of the defendant that the suit was bad for misjoinder, as the receiver could sue only for what accrued due up to the date of the death of H, and not for anything accruing due subsequently to H's death. *Held* that there was no misjoinder. Apparently the receiver might have sued alone to recover everything that was due to the estate; but for greater safety, the executrix was also added as a plaintiff. **BACHUBAI AND L.A. WATKINS v. SHAMJI JADOWJI, 9 B. 536. [R., 26 M. 330, 28 B. 94, 30 B. 250=6 Bom.L.R. 995.]**

—4.—Rights and Liabilities of Partners.

(1)—*Partnership—Liability of dormant partner—English and Indian Law—Bond entered as factory malik—Loan advanced on personal credit—Obligee's rights.*—The doctrine that a dormant partner, when discovered, is liable for every debt incurred for the partnership by the active partner, is not absolute even in the Courts in England; and even if it were, the Courts in this country are not bound to follow it unless it is, as applied to a particular case, found to be consonant with the rules of equity, justice and good conscience. A bond was executed in favour of plaintiff by U in his capacity as "Malik and Mooktear" of a certain factory, and the bond recited that the money covered by it was borrowed by U in his above capacity to pay off a decree against the factory, and that the factory should stand pledged for repayment. Plaintiff subsequently discovered that two other persons were partners in the said factory. It was clear on record that the plaintiff lent on the personal credit of U and on the credit of the factory itself. The plaintiff sued the two partners jointly with U for recovery of the money due under the bond from them personally. *Held* that the plaintiff was entitled to a decree against U personally and as against the factor, and that he could not be allowed to go beyond his contract and recover personally from the two partners, for, neither did they pledge their credit to him, nor did he rely upon their credit when he lent his money. **NUNDEE-PUT MAHATAH v. URQUHART, 9 W.R. 355.**

(2)—*Partnership in an undertaking—Abandonment by partner—Refusal to advance money in terms of agreement—Partner spending honestly for the firm mixing his accounts with partnership accounts—Effect.*—Although the subject-matter of a partnership is precarious and speculative, it is a matter of inference to be drawn from the facts of each case, whether or no there has been abandonment by a partner of his share, or loss of interest by laches. The mere fact that a partner, suing for partnership

Partnership—continued.**—4.—Rights and Liabilities of Partners**
—continued.

account and for winding up, had previously declined to advance more money for the business, and left the management to a co-partner, is not sufficient, to infer that the former abandoned or lost by laches, his position as a partner. [*D*, 25 M. 149=11 M.L.J. 353.] A partner, who has mixed up his accounts with the partnership accounts, so as to make it impossible to discriminate between them, will not be allowed amounts honestly spent by him for the firm. *MOUNG THA HUYIN v. MAHTHEIN MYAH*, 28 C. 53, P.C.=27 I.A. 189=5 C.W.N. 114=7 Sar. 776

(3)—*Hindu Law—Family trade—Power of manager to bind minor partner members of family—Compromise between co partners in absence of representative of deceased partner.*—Ancestral trade, like other Hindu property, will descend upon the members of a Hindu undivided family; and such a family can, by its manager or its adult members acting as managers, enter into co-partnership with a stranger. In carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager, or the adult members acting as managers, which are necessarily incident to and following out of the carrying on of that trade, whether it be singly or with a co-partner. The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Third parties in the ordinary course of *bona fide* trade dealings should not be held bound to investigate the status of the family represented by the manager whilst dealing with him on the credit of the family property. Were such a power not implied, property in a family trade, which is recognised by Hindu law to be a valuable inheritance, would become practically valueless to the other members of an undivided family wherever an infant was concerned, for, no one would deal with a manager, if the minor were to be at liberty on coming of age to challenge as against third parties, the trade transactions which took place during his minority. The general benefit of the undivided family is considered by Hindu Law to be paramount to any individual interest, and the recognition of a trade as inheritable property, renders it necessary for the general benefit of the family that the rule should confer powers on the manager necessary for the carrying on and consequent preservation of that family property; but that infringement is not to be carried beyond the actual necessity of the case. It is not easy to draw a well-defined line between what is, and what is not, an act necessarily incident to the carrying on of a trade; but taking into account the intimate and fiduciary position of one partner towards a co-partner, and the anxious protection afforded by Hindu law to the interests of a minor, it is safer and more in accordance with its spirit, to hold in a

Partnership—continued.**—4.—Rights and Liabilities of Partners**
—continued.

case like the present (where the property, so far as the minor's interest is concerned, is of an ancestral character), that a compromise of partnership differences and accounts, by a division and transfer of the partnership property, should not be treated as an act necessarily incident to the carrying on of a trade, but should be left to be governed by the law applicable to ordinary dealings with the manager of an undivided family when the interests of an infant member are concerned. And as to this the law is that persons dealing with an undivided family are bound, to enquire as to the purposes for which a sale or a mortgage of family property is effected by the manager, especially where minors are concerned; and the infants in general will not be bound but by "necessary acts" or such as are "evidently for their benefit." By "necessary acts" are meant such as are necessary for the material existence of the undivided family, in addition to expenditure upon religious ceremonies and marriages which, for members of the family, are, by Hindu Law and usage, looked upon as in the nature of paramount charges upon the undivided inheritance. Where it is found that a compromise entered into by the managing members is not necessary for the preservation of the family property, or would not be for the benefit of the infant whose interests are sought to be bound by its provisions, *held* that the compromise was not binding on the interests of the infant. And the avoidance of a law suit to take up partnership accounts does not, standing alone, fulfil either of the conditions mentioned above. As between adults, it might be a sufficient ground for enforcing specific performance, but where a minor's interests are to be taken notice of by the Court, the case made should go further and show either in express terms or by necessary inference from facts, that it would be for the advantage of the minor that the compromise should be carried out, or at least that the amount of property which the plaintiff was to receive (as in the present case) was a fair and reasonable adjustment upon foot of the partnership accounts. [*F.*, 1 C. 470, 3 C. 738=2 C.L.R. 440, 5 C. 792=6 C.L.R. 34; *R.*, 2 B. 494, 5 B. 38, 12 C. 389, 15 M. 356, 20 B. 767, 22 M. 166=9 M.L.J. 3, 6 C.W.N. 429, 26 B. 206=3 Bom. L.R. 738, *F.B.*, 4 A.L.J. 94=A.W.N. 1907, 13=29 A. 176, 34 B. 72=11 Bom. L.R. 255=2 Ind. Cas. 173; *D.*, 3 C. 503=1 C.L.R. 343.] A co-partner dealing with an undivided Hindu family will be placed, with reference to its component members, in the position that a partner according to British Law is placed in with reference to co partners and their representatives in the case of death. And where the surviving partners of a firm, in the absence of a representative of a deceased partner, adjusted the partnership accounts and agreed to hand over a portion of the partnership property to one of the partners in compromise of his claim,

Partnership—continued.**—4.—Rights and Liabilities of Partners—continued.**

and the partner whose claim was so agreed to be compromised prayed for a dissolution of the firm upon the basis of such compromise, *held*, that a representative of the deceased partner was a necessary party to the suit. And where such representative was subsequently impleaded, *held* that the plaintiff would not be entitled to specific performance of the compromise; inasmuch as the surviving partners were treated as trustees of the partnership property for the benefit of the representative of the deceased partner; and that an agreement entered into by such surviving partners in the absence of the representative of the deceased partner which was inconsistent with the nature of such trust—to deal with the partnership assets only by way of sale—could not be specifically enforced. **RAMLAL THAKURSIDAS v. LAKHMICHAND MUNIRAM**, 1 B.H.C. App. 51. [R., 1 C.L.J. 388.]

(4)—*Partnership—Bond by managing partner—Liability of other partners.*—The managing partner in a firm has authority to bind his remaining partners on a bond executed by him within the ordinary scope of his authority to raise money admittedly borrowed for the joint purpose of the firm. **HAKIM SYUD AHMED HOSSEIN v. BABOO KURNEEDAN**, 24 W.R. 60.

(5)—*Partnership—Incoming partner—Liability for debt contracted before becoming partner—Kiln—Execution sale—Suit for contents of kiln by defeated claimant—Burden of proof.*—Where on one of the two parties retiring from a partnership business, a third person became a partner, the incoming partner was not liable personally for the partnership debt contracted before his advent, unless he had made himself liable by some contract, but the original partners and the partnership property were liable just as before. Where a kiln was sold in execution of a decree, *held*, in a suit by a defeated claimant to establish his right to the contents of the kiln under a pledge, that the burden of proof lay on him to show that by the pledge he got a right to the contents of the kiln as well. **GUJADHUR PERSHAD v. KUNHYA LALL**, 3 Agra 27.

(6)—*Indian Contract Act (IX of 1872), s. 249—Admission of new partner—His liability for debts incurred before admission.*—It is true that a newly-admitted partner does not, ordinarily become liable for the existing debts under s. 249 of the Contract Act. But that section has no application to a case where, by the understanding between the parties, a person admitted as a partner becomes entitled to the profits and liable for the debts accruing to, and incurred by, the Firm before his admission (*Rolfe v. Flower*, L.R. 1 P. C. 27, R.). **SHEWAK MAHTOON v. J. ST. JOSEPH**, 9 C.L.R. 21.

(7)—*Partnership—Liability of partner for unauthorised act of co-partner.*—A partner is not liable for purchases made by a co-partner,

Partnership—continued.**—4.—Rights and Liabilities of Partners—continued.**

out of the scope of the partnership business and without the authority of the other. **MARTIN v. BAKER**, 15 B.L.R. 372.

(8)—*Partnership—Bill drawn by partners.*—Every one of the partners in a mercantile firm of ordinary trading partnership is liable upon a bill drawn by a partner in the recognised trading name of the firm for a transaction incident to the business of the firm, although his name does not appear upon the face of the instrument, and although he may be a sleeping and secret partner. In order to take a case out of the principles of the general law, it must be shown that the holder of the bill knew at the time he received it that the transaction was the private affair of a single partner. **BUNARSEE DOSS v. GHOLAM HOSSEIN, MUDDUN MOHUN AND LALA BHOLANATH**, 13 W.R.P.C. 29 = 13 M.I. A. 358. [R., 6 Bom. L.R. 1106.]

(9)—*Partnership property—Separation of—Notice to creditors.*—Partners may convert the partnership property into the separate property of one or more of its members, and they are not bound to give notice of the said conversion to their creditors. **HAZARI MAL v. NARSINGH DAS**, 77 P.R. 1900. [R., 75 P.R. 1908.]

(10)—*Partnership—Lien of banian on goods under agreement—Construction of agreement.*—Where, sometime after the date of the agreement under which the plaintiff became banian to the defendants and by which he had a lien on all goods "belonging to" them in their godowns while there was a balance due, the defendant's firm took in a new partner, *held* that the words "belonging to" included all goods in the possession of the new firm that came to them in the way of business and that the new firm, not having given notice to the contrary, must be taken to have engaged the plaintiff as banian, upon the terms expressed in the agreement with the old firm, and to be liable for the balance due. **BALDEODAS AGARWALLA v. ALEXANDER KAICH**, 3 B.L.R.O.C. 80.

(11)—*Suit by Agent of firm—Power of attorney given by only one partner—Civ. Pro. Code, s. 350—Acknowledgment of debt obtained under threat—Contract not to sue, Validity of.*—This suit was brought by A, the agent and attorney of certain persons carrying on business under the style of H. & Co. to recover a debt. The power of attorney under which A sued was executed by B, one of the partners, but purported to be given by the three partners who constituted the Firm and not by B for himself alone, and under it A brought the suit describing himself as the agent and attorney of H. & Co. *Held* that the plaint was no doubt informally entitled, but that it was not such an error as would have entitled the defendant to have the action dismissed, for the plaint might have been amended by striking out B's name and substituting the names of the partners as plaintiffs. One partner may institute a suit in the names of his co-partners without their

Partnership—continued.**—4.—Rights and Liabilities of Partners—continued.**

consent, at the risk of having to indemnify them against costs if they objected. The power of attorney given to A was no doubt informal as, though a partner in the ordinary course of his business had full power to sign the name of the Firm and bind his partners by his act as their authorised agent, yet, such an agent, unless he was expressly authorised to do so by deed, could not execute a deed on behalf of his principals, as B was not shown to have authority to enable him to execute the power of attorney on behalf of his absent co-partners. But this error, having reference to s. 350 of the Civ. Pro. Code, would not affect the merits of the case. [R., 38 P.R. 1882, 127 P.R. 1906=58 P.L.R. 1907.] Where an acknowledgment of a barred debt was made on account of a threat to put the matter into Court and apply for arrest before judgment, the threat was held to amount to such compulsion as would nullify the acknowledgment. [D., 161 P.R. 1879.] A contract not to sue for a limited period or until the happening of a certain event is perfectly valid. It is only where an agreement is made not to sue at all or under any circumstances that the law will consider it void as being contrary to public policy, for that would oust the Courts of their jurisdiction altogether. **HAMILTON AND CO. v. SHOWERS, 62 P.R. 1873.**

(12)—*Partnership—Agency—Partner represented at settlement of accounts—Effect.*—In order that one person may act as agent on behalf of another, it is not necessary that there should be any written authority. The authority may be given by words or acts. It may even be inferred from silence or acquiescence. So, where the question was whether a partner was duly represented at the settlement of accounts among his co-partners, it was held that he was so represented by a person without any written authority, his agency being inferred from the facts and circumstances of the case. **SODHA SINGH v. CHIPPUL, 84 P.R. 1867.**

(13)—*Rights of a deceased partner—Adjustment of a partnership account—Payment by partner—Presumption.*—A suit based on the right of a deceased partner cannot be limited to a demand for his share in the proceeds of property alleged to have come into the possession of the partnership during its existence. The agreement on which the partnership was formed, the amounts advanced and drawn out by the several partners, and the subsisting liabilities and assets, if any, must all be taken into account, and the suit must demand such a sum, if any, as, on a general account, and an account between the deceased partner and the co-partnership, being taken, shall appear to be due. The presumption as to payments made by the different partners of a firm is that they have been made out of the funds of the firm unless the contrary is proved by satisfactory evidence and when the death of one partner

Partnership—continued.**—4.—Rights and Liabilities of Partners—continued.**

dissolves a firm of two members, the presumption is that the deceased was entitled to a moiety of the existing assets. Principle on which the account of a dissolved partnership should be adjusted, explained. **KESHAV GOPAL GINDE v. RAYAPA, 12 B.H.C. 165.**

(14)—*Application to wind up business of partnership after its termination—Suit for dissolution of partnership—Contract Act, s. 265—Civ. Pro. Code, 1877, ss. 25, 215—Transfer of suit—Power of partner to borrow for partnership purposes.*—An application under s. 265 of the Contract Act, to wind up the business of a partnership after its termination, is one exclusively cognisable by a District Judge. But a suit for a declaration that a partnership existed between certain persons, praying that it may be dissolved if it still subsists, and if it had terminated, that the date of such termination may be fixed, and that a liquidator may be appointed, and so forth, is one not so exclusively cognisable, and may be instituted in the Court of the lowest grade according to its valuation. Such a suit, instituted in a District Court, and transferred to a Subordinate Judge, may be transferred by the High Court to its own file, in the exercise of its extraordinary original jurisdiction. [R., 5 A. 500, 10 C. 669.] One partner cannot create a charge on partnership property, nor borrow money for the purposes of the partnership, so as to make other partners liable, except under their authority, express or implied. But when they allow him to conduct the business of the partnership in such a manner as to make it appear that, to all intents and purposes, the whole control and management was vested in him, they would be liable to make good all advances that were made for the necessary purposes of the firm. **HARRISON v. THE DELHI AND LONDON BANK, 4 A. 437=A.W.N. 1882, 87.** [Diss., 31 M. 206=4 M.L.T. 66.]

(15)—*Money due to Partner—Application of payments—Set off—Barred debt—Civ. Pro. Code, 1908, O. 8, r. 6.*—A managing partner cannot appropriate money due to another partner out of the assets of a partnership firm, in liquidation of a debt due from that other partner to the managing partner and alien to the business of the firm. There can be no right of set off between parties mutually indebted if there is no agreement to that effect. Neither does O. 8, r. 6, Civ. Pro. Code, apply to the case of a debt sought to be set off, when it is barred by limitation before the suit was filed. **SOHNA v. NAND RAM, 53 P.R. 1898.**

(16)—*Imputations of fraud—Court winding up partnership—Policy holder disentitled to share of profits—Extension by implication of written agreement—Commission on sale—Dissolution of partnership—Compensation for loss of commission.*—Imputations of fraud should be disposed of at the first hearing, and

Partnership—continued.**—4.—Rights and Liabilities of Partners—continued.**

should not be left open to be disposed of subsequently. [R., 18 B. 551.] In the case of a winding up of a partnership by Court, all questions arising between the partners out of the partnership business must be disposed of in the winding-up suit. It is difficult to imply, from the circumstance of a policyholder being entitled to a share of profits, a contract on the part of the Company that they will, in order to give him a better chance, continue to carry on business even though it should turn out to be disadvantageous to them to do so. Where parties have entered into written engagements with the express stipulations, it is manifestly not desirable to extend them by implication. The presumption is, that, having expressed them, they have expressed all the conditions by which they intend to be bound under that instrument. Where the plaintiff was the founder of a company, in which he was a partner and of which he became the manager, broker and agent, with a commission during his lifetime, and after the company commenced work it was found that it had expended all its capital and was heavily involved in debt incurred by the plaintiff without the sanction of the co-partners, which necessitated the bringing of a suit for the dissolution of the partnership by some of the co-partners, which was opposed by the plaintiff and other co-partners, *held* that the plaintiff was not entitled to any compensation for the loss of his commission, as there was no obligation on the part of his co-partners to subscribe more capital after the original capital of the co-partners had been exhausted, and as there was no implied covenant to continue the work of the partnership in order that the plaintiff should be in a position, to earn his commission during his lifetime. **LALBHAI VALLABHAI v. KAVASJI NANABHAI, 8 B.H.C. O.C. 209.** [On appeal, 1 B. 468, P.C.; R., 16 Bom. L. R. 811.]

(17)—*Liability of partners for partnership debt.*—If two out of three partners are sued for a debt due from the partnership, and a decree is obtained against those two, and execution issues against the partnership property, if the third partner should apply successfully in the execution proceedings to have his share in the property released, the plaintiff's only remedy would be a regular suit, not for the purpose of making the third partner personally liable for the debt, but for the purpose of making the share of the third partner available to satisfy the decree. **NOBINCHANDRA ROY v. MAGANTASA DASSYA, 10 C. 924.** [R., 26 C. 677.]

(18)—*Discharge given by one partner only, of a debt due to the partnership—Collusion between partner giving discharge and the debtor—Effect of.*—Plaintiff and defendants 2 to 4 were members of a partnership. Defendants 2 and 3 colluding with the first defendant fraudulently gave him a full discharge for the amount due by him to the partnership. Plaintiff sued for his share

Partnership—continued.**—4.—Rights and Liabilities of Partners—concluded.**

of the debt, making the co-partners defendants. *Held*, that the aggrieved partner can sue, and that the general rule, that one partner can give a valid discharge of a debt due to his partnership, has no application, if the discharge so given is in fraud of the aggrieved partner and is the result of collusion between the debtor and the partner who gives the discharge. **VEERSAMI NAICKER v. IBRAMSA ROWTHER, 5 M.L.T. 209=19 M.L.J. 221=1 Ind. Cas. 200.** (1 A. 297, 17 M 12, D.)

(19)—*Partner, whether can bind firm by submission to arbitration.*—Although a partner is entitled, on behalf of the firm of which he is a member, to sue for the recovery of a debt due to the firm, he has no power, without special authority, to bind the firm by submission to arbitration. It must be shown that the reference to arbitration was either an act necessary for, or such as is usually done in, carrying on the business of the firm. **RAM BHAROSE v. KALLU MAL, 22 A. 135=20 A.W.N. 12.** [R., 103 P.L.R. 1902; D., 3 S.L.R. 5.]

(20)—*Lease taken by one partner—Liability of the others.*—When certain persons constitute themselves an agricultural association, and agree that any one of them may take a lease and execute any necessary document, such documents being taken to be binding on all the partners as if executed by them, the representatives of a partner who has not executed a rental agreement, but has worked as a partner after it was executed by the other partners, may be held liable on the agreement. **CHINNA-RAMANUJA AYYANGAR v. PADMANABHA PILLAIYAN, 19 M. 471.**

(21)—*Rights and liabilities of partners—Agricultural partnership—Termination at close of any agricultural year.*—Where the owner of a land cultivates it in partnership with another, the partnership is intended to continue from year to year only and either party may withdraw from it at the close of any agricultural year, unless there was an express agreement to the contrary. **KISAN SUKAL v. JAIWANT RAO MISAR, 3 C.P.L.R. 180.** [R., 10 C.P.L.R. 29, 6 C.P.L.R. 117.]

See **CONTRACT—WAGERING CONTRACTS, 12 B.H.C. 51.**

With manager of the joint Hindu family—Dissolution of—By death of manager—Continuance of—May be inferred from conduct—See **HINDU LAW—JOINT FAMILY, 28 M. 344.**

Suit for account and share of profits, including good-will and trade-marks—Suits by sons of deceased partner—Letters of Administration granted to widow of deceased partner during her son's minority, effect of, on right of suit—See **LIMITATION ACT, 1908, ss. 6, 8, 17, art. 106, 9 C.W.N. 537.**

See **RES JUDICATA—PARTIES, 90 P.R. 1868.**

Partnership—continued.**—5.—Suits relating to Partnership.**

(1)—*Dissolution of partnership—Defective investigation—Former partner ceasing to be such—Effect of.*—The acts of the principal member of a firm, done by virtue of special provisions in the partnership agreement or otherwise, to effect a dissolution as between a member and other partners, could not operate as to the third persons, strangers, who might well be wholly unacquainted with them, and who, in their dealings with the firm, might well suppose, in the absence of notification of a change, that the partnership continued unaltered as to its members. If a customer deals with a firm well knowing that a former partner has ceased to belong to it, he cannot be allowed to treat the retired partner as still a member of the partnership. *GUNGA RAM v. GUNGA DHUR*, 1 **Agra** 198.

(2)—*Dormant partner—Partner contracting on behalf of himself and a dormant partner—Dormant partner cannot sue the contracting party after the death of the partner entering into the contract.*—If one partner enters into a contract in his own name, still, if he is acting as the agent of the firm, his co-partners will be in the position of undisclosed principals. They can be sued on the contract and may join as plaintiffs in suing. A Railway Company entered into contracts with a person in the belief that he was the only person interested in them, but he had a partner unknown to the Company. After sometime the person who contracted with the Company died, and the dormant partner claimed payment of the amount due to the firm under one of the contracts. The Company refused to pay except on a joint receipt of the plaintiff and the administrators of the deceased. The dormant partner brought a suit to recover the amount: *Held*, that the Company having contracted with deceased partner alone the right to claim performance rested with him during the lifetime and he could have sued on the contract alone; and that the dormant partner might have joined his co-partner in suing but he could not sue the Company alone. *ALI MIYAN MAHOMED-BHAI v. B.B. & C.I. RY.*, 10 **Bom. L.R.** 306.

(3)—*Contract Act, s. 264—Notice of dissolution—Dormant partner.*—Where there persons carry on trade under the names of two of them, the third being only a dormant partner, and, after the partnership is dissolved and the dormant partner's retirement from the business, the others carry on the business under the old name, persons, who become creditors of the firm for the first time after the dissolution, though they had no notice of the dissolution and retirement of one of the partners, have no claim as against that person. *RAMASAMI v. KADAR BIBI*, 9 **M.** 492. [*R.*, 78 **P.R.** 1903.]

(4)—*Money for partnership supplied by another—Agreement to account for profits—Partner—Death—Reconstitution of partnership.*—Case where it was held that persons carrying on business with money supplied by another,

Partnership—continued.**—5.—Suits relating to Partnership—*ctd.***

and agreeing to account yearly to that person for a share in profits must be taken to have admitted him to proportionate partnership in the business where death dissolved the partnership, the representatives of the deceased, by receiving some six months after the death, an account, about two-thirds of the money advanced and some profits cannot claim to have become partners. *SHAIKH PEER MAHOMED v. NEKJAN BIBEE*, 25 **W.R.** 49.

(5)—*Contract of partnership—Right to dissolve partnership.*—In a contract between a partner and his co-partners, a provision for remuneration to the former by a certain commission on the sales, on account of his undertaking to manage the partnership business, does not imply the renunciation by the co-partners of their right to apply for a dissolution of the partnership during his life, even if they find that the business cannot be continued without loss, nor does it imply any undertaking to pay him compensation in the event of their exercising such a right. *COWASJEE NANABHOY v. LALLBHOY VULLUBHOY*, 1 **B.** 468, **P.C.** = 26 **W.R.** 78 = 3 **I.A.** 200 = 3 **Sar.** 645.

(6)—*Partnership debt—Liability of partner for debts incurred during partnership.*—A and B were partners. C supplied the firm with some goods, and brought a suit to recover their value from both A and B. A confessed judgment; but B pleaded non-liability on the ground that in a suit between himself and A for settlement of partnership accounts, his liability was fixed at a certain amount, and that as to the balance, he had been released and he is not therefore liable to pay the suit debt. *Held*, that as C was not a party to the partnership suit in which the liability of B was fixed at a certain amount, he was not bound by the decision and B remained therefore liable for the outstanding debts, unless he had caused his release from liability publicly notified before the goods were supplied by C. *ROOLDOO MULL v. JOWAHIR*, 90 **P.R.** 1868.

(7)—*Suit for account without praying for dissolution.*—A member of a common trading partnership, dissoluble at will, cannot, under ordinary circumstances, seek an account without praying for a dissolution. *GOLLA NAGABASHANAM v. KANAKALA GANGAYYA*, 2 **M.** **H.C.** 28. [*Diss.*, 32 **M.** 76 = 19 **M.L.J.** 10 = 4 **M.** **L.T.** 456.]

(8)—*Suit by a firm against one of the partners, maintainability of, without a prayer for dissolution.*—*Contract Act, s. 258.*—An action can be brought by a firm against one of the partners to account for a certain sum of money received by him, without bringing a suit for dissolution of the partnership, where the circumstances of the case are such as to render it equitable to allow such a suit to be preferred. *JAGADISA AIYAR v. KUPPUSAMY*, 15 **M.L.J.** 142. [*R.*, 32 **M.** 76 = 19 **M.L.J.** 10 = 4 **M.L.T.** 456 = 1 **Ind. Cas.** 384.]

Partnership—continued.**—5.—Suits relating to Partnership—*ctd.***

(9)—*Partnership—Suit by partner prior to dissolution—Suit for share in losses and advances.*—If is only when the action is for a dissolution of partnership, that the partners may claim an account and payment over of moneys that may be found to be due to them on the account being taken. Except under exceptional circumstances, no action lies between partners, which involve the taking of partnership accounts prior to dissolution. *KASSA MAL v. GOPI*, 9 A. 120 = A.W.N. 1886, 316. [F., 110 P.R. 1901 = 4 P.L.R. 1902.]

(10)—*Partnership subsisting—Suit for account without prayer for dissolution if maintainable.*—A suit which is virtually a suit by a member of a subsisting partnership, for an account of profits up to date, which has been framed accordingly, and in which the plaintiff does not seek any dissolution of the partnership, could not be maintained in that form. Plaintiff is therefore competent to bring a fresh suit against the defendant for an account of the profits of the partnership and for payment of the amount found due to him on taking the accounts from first to last. *UMAR BAKSH v. FAIZULLA*, 13 P. R. 1879.

(11)—*Suit for share of profits due to one partner, not maintainable during pendency of partnership—Suit for account without praying for dissolution.*—Plaintiff brought this suit for his share of the probable profits on a partnership account between 1st December, 1871, and 30th November, 1872. Defendant contended that the suit was not maintainable because the parties thereto were at the time partners and the plaintiff's only remedy was by a suit for the dissolution of partnership and rendition of accounts. *Held*, that the plaintiff as the defendant's partner, was not competent to ask the Court to declare him entitled to a share in the probable profits of a particular period antecedent to the suit, since such a suit would not at all lie. There is no authority whatever for the position that a member of a common trading partnership, dissoluble at will, may, under ordinary circumstances, seek an account without praying for a dissolution. *NAWAB KHAN v. SHEIKH GOLAM AHMED*, 7 P. R. 1875.

(12)—*Suit for dissolution of partnership and winding up of firm—Dissolution before suit—Indian Contract Act, ss. 265, 254—Partnership not entered into for fixed term—Mode of dissolving.*—This suit was brought for the dissolution of the partnership and the winding up of the firm of which the parties were members. The Courts below had held that the suit under s. 265 of the Indian Contract Act could not be entertained until the partnership had been dissolved by a regular suit under s. 254. *Held*, that, in the absence of an allegation that the partnership had been entered into for a fixed term, a suit was not the only mode of dissolving the partnership. Under s. 253, cl. 8, any partner is at liberty to retire at any time from a partnership which has not been entered into

Partnership—continued.**—5.—Suits relating to Partnership—*ctd.***

for a fixed term, and by bringing the present suit, the plaintiff had sufficiently indicated his intention of retiring. Under cl. 7, such retirement dissolved the partnership, and there was therefore held to be no sufficient reason for refusing to entertain the suit. *RULDU MAL v. ARJUN*, 12 P.R. 1881. (76 P.R. 1876, R.)

(13)—*Partnership, dissolution of—Notice to customers.*—When parties carry on business together and open current accounts with customers, they must, on dissolution of partnership, give full and fair notice of their dissolution to their customers and, if they fail to do so, they will be properly liable to customers paying on the partnership account current to one partner in the belief that he represents the firm. *SHEWRAM v. ROHOMUTOOLLAH*, W.R. 1864, 94.

(14)—*Dissolution—Accounts—Loan—Limitation—Acknowledgment by managing partner—Limitation Act (XV of 1877), s. 19—Receiver.*—Where the manager of a firm has full power to borrow and re-pay money, it follows of necessity that he has power to acknowledge the debt, by either immediately giving a promissory note, or subsequently, upon an adjustment of accounts, or in any other way in the course of business, making *bona fide* admissions in writing. To require express authority from each one of the partners to acknowledge the debt would be placing a very narrow construction on s. 19, Limitation Act, 1877, and would open the door to very serious fraud. It is a part of the duty of the Court, in the course of a suit for dissolution of partnership, in which a receiver has been appointed, to discharge the debts and liabilities of the firm, and the mere fact that the Court does not adjudicate on the claim of the creditor, until after the expiration of more than three years, does not render the claim a bad claim against the assets of a firm which is being administered by the Court. *LALTA PARSHAD v. BABU PARSHAD*, 6 A.L. J. 953 = 32 A. 51 = 4 Ind. Cas. 708.

(15)—*Suit against co-partners—Question of account—Proper form of suit.*—The plaintiffs sued to recover from their co-partners a sum of money alleged to have been lent at interest to the firm by two of the partners for the purpose of the partnership business. *Held*, that the Court ought not to have admitted the plaint as this suit which, on the face of it, involved a question of account, would not lie by one partner against another. *Held* also that, under the circumstances, the suit should have been for a dissolution of partnership and for an account. *PHULA AND DANA v. SHIBDIAL*, 34 P.R. 1873. [R., 7 P.R. 1875, 110 P.R. 1901.]

(16)—*Partnership—Suit by member of dissolved partnership for money due on balance of accounts—Reservation in decree—Review.*—In a suit by a member of a dissolved partnership for balance due on the partnership accounts, the parties referred the accounts to arbitration

Partnership—continued.**—5.—Suits relating to Partnership—*ctd.***

through Court. The arbitrators, in delivering the award, awarded to plaintiffs a certain sum of money subject to certain objections raised by defendants, which could not be disposed of without a reference to certain other accounts, which were not then available. The Provincial Court, to which the award was submitted, confirmed it, reserving to the defendants a right to recover what they could on the objections. Later on, the defendants, securing the original books of account on which they relied, applied for a review, which was rejected by the Provincial Court on appeal. The Sudder Dewanny Adawlut confirmed the order of the lower Court. On appeal to the Privy Council, *held* that the Provincial Court ought, in the first instance, to have postponed passing its decree pending the production of the original books of account or allowed an opportunity to the defendants to produce verified copies of the same unless it was satisfied that the objections were invalid. But, since it was considered that the objections were valid inasmuch as the decree reserved a right to the defendants to recover what they claimed, by means of a suit, the Sudder Dewanny Adawlut ought to have received in evidence the original books of account, under s. 16 of Reg. VI of 1793, and ascertained the sum actually due, having regard to the objections. **MUSSUMAT SEETUL BAHOO v. BAHOO HURKISHEN DOSS, 5 W.R.P.C. 76.**

(17)—*Suit to wind up—Decree against Plaintiff—Settlement of accounts—Order in favour of defendant—Disclaimer.*—If the aid of the Court is expected in winding up the affairs of a partnership, any decree which the Court might pass must be submitted to by the plaintiff, even if it be one ordering payment of money by plaintiff to defendant. But a defendant may disclaim any order made in his favour. **RAM SARAN v. HAR GOVIND, 65 P.R. 1888.**

(18)—*Partners—Promise by one partner to another to pay balance struck, suit maintainable on.*—A settlement of accounts between partners, followed by a promise on the part of one partner to pay a liquidated sum to the other, amounts to a distinct contract supported by good consideration. The oral settlement and the promise form a new contract, independent of the partnership, upon which a suit could be maintained without reference to the accounts under the partnership dealings. **MORIMUTHU v. SAMINATHA PILLAI, 21 M. 366.**

(19)—*Suit by partner against co-partner and business manager for account of his management—Accounts without dissolution—Contract Act, 1872, ss. 213, 258.*—A partner cannot sue his co-partner for an account only without also asking for a final settlement of all dispute, between them, and for a dissolution of partnership. But where the justice of the case demands it, the rule must be literally construed, so that one partner may sue his co-partner for

Partnership—continued.**—5.—Suits relating to Partnership—*ctd.***

an account only without claiming dissolution also. **AZIM KKAN v. MUHAMMAD RIAZ-UD-DIN, 110 P.R. 1901.** (34 P.R. 1873, 71 P.R. 1881, 9 A. 120, 48 R.R. 187, 34 R.R. 111, 32 R. R. 173, R.)

(20)—*Partnership—Suit for adjustment of accounts—Jurisdiction—Contract Act (IX of 1872), s. 265.*—The right of a partner, under (the enabling s. 265 of the Contract Act, to institute proceedings in the District Court, for winding up business, does not take away the ordinary right of suing in any Court having jurisdiction to have the accounts taken. **LUCHMAN LALL v. RAM LALL, 6 C. 521=8 C.L.R. 115.** [R., 6 B. 143, 5 A. 500.]

(21)—*Jurisdiction of Court—Valuation of suit—Accounts, suits for—Course of appeal—Contract Act (IX of 1872), s. 253 (10)—Partnership—Dissolution of, by death of a partner who is member of a joint Hindu family—Limitation Act (XV of 1877), sch. II, art. 106—Accounts, suit for, after dissolution of partnership—Evidence Act (I of 1872), s. 92—Evidence—Oral evidence as to contents of a document.*—In a suit for accounts, where the plaintiff has valued his claim at a sum not exceeding Rs. 5,000, the appeal against the preliminary decree passed in favour of the plaintiff lies to the Divisional Court and not to the Chief Court. When, in a case, appeal lies to the Chief Court, but is filed in and heard by the Division Court, and a further appeal is filed in the Chief Court, the further appeal may be converted into a first appeal, if this course does not prejudice any of the parties (58 P.R. 1902; 46 P.R. 1906=94 P.L.R. 1906, 31 C. 365, D.) In the case of a joint Hindu family carrying on a trading business, the ordinary rules of partnership do not apply in *toto*; the concern must be governed also by rules of Hindu Law, and one of such rules would be, that the death of one member of the family cannot operate to dissolve the family partnership. But it is equally clear that, where a partnership is composed of certain individual members of a joint Hindu family and outsiders, the relations of the parties are governed by the ordinary law of contract and not by Hindu Law (25 A. 378, 28 M. 344, R.) Some of the members of a joint Hindu family entered into a partnership. The deed did not show that the members of the family were acting on behalf of the family. It was contended that, on the death of one of the members of the family, the partnership was dissolved. *Held*, that the contention was valid. *Held*, also, that no extraneous evidence was admissible to prove that the members of the family were acting on behalf of the family in the concern and not in their individual capacity. A suit for accounts after the dissolution of a partnership is governed by art. 106 Limitation Act (1877). Copies of document required by s. 78 or s. 86 of the Evidence Act to be certified are not admissible in evidence when they are not duly certified. The Chi

Partnership—continued.**—5.—Suits relating to Partnership—*cld.***

Court held that the several acknowledgments relied on by the plaintiffs did not extend the period of limitation, as they did not fall within the purview of s. 19 of the Limitation Act. **RAM PERSHAD v. RATTAN CHAND, 87 P.L.R. 1909=4 Ind. Cas. 929.**

(22)—*Partnership—Suit for account—S. 265, Act IX of 1872 (Contract Act)—Jurisdiction.*—A suit for an account or for winding up of accounts brought under s. 265, Contract Act, may be brought in the Munsiff's Court, regard being had to the amount at which the relief sought is valued. **DHANI RAM SHAHA v. BHAGIRATH SHAHA, 22 C. 692. (6 B. 143, F.; 7 C. 157, R.)**

(23)—*Partnership—Assignment by partner—Decree for winding up and for account.*—Where two out of a firm of three partners assigned their shares to two others, and it was not proved that the third partner relinquished his claim upon the assignors as a partner, although he might have had knowledge of the assignment, he is entitled to sue for the winding up of the partnership and for a decree for account as against the assignor-partners and the assignees. **DOMATY NURSI AH v. RAMEN CHETTY, 27 C. 93 P.C.=26 I.A. 202=7 Sar. 615.**

(24)—*Civ. Pro. Code, 1859, s. 7—Splitting of claim—Disputes among partners respecting accounts.*—The words of the section are inoperative against the splitting of a claim into parts, but the consequence of an infringement of this direction is not that the suit which does not include the whole claim shall, for this reason, be barred. The words "in bar of suit," in the last clause of the section, refer to any subsequent suit brought for the portion of the claim which has been relinquished or omitted from the previous suit, and not to such previous suit itself. The words point either to a deliberate relinquishment, or an accidental or involuntary omission. But a plaintiff who omits to sue for a portion of his claim, stating at the same time that he does not relinquish it, but means to sue again for its recovery, can gain nothing by such a statement, which would be of no avail to save any subsequent right of suit; but neither, on the other hand, can such a statement furnish a reason for holding that the first suit is barred. In dispute between partners respecting their accounts, the plaintiff should frame his suit in such a way, that there may be a general adjustment of the partnership accounts. A particular item or claim should not be made the subject of a distinct suit; for a decree might thus be obtained by the plaintiff upon one matter, notwithstanding that a full enquiry into the accounts might show a balance due from him. **MUSUMAT SOONDER BEBEE v. KHILLOO MULL alias RAM LALL, 2 N.W. P. 90. [R., 4 M.L.T. 456=32 M. 76=19 M.L.J. 10.]**

(25)—*Partnership—Profit—Accounts—Remedy.*—A member of a subsisting partnership

Partnership—continued.**—5.—Suits relating to Partnership—*cld.***

is not in a position to sue his partner, still less one of his alleged partners, for the profits which had up to a particular time accrued; but he must, if he desires relief, sue in the ordinary way for an account. **DOYARAM LUSKUREE v. SOOKHANUM, 16 W.R. 141.**

(26)—*Suit for share of rent—partnership account—Jurisdiction of Small Cause Court.*—Where in a suit against a co-proprietor of land for the plaintiff's share of rent, which the defendant had received from the tenants, the defendant pleaded that the money had been expended for the benefit of the joint estate and that the plaintiff had received the rent of other joint lands, it was held that the suit was not cognisable by a Small Cause Court, as it involved questions of partnership account. **RANTOM ACHARJEE v. PEARY MOHAN ACHARJEE, 6 C. 551=7 C.L.R. 557.**

(27)—*Jurisdiction—Cause of action—Partnership—Contract—Beng. Reg. II of 1803.*—A contract was entered into at Rutlam, in the independent State of Malwa, between the firm of L, who resided and carried on business at Muttra, within the jurisdiction of the Zillah Court at Agra, and the firm of Z, carrying on business at Rutlam, and elsewhere, for the establishment of a co-partnership, for the purchase and sale of opium. The co-partnership was carried on principally at Muttra, and the business was conducted there by means of the capital advanced in the concern, by the firm of L, in which place the partnership books were kept. At the close of the partnership, which was attended with loss, a balance was struck at Muttra which showed a debt due by the firm of Z. In a suit in the Zillah Court of Agra, for recovery of the amount of this balance, it was pleaded by Z that as the contract was made at Rutlam, where the firm resided, the Zillah Court at Agra had, by Beng. Reg. II of 1803, no jurisdiction to entertain the action, which objection the Zillah Court allowed and afterwards the Sudder Court at Agra, on appeal, sustained. On appeal, such decision was reversed by the Judicial Committee on the ground that the cause of action arose in Muttra and was by Beng. Reg. II of 1803, within the jurisdiction of the Zillah Court at Agra; because Muttra was the established place of business of the co-partnership, where the books were kept for the purpose of the partners ascertaining the state of the transaction between them, and as it was there that the balance was struck and payment of the balance due made. **SETS LUCHMEE CHUND RADHAKISHEN v. SETS ZORAUR MULL, 1 W.R.P.C. 35=8 M.I.A. 291. [F., 22 W.R. 79; R., 15 B. 93; Cons., 3 M.H.C. 384, 8 B.H.C. 102, 12 B. H. C. 113, 5 C.L.R. 268, 5 A. 277=A.W.N. 1883, 34, 9 C. 105, 11 B. 649, 11 M.L.J. 91; D., 4 M.H.C. 218.]**

(28)—*Suit for contribution against partners—Limitation Act, 1877, art. 99.*—Where, in an agreement of partnership, every partner, together with the gomastas of the business, is at

Partnership—continued.**—5.—Suits relating to Partnership—*ctd.***

liberty to borrow money on his individual credit and apply the same for the benefit of the business, the mere fact that such money is applied to the partnership business does not render it an item in the partnership business. So, where a partner paid the amounts borrowed on his individual credit for partnership business, a suit by him for contribution against other partners is maintainable, notwithstanding that there was no adjustment of the accounts relating to the firm. (26 C. 262, Note, Cons.; 12 B.H.C. 97, 6 B. 628, R.) [R., 4 M.L.J. 456=32 M. 76=19 M.L.J. 10.] Such a suit for contribution is governed by art. 99, the period running from the time when the plaintiff was compelled to make the payments. **DURGA PROSSONNO BOSE v. RAGHU NATH DASS, 26 C. 254=3 C.W.N. 299.**

(29)—*Partnership—Payment by one partner of the share of another's decree-debt—Suit for contribution.*—Advances made by one partner to the partnership concern can only result in matters of account, and cannot be made the subject of a separate suit. But where under a decree passed against two partners, each of them is bound to pay the whole debt and bound to indemnify the other against the payment of more than his sharer, the transaction is something *dehors* the partnership, and a suit for contribution for an over-payment would lie. **SUBBARYUDU v. ADINARAYUDU, 18 M. 134.** [Cons., 32 M. 203=4 M.L.T. 475; R., 32 M. 76=4 M.L.T. 456=19 M.L.J. 10.]

(30)—*Money due by partnership—Payment by one partner—Suit for contribution.*—If the amount paid up by one partner was a liability of the partnership, then the mere fact of his having been compelled to pay the whole of the partnership debt would not entitle him to sue his co-partners, or any of them, for contribution, in the absence of any special circumstances, though he would be entitled to charge the sum paid in the partnership account. Where some only of the members of the partnership executed bond, but not in the usual course of partnership business, and the liability is satisfied by one of them, he is entitled to sue the other executants for contribution. Such a suit is also maintainable, when the co-partners expressly promised to contribute, after a decree is obtained on the bond. **GUDA KULITA v. JOYRAM DAS, 26 C. 262, Note.** (12 B.H.C. 97, R.) [Cons., 26 C. 254.]

(31)—*Suit to recover share of profits—Art. 106, Limitation Act—Suit good as suit for contribution.*—Though a suit, instituted at the instance of a partner, as a suit for an account and a share of profits, is barred by limitation, yet, as a suit for contribution, it may be maintained; but the defendant in that case must be allowed to show, if he can, that, on a settlement of accounts, the amount payable by him as contribution is wiped out or reduced. **SADHU NARAYANA IYENGAR v. RAMASWAMY IYENGAR, 4 M.L.T. 475=32 M. 203=3 Ind. Cas. 486.** (28 M. 344, F.; 18 M. 134, Cons.)

Partnership—continued.**—5.—Suits relating to Partnership—*ctd.***

(32)—*Partners—Common proprietors of land, suit between—Punjab Civ. Code, s. 17, para. 11—General adjustment.*—Para. 11, s. 17 of the Punjab Civil Code, refers to trading companies and firms and not to the case of persons holding land in common. Such persons must frequently have causes of action against one another, which must be dealt with, irrespective of a general adjustment of accounts. Cl. 9 applies to joint tenancy in land in the absence of express agreement. It nowhere lays down that a sharer may not sue his co-sharer unless there has been a division of crops or land. **HEERA SINGH v. KANAH, 32 P.R. 1870.**

(33)—*Partner, common—Right to sue.*—Where an individual is a common partner in two firms no action can be brought by one firm against the other firm upon any transaction between them while such individual is a common partner. **KASHINATH v. GANESH, 4 Bom. L.R. 525=26 B. 739.**

(34)—*Suit upon contract by firm against some partners only, maintainability of.*—In a suit brought upon a contract made by a firm, the plaintiff may select as defendants those members of the firm against whom he wishes to proceed. **BALDEO PRASAD KANHAIYA LAL v. SHEKH ABDULLA, 15 C.P.L.R. 51.** (6 B. 700, 21 M. 256, 1 C.W.N. 12, R.)

(35)—*Excess realisation by one partner—Suit for—Necessary parties—Joinder of other partners—Nature of suit.*—While a partnership subsists, though it may do so only for the purpose of realising outstandings, one partner cannot sue another without joining others on the ground that the latter has realised more than his share in the outstandings. One partner may sue for an account and to wind up the partnership affairs but to such a suit, all the members are necessary parties. **PANDIT BHAWANI SAHAI v. GANESH DAS, 65 P.R. 1884.** [D., 24 P.R. 1904; R., 69 P.R., 1902.]

(36)—*Partnership—Death of one partner—Continuing partnership—Nature—Rights of surviving partners—Suit for accounts of continuing partnership—Whether original partnership accounts can be gone into—Limitation.*—Where a partnership is a continuing one, there is, technically, a new partnership formed whenever any partner dies. On such death, each surviving partner is presumed to invest in the new partnership his share of the assets of the dissolved partnership and to take his share of the liabilities. As soon as the new partnership is formed, each partner is personally responsible to, and has personal rights, against all others. Although a suit for account in respect of a partnership would become barred three years after the death of one of the partners, yet, limitation offers no bar to a Court instituting an inquiry into the financial relations of the partners *inter se* at the commencement of the partnership which the Court is engaged in winding up, and, for this purpose, it may be

Partnership—continued.**—5.—Suits relating to Partnership—*ctd.***

necessary to go into the accounts of a previous partnership. *PARCHOMAL VASANDMAL v. PAMANDAS ALAMCHAND*, 3 S.L.R. 108=4 Ind. Cas. 600. (25 M. 26, R.)

(37)—*Death of one partner—Business carried on by surviving partner—Right of deceased partner's representative to sue for firm's debts—Contract Act (IX of 1872), s. 45.*—It is competent to the representative of a deceased partner of a foreign firm to sue debtors of that firm to recover a specific asset, although there is a surviving partner still carrying on the business who does not join in the suit, but who desires to manage and wind up the affairs of the firm himself and who, having assets of the firm in his hands sufficient to answer all the claims made on behalf of the deceased partner, is willing to satisfy all such claims. Further, the only logically consistent result of the application of s. 45 of the Contract Act to partnerships is, that "the right to performance of the contract, as far as the other contracting party is concerned, rests just as much with the representative of the deceased partner as with the surviving partner." The right of the deceased co-partner as that of the deceased co-contractor under s. 45 of the Contract Act survives to his representative, and, the right surviving, there is a remedy as well, so that the representative of a deceased partner has a separate and independent right of suit. *AGA GULAM HUSSAIN v. A.D. SASSOON*, 21 B. 412. [R., 23 A. 94=A. W.N., 1901, 8, 13 Bom. L.R. 323.]

(38)—*Parties to a suit regarding partnership shares—Award of interest.*—Where the parties to the suit, the heirs and representatives of the original partners, a family carrying on a banking business, made and acted upon a new arrangement of their shares, the amounts of which were found in the first Court, and affirmed on appeal, a decree for an account, and an award of interest at 12 per cent. on the amounts found to be due upon the shares from the date of the closing of the business was maintained. *MUTIA CHETTI v. SOBRAMANIEM CHETTI*, 18 C. 616, P.C.=6 Sar. 49.

(39)—*Partnership composed of individual members of joint family and also of strangers—Contract Act, s. 239—Suit regarding partnership—Necessary parties.*—A member of an undivided Hindu family may enter into a contract in his individual capacity, and, when suing to recover moneys due to him under the contract, he need not join the members of the joint family as plaintiffs. The members of an undivided Hindu family who are minors, and who are not shown to have been admitted into a trading partnership and to have taken part in its business, need not be made parties as plaintiffs to a suit to recover arrears due to a family trading firm. *ANANT RAM v. CHANNU LAL*, 25 A. 378=A.W.N. 1903, 76. (7 B. 217, 14 A. 424, 5 B. 38, 18 M. 33, 8 A. 264, 6 C. 815, 9 B. 311, 26 C. 349, R.) [R., 69 P.R. 1906=118 P.L.R. 1906, 87 P.L.R. 1909.]

Partnership—continued.**—5.—Suits relating to Partnership—*ctd.***

(40)—*Partnership—Assignment of share of partner, effect of—Suit by assignee—S. 253 (6), Contract Act.*—One partner cannot, by assigning his share, make any one else a partner in his stead with his co-partners; and, therefore, upon his assigning his share, the partnership ceases to exist, unless the other partners consent to accept the purchaser as a partner in the place of the latter. If they do so consent, the partnership may continue to be carried on as before. If they do not consent, the assignee would, upon the dissolution, have a right to sue, not as a partner, but as an assignee of the rights of his assignor in the partnership property, for an account of that property, and for such a distribution of the share as belonged to his assignor. *JUGGUT CHUNDER DUTT v. RADA NATH DHUR*, 10 C. 669.

(41)—*Suit for partnership debt without impleading representatives of deceased partner—Dismissal of suit without entering into merits—Power of revision of High Court—Civ. Pro. Code, s. 622.*—A Court having dismissed such a suit without entering into the merits, on the ground that the plaintiff, who was a sole surviving partner, cannot maintain the suit without having joined the representatives of a deceased partner, held that, since the suit was one brought by a person legally entitled to sue alone in the Court, and it was the duty of the Court to have heard and determined the suit which was within its jurisdiction, the fact that the Court declined to proceed with the suit on the merits must be taken to bring the case within the scope of s. 622 of the Code of Civil Procedure. *GOBIND PRASAD v. CHANDER SEKHAR*, 9 A. 486=A.W.N. 1887, 133. (9 A. 104, 8 A. 519, R.) [Diss., 70 P.R. 1904; F., 20 A. 365, 10 P.R. 1906; Appl., 17 B. 6; R., L.B.R. 1872—1892, 651, 14 A. 524=A.W.N. 1892, 104, 21 B. 412; D., 18 C. 86, 21 C. 274.]

(42)—*Representative of deceased partner, suit maintainable by, even after bar by limitation of suit for partnership accounts generally.*—A suit may be brought by the representative of a deceased partner against the surviving partner to recover a share in a sum received by the surviving partner in respect of partnership transactions within the period of limitation, although a suit to take the partnership accounts generally would be barred. Also a defendant can deduct the amount (if any) which may be found due to him on taking the partnership accounts, even where a separate suit in respect of such accounts in general would be barred by limitation. *MERWANJI HORMUSJI v. RUSTOMJI BURJORJI*, 6 B. 628. [F., 28 M. 344; R., 26 C. 254=3 C.W.N. 299; D., 11 Bom. L.R. 1354.]

(43)—*Partnership—Benami partner lending money to concern—Suit by creditor.*—A was a partner in an indigo concern in the name of his son. In his own name, A lent moneys to the concern for the purpose of carrying on the business, and each partner was to be separately

Partnership—continued.**—5.—Suits relating to Partnership—*ctd.***

liable for the money advanced in proportion to his share in the concern. In a suit against one of the partners for his proportion of the moneys so lent, *held* that plaintiff could not sue for those moneys on the footing of a mere creditor, and that the suit should be so framed as to determine the profits or losses of the concern and whether any and what assets would be available to each partner to liquidate the loan in proportion to his share. **CHUNDER SIKHUR BISWAS v. RAM BUKSH CHETLUNGEE, 1 C.L.R. 545.** [R., 32 M. 76=19 M.L.J. 10=4 M.L.T. 456=1 Ind. Cas. 384.]

(44)—*Suit by partner for money deposited in firm.*—Before a partner is enabled to recover money deposited by him as his share, the whole accounts of the firm ought to be taken and the ultimate liability of each partner should be ascertained. **KALEE CHURN SAHOO v. RAM LALL SAHOO, 21 W.R. 300.**

(45)—*Preliminary decree in a partnership suit—Appeal not filed within time—Art. 15, Limitation.*—A preliminary decree in a partnership suit, though not appealed against within the period of limitation, may be questioned when the appeal against the final decree is preferred. *N.B.*—Act XII of 1879 did not alter the existing law. **BISWA NATH CHAKI v. BANI KANTA DUTTA, 23 C. 406.** [F., 29 C. 758, F.B.=5 C.W.N. 617, 56 P.L.R. 1902=49 P.R. 1902 *Disappr.*, 29 C. 758, F.B.=5 C.W.N. 617=23 C. 406; R., 13 C.W.N. 493=9 C.L.J. 367=5 M.L.T. 360=1 Ind. Cas. 86.]

(46)—*Partnership—Suit by representative of deceased partner to recover assets from surviving partner—Suit for general partnership—Account time barred—Effect.*—A suit by the representative of a deceased partner to recover a share in assets received by the surviving partners may be brought, although a suit for a general partnership account may be barred by limitation. **RIVET CARNAC v. GOCULDAS SOBHANMULL, 20 B. 15.** [Not F., 97 P.R. 1910=11 P.L.R. 1911=142 P.W.R. 1910=8 Ind. Cas. 999; R., 21 B. 412, 28 M. 344.]

(47)—S. 253, I.C.A., 1872—*Agreement as to shares in partnership—Burden of proof.*—Where one party to a partnership suit does not allege any specific agreement as to the amount of the shares, but the other party alleges a specific agreement that the shares were to be unequal, the presumption, which exists as to the equality of partners' shares, casts the burden of proof upon the latter, who must therefore begin. **JADOBRAM DEY v. BULLORAM DEY, 26 C. 281.** [R., 40 P.R. 1908=89 P.W.R. 1908=186 P.L.R. 1908]

(48)—*Dissolution of partnership—Burden of proof—S. 109, Evidence Act—Evidence of dissolution.*—Under s. 109 of Act I of 1872, a partnership which once existed will be presumed to have continued till dissolution is affirmatively proved. But the following facts may lead to

Partnership—continued.**—5.—Suits relating to Partnership—*ctd.***

the inference that it has terminated by some cause or other, *viz.*, (1) the books and accounts continuing up to a certain date only, (2) the business being carried on by one of the partners only, (3) the plaintiff not taking any part in the business, and (4) indents on the firm being made in the name of one only. **BAKSH ILAHI v. ALLA BAKSH, 11 P.R. 1897.**

(49)—*Written release—Oral agreement adding to terms of release—Admissibility—Evidence Act (I of 1872), s. 92.*—R and the defendants were members of a partnership and the business was carried on under the name and style of Nowroji Cursetji & Co. R died on 8-11-1884 appointing P and B his executors. The accounts of the partnership business had remained unadjusted for many years prior to the death of R. In adjustment of such accounts, the executors, after examining the books, etc., of the firm, received from the defendants a lump sum of Rs. 8,395-11-0 as the amount due to the estate of R, and executed a release deed on 9-11-1885 to the defendants in respect of the share and interest of R in the firm. By an assignment in writing dated 7-4-1887, the executors assigned over to the plaintiff 1/16 of the share in the said firm. The present suit was brought by the plaintiff (as assignee of the 1/16 share) to declare his right to the said share. He also prayed that an account might be taken and his share of the profits paid over to him. The plaintiff alleged that the amount due to the estate of R had not been ascertained accurately at the time the release deed was executed. He also set up an agreement among the partners, at the time of the release, to the effect that, exclusive of the amount due under the release, the executors should receive a 1/16 share in the partnership. The defendants who denied the plaintiff's right to any share in the partnership, contended that the share and interest of R and his estate in the partnership ceased on his death, and alleged that there was no agreement to give the executors a share in the partnership. They also relied on the release given by the executors and urged that, under s. 92 of the Indian Evidence Act, no evidence can be given as to the alleged agreement made at the time of the release. *Held*, that, under s. 92 of the Evidence Act, evidence of the agreement that the executors should continue to have a one-anna share in the firm was inadmissible, because it was inconsistent with the written release. Under the release, in consideration of a lump sum paid to the executors, the latter gave up all claims arising out of the old partnership. The oral agreement added another term as the consideration of waiving all claims on the past accounts, to wit,—the continuance of a one-anna share in the partnership. Such an agreement is an addition to the terms of a contract which had been rendered into writing and was inconsistent with those terms. **COWASJI RUTTONJI LIMBOOWALLA v. BURJORJI RUSTOMJI LIMBOOWALLA, 12 B. 335.**

Partnership—continued.**—5.—Suits relating to Partnership—*ctd.***

(50)—*Judgment of High Court—Failure of justice—Right to re-open—Remedy.*—It is impossible to allow the judgment of the High Court to be impugned or the same question as was then at issue to be re-opened, on any grounds either of additional evidence, or of the Court on the last occasion having failed to do justice, or of the expediency of the High Court's doing justice, supposing there had been a failure of the same, at the eleventh hour. If there has been a wrong conclusion on the original evidence, the Privy Council is the proper tribunal for the appellants to have recourse to. **PHULRAM v. PARBUTTEE KOER, 3 W.R. 223.**

(51)—*Suit by agent of Firm—Power of attorney given by only one partner—Civ. Pro. Code, s. 350.*—This suit was brought by A the agent and attorney of certain persons carrying on business under the style of H. & Co. to recover a debt. The power of attorney under which A sued was executed by B, one of the partners, but purported to be given by the three partners who constituted the Firm and not by B for himself alone, and under it, A brought the suit describing himself as the agent and attorney of H & Co. *Held* that the plaint was no doubt informally entitled, but that it was not such an error as would have entitled the defendant to have the action dismissed, for the plaint might have been amended by striking out B's name and substituting the names of the partners as plaintiffs. One partner may institute a suit in the names of his co-partners without their consent, at the risk of having to indemnify them against costs if they objected. The power of attorney given to A was no doubt informal as, though a partner in the ordinary course of his business had full power to sign the name of the Firm and bind his partners by his act as their authorised agent, yet such an agent, unless he was expressly authorised to do so by deed, could not execute a deed on behalf of his principals, and as B was not shown to have authority to enable him to execute the power of attorney on behalf of his absent co-partners. But this error, having reference to s. 350 of the Civ. Pro. Code, would not effect the merits of the case. **HAMILTON AND CO. v. SHOWERS, 62 P.R. 1873. [R., 127 P.R. 1906=58 P.L.R. 1907.]**

(52)—*Partnership account—Plaintiff to prove his own case.*—*Held*, that a plaintiff has to prove his own case; so, in a partnership suit, though the defendant may have been negligent in not keeping detailed account and may possibly be to blame for not producing books, the plaintiff cannot succeed, if he has been, at least, equally negligent in not keeping up any correct detail of the various works undertaken and of the profit realised therein. **BUDHU SINGH v. BHAGWATI PARSHAD BABU RAM, 110 P.W. R. 1912=15 Ind. Cas. 878.**

Partnership — Money decree against individual partner—Partnership property, if liable

Partnership—continued.**—5.—Suits relating to Partnership—*cld.***

—Suit by other partners on attachment of partnership property—Amendment of plaint in appeal—*See* ATTACHMENT — SUBJECTS OF ATTACHMENT, 4 B. 222.

See CIV. PRO. CODE, O. VIII, r. 6, O. XX, r. 19, 10 A. 587=A.W.N. 1888, 258.

See CONSIDERATION, 9 B.H.C. 418.

See COSTS—COSTS OUT OF ESTATE, 16 B. 515.

Partnership suit — Costs — *See* COSTS—SPECIAL CASES, 7 C. 428=9 C.L.R. 157.

Joint family—Joinder of party—*See* LIMITATION ACT, 1908, s. 22, 76 P.L.R. 1905, F.B.=57 P.R. 1905.

See LIMITATION ACT, 1908, s. 22, 12 B.H. C. 97.

See PARTIES TO SUIT—GENERAL, 25 W.R. 203.

Suit for partnership accounts—Joint agreement—Omission of parties—*See* PARTIES TO SUIT—ADDING PARTIES TO SUIT, 14 C. 791.

Plaintiff in partnership suit seeking withdrawal or dismissal of suit—Application by defendants to be made plaintiffs—Practice—*See* PARTIES TO SUIT—TRANSPOSITION OF PARTIES TO SUIT, 7 B. 167.

See RES JUDICATA—CAUSE OF ACTION, 5 M. 47.

Money promised as consideration for retirement of partner, suit for—Small Cause Court — *See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 19 A. 513=A. W.N. 1897, 136.

Service of summons on minor defendants—Suit—*See* SUMMONS, 26 C. 267=3 C.W.N. 261.

—6.—Miscellaneous.

(1)—*Sub-partnership—Documentary evidence.*—On a question whether a sub-partnership had been entered into, the validity of which depended on an instrument produced in evidence in the Court below, and upon inspection, as well as the evidence in support of it, pronounced to be invalid, the Judicial Committee, in confirming the judgments of both Courts below, were of opinion that they were concluded under the circumstances of the case from entering upon the examination of the instrument itself, though they fully concurred in the opinion expressed by the Judge of the Zillah Court, and dismissed the appeal with costs. **NUNDRAM DYARAM AND OTHERS v. DULA-BHAE KURPARAM, 1 M I A. 414.**

(2)—*Firm deriving benefit of contract with a partner—Liability of firm to be bound by contract.*—A firm obtaining the benefit of a contract made with one of its partners is not necessarily bound by that contract. **SETH RAMLAL v. SETH NARSINGDASS, 14 C.P.L.R. 22.**

Partnership—continued.**—6.—Miscellaneous—continued.**

(3)—*Suit for accounts—Procedure—Civ. Pro. Code (Act X of 1877), sch. IV, forms 132 and 133—Partnership suit—Frame of suit—Sch. IV, form 113.*—In a suit for an account of partnership transactions, the Judge should follow the course pointed out in forms 132 and 133 of sch. IV of the Civ. Pro. Code; and upon determining, at the first hearing, whether there had been a partnership, what its conditions, whether it was dissolved, &c., he should direct accounts to be taken and make a final decree after the accounts are taken. [R., 20 M. 313.] The plaint in a partnership suit must be framed on the lines of form 113 of the Civ. Pro. Code and the accounts taken as prayed therein. *RAM CHUNDER SHAHA v. MANICK CHUNDER BANIKYA*, 7 C. 428=9 C.L.R. 157. [R., A.W.N. 1883, 220.]

(4)—*Adjusted account—Settlement of basis of account—Final adjustment not signed—Pleadings, want of precision in, if material—Limitation—Cross demands in partnership account—New cause of action from adjustment—Limitation Act (IX of 1908), sch. I, arts. 64, 115 and 120.*—When parties had agreed on the 2nd April, 1905, that a settlement of partnership accounts between them should be made upon a certain basis, and the final adjustment took place on the 20th August, 1906 and entries to that effect were made in the books on that date but not signed by the parties, in a suit brought on the 16th April to recover the amount due on such adjustment: *Held*—That it was an adjustment which gave rise to a fresh cause of action as from date, and whether it was article 115 or article 120 of the Limitation Act that applied, the suit was not barred. When the plaint did not specify the day on which the adjustment took place, but approximately indicated the time and proof was furnished of exact date at the hearing. *Held*—that there was nothing in the pleadings which should prevent the Judge from arriving at any conclusion on the evidence adduced as to the date. *JALIM SINGH SRIMAL v. CHOONEE LALL JOHURRY*, 15 C.W.N. 882.

(5)—*Partnership accounts—Examination of original account books by Court.*—The Court of Sudder Dewanny Adawlut of Bengal ought not to affirm a decree of a Provincial Court in a case respecting a balance of partnership accounts without examining the original account books of the firm, if they are tendered in evidence before it, although they were not produced before the Provincial Court. *BABOO BENEE SUHAE v. BABOO HURKISHEN DOSS*, 2 Knapp 255.

(6)—*Suit to enforce article in partnership deed—Suit for dissolution not necessary.*—At the instance of one partner, the Court can compel the other partner to enforce a particular term of a partnership or to restrain its breach the same being not substantially open to the same objections as enforcing the performance of a contract to carry on a partnership

Partnership—continued.**—6.—Miscellaneous—continued.**

business. Even without bringing a suit for dissolution of partnership such a suit for enforcing of the partnership articles may be maintained. *KARI VENKATAREDDI v. KOLLU NARASAYYA*, 4 M.L.T. 456=19 M.L.J. 10=32 M. 76=1 Ind. Cas. 384. (15 M.L.J. 142, 18 M. 134, 26 C. 254, R.; 2 M.H.C. 28, Cons. & Diss.; 2 N.W.P. 90, 3 M.H.C. 341, 1 C.L.R. 545, R.)

(7)—*Dissolution of—Decree—Money-decree—Civ. Pro. Code (XIV of 1882), s. 273.*—A decree in a suit for dissolution of partnership is, for the purposes of execution, to be regarded as a money decree. It can be attached but cannot be sold: and the only remedy respecting it, is the procedure under s. 273 of the Civ. Pro. Code, 1882. *SIDLINGAYA v. SHANKAR-APA*, 5 Bom. L.R. 529=27 B. 556.

(8)—*Partnership—Dissolution of partnership—Liability of retired partner for debts contracted after dissolution—Contract Act, 1872, ss. 245, 264.*—A party was charged with liability as a partner long after the partnership was dissolved by a person who had had no dealings with the original firm before its dissolution, and was not even aware that the party charged with the liability was a partner of the firm. Notices of dissolution were given to all concerned. No attempt at concealment of the change in the constitution of the firm was proved. *Held* that the continuing partners being suffered to carry on business in the old firm's name, which did not disclose the identity of the retired partner or the maintenance of a joint responsibility in a specific contract, was no reason to make such person liable for debts contracted by the firm long after his retirement. S. 264, Contract Act, will not apply to the case of a person dealing with a firm for the first time after a change from its original constitution, so as to make a *quondam* partner liable. *CHAND MAL v. GANGA RAM*, 78 P.R. 1903. (8 C. 678, 7 C.W.N. 441, 25 A. 1, 9 M. 492, R.)

(9)—*Mortgage of revenues of village executed by a firm—Suit by partner against co-partners for his share of assets—Attachment against estate in execution—Suit by mortgagee for removal of attachment.*—The question in this case related merely to the construction of a mortgage deed by which the revenues of a village were mortgaged by a firm in which the respondent was a partner. By the mortgage-deed it was stipulated that the holders of the mortgage shall station a *mehta* or clerk of their own in the said village for the purpose of making the collections, so long as the property remained in mortgage, the *mehta* was to receive his salary from the mortgagors. The instrument was executed on account of the partnership of which the respondent was member, so that, though he had not himself executed it, he was cognizant afterwards of its execution, and was bound by its contents so as to be considered as being a mortgagor. This respondent, having obtained a decree against

Partnership—continued.**—6.—Miscellaneous—continued.**

his co-partners for his share of the assets of the firm, got attachment to issue against the estate in execution of his decree. Thereon, the mortgagee instituted the present suit for the removal of such attachment. Their Lordships were of opinion that, on the facts in evidence, actual possession should be deemed to have been taken by virtue of the mortgage and that the transaction was valid up to the time of the notice of the respondent's claim, because until the attachment was executed there was no notice to the mortgagee of any adverse claim on the part of the respondent. But, when the attachment was placed on the village, the mortgagee had notice of the adverse claim so that if, after that time, he permitted the mortgagor to receive any portion of the profits of that estate, then he ought, with respect to the monies so received, to be postponed to the respondent who was to be regarded as a second incumbrancer, only from after his having proceeded to enforce his claim by attachment and not before. *JUGJEEWUN DAS KEEKA SHAH v. RAM DAS BRIJBOOKUN DASS*, 6 W.R. P.C. 10 = 2 M.I.A. 487. [Appl., 12 C. 389, 26 M. 652; R., 19 M. 471; D., 7 Ind. Cas. 808 = 8 M.L.T. 253.]

(10)—*Creditor of the partnership executing a decree against one of the partners—Receiver.*—One of several partners in a trade, who pays money on account of his co-partners, cannot maintain an action against them for contribution on the ground that he made such contribution not voluntarily but by compulsion of law. But when once the decree dissolving the partnership is passed and a receiver is appointed to take the account of the partnership and to pay its debts, the creditor of the partnership should not execute his decree against any of the partners but must go to the Court which has appointed the receiver and take its directions. *SIDLINGAPPA v. SHANKARAPPA*, 5 Bom. L.R. 912 = 28 B. 176.

(11)—*Provision in partnership deed regarding succession of partner's nephew on partner's death—Partnership terminable at will, and not for a term.*—Where a deed of partnership provides that, on the death of one of the partners, his nephew should act in his stead, held, that the provision did not constitute the partnership as one for a term intended to run during the lifetime of the partner, but only a partnership dissoluble at will. *SAMI AYYANGAR v. SRINIVASA AYYANGAR*, 4 M.L.T. 478 = 19 M.L.J. 77 = 4 Ind. Cas. 618.

(12)—*Arbitration, submission to—Submission to arbitration by some members—Other members not bound by submission.*—One of several partners in a partnership cannot bind the others by a submission to arbitration even of matters arising out of the business of the price. It is no part of the ordinary business of a trading firm to enter into a submission to arbitration. *DATOOBHOY v. VALLU*, 1 Bom. L.R. 828.

(13)—*Advances by partner—Rights regarding the advances made by him to the partnership*

Partnership—continued.**—6.—Miscellaneous—continued.**

—*Account—Plaintiff's death—Defendant becoming plaintiff—Practice and Procedure.*—It is not permissible to one partner to sue his co-partners for money lent by him to a partnership of which they all are members, because the advance made can only form an item in the partnership account. A firm, owned by a Joint Hindu family consisting of a father and son, plaintiff and defendant 2, made advances to a partnership of which defendant 2 was one of the partners. Plaintiff brought a suit to recover the advances made from all the partners and the surety including defendant 2. The lower Court passed a decree against the defendants. One of the partners and the surety preferred an appeal to the High Court; and while the appeal was pending plaintiff died. At this, defendant 2, who thereby became the sole owner of the firm, was substituted in plaintiff's place: Held, (1) that the fact that defendant 2 was partly interested both as creditor and debtor rendered the suit unmaintainable so far as his share was concerned, but it could not stand in the way of the Court's adjusting the rights of the parties in accordance with the rule of justice, equity and good conscience. (2) that as defendant 2 became the sole creditor and sole plaintiff owing to plaintiff's death pending the appeal, he was entitled only to such relief as would have been possible and he occupied that position at the institution of the suit; that, therefore, defendant 2 was only entitled to credit in the partnership account his share as well as the share which descended to him at plaintiff's death but not entitled to any decree in the present suit either against the partners or the surety. *RUSTOMJI v. PURSHOTAMDAS*, 3 Bom. L.R. 227 = 25 B. 600.

(14)—*Solicitor's lien—Costs—Partnership suit—Assets of partnership in the hands of Receiver—Solicitors' costs entitled to preference over creditor's claim—Creditor should not issue execution against assets, but to ask for charging order—Practice and procedure.*—Where there are assets of a partnership in the hands of a Receiver appointed in a partnership suit, the solicitors engaged in that suit are entitled to ask for a charge on those assets in priority to the creditors of the partnership. A creditor of a partnership, the assets of which are in the hands of a Receiver appointed by the Court, should not issue execution against the assets; but he should ask the Court for a charging order in his favour. *A. HAJI ISMAIL AND CO. v. RABIABAI*, 11 Bom. L.R. 1062 = 34 B. 484 = 4 Ind. Cas. 135.

In elephant-catching business—Whether falls under s. 4, Companies Act—See ACT VI OF 1882, s. 4, 13 C.W.N. 638 = 1 Ind. Cas. 655.

Interlocutory order in—Suit, not a final decree or order—See APPEAL TO PRIVY COUNCIL—CASES WHERE APPEAL LIES OR NOT, 6 B. 260.

Partnership—continued.—6.—**Miscellaneous**—continued.

Unascertained interest in a—Court-sale—Validity—See ATTACHMENT—SUBJECTS OF ATTACHMENT, 13 M. 447.

See BURDEN OF PROOF—DEBTOR AND CREDITOR, 3 N.W.P. 129.

Suit for dissolution of two partnerships—Misjoinder—See CIV. PRO. CODE, 1908, O. II, r. 3, 3 S.L.R. 108=4 Ind. Cas. 600.

Suit for money on taking accounts of a dissolved—not to be decreed for defendant but dismissed though something was found due to defendants—See CIV. PRO. CODE, 1908, O XX, rr. 15 and 19, 3 A.L.J. 233=A.W.N. 1906, 111.

Partnership with excise licensee—Legality of partnership—See CONTRACT ACT, 1872, s. 23, 11 C.P.L.R. 62.

Agreement of, entered into by licensee under Excise Act XII of 1896, whether valid—See CONTRACT ACT, 1872, s. 23, 114 P.R. 1906.

Suit for recovery of debt due to—Debt accrued due when a deceased partner was alive—Necessity of representatives of deceased partner as parties—See CONTRACT ACT, 1872, s. 45, 10 P.R. 1906.

See CONTRACT ACT, 1872, s. 178, L.B.R. 1872—1892, 314.

See COURT FEES ACT, 1870, sch. II, cls. 11, 12, 1 C. 168.

See DORMANT PARTNER, 10 Bom. L.R. 811.

See EVIDENCE ACT, 1872, s. 92 (4), U.B.R. 1902—1903, Vol. II, Evidence 5.

See EXECUTION OF DECREE—MISCELLANEOUS, U.B.R. 1897—1901, Vol. II, 431.

Proved—Dismissal of suit for non-joinder—See HIGH COURT, JURISDICTION OF—BOMBAY, 11 Bom. L.R. 273=34 B. 13=3 Ind. Cas. 837.

Appointment of receiver—Injunction against defendant—Partner collecting partnership debts—See LIMITATION ACT, 1908, s. 15, 8 M. 229.

Part payment by one partner, whether keeps alive debt against other partners—Authority to pay, necessary—See LIMITATION ACT, 1908, s. 21, cl. 2, 5 M.L.T. 102=2 Ind. Cas. 309=32 M. 421.

Mahomedan Law of—Resemblance with English Law—Effect of death of partner—See MAHOMEDAN LAW—INHERITANCE, 5 M.L.T. 201=32 M. 276=3 Ind. Cas. 576.

Suit for partition and for dissolution of—See MULTIFARIOUSNESS, 5 M.L.T. 117=19 M.L.J. 102.

Suit by some partners for dissolution of partnership—Opposition by other partners—Order of reference by consent—Subsequent suit by defendant partners for damages—Maintainability—See RES JUDICATA—PARTIES, 12 M.L.J. 445.

Partnership—concluded.—6.—**Miscellaneous**—concluded.

Death of a partner—Insolvency application by surviving partners, if vests in the official assignee—See ST. 11 AND 12, VIC., C. 21, s. 7, 6 M.L.T. 188=3 Ind. Cas. 163.

Suit for account of partnership—Suit by son of Muhammadan partner—See SUCCESSION CERTIFICATE ACT, 1889, s. 4 (1) (a), 22 M. 139.

Part-payment.

See LIMITATION ACT, 1908, s. 20.

(1)—*Part satisfaction, if mortgagee bound to accept.*—A mortgagee is not bound to accept any sum in part-satisfaction of his decree. RAM KAMLESSURI PERSHAD SINGH v. SUKHAN SINGH, 7 C.W.N. 172. [R., 10 C.L.J. 91.]

(2)—*Hindu law—Joint family—Bond in favour of one member of an undivided family for himself and others—Practice—Procedure.*—A member of a joint Hindu family can sue on a contract which he has taken in his own name especially when it does not purport to have been obtained by him on behalf of any other, but himself. The question whether payment to any member of the family will be binding on the member who takes the contract in his own name seems to depend upon the facts of each particular case. The promisee under the contract will be, as regards the promisor, the only person entitled to payment. It cannot be said that a part payment to any member of the family is by itself necessarily binding on the promisee. It lies on the promisor to show that his payment to a third party is binding on the promisee. GURUSHANTAPPA v. CHANMALLAPPA, 1 Bom. L.R. 556=24 B. 123.

Where—is pleaded to take a case out of the bar by limitation, the Court ought to find whether the payment was on account of principal or on account of interest—See CIV. PRO. CODE, 1908, O. XVIII, r. 13, 9 C.W.N. 418.

By a guardian extends the period of limitation against his ward—See LIMITATION ACT, 1908, ss. 19 and 20, 3 Bom. L.R. 817=26 B. 221.

Part performance of contract.

Doctrine of—See PARTITION—GENERAL, 6 Ind. Cas. 346=12 C.L.J. 25.

Lease—Doctrine of—See TRANSFER OF PROPERTY ACT, 1882, ss. 4, 105, 107, 5 Ind. Cas. 562.

Party Wall.

(1)—*Tenancy-in-common.*—When the precise extent of the land which originally belonged to each party can be ascertained, the presumption in favour of a tenancy in common gives way to the inference that each party owns that moiety of the wall which stands upon his own land. The strip belonging to each owner is subject to an easement in favour of the other owner to have the whole wall maintained as a party-wall. PURSHOTUM v. KHMJI, 7 Bom. L.R. 228.

Party Wall—concluded.

(2)—*Beams, insertion of, in the party wall—Posts, insertion of, in the party-wall.*—Where one of the owners of a party-wall in constructing his house inserts beams and pillars into his side of the wall, the other owner has a right to complain only if the alleged acts amount to his ouster or to a destruction of the party-wall. *KALISHANKER v. BAI KESHI*, 6 Bom. L.R. 682.

See CO-SHARERS—ENJOYMENT OF PROPERTY BY CO-SHARERS, 19 M. 38.

Party-wall, raising of, under the terms of an agreement—See DEED—CONSTRUCTION OF DEEDS, 2 Bom. L.R. 214.

Building leases of contiguous sites—Undertaking of liability for the cost of—Common covenant—Right of lessees to enforce *inter se*—See LEASE—GENERAL, 6 B. 528.

Partition wall with drain for passage of water—Continuous and necessary easements, grant of, by implication—See PRESCRIPTION—EASEMENTS—WATER, RIGHT CONCERNING, 14 B. 452.

Holders of adjoining plots of land for building, liability of, in respect of party walls—Suit not maintainable for declaration of ownership of wall and for injunction—Order amounting to decree within the meaning of s. 2 of the Civ. Pro. Code, right of appeal from—See RIGHT OF SUIT—BUILDING, SUIT TO RESTRAIN, 9 B. 183.

Interference by one mortgagee with another—Opening of shut up door in common party-wall—Duty of mortgagee—See TRANSFER OF PROPERTY ACT, 1882, s. 76, 16 A. 386=A.W. N. 1894, 129.

Pass-Book.

(1)—*Pass-Book, credit entry by a bank in.*—Credit given in a pass-book binds the banker, if on the faith of such credit the customer has altered his position, as by drawing on the credit, etc., for, by entering the sums to the customer's credit, they lead him to suppose that they have received them on his account. When, however, there has been no such alteration, the banker is allowed to show that the entries were made by mistake; for the pass-book is only *prima facie* evidence against him. *MOWJI v. NATIONAL BANK OF INDIA*, 2 Bom. L.R. 1041=25 B. 499.

Passengers.

See RAILWAY COMPANY.

Injured by negligence of a Railway Company—See NEGLIGENCE, 1 Bom. L.R. 254=24 B. 1.

Passenger Ships, Native Act.

See ACT XXI OF 1858.

See ACT VIII OF 1876.

Past Services.

Value of, when set up against an alienation—See CONTRACT—MISCELLANEOUS, 5 M.L. T. 140=19 M.L.J. 62.

Pasturage, Right of.

(1)—*Nowabad mehals—Sub-lease—Pasturage lands.*—Sub-lease of Nowabad lands, with a stipulation as to acknowledged pasturage lands being rent-free, allows of rent being demanded from *bona fide* pasturage lands not acknowledged at the time of the sub-lease. *ALIMOODEE v. SUFFER ALI*, 1 W R. 259.

Pasturage right, grant of, independently of interest in land—See BEN. ACT VIII OF 1885, ss. 144, 184, 193, sch. III, art. 2, 7 C. L.J. 152.

Right to free pasturage—See BOM. ACT I OF 1865, s. 32, 2 B. 110.

Free grazing lands set apart by Government for village cattle—Disposal of part of such lands by Government—Extent of right of pasturage in Government waste lands—Relative rights of villagers and of Government, how far within Civil Courts' jurisdiction—See JURISDICTION OF CIVIL COURTS, 21 B. 684.

Extent of tenant's rights of free pasturage—Landlord and Tenant—See LANDLORD AND TENANT—GENERAL, 31 C. 503, P.C.=31 I. A. 75=8 C.W.N. 425=14 M.L.J. 152.

Provisions of statutes, the Crown how far affected by—S. 26 of Limitation Act not applicable to the Crown—Rights of pasturage claimed as against Government—Profits *a prendre*, rule of English Law regarding—Acquisition by custom or prescription—See LIMITATION ACT, 1908, s. 26, 14 B. 213.

Rights of pasturage—In Zamindari waste-lands—Right of Zamindar to reclaim—See WASTE LANDS, 19 A. 172=A.W.N. 1897, 35.

Pasture Lands.

See CHARIRAMNA HOLDINGS, 14 C.W.N. 372=5 Ind. Cas. 783.

Right of inamdar to enclose—See INAMDAR, 3 B. 147.

In a suit for possession of land by landlord, the fact of the land being—raises a presumption in favour of plaintiff that it is *mal*, and not *lahiraj* land—See LANDLORD AND TENANT, —MISCELLANEOUS, 10 C.W.N. 434.

Pasture ground—See STAMP ACT, 1879, sch. I, art. 5 (c), 13 B. 87.

Pasture, right of—Over waste land—Prescriptive right—See WASTE LAND, 7 M.L.T. 380.

Paswal Gujars.

(1)—*Paswal Gujars of tahsil Kharian, Gujarat District—Gift by childless proprietor to sister's son—Custom.*—Among the Paswal Gujars of tahsil Kharian, Gujarat District, there was no custom by which a childless proprietor could make a valid gift of his ancestral land or any portion thereof to his sister's son without the consent of the donor's male collaterals. In the absence of a general custom, such proprietor could not, in the presence of brother's sons, make a valid gift of his land or any portion thereof to his sister's son when that son from infancy had been brought up as

Paswal Gujars—concluded.

a son in the donor's house. *NURDIN v. SAHIB-ZADA*, 18 P.R. 1880. [R. 51 P.R. 1883, 127 P.R. 1883, 53 P.R. 1889, 128 P.R. 1890, 92 P.R. 1891, 140 P.R. 1893, 67 P.R. 1901.]

Pat.

And Natra marriages—Chhor Chithi—Inheritance. See *HINDU LAW—MARRIAGE*, 1 B. 97.

Patelki Vatan.

Suit for partition of vatan property—Family Custom of primogeniture set up—Deshmukhi vatan, impartible nature of—Patelkhi vatan partibility of—See *HINDU LAW—CUSTOM*, 10 B. 598.

Patent.

See *ACT XV OF 1859*.

(1)—*Useful invention—Act XV of 1859, s. 25—Limitation and piracy of patented machine test of finding—Patented machine improvement of—Novel combination—Infringement of Patent—Injunction—Suit for account of profits and damages—Election between the two remedies.*—The fact that a machine has been improved several times since the original patent was obtained is no argument against its being a useful invention within s. 25, Act XV of 1859, (*Cannington v. Nuttal*, L.R. 5 H.L. 205, F.) In deciding whether a machine patented as an entire invention, is an imitation and piracy of another machine previously patented as an entire invention, the question is, is the later patented machine substantially the same as the earlier one? The fact of considerable differences existing in the several parts of the two machines will not prevent the later machine from being as a whole a copy of the earlier one; even where an exclusive privilege might have been acquired had the alterations in the later machine been claimed as improvements on the earlier one (*Clark v. Adie*, 2 App. Cas. 315, F.) Where a patent has been obtained for a machine which the patentee subsequently somewhat improves, a subsequent specification claiming the improved machine as a novel combination is bad though the improvement might be claimed and protected as such. Where a new arrangement of the parts of a machine is claimed as an improvement, the arrangement must be clearly described in the specification. The mere substitution of one mechanical equivalent for another already in use will not be protected. Where a case of infringement of a patent has been made out, an injunction will follow as a matter of course. A plaintiff cannot pray for an account of profits and for damages. He must elect between the two remedies. If the plaintiff elects to take an account of the profit, such accounts will only be carried back to the period of one year before the filing of the plaint in accordance with Act IX of 1871, sch. II, cl. 11. *KINMOND v. JACKSON*, *KINMOND v. LAWRIE*, 1 C.L.R. 66.

Patent—concluded.

(2)—*Manufacture outside—Sale within the place of privilege—No infringement.*—Where an exclusive privilege is acquired for the process or manner of producing bricks and not for the bricks so produced, a sale by a third party within the limits of exclusive privilege, of bricks manufactured by the said process outside those limits will not amount to an infringement of the patentee's rights. *HIRANAND v. HARI RAM*, 24 P.R. 1896.

(3)—*Infringement of Patent—Amount of damages—Specification of places and breaches—Acts amounting to infringement.*—The fact that in the specification filed under Act XV of 1859 only some places are mentioned does not give a license to a person to infringe the right in other places not mentioned therein. Evidence of breaches in addition to those entered in the schedule prescribed by s. 34 may be taken into consideration in assessing damages. The buying of portions of machines from licensed persons and putting them together and the buying of rollers and whole machines from unlicensed persons are acts constituting infringement. *LALA GANDA MAL v. MESSRS WALTER THOMSON AND JAMES MYLNE*, 115 P. R. 1889.

(4)—*Patent, infringement of—Injunction, to restrain infringement of patent.*—The plaintiff, a patentee of a cane-crushing mill, brought a suit for an injunction to restrain infringement of his patent by the defendant. The defendant contested the suit, but the District Judge granted the injunction. Before the Appellate Court the defendant admitted the validity of the patent and that he had infringed it and undertook not to infringe it again. *Held*, that as there was a danger of future infringement an undertaking was not sufficient and the plaintiff was entitled to the injunction granted by the Court. *BISHUN DATT v. G. L. PERFECT*, 7 O.C. 103.

Grant of patent when justified—See *ACT V OF 1888*, ss. 4, 30, 17 A. 490=A.W.N. 1895, 113.

Trade-mark, infringement of—Colorable limitation—Injunction—See *INJUNCTION—SPECIAL CASES*, 17 B. 584.

Infringement of patent—See *REVISION—GENERAL*, A. W. N. 1882, 62.

Patil.

Appointment by Collector, of one of several co-parceners to officiate as Patil—Presumption as to adverse possession—See *BOM. ACT XI OF 1843*, 1 B. 533, Note.

Patnidar.

Apportionment of compensation money between Zemindar and patnidar—See *ACT X OF 1870*, 7 C. 585=9 C.L.R. 227.

Amount of compensation under Act X of 1870—Apportionment between Zemindar and—Principle—See *ACT X OF 1870*, 14 C. 749.

See *ACT I OF 1894*, 7 C.W.N. 130.

See *BEN. ACT VI OF 1870*, 4 C.W.N. 814.

Putnidar—concluded.

See BEN. ACT VII OF 1876, ss. 38, 78, 24 C. 404.

Relinquishment by—Adverse possession against putnidar—See LIMITATION ACT, 1908, art. 144, 26 C. 460.

See BEN. REGULATION VIII OF 1819, 3 B. L.R. 48, P.C. = 13 M.I.A. 160 = 12 W.R. 43, P.C.

Patni Taluk.

(1)—*Reg. VIII of 1819—Purchaser of under-tenure—Decision against defaulting putnidar—Res judicata.*—In the case of a person purchasing an under-tenure sold at the suit of the landlord, the purchaser is entitled to acquire rights higher than an ordinary purchaser by private contract only to the precise extent to which such privileges are conferred by express terms of law. The purchaser of a putnee talook is not entitled to set at naught all decisions arrived at against the defaulting putnidar. *TARAPRASAD MITTRA v. RAM NARSING MITTRA*, 6 B.L.R. App. 5 = 14 W.R. 283. [Expl., 12 C. 82; R., 34 C. 868.]

See BEN. REG. VIII OF 1819, s. 8, 9 C. 619 = 10 I.A. 19 = 13 C.L.R. 34, P.C.

Patni Tenure.

See SALE—SALE FOR ARREARS OF BENT.

(1)—*Putni lease, construction of—Covenant in contravention of the rule against perpetuities—Contingent covenant in a lease, when operative.*—Where a lessor by a putni patta, after leasing a mouzah, exempted from its operation certain lands, and covenanted that, on certain contingencies happening, the lessee should acquire a right thereto as putnidar, but no time was specified within which the contingency was to happen in order to vest the right in the putnidar: *Held*, that such a covenant was void as offending against the rule against perpetuities, even as between the parties to the covenant. *ANATH NATH MAITRA v. KUMAR KESHAB CHANDRA ROY*, 14 C.W.N. 601 = 5 Ind. Cas. 487. (16 C. 71, P.C., 24 M. 449, 5 C.W.N. 343, R.)

(2)—*Reg. VIII of 1819, s. 11, cl. 1—Putni lease—Construction—Sale of portion of putni tenure—Right of auction-purchase.*—Where a putni lease contained certain words to the effect that the putnidar could give no *dur-putnee* or *mokurruri* at *jumma* less than the *jumma* of the putni, *held* that it did not confer any such power as that described in cl. 1, s. 11 of Reg. VIII of 1819, by which the right to make incumbrances has been expressly vested in the putnidar. A portion of a putni-tenure cannot be sold under the provisions of Reg. VIII of 1819, and therefore the auction-purchaser of such portion under the provisions of that law would acquire nothing. If by the sale he has acquired any of the rights of the putnidar, he is bound by the acts of the putnidar who gave the lease. *MOHADEB MUNDUL v. H. COWELL*, 15 W.R. 443. [Expl., 20 W.R. 275; Appr., 22 W.R. 50.]

Patni Tenure—continued.

(3)—*Suit for registration of name—by se-putnidar against dur-putnidar.*—A suit by a se-putnidar to compel a dur-putnidar to register his name in his sherista as transferee of a se-putni tenure is not maintainable (24 C. 642, F.). It is open to a se-putnidar to sue for a declaration of his rights as the tenant of the dur-putnidar. *MOTI LAL SINGH v. SHEIK OMAR ALI*, 3 C.W.N. 19. [R., 13 C.W.N. 1110.]

(4)—*Transfer without Zemindar's consent—Effect of partial transfer.*—A putnee talook remains whole and entire unless divided by an act of the Zemindar or by an act recognised by him. A putneedar may generally transfer his tenure without the consent of the Zemindar, but he can only do so in *solido*; and though the transfer of a portion of the putnee may perhaps be not altogether void, it can have no other operation than to create some kind of under-tenure between the transferor and the transferee, and can in no way affect the existence of the putnee in its entirety or the rights of the Zemindar. *JUDOONATH SHAHANA v. JADUB CHURN THAKOOR*, 11 W.R. 294. [D., 8 C.L.J. 554.]

(5)—*Putnee-patta—Suit as ijaradar for rent—Regular suit.*—A putnee tenure as regards a share therein cannot be got rid of by one of the several grantors of the putnee patta by a suit for rent as ijaradar of that share against the ryots. The putnee should be upheld until it is set aside by a regular suit. *RAJ CHUNDER ROY CHOWDHRY v. UNNODA PERSHAD MOOKERJEE*, 17 W.R. 221.

(6)—*Putnee—Conduct of putneedar—Cancellation of original lease.*—Where a putneedar made separate payments of rents to the sharers, registered his name with each of them and was prepared to enter into a fresh engagement with the plaintiff, who was one of them, all these facts did not amount to a cancellation of the original lease and substitution of a new lease. *SHAM CHAND MITTER v. JUGGUT CHUNDER SIRCAR*, 22 W.R. 50. [Appl., 22 W.R. 541.]

(7)—*Landlord and tenant—Suit by Zemindar against both for setting aside putnee—Decree—Satisfaction by tenant—Effect.*—Where a putneedar and his tenant were defendants in a suit brought by the Zemindar for setting aside the putnee and a decree was passed under which both were made liable for mesne profits which the tenants paid out of his own pocket, *held*, that the effect of the payment was to cancel all relation of landlord and tenant between them, and to give the tenant the right to receive back what he had paid to the zemindar. *RAKHAL MONEE DOSSEE v. BROJENDRO GOPAL ROY*, 23 W.R. 303.

(8)—*Setting aside of putnee.*—A putnee fraudulently created may be set aside as invalid notwithstanding the acquiescence of the subsequent mortgagees. *JOTENDRU MOHUN TAGORE v. BROJO SOONDUREE DABEE*, 1 W.R. 362.

(9)—*Suit to set aside sale of putnee by widow—Subsequent collusive sale for arrears of rent—*

Patni Tenure—continued.

Defendant in possession under title from widow, rights of.—Plaintiff alleged that a *putnee* belonged in equal shares to his maternal grandfather and his maternal grand-uncle, that on the death of the former, his widow succeeded to his moiety and afterwards sold it to the defendants. Plaintiff sued to set aside the above sale by the widow and a subsequent collusive sale under Reg. VIII of 1819, the defendant having fraudulently allowed the tenure to fall into arrear and then purchased it himself at a sale under the Regulation. The main issue to be tried was whether the defendant held possession under a title from the maternal grand-mother or not previous to the *putnee* sale, or did acquire his original title only from that sale; because, if the defendant was in possession under a title from the widow, his subsequent purchase at the auction sale, six years before the death of the widow, on account of non-payment of rent, would not create a new title as against those claiming through the widow, especially when, according to the plaintiff, the defendant at first allowed the *putnee* to fall into arrear and then fraudulently purchased it himself. **WOMESH CHUNDER MOOKERJEE v. BISSESSUREE DABEE, 6 W.R. 8.**

(10)—*Patni taluk—Splitting up of tenure—Suit by putneedar—Registrations of share—Act X of 1859, s. 27.*—A *putneedar* is not bound to split up the tenure and to record separately the *jumma* payable by the holder of a share. Before the holder of a share can sue a *putneedar* to register his share, he should make an application to the *putneedar* for registration of his share under s. 27, Act X of 1859. **BHOOPUTTEE ROY v. UMBICA CHURN BANERJEE, 17 W. R. 169.** [R., 13 C.L.J. 613 = 9 Ind. Cas. 1001 = 16 C. W. N. 64.]

(11)—*Shebait of endowed property—Powers of alienation.*—The creation of a *putni* by the shebait of an endowed property is not absolutely null and void. Such an alienation under special circumstances of necessity will be valid. **TAYUBUNISSA BIBI v. KUWAR SHAM KISHORE ROY, 7 B.L.R. 621 = 15 W.R. 228.** [R., 5 B. 393, 19 B. 271, 25 A. 296.]

(12)—*Putneedar—Payment of rent in equal shares to two owners of Zamindari—Division.*—Where the *putneedar* is one individual who holds his *putnee* by paying rent in equal shares to the two owners of the *Zamindari*, the division of the *putnee* is the joint act of the *putneedar* and the *Zamindars*, and is as if each of the *Zamindars* had granted to the same person his share in the *putnee*. **MONOMOTHONATH DEY v. GLASCOTT, 20 W.R. 275.** [D., 8 C.L.J. 554.]

(13)—*Putnee lease by zemindar—Interest of zemindar—Lakheraj.*—A *zemindar* giving his estate in *putni* lease is entitled to challenge the right of another who asserts a *lakheraj* title adverse to him. **OKHOY RAM JANAH v. SYUD MAHOMED HOSSEIN, W. R. 1864, 212.**

Patni Tenure—continued.

(14)—*Putnee tenure—Arrangement between a former proprietor and the putneedar—Validity as against the present proprietor—Held that the proprietor for the time being is not bound by a former proprietor's arrangement to allow the putneedar to pay his rent direct to the Collector.* **MUDDUN MOHUN SHAHA v. SOOKOMOYEE CHOWDHRAIN, W.R. 1864, Act X, 109.**

(15)—*Act VIII (B.C.) of 1869, s. 46—Putnee talookdars—Under-tenant—The term 'under-tenant' is wide enough to include a talookar and s. 46 of Act VIII (B.C.) of 1869 applies to putnee talookdars.* **THAKOOR DOSS GOSSAIN v. PEAREE MOHUN MOOKERJEE, 22 W. R. 431.**

(16)—*Putnee lease—Intermediate taluks—Merger.*—Where a *putnee* was obtained at a time when there were some taluks in existence under a mortgage, and the *zemindar* subsequently bought in the rights of the talukdars; held, that the *putneedar* could not claim to collect rents directly from the tenants in respect of such taluks, in the absence of a stipulation that the *zemindar* should put an end to the taluks in order that the plaintiff may have the benefit of collecting rents directly from the tenants. The *putnee* having been created prior to the cessation of the mortgage interest, the latter could not have passed under the *putnee*. **JOORA GAZEE v. ABOO KHALIFA, 21 W.R. 427.**

(17)—*Plea of purchase and putnee settlement, onus of proof on defendant.*—When a defendant admits that the disputed property belongs to the plaintiffs but pleads purchase and *putnee* settlement, inasmuch as he resists the plaintiffs' right to enter on their own estate, the burden of proving his case lies upon the defendant. When the defendant, however, sets up, and proves by evidence, which is in itself credible, the creation by the plaintiffs of an inferior tenure which entitles him to hold the estate, he has discharged himself of that burthen, and it then lies on the plaintiffs to displace or explain away that evidence. **OPENDRO NARAIN GHOSE v. BAJPAYEE RAJAH-KESHUP CHUNDER DEB, 6 W.R. 25.**

(18)—*Partition—Putnee.*—In this case the Privy Council agreed with the Lower Courts in declaring the respondents' absolute title (under a final decree in a partition suit) to an estate unencumbered by any *putnee* rights in the appellants. **PROSONNO GOPAL PAL CHOWDRY v. BROJONATH ROY CHOWDRY, 26 W.R. 93.**

(19)—*Patni tenure—Alienation.*—The term "*patni talook*" *prima facie* imports a hereditary tenure [S.D.A. (1806), 139, 3 W.R. Act X, Rul. 127, R.] A tenure in the nature of a *patni talook* is, by its very nature, alienable; the *zemindar* parting with all control and interest except as regards an annual rent, and his interest only requiring that the talook should be kept whole and entire. Where a *potehtah* granting a *patni talook* contained clauses

Patni Tenure—continued.

prohibiting the transfer of its lands by sale or gift, the clauses were construed as intended to prevent alienation, not of the entire talook, but only of portions of the land. *TARINI CHARAN GANGULI v. JOHN WATSON*, 3 B.L.R. A.C. 437 = 12 W.R. 413.

(20)—*Act X of 1859, s. 23 (6)—Dispossession of tenant—Buying in by Government at revenue sale of putnee taluq—Sale of taluq—bought in—Rights of purchaser—Revenue Sale laws—Sale Law before 1822 and after Reg. XI of 1822—Where tenants are dispossessed of their lands by a zemindar who disputes their title, the proper remedy is to sue under Act X of 1859.* [R., 23 W.R. 460; D., 20 W.R. 455.] An hereditary, transferable putnee taluq, created subsequent to the perpetual settlement, and held at a fixed rent, was sold by Government in the year 1835, for arrears of revenue, and the Government itself became the purchaser at such sale. No steps were taken by the Government under Beng. Reg. XI of 1822, to cancel or destroy the talookdary tenure, but, on the contrary, the Government, after reducing the tenure from a taluq at a fixed to a variable rent, made various settlements with the talookdars as late as 1862, agreeing to preserve their rights. The Government afterwards sold the taluk subject to the rights of the talookdars. *Held* that, as the Government had not effectually annulled the tenure before the year 1842, it had lost its statutory right to do so, as Ben. Reg. XI of 1822, under which that right depended, was repealed by Act XII of 1841. *Held* further, that the purchaser from the Government had no higher rights than were possessed by his vendor, at the date of the sale, and the purchaser's title was subject to the vendor's agreement to preserve the talookdar's rights. [R., 24 W.R. 247, 18 W.R. 469, 25 W.R. 536, 2 C.L.R. 13, 9 C. 683 = 12 C.L.R. 304; D., 23 W.R. 345, 2 C.L.R. 216.] The general policy of the Revenue Sale Laws that have been passed since the Perpetual Settlement has been to protect the public revenue by placing the purchaser of an estate sold for arrears of revenue in the position of the person who, at the time of the Decennial Settlement, engaged to pay the revenue then fixed. They, therefore, gave or sought to give the purchaser, the power of abrogating all engagements made by the defaulting zemindar or his predecessors since the settlement, whereby the zamindaree rents and profits, which were the security of Government for the payment of revenue, were diminished. A talookdar could not be dispossessed of his land at the will of the purchaser at the sale; he was at the most liable to pay the district rate for them, and could only be ejected from them if he finally declined to hold it at the enhanced rent. Under Reg. XI of 1822, the law respecting dependent talooks created subsequently to the Settlement was that "such talooks were liable to be wholly avoided and annulled at the option of the purchaser at a sale for arrears of revenue, unless they fell within the class contemplated by

Patni Tenure—continued.

s. 32 of the Regulation." *KHAJAH ASSANOOLLAH v. OBHOY CHURN RAY*, 13 W.R.P. C 24 = 13 M.I.A. 317 = 2 Suther. 306 = 2 Sar. 535.

(21)—*Payment by durputneedar to zemindar, putneedar not liable to make good.*—The plaintiff, a durpatneedar, sued to recover from the Zemindar and putneedar a sum of money which he, the plaintiff, had paid to the Zemindar on account of the putneedar. The Judge on appeal decreed the suit against the putneedar who, on his present special appeal, alleged first, that his putnee had been sold, before the money was paid in, and secondly, that the money was not paid in, according to s. 13, Reg. XVIII of 1819, direct into Court but to the Zemindar. The High Court accepted the above contentions and held that the putneedar was not liable to make good the durputneedar's payments to the zemindar, insufficient as they were to stop the sale of the putnee and also because such payments, under the law, must be made in Court. *MIRZA MAHOMED HOSSEIN ALI v. SHAIKH BUKAOOLAH*, 6 W.R. 84. [R., 15 W.R. 560.]

(22)—*Unregistered purchaser of dur-putnee payments made by, to save putnee from sale—Liability of registered dur-putneedar to pay rent to putneedar.*—Plaintiff, a putneedar, sued his registered dur-putneedar for rent. The dur-putneedar was held to be liable for rent though he asserted that he had sold his tenure to one S not acknowledged by the putneedar. One a sale of the putnee for arrears, S paid money to save the putnee from sale, and the dur-putneedar was held to be not entitled to deduct, as he claimed to do, from the rent due by him, the payments made by S, which were those of a mere volunteer, till S established her interest in the estate and obtained registration. *LUCKEE NARAIN MITTER v. SITANATH GHOSE*, 6 W.R. Act X Ruls. 8.

(23)—*Sale of putnee tenure—S. 14, Act X, 1859, applicability of.*—S. 14, Act X, 1859, applies to the case of a purchaser of a putnee Taluq at a sale held under Regulation VIII of 1819, only when the jumma is shown to be a mesne incumbrance which came into existence subsequently to the creation of the putnee. *HURRO MOHUN MOOKERJEE v. BROJOKISHOR ROY*, W.R., 1864, Act X, 103.

(24)—*Putni—Alienation by putneedars and dur-putneedars—Non-registration by zemindar—Status of alienees.*—All putneedars and dur-putneedars have the right to alienate or otherwise transfer their property without the consent of the zemindar. Consequently, the status of the alienees does not depend upon the registration or the consent of the zemindar. *OKHOY COOMAR CHATERJEE v. MAHARAJAH DHIRAJ MAHTAB CHAND BAHADOOR*, 22 W.R. 299.

(25)—*Dur-patneedar taking putnee lease of same property—Abandonment of possession—Right to recover damages—Benami putnee—Lapse of darpatni.*—A took a durputnee lease of a certain village under one K knowing that the latter held a benami putnee of the whole estate

Patni Tenure—continued.

from the zamindar. The rights and interests of the said zamindar being afterwards sold in execution of a decree against him, they were purchased by a member of the family of the zamindar and were afterwards purchased by M from the first purchaser. M brought an action to prove that the *putnee* in the name of K was only a *benami* for the zamindar and obtained a decree and in execution of it took *khas* possession of the property. A then losing possession of the village he had held in *dur-putnee* for about 8 years. The zamindari and *putnee* rights acquired by M by purchase and by decree came back to the zamindar by some subsequent arrangement and A, previous to this transfer, obtained from M a *putnee* of the village he held as *durputnee* on the same jumma that he paid before as his *dur-putnee* rent. A now sued the zamindar to recover as damages the consideration he had paid for the *dur-putnee*. Held that A having virtually abandoned his possession without trying to dispute in a Court the purchaser's right to oust him, was not entitled to recover any damages for such loss of possession. Where a higher tenure (*e. g.*, a *putnee*) is found to be a *benami*, an under-tenure (*e. g.*, *dur-putnee*, acquired *bona fide* does not necessarily lapse. DWARKANATH MISSER v. SREE GOPAL PAUL CHOWDHRY, 5 W.R. 240.

(26)—*Patni*—Subsequent *qabuliat* giving up certain *mouzahs*—Fresh *patni*—Regulations V of 1816, XII of 1817 and I of 1819—Kanungo and Patwari—Jamawasil baki Papers, admissibility of—Documents not objected to at trial—Subsequent objection not allowable.—A *patni* of thirty *mouzhas* was created bearing a certain rent. Subsequently the *patnidar* executed another *qabuliat*, by which he gave up seventeen *mouzahs* and kept thirteen as his *patni*, with a proportionate reduction of rent: Held, that by the second *qabuliat* he became a *patnidar* of a fresh *patni*. Regulations V of 1816 and XII of 1817 and I of 1819 should be read together. By s. 16 of Regulation XII of 1817, there is no condition that the *patwaris* should confine themselves only to such lands as are *khas* lands or under attachment. Therefore, the *jama-wasilbaki* prepared prior to the fresh *patni*, though subsequently to the original *patni*, would be admissible against the *patnidar*. (7 W. R. 533, D.) The erroneous omission to object to the admission of a document, which is out and out irrelevant, does not make it relevant, and a party may object to it even before the appellate stage of the case, though he did not object to it at the trial; but when once a document which is relevant has been received without any objection at the trial in evidence, it is too late afterwards to object to it on the ground of inadmissibility. TARA PRASONNO MUKERJEE v. ASUTOSH CHOWDHURY, 2 Ind. Cas. 998. (23 I.A. 106=19 A. 76, Expl. & D.; 34 C. 1059=6 C.L.J. 678=9 Bom. L.R. 1192=2 M.L.T. 439, F.)

Permanent tenure between zamindar and *patnidar*, creation of, whether valid—See BEN.

Patni Tenure—concluded.

ACT VIII OF 1885, ss. 3 (7) 5 (1), 65, 4 Ind. Cas. 471=14 C.W.N. 389.

See BEN. ACT VIII OF 1885, ss. 15, 16, 195 (e), 19 C. 504.

See CIV. PRO. CODE, 1908, ss. 15, 20, 30 C. 453=7 C.W.N. 402.

Custom originated during—Whether binding on zamindar after extinction of—See CUSTOMARY RIGHT, 11 C.L.J. 209=14 C.W.N. 487=5 Ind. Cas. 243=37 C. 322.

Granted by widow, void or voidable—See HINDU LAW—WIDOW, 25 C. 1, P.C.=24 I. A. 164=1 C.W.N. 433.

Suit for rent by *putni* lessee against his *dar-putni* lessee—Liability of the latter to pay rent when possession was not delivered—See LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, 9 C.W.N. 387.

Over specific area, in *putni* taluk, transferable—See LANDLORD AND TENANT—TRANSFER OF LANDLORD'S INTEREST, 25 C. 445=2 C.W.N. 108.

See LANDLORD AND TENANT—TRANSFER OF LANDLORD'S INTEREST, 6 W.R. 190.

When *putni* right merges in Zamindari right—See LEASE—GENERAL, 7 Ind. Cas. 346.

Suit by *patnidar* for possession of Chakran lands—Resumption of the lands by Government and subsequent restoration to landlord—See LIMITATION ACT, 1908, arts. 113, 142 and 144, 34 C. 564.

Sale for arrears of rent—Effect of agreement between parties—See BEN. REGULATION VIII OF 1819, 33 C. 381=3 C.L.J. 373.

See RENT, SUIT FOR, 6 W.R. Act X Rul. 31.

See TRANSFER OF PROPERTY ACT, 1882, ss. 2 (d), 111 (d) 117, 28 C. 744.

Putni created and registered after mortgage of revenue paying estate—Decree on mortgage against proprietor and *putnidar*—Sale of estate for arrears of revenue—Transfer of lien to sale-proceeds, if relieves *putni* interest from liability to sale—See TRANSFER OF PROPERTY ACT, 1882, s. 73, 14 C.W.N. 186=5 Ind. Cas. 70.

Sale of *putni* tenure—Setting aside of sale—Applications of some judgment-debtors barred—Sale of entire tenure if to be set aside—See WAIVER, 14 C.L.J. 346.

Patta.

See POTTAH.

Pattadar.

See POTTAH.

See CO-SHARERS—GENERAL, 4 M.H.C. 108.

Pattidari Estates, Bengal Act.

See BEN. ACT I OF 1841.

Patwari.

(1)—*Patwari's rates and cesses—Plaintiffs suing as assignees of Government revenue—whether they can recover.*—In a suit to recover the patwari's rates and cesses paid by the plaintiffs on behalf of the defendant, a zemindar, it was held, that they could recover the said rates and cesses in the same manner as in a suit for arrears of revenue, and a suit for their recovery lies as a suit to recover arrears of revenue. As for those rates the persons with whom the mahal was settled incurred a joint liability, and so, the plaintiffs must be deemed to have paid them as co-sharers. **NARAIN SINGH v. KESHO DAS, 4 A.L.J. 816 = A.W.N. 1908, 20.**

(2)—*Rules regarding—S. 6, Punjab Land Revenue Act—Scope of Rule 29—Person owing land or trading—Appointment of, as patwari.*—Rule No. 29 of the rules framed under s. 6, Land Revenue Act and relating to Patwaris, while it prohibits a man from trading or acquiring land in his circle after he has been appointed patwari does not in any way prevent a man who has traded or whose relations trade or who already owns land from being appointed as a Patwari. **GANPAT v. DEVI DAS, 8 P.R. 1881, Rev.**

(3)—*Transfer—Grounds.*—Patwaris ought not to be transferred from one circle to another as a punishment. The mere fact that a patwari is not acceptable to a certain faction in a village is not a sufficient ground for his transfer. **GURU DAS v. CROWN, 3 P.R. 1885, Rev.**

This circular adds a condition to be prescribed form of patwaris' conduct. **REV. CIR. NO. 5, 25 W.R. Rev. Cir. 4.**

Note in Patwari's diary—See U.P. ACT XVIII OF 1873, s. 12, A.W.N. 1881, 166.

See JURISDICTION OF CIVIL COURTS, 28 P.R. 1876.

Suit by, to recover land appertaining to his holding—Starting point of limitation—See LIMITATION ACT, 1908, art. 144, 10 C.P.L.R. 78.

Patwari Papers.

Patwari's papers—Presumption as to correctness—Rebuttable presumption.—There may be a presumption that what is entered in the patwari's papers is correct, but that presumption is rebuttable. **KINOO JATTI v. BIRJ NANDAN LAL, 10 Ind. Cas. 280.**

See EVIDENCE—SECONDARY EVIDENCE, 1 P.R. 1875, Rev.

Patwaris and Kanungos Act.

See U.P. ACT XIII OF 1882.

See U.P. ACT IX OF 1889.

Pauper Appeals.

See CIV. PRO. CODE, 1908, O. XLIV. rr. 1 and 2.

See PAUPER SUITS.

(1)—*Pauper appeal—Application for leave to appeal as a pauper, matters to be considered in*

Pauper Appeals—continued.

determination of—Civ. Pro. Code, O. XLIV, r. 1. Held that, under O. XLIV, r. 1, Civ. Pro. Code, all that the Judge is bound to consider is what is contained in the application, copy of the judgment and the copy of the decree. He is not at liberty to refer to any other matter in determining whether the application for leave to appeal as a pauper may or may not be granted. **SHAH INAYAT-UL-RAHMAN v. AZIZ-UL-RAHMAN, 13 O.C. 302 = 8 Ind. Cas. 376.**

(2)—*Pauper appeal—Ordinary vakalatnamah not enough—Power of attorney necessary to authorise vakil.*—A pauper's petition of appeal, simply signed by a vakil, who was retained under an ordinary retainer, but had not been duly authorised to sign the petition as the pauper's attorney, was rejected. **MUSSAMUT BHUGOBUTTY KOOR v. GUNESH DUTT, 21 W.R. 308.**

(3)—*Civ. Pro. Code, s. 592—Personal presentation.*—An application for leave to appeal in forma pauperis, under s. 592 of the Civ. Pro. Code, must be presented by the party in person, subject to the exemption contained in s. 404. **In re NARISI, 8 M. 504. [Not F., 25 M. 369.]**

(4)—*Civ. Pro. Code, 1882, ss. 411, 412 (= O. XXXIII, rr. 10, 11, new Code)—Procedure when decree omits to provide for payment of Court-fee due to Crown—Review.*—In a pauper suit, the claim was decreed and dismissed in part, but no provision was made for payment of the Court-fee on the portion dismissed. On the Crown's appeal in respect of the Court-fee thus omitted to be provided for, the appeal was held to lie, though the proper procedure was held to be to apply to the Court of first instance for a review of its judgment in respect of the omitted Court-fees. **THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. BHAGWANTI BIBI, 13 A. 326 = A. W. N. 1891, 97. (9 A. 64, R.) [Cons., 23 M. 73; R., 18 B. 454.]**

(5)—*Suit in forma pauperis—Dismissal—Decree containing no direction for payment of Court fees due to Government—Rectification of decree by High Court—Civ. Pro. Code, 1882, s. 622—Appeal.*—A decree dismissing a pauper suit containing no direction in respect of the recovery of Court fees due to Government can be rectified by the High Court in revision by directing the plaintiff to pay the same, and no appeal by the Government would lie in such cases. **COLLECTOR OF KANARA v. RAMBHAT, 18 B. 454. [R., 27 B. 140 = 4 Bom. L. R. 974.]**

(6)—*Appeal in forma pauperis—Security for costs—Civ. Pro. Code (Act VIII of 1859), ss. 342, 370.*—Under s. 370, Act VIII of 1859, an appellate Court has no power to demand security for costs from the petitioner after his appeal has been admitted. The provision in s. 342, which makes it discretionary in the appellate Court to demand security for costs, being inconsistent with the provisions as to appeals in forma pauperis, is not applicable to such

Pauper Appeals—continued.

appeals. **NASSEEROODDEEN BISWAS v. UJJUL BISWAS**, 17 W.R. 68. [Not F., 3 M. 66; F., 7 C.L.J. 312=12 C.W.N. 163; R., 15 C.W.N. 879=13 C.L.J. 688.]

(7)—*Civ. Pro. Code*, s. 549—*Pauper Appellant*.—Security for costs under s. 549, *Civ. Pro. Code*, may be demanded from a pauper appellant but should not be enforced by Courts except on very special grounds. **SESHAYYANGAR v. JENULAVADIN**, 3 M. 66 (17 W.R. 68, Diss.) [F., 17 M.L.J. 583; R., 7 A. 542=A.W.N. 1885, 127.]

(8)—*Execution of decree—Attachment—Disallowance of claim—Appeal in forma pauperis—Right of suit*.—In execution of a decree obtained by him against A's husband's brother, B attached certain property. The objections of A's husband under s. 246, Act VIII of 1859, having been disallowed, A sued the decree-holder B and the auction-purchaser for a declaration of her right and title to the property, on the allegation that it belonged to her husband and obtained a decree. Held that, in the appeal in *forma pauperis* preferred by B and the auction purchaser, the former had a good ground of appeal if he could make out that the property really belonged to the judgment-debtor. *In the matter of MOSHAOOLLAH KHAN*, 14 W.R. 445.

(9)—*Order disallowing appeal in forma pauperis—Appeal*.—The lower appellate Court passed an order declining to allow an appeal in *forma pauperis*. Held that no appeal lay against that order. **HURRIE SINGH v. JEET SINGH**, 62 P.R. 1870.

(10)—*Court Fees Act* (VII of 1870), s. 16—*Appeal—Pauper respondent—Memo. of objections*.—S. 16 of the *Court Fees Act* makes no exception in favour of pauper respondents as to the stamp duty leviable on any memorandum of objections presented at the trial of an appeal. **BABAJI HARI v. RAJARAM BALLAL**, 1 B. 75. [F., 8 M. 214, 1 N.L.R. 33, 4 L.B.R. 262.]

(11)—*Civ. Pro. Code*, s. 561—*Objections by respondent in forma pauperis*.—The *Civ. Pro. Code* does not provide for the admission of objections, even when preferred by a pauper, without payment of Court-fees. **NARAYANA v. KRISHNA**, 8 M. 214. (1 B. 75, F.) [R., 1 N. L. R. 33; D., 4 L.B.R. 262.]

(12)—*Cross appeal by respondent in forma pauperis—Civ. Pro. Code*, 1882, s. 561.—Where a suit in *forma pauperis* was decreed in part in favour of plaintiff, the plaintiff would not, on an appeal by the defendant, be entitled, to be heard in *forma pauperis* on cross appeal as to the portion of the claim which went off against him in the first Court. **BROJESHWARI DAS v. GUROO CHURN DAS**, 11 C. 735. [F., 1 N. L. R. 33.]

(13)—*Suit in forma pauperis—Dismissal—Appeal in forma pauperis—Compromise—Withdrawal of appeal—Effect—Costs due to Government—Civ. Pro. Code*, 1882, ss. 412, 414. The suit in this case was brought in *forma pauperis* in the

Pauper Appeals—continued.

Court of first instance which dismissed it and ordered the plaintiff to pay Court fees due to Government. Thereupon the plaintiff preferred an appeal in *forma pauperis* to the High Court and the parties compromised the claim by an agreement that the plaintiff should withdraw the appeal and that the defendant should pay the costs due to Government both in the Court of first instance and in the appellate Court. On the day of the hearing of the appeal, the plaintiff withdrew the appeal. Thereupon, the Government pleader, on behalf of the Collector, intervened and applied for an order directing the defendant (in pursuance of the terms of the compromise) to pay to Government all costs due to them in the Court of first instance and the appellate Court. Both parties opposed the application, and the Government pleader prayed for an order dispaupering the plaintiff under s. 414, *Civ. Pro. Code*, 1882. Held (1) that the Court cannot order the defendant to pay any fees on the strength of any agreement between the parties, and (2) that, the appeal having been withdrawn by the plaintiff, the decree of the Court of first instance stands, and thus the right of the Government to the Court-fees due by the institution of the suit is secured, and that, s. 414 not being applicable to the present case, no order could be passed under s. 412. **BAI CHANDABA v. KUPER SAHEB BAPU SAHEB**, 18 B. 464. [Overruled, 31 B. 10=8 Bom. L. R. 689; D., 6 Bom. L. R. 1122=29 B. 102.]

(14)—*Res judicata—Order admitting appeal by Judge in Chambers—S. 592, Civ. Pro. Code—Application for leave to appeal as a pauper*.—Held, that an order admitting an appeal passed by a Judge in Chambers is a provisional order and is subject to the decision of the Bench which tries the appeal. The Chief Court rejected the application for leave to appeal as a pauper after perusal of the application and the judgments of the lower Courts holding that the decree was contrary not to law or usage or otherwise erroneous or unjust. **MUSSAMMAT HUSAINI BEGAM v. MUSSAMMAT SAHANI BEGAM**, P.L.R. 1900, p. 449.

(15)—*Pauper case—Costs—Practice*.—No costs of appeal allowed, if the case be a pauper case. **TARA LALL SINGH v. SAROBAR SINGH**, 27 C. 407. P.C.=27 I.A. 33=4 C.W.N. 533=2 Bom. L.R. 5=7 Sar. 657.

(16)—*Act X of 1877*, s. 545—*Stay of execution—Memorandum of appeal with application for leave to appeal as pauper—Application not forthwith rejected under s. 59—Power of Court to order stay of execution of decree*.—Under s. 545 of Act X of 1877, the power of an appellate Court to order stay of execution of the decree commences as soon as the appeal has been preferred against the decree by the presentation of a memorandum of appeal which is not rejected by the Appellate Court. So, where a party desirous of appealing as a pauper prefers an application to so appeal accompanied by a memorandum of appeal, unless the Court has forthwith rejected the application under s. 592 of the Code, it has power

Pauper Appeals—continued.

to order execution of the decree to be stayed notwithstanding that the appeal may not have been admitted as a pauper appeal. *R. LANCASTER v. LAHORE ICE AND AERATED WATER COMPANY*, 70 P.R. 1879.

(17)—*Order allowing suit in forma pauperis, High Court not competent to set aside—Application for stay of all proceedings in appeal—Question to be decided in regular proceedings in suit or appeal.*—One of the two applications in this case was made praying that the plaintiff should be dispauperized, on the ground that facts had been discovered since the permission to sue *in forma pauperis* was granted, which showed that he was not, and never was, entitled to carry on any proceedings as a pauper. The High Court held that the only order made in the case was that made in the Court below that he should be allowed to carry on the suit there as a pauper. That order was one not subject to appeal and, if that had been obtained improperly, the proper course would be to apply to the Courts which made it, and the High Court has no jurisdiction to set aside the final order of the lower Court on any such ground. The other application sought for stay of all proceedings in the appeal on the ground that the plaintiff had no interest in the suit. It was held that even if there be anything to show that the plaintiff had no interest whatever in the suit there were proper recognized modes for bringing the matter forward in the course of regular proceedings in the suit or the appeal, and the High Court could not, by a mere collateral proceeding, try a question which can only properly be raised in the suit or the appeal itself. *In re petitioner, KHODEJOONISSA*, 7 W. R. 486.

(18)—*Application for leave to appeal as—Limitation—Burma Courts Act.*—S. 4 of the Limitation Act is general, and there being no special or local law of limitation for application for leave to sue as a pauper, art. 170, the only limitation in existence, must be applied as it stands. An application to the Judicial Commissioner for leave to appeal as a pauper must be presented within 30 days from the date of the judgment appealed against. *MI CHAW AND NGA SHWE AUNG v. ME ME AND ME KIN*, L.B.R. 1872-1892, 149.

See CIV. PRO. CODE, 1908, O. XXXIII, r. 3, O. XLIV, r. 1, 26 M. 369.

The Court in granting leave must record its reasons in writing for granting the leave—See CIV. PRO. CODE, 1908, O. XLIV, r. 1, 6 Bom. L.R. 442=28 B. 451.

See CIV. PRO. CODE, 1908, O. XLIV, r. 1, A.W.N. 1895, 34.

Memo of objections—See COURT FEES ACT, 1870, s. 16, 1 B. 75.

Appeal—Limitation—Sufficient cause—Court fee not paid within time allowed—See CUSTOM—PUNJAB—INHERITANCE, 130 P.L.R. 1909=94 P.R. 1909=95 P.W.R. 1909.

Appeal in forma pauperis—Presentation of appeal by authorized agent and not by advocate,

Pauper Appeals—concluded.

vakil, attorney or suitor—Appellant a pardanashin woman—See LETTERS PATENT, HIGH COURT, 1865—N.W.P., s. 8, 24 A. 172=A.W.N. 1901, 203.

Application for leave to appeal in forma pauperis—Subsequent presentation of appeal on stamp, whether will be in time—See LIMITATION ACT, 1908, s. 3, 78 P.R. 1906=150 P.L.R. 1906.

See LIMITATION ACT, 1908, ss. 4, 5, 8 C.W. N. 906, 26 A. 329.

See LIMITATION ACT, 1908, ss. 4, 5, and art. 170, A.W.N. 1898, 80.

See LIMITATION ACT, 1908, s. 5, 47 P.R. 1899.

See LIMITATION ACT, 1908, s. 12, 33 P.R. 1895.

Pauper appeal barred technically—Whether 'sufficient cause' for extending time—S. 5, Limitation Act—See MAHOMEDAN LAW—DOWER, 34 P.W.R. 1912=52 P.L.R. 1912.

Suits in forma pauperis—Government's claim for Court-fees—Prerogative of the Crown—See MORTGAGE—GENERAL, 1912 M.W. N. 311, P.C.=11 M.L.T. 193=16 C.W.N. 433=15 C.L.J. 327=14 Bom. L.R. 212.

See PRACTICE AND PROCEDURE, 3 B. 241, 3 M. 66.

See REVIEW—GROUNDS FOR REVIEW, 73 P.R. 1868.

Pauper Suits.

See CIV. PRO. CODE, 1908, O. XXXIII, rr. 1-13.

See CIV. PRO. CODE, 1908, O. XLIV, rr. 1 and 2.

(1)—*Power to continue ordinary suit in forma pauperis.*—A suit not instituted in *forma pauperis* may be permitted to be continued in *forma pauperis*. *NIRMUL CHANDRA MOOKERJI v. DOYAL NATH BHUTTACHARJEE*, 2 C. 130. [F., 8 B. 615, 20 C. 319, 5 C. 819=6 C.L.R. 120.]

(2)—*Power of Court to allow suit instituted in ordinary form to continue in forma pauperis.*—It is in the power of Court to permit a suit instituted in the ordinary form to be continued in *forma pauperis*. *THOMPSON v. THE CALCUTTA TRAMWAY COMPANY*, 20 C. 319. (2 C. 130, F.; 8 B. 615, 5 C. 819, R.)

(3)—*Leave to defend in forma pauperis.*—The Court can allow a defendant to defend as a pauper, though the Code expressly provides only for suing in *forma pauperis*. *DURGA CHURN DOSS v. NITTOKALLY DOSSEE*, 5 C. 819=6 C.L.R. 120. [Diss., 54 P.R. 1905=121 P.L.R. 1905; R., 20 C. 319.]

(4)—*Suit by pauper minor—Next friend, not pauper—English practice—Consent of minor.*—A minor may sue in *forma pauperis* even when the next friend is not a pauper and possessed of means. The rule of English practice

Pauper Suits—continued.

requires proof (before the institution of the suit) on the part of the minor, that he cannot get any substantial person to act as next friend. The consent of a minor to the institution of a suit by a next friend is immaterial. **VENKATA NARASAYYA v. ACHEMMA, 3 M. 3.**

(5)—*Duty of Court to admit representatives of deceased pauper—No enquiry necessary into the pauperism of such representative.*—In the case of an alleged representative of an admitted pauper, there is no necessity for an enquiry whether such representative is a pauper or not. Where the Court is satisfied that the person is the real legal representative, it is bound to admit him to carry on the suit. **BHAGBUT DOSS v. BULORAM DOSS, 3 W.R. Mis. 20.**

(6)—*Suit in forma pauperis—Next friend a pauper.*—A suit on behalf of a pauper can be brought in *forma pauperis* by a next friend who is also a pauper. **GOLAUPMONEE DOSSEE v. PROSONOMOYE DOSSEE, 11 B.L.R. 373. [R., 3 M. 3.]**

(7)—*Civ. Pro. Code, s. 401—Pauper administrator.*—The Procedure Code, while it excepts certain cases, does not exclude persons holding a fiduciary character from suing in *forma pauperis*. An administrator of the estate of a deceased person may apply to sue in *forma pauperis*, under the provisions of Chapter XXVI of the Civ. Pro. Code. **In re BILL, 7 M. 390.**

(8)—*Act VIII of 1859, ss. 17, 301—Pauper petition—Presentation in person.*—A petition for permission to sue in *forma pauperis* is to be presented by the petitioner in person. S. 301 of Act VIII of 1859 is imperative, and must be held to control s. 17 of the same Act, which provides for application and appearances to be made by the recognized agents of the parties. **Ex parte DEVGIR GURRU SUMBHAGIR, 4 B. H.C.A.C. 91.**

(9)—*Civ. Pro. Code, Act VIII of 1859, s. 301—Duly authorized agent—Pleader.*—There is nothing to prevent a pleader from being a "duly authorized agent" as described in s. 301 of Act VIII of 1859. **KISHOREE MOHUN BOSE v. GOUR MONEE DOSSEE, 15 W. R. 198.**

(10)—*Presentation of plaint—Limitation—Suit when to be considered as commenced.*—In calculating the period of limitation in a case where it is sought to extend the time by reason of a pauper suit having been commenced, the suit is commenced for this purpose when the plaint is presented to the Court, and not merely at the date of its allowance. **SEETARAM GOWER v. GOLUCKNATH DUTT, Marsh 174; GOLUCKNATH DUTT v. SEETARAM GOWER, W.R., F.B., 53=1 Ind. Jur. O. S. 66=1 Hay 378. VINAYAK K. DHAVLE v. BHABU B. SAMVAT, 4 B.H.C. A.C. 39.**

(11)—*Pauper suit—Limitation—Stamp.*—Mode of calculating limitation in pauper suits.

Pauper Suits—continued.

Stamp duties to be levied from applicant. **GOLUCKNATH DUTT v. SEETARAM GOWER, W.R.F.B. 53=1 Ind. Jur. O.S. 66=1 Hay, 378.**

(12)—*Suit in forma pauperis—Petition filed in time—Application registered as suit when out of time—Act VIII of 1859, ss. 299, 308.*—A pauper suit commences for the purpose of limitation on the day when the petition to sue in *forma pauperis* is presented to the Court and not on the day when it is numbered and registered as a plaint under s. 308, Act VIII of 1859. **DHAVLE v. SAMVAT, 4 B.H.C. A.C. 39. [R., 5 B.L.R. 84=13 W.R. 371.]**

(13)—*Act VIII of 1859, s. 308—Pauper suit—Institution of suit—Presentation of plaint—Limitation.*—An application under s. 299 of the Civ. Pro. Code, 1859, to sue in *forma pauperis* can be deemed the plaint in the suit, when it is granted, and relates back to the date on which it was presented. But when it is virtually withdrawn and court-fee stamps required for the plaint are put in, the suit must be held to have been instituted on the date when the plaint-stamps were put in. And if this date be beyond the period of limitation prescribed, the suit will be barred. **SKINNER v. ORDE, 1 A. 230.**

(14)—*Application for leave to sue in forma pauperis—Court-fee paid at subsequent date—Date of institution—Ss. 410, 415, Civ. Pro. Code, 1882, s. 4, Limitation Act, 1877.*—The defendant having, during the pendency of an application to sue in *forma pauperis*, objected to the pauperism of the plaintiff, the plaintiff offered to pay the full Court-fee, and prayed that his application to sue in *forma pauperis* might be treated as the plaint. **Held**, that the application should be decreed to be the plaint for purposes of limitation. **JANAKDHARY SUKUL v. JANKI KOER, 28 C. 427. (20 C. 41, 2 A. 241, P.C., F.; 19 C. 780, 18 A. 206, D.) [F., 129 P.L.R. 1903=59 P.R. 1903; D., 150 P.L.R. 1906=78 P.R. 1906]**

(15)—*Civ. Pro. Code, Act VIII of 1859, ss. 12, 13, 306, 308, 310—Suit in forma pauperis—Immoveable property situate in different Districts subject to different Sudder Courts—Leave to sue in forma pauperis granted in one District—Presentation of plaint in another District subject to different Sudder Court—Limitation Act, 1859, s. 14—Computation of time.*—On the 21st February 1873, the plaintiff presented his petition for leave to sue as a pauper to the Subordinate Judge of Meerut. The petition contained a statement of the claim and such particulars as are required in a plaint, and a prayer that as part of the immoveable property was situate within the jurisdiction of the Punjab Chief Court, the Subordinate Judge would seek the necessary sanction to give him jurisdiction. The Subordinate Judge dismissed the application, not on any of the grounds mentioned in the Code, but because the suit could also be instituted in the Delhi Court, and he considered it should be instituted there, that Court being in a better position to ascertain

Pauper Suits—continued.

whether or not the plaintiff was a pauper. The plaintiff on the 3rd March presented his petition to the Court at Delhi, and on the 14th April was admitted to sue as a pauper. Sanction having been sought by the Court at Delhi for trial of the suit by that Court, the High Court, North-Western Provinces, and the Chief Court of the Punjab considered it better that the suit should be tried at Meerut, and on the 10th June, the Deputy Commissioner returned the plaint to the plaintiff for presentation in the Meerut Court. On the 19th July, the plaint was again presented to the Subordinate Judge at Meerut, and was registered by him. On the 10th November, several defendants to the suit filed their written statements and some of them urged that the plaintiff ought not to be allowed to sue in *forma pauperis* till his pauperism had been proved in the Court which was competent to hear the claim. Upon this the Subordinate Judge held that he had no jurisdiction to admit the suit and threw it out. *Held*, that, if the Subordinate Judge regarded as ineffectual the order of the Delhi Court admitting the plaintiff to sue as a pauper, he should himself have entered on the enquiry as to the plaintiff's pauperism, and passed orders in the manner prescribed by law, and that the provisions of s. 310 of the Code were not applicable to the order of the Subordinate Judge who did not refuse to allow the plaintiff to sue as a pauper but did not pronounce any opinion on the point. The plaintiff was entitled to deduct any portion of the time during which his suit was pending in the Delhi Court, as he prosecuted it *bona fide* and with due diligence in that Court which, because it could not obtain the sanction necessary for the trial of the suit, was compelled to reject the plaint. **STEWART SKINNER v. WILLIAM ORDE**, 6 N.W.P. 225.

(16)—*Pauper suit—Scope of inquiry.*—When a pauper application comes on for hearing, the Court has no power to inquire into any other circumstances than the applicant's pauperism. **DIPSANGI JITWANGJI v. FATTERANJI JAS-VATSANGJI**, 5 B.H.C. A.C. 59.

(17)—*Application for leave to sue as a pauper—Question to be determined.*—In an application for leave to sue as a pauper, the Court is bound to enquire and determine the question of plaintiff's pauperism, unless it is satisfied that, under O. XXXIII, r. 5, plaintiff's allegations do not show a cause of action. **VENKATARAMANA IYER v. KITTAMMAL**, M.W.N. 1912, 173=11 M.L.T. 187=15 Ind. Cas. 184. (11 M. 5, D.)

(18)—*Civ. Pro. Code, O. XXXIII, r. 1—Decision as to pauperism—Merits of case not to be gone into.*—In adjudicating on the issue as to pauperism, the Courts should avoid encroaching on the merits of the case. **MUS-SAMMAT TABO v. NAN NIHAL**, 17 P.R. 1900.

(19)—*Civ. Pro. Code, Act V of 1908, O. XXXIII, r. 1—Inquiry into pauperism—Claim for redemption of mortgage—Applicant*

Pauper Suits—continued.

able to raise money upon security of equity of redemption.—The applicant who wished to institute a suit for redemption applied to be declared a pauper. The Court below holding that he was possessed of the equity of redemption of the property in dispute, and was therefore not a pauper, dismissed the application. *Held*, that the plaintiff could have raised money on the equity of redemption, and that, in trying to raise money on the equity of redemption, he would not in effect be mortgaging his claim. **KAPIL DEO SINGH v. RAM REKHA SINGH**, 7 A.L.J. 1191=8 Ind. Cas. 484.

(20)—*Witnesses summoned to enquire into petitioner's pauperism—Decision on point of limitation from their evidence—Not proper—Jurisdiction.*—Subordinate Judge exceeded his jurisdiction in deciding a question of limitation on evidence of witnesses summoned for another purpose, i.e., with regard to question of pauperism of the petitioner. **PARKASH OJHA v. DUSRUTH OJHA**, 25 W.R. 74.

(21)—*Civ. Pro. Code, 1882, ss. 401, 407 (=O. XXXIII, rr. 1, 5, new Code)—Suit in forma pauperis—"Pauper"—Inquiry into pauperism.*—When an application is made for leave to sue in *forma pauperis*, the Court must deal with the question of pauperism with reference to the definition contained in the explanation to s. 401; and, in deciding the question, must ascertain the exact property, its market-value, and the title thereto; and then must deal with the case under s. 407, irrespective of any surmises as to the reason why the plaintiff has valued his claim at a high figure. **MUHAMMAD HUSAIN v. AJUDHIA PRASAD**, 10 A. 467=A.W.N. 1888, 179.

(22)—*Suit in forma pauperis—Appeal—Formal application for inquiry into pauperism, necessity of.*—An appeal does lie from a decision in a suit heard in *forma pauperis*. An application to be allowed to appeal in *forma pauperis* need not be preceded by a separate formal application for inquiry into the pauperism of the applicant. **KAMOO POORY v. SHEO POORY**, 1 N.W.P. 246.

(23)—*Civ. Pro. Code (1882), ss. 401, 408, 409, 410—Application to sue in forma pauperis—Property admitted by respondent to be property of applicant and deposited in Court—Application, if maintainable—Subject-matter of suit, when determined—Ground of excluding subject-matter of suit from calculation—General intention of Chapter—Rule of construction.*—In an application for permission to sue as paupers, the opponents produced some of the articles claimed, valued at Rs. 100, and deposited them in Court, admitting them to be the property of the applicants, who, while they acknowledged the property to be theirs, declined to take possession of them. *Held* that the articles in Court were property other than the subject-matter of the suit, and the applicants were no paupers; and the application was consequently to be rejected. [Not F., 12 Bom.L.R. 102.] The "subject-matter of the suit" mentioned in

Pauper Suits—continued.

s. 401 of the Code is not determined until after the inquiry under ss. 408 and 409 of the Code into the petitioners' *pauperism* is completed, and during that stage there is no plaint and consequently no suit. It is only after the application is granted under s. 410 that the application is deemed the plaint in the suit. And any facts brought out in the previous inquiry under ss. 408 and 409, must be taken into account, and any property proved not to be in litigation cannot reasonably be held to be part of the claim. [R., 33 C. 1163=4 C.L.J. 234.] The real ground of excluding the subject-matter of the suit from calculation is because it is presumably out of the petitioner's reach, and cannot be made use of by him to carry on his litigation. But where a portion of the property is freely at his disposal, as in the present case, there is no reason for excluding it from the reckoning. The general intention of the chapter relating to pauper suits apparently is that no person should be declared a pauper, who has at his disposal sufficient means to proceed. The conditions of pauperism are different (1) when the plaint requires a Court-fee, and (2) when none is required; but in both the cases the intention of the chapter is the same, viz., to fix a certain sum as the measure of the pauperism—in the one case the institution fee and in the other case Rs. 100, and to provide that, if the petitioner has not this sum at his disposal, he will be exempt from Court-fees; if he has it, he is held to have the means of proceeding, and is not allowed the privilege of pauperism. Because it is a privilege to sue as a pauper, the rule of construction is that the provisions of the sections under which the privilege is claimed must be strictly construed. DWARKA NATH NARAYAN v. MADHAVRAU VISHVANATH, 10 B. 207.

(24)—*Application for leave to sue in forma pauperis—Rejection of application—Civ. Pro. Code, ss. 407 (c), 622—"Right to sue"—Limitation Case.*—The words of s. 407, Civ. Pro. Code, should not be read as limiting the Court's discretion to merely ascertaining whether the "right to sue" arose within its jurisdiction, but they have a more extended meaning, namely, that an applicant must make out that he has a good subsisting cause of action, capable of enforcement in Court and calling for an answer, and not barred by the law of limitation or any other law. Therefore, when an application for leave to sue in *forma pauperis* was rejected under s. 407 (c) on the ground, that the claim was barred by limitation and that the applicant had thus no right to sue—held, by the Full Bench, that the Court had acted within its powers, and that its jurisdiction not having been exercised illegally or with material irregularity, the High Court could not interfere in revision under s. 622. (11 C. 6, R.) *Per Mahmood, J.*—The provisions of s. 407 must be interpreted strictly, because they operate in derogation of the right, which every litigant has, to seek the aid of the Courts of justice. And the High Court has power, under s. 622 of the Civ. Pro. Code, to revise an order

Pauper Suits—continued.

passed under s. 407, rejecting an application to sue in *forma pauperis*, in cases whether such rejection has been made by exercising jurisdiction "illegally or with material irregularity" within the meaning of s. 622. (7 A. 345, 4 M. 323, R.) [F., 13 B. 126, 130 P.R. 1894, 5 M.L.J. 193 = 19 M. 197, 20 A. 299; R., 20 B. 86, U.B.R. 1892—1896, Vol. II, 272, 13 M.L.J. 292, F.B.; D., 10 A. 467, A.W.N. 1888, 150, A.W.N. 1893, 218.] The word "case" as used in s. 622, Civ. Pro. Code, should be understood in its broadest and most ordinary sense, and includes all adjudications which might form the subject of appeal or revision, and applies to an order under s. 407, just as it applies to an order under s. 53 or s. 54, Civ. Pro. Code. CHAT-TARPAL SINGH v. RAJA RAM, 7 A. 661, F.B. = A.W.N. 1885, 156. (A.W.N. 1882, 39, 69, 92, R.) [R., 10 A. 467, 2 L.B.R. 333.]

(25)—*Rejection of application to sue—Civ. Pro. Code, ss. 457, 622.*—An application to be allowed to sue as a pauper was, though plaintiff was found to be a pauper, rejected on the ground that he had not made out a *prima facie* case entitling him to permission to sue, apparently under s. 407, cl. (c) of the Civ. Pro. Code. Held in revision, that orders under s. 407 do fall under the purview of s. 622 of the Civ. Pro. Code, and that the application ought not to have been rejected without giving the plaintiff an opportunity of producing his evidence upon the merits of the title alleged by him in the plaint. ALI HAMZA v. AHASAM ALI, A.W.N. 1888, 150. [Appr., 10 A. 467.]

(26)—*Application for leave to sue as pauper, when good prima facie title to property in suit not established—Civ. Pro. Code, ss. 407 and 409.*—In the matter of an application for leave to sue as a pauper, it was pleaded that the applicant had grossly over-stated his claim, and documents were filed which bore out this contention. Several adjournments were allowed in order that the applicant might establish a *prima facie* claim to the share in the villages in dispute but he was unable to do so. Held, that a person, who applies for leave to sue as a pauper, must make out that he has a good subsisting *prima facie* cause of action, capable of enforcement in Court and calling for an answer. SHEOPAL v. SINGH SUKH KARAN SINGH, 11 O.C. 57.

(27)—*Right to sue in—Civ. Pro. Code, ss. 407 (c), 409.*—Where a person obtained a conviction against another, which was set aside on appeal, on the ground that the Magistrate was not competent to try the case, and the latter thereupon applied for permission to sue in *forma pauperis* for damages for malicious prosecution, the Court should not dismiss the application, on the ground that the suit is not maintainable, because of the applicant not having been acquitted on appeal by reason of the original conviction having proceeded on evidence which the complainant knew to be false or on the wilful suppression of material information by him. The question whether

Pauper Suits—continued.

the suit was not maintainable on such a ground is one, which was outside the scope of question, which the Court had authority to decide under s. 409, and pertained to the merits of the case. The Court should proceed with the enquiry into the pauperism of the applicant and pass the necessary orders under that section. **PEROBASHAW SEROBASHAW v. GAWRI DUTT BOGLA, 3 L.B.R. 243.** (26 M. 506, 8 C.W.N. 70, 9 Bur. L.R. 130, R.)

(28)—S. 407, Civ. Pro. Code—Application for leave to sue in *forma pauperis*—Condition precedent.—In an application to sue in *forma pauperis*, if on the allegations, a right to sue is shown, the Court should allow the application, without satisfying itself as to the merits of the claim. A Court should not go into evidence as to the merits of the claim, in an application for leave to sue in *forma pauperis*. **KOKA RANGANAYKA AMMAL v. KOKA VENKATACHELLAPATINAIIDU, 4 M. 323.** [Diss., 20 A. 299; Appr., 13 M.L.J. 292; Expl., 19 M. 197, 5 M.L.J. 193; R., 7 A. 661.]

(29)—Civ. Pro. Code, 1882, s. 407 (d)—Application to sue in *forma pauperis*—Agreement with *vakil* to pay remuneration out of subject-matter of suit.—The application in this case, to sue in *forma pauperis*, was contested on the ground that the applicants had entered into an agreement to give a lump sum of money as remuneration for the services of their *vakil* and permitted him in default to recover the same from the revenues of the *Jaghir* sought to be redeemed by them. Held that the application should be rejected as the language of cl. (d) of s. 407 of the Civ. Pro. Code was sufficiently wide to cover such an agreement and it could not be contended that the word 'interest' in the clause could not be restricted to such a vested and complete interest as that the person who obtained it should be made a party to the suit from commencement. **MANOHAR RAMCHANDRA v. LAKSHMAN MAHADEV, 9 B. 371.** [F., U.B.R. 1892—1896, Vol. II, 272.]

(30)—Pauper—Mortgage of claims.—A person trying to sue in *forma pauperis* is not bound to raise funds by mortgaging his claims. **VEDANTA DESIKACHARYULU v. PERINDEVAMMA, 3 M. 249.** [F., 30 B. 593=8 Bom. L.R. 671.]

(31)—Civ. Pro. Code, ss. 404, 406—Joint application for permission to sue as paupers.—The mere fact that several pauper applicants jointly present an application for permission to sue as paupers does not authorize the Court to entertain it on behalf of applicants who do not appear in person. **BURGESS v. SIDDEN, 10 M. 193.**

(32)—Civ. Pro. Code, 1882, ss. 406, 407 (= O. XXXIII, rr. 4, 5, new Code)—Application for leave to sue as pauper—Subsisting *prima facie* cause of action to made out—Statements in *plaint* accompanying application for leave to sue in *forma pauperis*—Right to sue.—S. 407 (c), Civ. Pro. Code, does not refer solely to a question of jurisdiction, but the applicant to sue as

Pauper Suits—continued.

pauper must make out that he has a good, subsisting *prima facie* cause of action capable of enforcement in Court and calling for an answer. (7 A. 661, 13 B. 126, 19 M. 197, R.; 4 M. 323, Diss.) [F., 27 M. 37; R., 27 M. 120, 13 M.L.J. 425, 4 M.L.T. 302, 6 M.L.T. 359=3 Ind. Cas. 829.] The mere statements in the *plaint* which accompanies an application for leave to sue as a pauper cannot be accepted as the sole materials on which a decision as to whether the applicant's allegations do or do not show a right to sue, can depend. If the allegations in the *plaint* were the sole matters to be looked to and the applicant were admittedly a pauper, the granting of this application to sue as a pauper would depend, not on whether he had any merits to go upon, but on the skill of gentleman who drafted his petition and his *plaint*, and the examination as to the merits under s. 406, Civ. Pro. Code, would be superfluous. **KAM RAKH NATH v. SUNDAR NATH, 20 A. 299=A.W.N. 1898, 36.** (12 B. 617, D.) [R., 91 P.L.R. 1909, 2 L.B.R. 333.]

(33)—Civ. Pro. Code, ss. 407, 409.—On the hearing of a petition under s. 409, Civ. Pro. Code, for leave to sue in *forma pauperis*, the Court must decide whether the petitioner has a subsisting cause of action capable of enforcement at the date of the petition, and when the cause of action is barred by *res judicata* or limitation, the petition must fail. **VIJENDRA TIRTHA SWAMI v. SUDEINDRA TIRTHA SWAMI, 19 M. 197.** [Overruled, 13 M.L.J. 292, F.B.; F., 4 M.L.T. 302; R., 20 A. 299, 13 M.L.J. 425.]

(34)—Costs of successful defendant in pauper suit, not covered by s. 412, Civ. Pro. Code.—Application of s. 220.—S. 412 of the Civ. Pro. Code, and the chapter of which it forms a part do not deal with the costs of a successful defendant in a pauper suit. The institution fee and other fees which a pauper plaintiff is excused from pre-paying are fees payable to Government. Ss. 411 and 412 prescribe how those fees payable to Government are to be eventually recovered 'in any case, whether the pauper succeeds or whether he fails. There is nothing, however, in either of these sections, or in any other part of chapter XXVI of the Code which can be held to apply to the costs incurred by the successful defendant when the pauper fails. Such costs fall under s. 220, which deals with costs in suits in general and leaves them to be disposed of by the Court in any manner it thinks fit. **JETHA MULCHAND v. GULRAJ JASRUP, 8 B. 577, F.B.**

(35)—Decree in pauper suit—Sale of decree—Consent of Government—Claim of Government for stamp—Lien—Costs.—Where Government, after obtaining an attachment against a pauper plaintiff's decree for satisfaction of the amount awarded to them in respect of stamps, consent to the sale of that decree in execution of another decree against the pauper and obtain an order by which they secure to themselves the chance of any surplus arising from that

Pauper Suits—continued.

sale, they cannot, when there is no surplus, be heard to say, as against the purchaser at that sale, that the decree sold was subject to any claim of Government under the decree made in their favour for the value of stamps. The amount of stamps in a pauper-case is recoverable by Government from any person ordered to pay the same, in the same manner as costs of suit are recoverable. The Government has not a lien or charge in their favour upon the decree for the amount of such stamps. **PRAN KRISTO ROY v. THE COLLECTOR OF MOORSHEDABAD**, 15 W.R. 205.

(36)—S. 411, Civ. Pro. Code, 1882—Scope of—Old Civ. Pro. Code (Act VIII of 1859), s. 309—Suit in forma pauperis—Successful petitioner—Charge of Government for Court-fees—Crown-debt, priority of.—S. 411 of the Code is an enabling section. Though it indicates the manner in which the Crown may proceed to realise Court-fees of a successful pauper plaintiff, which form a Crown-debt, it does not preclude the Crown or its representative from urging its prerogative and insisting on its right to precedence over all other creditors. A successful pauper plaintiff attached and sold for her costs certain property, other than the property in suit, belonging to the judgment-creditor. The sale-proceeds were paid into Court. The plaintiff's solicitor applied to have his costs paid out of the sale-proceeds. The Government Solicitor also applied to have his certified Court-fees paid to him out of the fund in Court. *Held*, that the Government Solicitor was entitled to precedence and that it was not necessary for him to attach the fund before getting payment. **SRIMATY GAYANODA BALA DASEE v. BUTTO KRISHNA DASS BAIRAGEE**, 10 C.W.N. 857=33 C. 1040. (5 B.H.C. 23, 1 B. 7, 1 A. 596, 2 A. 196, 18 A. 419, 25 M. 457, R.)

(37)—Civ. Pro. Code, 1859, s. 309 (= O. XXXIII r. 10, Civ. Pro. Code, 1908)—Recovery of Court-fees—Prerogative of Crown—Priority of Crown.—The direction as to the recovery of Court-fees in s. 309, Civ. Pro. Code (1859), does not reduce the rights of the Crown or its representative, to those of a private judgment-debtor nor preclude it from urging its prerogative. [R., 18 A. 419, 33 C. 1040=10 C.W.N. 857.] The claim of the Crown on the proceeds of a pauper suit, to the extent of the Court-fee leviable thereon if the plaintiff was not a pauper, has precedence over that of other creditors. **GANPAT PUTAYA v. THE COLLECTOR OF KANARA**, 1 B. 7. [R., 18 A. 419, 18 B. 237, 33 C. 1040=10 C.W.N. 857; F., 1 A. 596; Appl., 2 A. 196; D., 29 A. 537, F.B.=A.W.N. 1907, 157=4 A.L.J. 720.]

(38)—Execution of decree—Distribution of sale proceeds—Claim for Court-fees—Prerogative of the Crown.—When the same property is attached and sold, at the instance of the Collector for recovery of Court-fees in a pauper suit and at the instance of a lien-holder, the former is entitled, as representing the Crown,

Pauper Suits—continued.

to be paid first, out of the sale proceeds, the amount of Court fees due in connection with the pauper suit. The principle that the Government takes precedence of all other creditors is not liable to an exception in the case of lien-holders. **COLLECTOR OF MORADABAD v. MUHAMMAD DAIM KHAN**, 2 A. 196. (1 B. 7, Appl.) [Overruled, 29 A. 537, F.B.=A. W. N. 1907, 157=4 A.L.J. 720; Not F., 7 M. 434; F., 33 C. 1040=10 C.W.N. 857; Appr., 25 M. 457; R., 18 B. 237.]

(39)—Sale proceeds realized in execution against pauper plaintiff—Preferential right of Collector to amount of Court-fee.—In an application for execution by the defendant against an unsuccessful pauper plaintiff, his property was attached, and subsequently, on the application of the Collector, the Court executing the decree ordered that the property should be sold in satisfaction of the Collector's claim for Court-fees and of the demand of the defendant for costs, and that the Collector should be first paid out of the sale proceeds. The sale proceeds being insufficient to meet both these demands, the Court passed another order, under which the Collector and the defendant were to be paid out of the sale proceeds rateably. *Held*, in a suit by the Collector to contest the order and to recover from the defendant, in the pauper suit, the amount paid to him out of the sale proceeds, that he was entitled to recover, as the Crown was entitled to be paid first, out of the proceeds of such sale, the amount of the Court-fee the plaintiff in the pauper suit would have had to pay if he had not been allowed to sue as a pauper. **GULZARI LAL v. THE COLLECTOR OF BAREILLY**, 1 A. 596. (1 B. 7, F.) [R., 33 C. 1040=10 C.W.N. 857.]

(40)—Plaint in suit in forma pauperis, return of, for presentation to proper Court—Returning Court not competent to order payment of Court-fees by plaintiff—Order of such Court refusing to execute its order for costs, no appeal lies from.—A Court, to which an application to sue as a pauper was presented, *held* the plaintiff-applicant's pauperism to be proved, but, finding that it had no jurisdiction, returned the plaint for presentation to the proper Court with an order that each party was to pay his own costs. From the order passed by such Court rejecting an application of the Collector for recovering the Court-fees from the plaintiff, no appeal and, therefore, no second appeal was held to lie. But, inasmuch as the original order of the first Court for payment of Court-fees by the plaintiff was not one which that Court had jurisdiction to make under s. 412 of Act X of 1877, the High Court, in the exercise of its extraordinary jurisdiction, annulled that order and with it all the proceedings consequent upon it, including the orders passed by the lower Courts on the said application of the Collector. **THE COLLECTOR OF RATHNAGIRI v. JANARDAN VITHAL KAMAT**, 6 B. 590. [F., 18 B. 454, 23 M. 73=9 M.L.J. 265; R., 27 B. 142; D., 15 B. 77, 20 B. 86.]

Pauper Suits—continued.

(41)—*Act VIII of 1859, ss. 308, 309—Pauper not exempted from liability to stamp duty and penalty—Application of pauper-plaintiff for remission of penalty under stamp law—Civil Court not bound to receive and submit to the Revenue Board—Pauper bound to apply under Act X of 1862, s. 15, cl. 6.*—The sections applicable to the recovery of stamp-duties in pauper suits are ss. 308 and 309 of Act VIII of 1859. In cases in which the application of a pauper to be permitted to sue in *forma pauperis* is admitted, such plaintiff is not liable to any further stamp-duty in respect of any petition, appointment of a pleader or other proceeding connected with the suit, or with the execution of any decree passed on it. Under these sections, the pauper cannot claim exemption from liability to pay any further stamp-duty or penalty in respect of a document on which he relies, and which, owing to a defect in the stamp, is inadmissible as evidence in the suit. It is not for a Civil Court to receive and submit to the Revenue Board any application on the part of a pauper for the purpose of obtaining the authority of the Board to remit or mitigate the penalty under the Stamp Law. It is the duty of the plaintiff to make timely application to the Board for the above purpose under cl. 6, s. 15 of Act X of 1862. **GOLAM GUFOOR v. EKRAM HOSSEIN CHOWDHRY, 10 W.R. 357.**

(42)—*Civ. Pro. Code, 1882, ss. 244, 246, 247, 411—Execution by Government for Court-fees—Appeal—Cross-claims and cross-decrees—Court-fees payable to Government—Mode of recovery—An appeal lies from an order granting an application by the Collector, for the recovery of Court-fees due by a plaintiff suing in forma pauperis, inasmuch as the Collector must be deemed to have been a party to the suit in which the decree was passed. [F., 13 A. 326; Cons., 23 M. 73; R., 18 M. 439.]* The provisions of these sections apply, only when execution proceedings are taken, and in the absence of such proceedings, no questions of set-off and consequent reduction or other modification of the "subject-matter" of the suit decreed against a defendant can arise. The Government has in respect of the Court-fees due to it in a pauper suit, a first charge on that portion of the subject-matter of the suit decreed in favour of the plaintiff, recoverable in the same way as costs are ordinarily recovered under the Code. **JANKI v. THE COLLECTOR OF ALLAHABAD, 9 A. 64. [R., 18 B. 237.]**

(43)—*Civ. Pro. Code, 1882, s. 412—Suit in forma pauperis—Withdrawal—Payment of Court-fees to Collector—Civ. Pro. Code, s. 622.*—K instituted a suit in *forma pauperis* for cancelling a certain document and for obtaining certain property. Subsequently, the matter was amicably settled, and the plaintiff's application that the suit may be dismissed was granted by the Subordinate Judge. But no order was made as to the payment of Court-fees. An application was thereupon made by the Collector to the High Court under s. 622, Civ.

Pauper Suits—continued.

Pro. Code, 1882, praying that the lower Court should be directed to make an order for the payment of Court-fees under s. 412 of the Civ. Pro. Code, 1882. *Held* (1) that though the Collector was not a party to the suit, he was not debarred from moving the High Court under s. 622 of the Civ. Pro. Code, and (2) that the Subordinate Judge was not competent to make the order desired by the Collector, because s. 412 of the Code had no application to the present case, there having been no adjudication of the rights of the parties. S. 412 when read with s. 411, applies only to cases of adjudicated failure and to other cases specified, as where the plaintiff has been dispaupered or the suit has been dismissed under s. 97 or s. 98. **THE COLLECTOR OF KANARA v. KRISHNAPPA HEDGE, 15 B. 77. [Overruled, 8 Bom. L.R. 689=31 B. 10; Not F., 4 M.L.J. 98; R., 18 B. 464, 29 B. 102=6 Bom. L.R. 1122; D., 20 B. 86.]**

(44)—*Civ. Pro. Code (XIV of 1882), ss. 412, 622, words "fails in the suit" in, meaning of—Pauper suit dismissed without contest, plaintiff liable to pay up Court-fees.*—Even where a suit in *forma pauperis* happens to be dismissed without contest and trial, the plaintiff will be liable under s. 412 of the Civ. Pro. Code. The words "succeeds" and "fails in the suit" in the section refer to the ultimate decision or the result of the suit, and not to the mode in which the decision is arrived at. It would be doing violence to the language of the section, to construe it as if the words "after contest" had occurred therein. Where in such a case, the lower Court's proceedings have been based on a misconstruction of the section, it is competent to the High Court to interfere under s. 622 of the Code and order payment of Court-fees by the plaintiff. **THE COLLECTOR OF VIZAGAPATAM v. ABDUL KARIM SAHEB, 21 M. 113=8 M.L.J. 4. [R., 23 M. 73, 29 B. 102=6 Bom. L.R. 1122.]**

(45)—*Civ. Pro. Code, s. 411—Suit in forma pauperis—Court-fee—Property of defendant sold to realize Court fee—Property sold subject to a mortgage—Rights of mortgagee.*—*Held*, that the sale, subject to a mortgage, of property belonging to the defendant in a suit brought in *forma pauperis*, for the purpose of realizing the Court-fee payable to Government by the plaintiff, does not preclude the mortgagee from bringing to sale the same property, in execution of a decree for sale, on his mortgage. **DOST MUHAMMAD KHAN v. MANIRAM, A.W.N. 1907, 157=29 A. 537=4 A.L.J. 720, F.B. (2 A. 196, Overruled; 1 B. 7, D.)**

(46)—*Pauper, suit by—Court-fees, payment of, by pauper subsequent to filing of his application—Limitation.*—A suit is instituted in the case of a pauper, who, before the enquiry into his pauperism is finished, pays the Court-fees required on his plaint, when his application to sue as pauper is filed, if he is found to be a pauper at the time he filed the application. **AMJAD ALI v. SARFARAZ ALI, 4 O.C. 250.**

Pauper Suits—continued.

(47)—*Ss. 273, 284, Act XIV of 1882 (Civ. Pro. Code)—Plaintiff obtaining decree in forma pauperis for money—Order made in favour of Collector for realisation of Court-fees due to Government, at the time of decree—Attachment—Decree, execution of—Sale.*—A certain person obtained a decree in *forma pauperis* for money. At the time when the suit was decreed, an order was made in favour of the Collector for the realisation of the Court-fees due to Government. In execution of this order, the Collector attached the said decree under s. 273 of the Code of Civil Procedure and subsequently sold the same under s. 284. An application was made by the decree-holder for execution of his decree: *held*, that the provisions of s. 273 did not contemplate the sale of a decree for money, and that section was introduced into the Indian Code for the purpose of showing in what manner the attachment of decrees under the Code should be made available on behalf of the attaching person. *JOTINDRO NATH CHOWDHRY v. DWARKA NATH DEY*, 20 C. 111. (6 M. 418, 2 A. 290, F.)

(48)—*Civ. Pro. Code, s. 411—Decree for less than a pauper's claim—Stamp duty on the decretal amount—Disreputable defence.*—The pauper brother of a dancing girl sued her for a moiety of her property. She pleaded that all was mere self-acquisition by prostitution. The Judge found that only a very small sum was ancestral, and gave the plaintiff a decree for a moiety, but directed the sister to pay the Government stamp duty for the entire claim, as her defence was a disreputable one. *Held* that no penalty can lawfully be imposed upon her for pleading what was found to be substantially true and that the decision of the ancestral property was founded on the custom of their caste. *CHANDRASEKA v. SECRETARY OF STATE FOR INDIA*, 14 M. 163.

(49)—*Civ. Pro. Code, s. 411—Court-fee payable to Government by successful pauper plaintiff—Execution against subject-matter of suit.*—By s. 411 of the Civ. Pro. Code, the Court-fees which would have been payable had not the plaintiff been allowed to sue as a pauper are to be calculated by the Court should the plaintiff succeed. When so calculated, the amount is declared by operation of law to be a first charge on the subject-matter of the suit, and such amount is also, according to law, recoverable by Government from any party ordered by the decree to pay the same, in the same manner as costs of a suit are recoverable. It cannot be successfully contended that the first charge thus created can only be enforced by a separate suit brought by the Government. The Legislature must be taken to have given the Secretary of State a right to recover the Court-fees in the same way as if they had been costs in the suit, either generally from the person or property of any one ordered by the decree to pay the same, or from the property, the subject-matter of the suit. It cannot have been the intention of the Legislature to compel the Government to bring a separate suit, in such a

Pauper Suits—continued.

case, to recover the value of the Court-fees which the plaintiff had been relieved from paying on his plaint owing to his pauperism. *RAMDAS v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL*, 18 A. 419=A.W.N. 1896, 121. [R., 33 C. 1040=10 C.W.N. 857.]

(50)—*Application to sue in forma pauperis—Order rejecting the same—Appeal.*—There is no appeal from an order rejecting an application under s. 407, Civ. Pro. Code (1877), for permission to sue as a pauper. It does not embody the result of the decision of the suit, which it merely refuses to entertain in the manner in which it is sought to be instituted. Nor is it, though undoubtedly the result of a judicial proceeding, one of those enumerated in s. 588 of the Civ. Pro. Code, as appealable. *COLLIS v. MANOHARDAS*, 1 A. 745, F.B. (1 A. 668, R.)

(51)—*Civ. Pro. Code, Act VIII of 1859, s. 310—Rejection of application to sue as pauper—Appeal—Revival of application.*—There was no appeal open to a pauper, where his application to sue as a pauper was rejected for default. Where there had been no refusal under s. 310, Act VIII of 1859, the applicant could revive his application for leave to sue as a pauper. *RAJAH BHOJ SINGH v. RANEE MAHA KOONWER*, 3 Agra Mis. 1.

(52)—*S. 413, Civ. Pro. Code, 1882—Application for leave to appeal as pauper, effect of, dismissal of.*—The provision in s. 413 of the Code that, on the refusal of a petition to allow a person to sue as a pauper, the applicant shall be at liberty to institute a suit in respect of the same matter, duly stamping the plaint in the ordinary manner, is equally applicable to the case of the dismissal of an application to be allowed to appeal as a pauper, and consequently, when such an application happens to be dismissed by the Court, the applicant has the further right of presenting, on proper stamps, the appeal sought to be made. *SHAIK BUFFATI v. KALLOO KHAN*, 3 L.B.R. 194. (22 B. 849, 2 A. 241, 26 A. 329, R.)

(53)—*S. 5 and art. 170, Limitation Act, 1877.*—Appeal does not include leave to appeal in *forma pauperis*. The expression "appeal" in s. 5, Act XV of 1877, does not include an application for leave to appeal in *forma pauperis*. *SARAT CHANDRA DEY v. BROJESHWARI DAS*, 30 C. 790. (2 M. 230, 12 A. 79, R.)

(54)—*Civ. Pro. Code, 1882, ss. 579, 592—Application to appeal in forma pauperis—Limitation Act (XV of 1877, s. 5, art. 170)*—The provisions of s. 5 of the Limitation Act do not apply to an application to appeal in *forma pauperis*. *PARBATI v. BHOLA*, 12 A. 79=A.W.N. 1890, 25. [Appl., 12 A. 461; R., 19 B. 48, 30 C. 790=8 C.W.N. 906.]

(55)—*Civ. Pro. Code, 1882, ss. 407, 408—Application for leave to sue in forma pauperis—Rejection of application on grounds other than those mentioned in s. 407—Revision.*—A Court is not competent in an inquiry into the pauperism of an applicant for leave to sue in *forma*

Pauper Suits—continued.

pauperis to go into the question of the probable result of the applicant's suit if leave were to be granted, that suit not being *prima facie* barred by any rule of law. Where a Court, having found the applicant to be a pauper, acted as above described and rejected the application for leave to sue as a pauper: *Held* that the applicant could apply for revision of the order rejecting his application. **FAIZ MUHAMMAD v. AZIZ-UN-NISSA, A.W.N. 1893, 218.** (7 A. 661, D). [R., 32 A. 623=7 A.L.J. 741=6 Ind. Cas. 703.]

(56)—*Civ. Pro. Code, 1882, ss. 401, 407—Application for permission to sue in forma pauperis—Possibility of professing pauper's raising money on his claim no ground for rejecting his application—Revision.*—Money which may be borrowed on the strength of his claim in a suit which a person is seeking permission to institute in *forma pauperis* cannot be regarded as property in the possession of such person so as to disentitle him to sue in *forma pauperis*. An order rejecting an application for permission to sue in *forma pauperis* is not a decree, and being unappealable may form the subject of an application for revision. **AZMAT ALI v. KIFAYAT-ULLAH KHAN, A.W.N. 1893, 11.**

(57)—*Pauper suit—Refusal of permission—High Court's powers of revision—Civ. Pro. Code, 1877, s. 622.*—The High Court would not interfere, in revision, with the Subordinate Judge's order refusing the application of the petitioners to sue in *forma pauperis*. **BHULNESHRI DAT v. BIDIADIS, A.W.N. 1882, 69.** [F., 32 A. 623=7 A.L.J. 741=6 Ind. Cas. 831; R., 7 A. 661, F.B.]

(58)—*Jurisdiction—Civ. Pro. Code, 1859, ss. 304, 306.*—Where, on the day fixed for hearing on the question of pauperism, the defendant brings to the notice of the Court any ground on which the Court would have been bound to refuse to admit the petition, it is in the discretion of the Court to admit or to refuse to admit evidence of such ground. *In the matter of the petition of* **GANGA DASS ADHIKAREE, 11 B.L.R. App. 23, Note=14 W.R. 281.**

(59)—*Suit in forma pauperis—Civ. Pro. Code, 1859, ss. 304, 306.*—This was a suit in *forma pauperis*. The petition was admitted, and the usual order made under s. 305, and the case came on for hearing under s. 306. The defendant proposed to show by examination of the plaintiff that, on the facts stated in the petition there was no cause of action. The plaintiff objected that in suits in *forma pauperis* no question except the pauperism of the petitioner could, under s. 306, be gone into. The Judge allowed the examination of the plaintiff with a view to show that, on her own evidence, she had no cause of action. But her evidence not showing that she had no cause of action, the defendant proposed to show it by calling other witnesses which the Court refused to allow. **TARRAMONEY DABEE v. HURRO MOHUN CHATTERJEE, 11 B.L.R. App. 23.**

Pauper Suits—continued.

(60)—*Suit brought in ordinary form—Power of Court to permit continuance of suit in forma pauperis—Civ. Pro. Code, 1882, s. 401*—Where a suit has been originally instituted in a Court not as a pauper suit but as an ordinary one, it is in the power of the Court when necessary to allow the plaintiff to continue the suit in *forma pauperis*, since exactly the same considerations apply to the case of a plaintiff who becomes a pauper in the course of the litigation as to one who begins it as a pauper. **REVJI PATIL v. SAKHARAM, 8 B. 615.** (2 C. 130, F.) [F., 20 C. 319.]

(61)—*Pauper petition—Payment of Court-fees by petitioner—Institution of suit—Limitation.*—Where a person, being a pauper, petitions to sue in *forma pauperis*, and afterwards, pending enquiry into his pauperism, obtains funds and pays the Court-fees required for his suit, and his petition is, on such payment, numbered and registered as a plaint, his suit must be deemed to have been instituted from the date when he filed his pauper petition, and not when he paid the Court-fees; and limitation for the suit runs against him only up to the former date. **SKINNER v. ORDE, 4 C.L.R. 331, P.C.=2 A. 241=6 I.A. 126=4 Sar. 31=3 Suth P.C.J. 627.** (1 A. 230, reversed.) [F., 4 O.C. 250, 74 P.R. 1903, 28 M. 493=15 M.L. J. 219, 3 L.B.R. 194, 123 P.R. 1907=82 P.W. R. 1907; Appl., 4 A. 37=A.W.N. 1881, 129; R., 1 O.C. 272, 159 P.L.R. 1901, 59 P.R. 1903=129 P.L.R. 1903, 73 P.R. 1906=150 P.L.R. 1906, 1 S.L.R. 71; D., 18 A. 206=A.W.N. 1896, 33, 9 Bom. L.R. 204.]

(62)—*Mad. Reg. VII of 1818, s. 18, cl. 5—Suit in forma pauperis—Presentation and filing of petition for leave to sue—Irregular proceedings.*—By Mad. Reg. VII of 1818, s. 18, cl. 5, the practice is to serve a petition for liberty to sue in *forma pauperis* and the plaint, on the party proceeded against, to show cause within a certain time why the plaintiff should not be allowed to sue in *forma pauperis*. In 1847, A presented a petition to the Civil Court of Chittoor for liberty to sue in *forma pauperis* for recovery of a polliam. The Court was of opinion that, under Mad. Reg. IV of 1831, A could not be permitted to sue without obtaining the authority of the Government. In May, 1848, A obtained the sanction of the Government, and in October of that year, he presented a petition for leave to sue in *forma pauperis* and at the same time, lodged his plaint. On the 13th of November, 1848, the plaint and petition were ordered by the Court to be filed. The order for service of the petition and plaint, requiring the defendant to show cause why A should not be allowed to sue in *forma pauperis* was not served until August, 1849. No cause was shown, and the proceedings stood in that position on the 16th of September, 1849, when twelve years (the time limited by Mad. Reg. II of 1802, s. 18, cl. 4), from the 16th of September, 1837, when the cause of action accrued, had expired. The plaint was, by a subsequent order of the Court, filed on the

Pauper Suits—continued.

1st of March, 1850. *Held*:—First, that the proceedings of the Civil Court of Chittoor, on the 13th of November, 1848, were, by Mad. Reg. VII of 1818, s. 5, irregular, as the course there directed was to serve the petition and plaint on the party proceeded against, to show cause within a certain time why the plaintiff should not be allowed to sue in *forma pauperis*: Secondly, that the suit was not barred by Mad. Reg. II of 1802, s. 18, cl. 4, as A had preferred his claim within the prescribed period to a Court of competent jurisdiction, and had been prevented from commencing his suit in proper time by the irregular proceedings of the Court. **NARAGUNTY LUCH-MEDAVAMA v. VENGAMA NAIDU, 1 W.R.P.C. 30=9 M.I.A. 66.**

(63)—*Suit in forma pauperis*—Senior anand-ravan of a Malabar Tarwad—*Right to bring such a suit—Trust properties*.—A senior anand-ravan of a Malabar Tarwad is entitled to bring a suit in *forma pauperis* to set aside alienations made by the *karnavan*, where the properties alienated are temple properties; it is not necessary for him to consult other *uralers* of the temple to bring such a suit. A Court should not refuse an application to sue in *forma pauperis*, merely because there is no cause of action in regard to a portion of the claim made in the suit. Such a question is one for elimination of such properties from the suit when tried, and not for a refusal of the application to sue in *forma pauperis*. **MANGALASHERI ILLATH KRISHNAN NUMBUDRI v. MANGALASHERI ILLATH KESAVAN NUMBUDRI, M.W. N. 1913, 38=16 Ind. Cas. 612.**

Pauper Suits—Recovery of Stamp fees, Cir. No. 34, dated the 30th November 1864, 1.W.R. Civ. Cir. Orders, p. 4.

This circular lays down the Rules regarding costs in suits in *forma pauperis* instituted in the Original side of the High Court, **14 W.R. H. C. Rules, p. 7.**

See ACT XX OF 1863, s. 18, 24 M. 419.

See APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 7 W.R. 29, P.C.=4 M.I.A. 114.

Leave to sue in forma pauperis—Order granting leave—Revision—**See CIV. PRO. CODE, 1908, s. 115, 7 N.L.R. 49.**

Order granting application to sue in *forma pauperis*—Revision—**See CIV. PRO. CODE, 1908, s. 115, 7 A.L.J. 741=6 Ind. Cas. 831.**

See CIV. PRO. CODE, 1908, s. 115, A.W.N. 1882, 92.

Application to file a suit in *forma pauperis*—**See CIV. PRO. CODE, 1908, s. 115 and O. XXXIII, r. 1, 8 Bom. L.R. 642, 671.**

See CIV. PRO. CODE, 1908, O. VII, rr. 1, 2, 4, 5, 6, O. XXXIII, r. 1, s. 115, A.W.N. 1900, 214.

Right to be declared a pauper, whether personal—Death of applicant to sue in forma

Pauper Suits—continued.

pauperis—Right of heir to be substituted—**See CIV. PRO. CODE, 1908, O. XXII, r. 3 (1), O. XXXIII, rr. 2, 5, 8, 15, 4 C.L.J. 234=33 C. 1163.**

Withdrawal of, with permission to bring a fresh suit, amounts to failure of the suit—Payment of Court fees due to Government—**See CIV. PRO. CODE, 1908, O. XXIII, r. 1 and O. XXXIII, r. 11, 6 Bom. L.R. 1122=29 B. 102.**

Plaintiff withdrawing from a suit without the permission of the Court, as a result of compromise—**See CIV. PRO. CODE, 1908, O. XXIII, r. 1 and O. XXXIII, r. 11, 8 Bom. L. R. 689=31 B. 10.**

Application for leave to appeal as pauper—Application containing no schedule of property belonging to applicant—Want of verification—Effect—**See CIV. PRO. CODE, 1908, O. XXIII, r. 2, O. XLIV, r. 1, 11 O.C. 19.**

Plaintiff, if can be required to furnish security for defendants' costs—**See CIV. PRO. CODE, 1908, O. XXV, r. 1 (1), (3), O. XXXIII, r. 8, 12 C.W.N. 163=7 C.L.J. 312.**

Plaintiff obtaining leave to sue in *forma pauperis*—Plaintiff partly successful—Memorandum of objection in *forma pauperis*—**See CIV. PRO. CODE, 1908, O. XLI, r. 22, 4 L.B. R. 262.**

See CONTRACT ACT, 1872, s. 23, 13 B. 126.

See COSTS—SPECIAL CASES, 15 W.R. 41, P.C.=7 B.L.R. 216=14 M.I.A. 67.

Review of judgment—Suit in *forma pauperis*—Non-liability to Court fee—**See COURT-FEES ACT, 1870, sch. I, arts. 4 and 5, 20 A. 410.**

See DECREE—ALTERATION OR AMENDMENT OF DECREE, 2 C.L.R. 461.

See DECREE—DECREE, CONSTRUCTION OF, 25 W.R. 316.

S. 440, Civ. Pro. Code, 1882—Suit in *forma pauperis* by father as next friend—Dismissal—Order to pay costs—Nature of liability—**See HINDU LAW—DEBTS, 6 M.L.T. 308.=20 M.L.J. 89=4 Ind. Cas. 105.**

See INJUNCTION—SPECIAL CASES, A.W. N. 1890, 167.

Applications for leave to sue in *forma pauperis*, refusal of—Institution of regular suit—Limitation—**See LIMITATION ACT, 1908, s. 3, 17 A. 526=A.W.N. 1895, 106.**

Payment of Court-fees by petitioner—Institution of such suit—Limitation—**See LIMITATION ACT, 1908, s. 3, 2 A. 241, P.C.=4 C.L.R. 331=6 I.A. 126.**

See LIMITATION ACT, 1908, s. 3, 2 C. 389, 129 P.L.R. 1903=59 P.R. 1903.

Civ. Pro. Code, s. 403—Objection to application for leave to sue as pauper—Payment of Court-fees after expiry of limitation—**See LIMITATION ACT, 1908, ss. 3, 4, 5, 18 A. 206=A.W. N. 1896, 33.**

Pauper Suits—concluded.

Proceedings, effect of payment of Court-fees not made in time—See LIMITATION ACT, 1908, ss. 3 and 14, 9 Bom. L.R. 204.

Application by next friend of minor for leave to appeal as pauper made after time—Payment of Court-fee—Sufficient cause—See LIMITATION ACT, 1908, ss. 4, 5 6 and 8, art. 170, 144 P.W.R. 1909.

See LIMITATION ACT, 1908, ss. 4, 5, 22, 84 P.R. 1904.

See LIMITATION ACT, 1908, arts. 149, 182, 2 B.L.R. App. 22=11 W.R. O.C. 67.

See LIMITATION ACT, 1908, arts. 170, 181, 19 B. 48.

See LIMITATION ACT, 1908, art. 171, 7 B. 373.

Exemption of public claims—Claim of Government to recover stamp duty on dismissal of—See LIMITATION ACT, 1908, ART. 182—LAW APPLICABLE TO APPLICATION FOR EXECUTION, 8 M.H.C. 40.

Cross objections in—See MAINTENANCE, 7 Ind. Cas. 118.

Application for leave to sue in *forma pauperis*—Minor unrepresented by guardian or next friend—Costs—See MINOR—SUITS BY AND AGAINST MINORS, 13 B. 234.

See PRIVY COUNCIL, PRACTICE OF—SPECIAL LEAVE TO APPEAL AND TO DEFEND APPEAL, 7 W.R. 29, P.C.=4 M.L.A. 114.

Application in *forma pauperis* for probate of will by executor—Court's power to grant—See PROBATE—PRACTICE AND PROCEDURE AS TO PROBATE, 18 B. 237.

See PROCESS FEES, 4 P.R. 1873.

See REVIEW—GENERAL, 5 B.L.R. 318, Note=11 W.R. 22.

See REVIEW—REVIEW WHEN LIES, 24 P.R. 1870, 4 B. 414, 5 B.L.R. App. 29.

Rejection of application to appeal as a pauper—High Court's powers of revision—See REVISION—GENERAL, 4 A. 91=A.W.N. 1881, 136.

See REVISION—GENERAL, 21 P.R. 1885.

Pawn.

See CONTRACT ACT, 1872, ss. 172 TO 178.

See PLEDGE.

(1)—Act XIV of 1859, s. 1, cl. 15—Deposit—Pawn—Absentee—Adverse possession—Entry of absentee's name in Collector's records.—A deposit or pawn is of moveable property, not of land, and a suit for recovery of land cannot be governed, as regards limitation, by cl. 15, s. 1 of Act XIV of 1859 which relates to suits for the recovery of a deposit. The mere entry in the Collector's records of the names of absentees in respect of certain shares cannot alter the nature of possession adversely held by the other co-sharers. *DOORJUN v. CHAINA*, 2 N.W.P. 43. [R., 3 A. 458.]

Pawn—concluded.

Unauthorized pledge of goods by servant—Suit in trover—See CONTRACT ACT, 1872, s. 178, 4 C. 497=3 C.L.R. 398.

Trust—See DEPOSIT [OF TITLE-DEEDS, 9 M.L.A. 303.

8 Suits by pawnee to recover balance of debt after sale of pawned articles—See LIMITATION ACT, 1908, art. 57, 24 A. 251=A.W.N. 1902, 43.

See MORTGAGE—FORM OF MORTGAGES, 3 N.W.P. 71.

Pawnee.

Rights of pawnee—See COMPANY—POWERS AND LIABILITIES OF DIRECTORS, 106 P.L.R. 1902.

Payment.

(1)—*Payment*—Payment of debt to representative of deceased person—Discharge—Right of executors of the deceased to ignore such payment—Notice of claim—Duty of executors—Negligence, effect of.—Held, that as no one is under legal obligation to pay debts due to the estate of a deceased person to any one claiming to be entitled to the effects of the deceased, except on the production of a probate, letters of administration, certificate or some authority to collect the debts due to the estate of the deceased, therefore a payment by a debtor to the widow of his deceased creditor, who had not obtained any authority to recover the debts due to her deceased husband's estate was not a valid discharge to the debtor, and that the executors of the deceased creditor were fully entitled to ignore such a payment, and to sue for the same. Mere neglect on the part of the executors to give notice of their claim to the debtor did not debar them from claiming the debt, although it might be a good reason for declining to give interest, damages or even costs as regards such a claim. *GOLAK NATH v. CRADDOCK*, 72 P.R. 1903. (8 B.H.C. A.C. 152, R.)

(2)—*Bond*—Proof of payment—Evidence—It is wrong to require, as was done in this case, that payment pleaded in discharge of a bond, should be payment recorded in Court; it is enough if the payment appears in the books of the *Mahajuns* as was usual in such cases. *JEYRAM v. HARBHUGGUT*, 88 P.R. 1866.

See BOND, 1 B. 45.

Into Court of decretal money—See CIV. PRO. CODE, 1908, O. XXI, r. 89, 1 Bom. L.R. 215=23 B. 723.

See CONTRACT—ILLEGAL CONTRACTS, 9 B.L.R. App. 38=18 W.R. 450.

Where place of payment is not stipulated, the debtor must make the payment at the place where the creditor is—See CONTRACT ACT, 1872, s. 49, 6 Bom. L.R. 1038=30 B. 167.

By plaintiff for his own benefit—See CONTRACT ACT, 1872, ss. 69, 70, 1 Bom.L.R. 371.

Payment—concluded.

Extension of time for — See DECREE — DECREE, FORM OF, 26 C. 639 = 3 C.W.N. 628.

Stipulation in bond that payment of money due under it shall be endorsed on bond and that no other evidence of payment is admissible—Other evidence of payment not excluded—See EVIDENCE—PAROL EVIDENCE, 3 M.L.J. 9.

Bond—Contemporaneous oral agreement for discharge — See EVIDENCE — PAROL EVIDENCE, 4 C.L.R. 274.

Appropriation of—See GUARANTEE, 4 C. 560 = 3 C.L.R. 361.

See INSTALMENT DECREE, 24 A. 85 = A. W.N. 1901, 168.

Lambardar and co-sharer—Of rent to lambardar—*Bona fide* payment—Suit for recovery of rent—See LAMBARDAR, A.W.N. 1888, 45.

Money paid by defendant not liable to pay into Court and realised by decree-holder—Suit to recover—Limitation—See LIMITATION ACT, 1908, arts. 29, 62, 96, 97, 120, 6 Ind. Cas. 654 = 49 P.W.R. 1910.

Of money for defendant's use—Cause of action — Right to recover — Limitation—See LIMITATION ACT, 1908, art. 61, 7 A.L.J. 585 = 6 Ind. Cas. 878.

Goods priced in sterling — Money paid in rupees, how far payment for goods— See SALE OF GOODS, 17 B. 62.

Payment into Court.

See CIV. PRO. CODE, 1908, O. XXI, rr. 1, 2.

(1)—*Civ. Pro. Code, s. 308 — Purchase at Court sale—Payment into treasury—Rules of High Court of 21st June, 1882.*—Under the rules of the High Court of 21st June, 1882, the treasury becomes, for purposes of payment, part of the establishment of the Court. Therefore, when the balance of the purchase money was brought to the Court, on the fourteenth day after sale, and a chalan was obtained, and both were taken to the treasury, but the treasury officer had closed for the day and, the next two days being holidays for the treasury, the money had to be paid on the seventeenth day, the Courts ought to consider such payment as made in time. SRINIVASA v. MALAYACHAN, 7 M. 211. [D., 8 M.L.J. 168.]

(2)—*Execution of decree—Deposit of money on behalf of judgment-debtor, effect of.*—When, by the terms of a decree, the estate of a judgment-debtor is primarily made liable to discharge a debt with interest, the judgment-debtor or his heirs would have a right to pay the principal and interest, in order to protect himself from being made responsible to indemnify the sureties; and if money is deposited by some one for the benefit of the judgment-debtor, it is unnecessary for the Court to enquire whether such person had authority from the judgment-debtor or his heirs to do so,

Payment into Court—continued.

inasmuch as the money is in Court for the purpose of satisfying the decree of the execution-creditor. BISSESSUR SINGH v. NIM CHAND BOSE, 12 W.R. 505.

(3)—*Question decided in regular Court, not triable again in course of execution—Money paid under wrongful order of Court — Civil suit maintainable for recovery of.*—A question already decided by a Court of special jurisdiction could not, in the course of executing the decree passed by that Court, be tried over again so that the decision may come on again to be reviewed in the Civil Court. Money paid over at the instance of the judgment-creditor under a wrongful order of the Court might be recovered by the person from whom it was extorted, by means of suit in the Civil Court. OMANATH ROY CHOWDHRY v. SUROOP CHUNDER BOSE, 10 W.R. 485.

(4)—*Auction-purchaser—Mortgage —Lien—Payment.*—Auction-purchasers with notice of a mortgagee's lien are liable to pay off the mortgage, and to satisfy any decree which the mortgagee may obtain in regard to the property in a suit pending at the time of the purchase. Such decree cannot be satisfied by payment into Court unless the mortgagee has the means of immediately taking the money out of Court, or has acquiesced in such payment. THE LAND MORTGAGE BANK v. RAM RUTTUN NEOGY, 21 W.R. 270. [D., 22 W.R. 461.]

(5)—*Specially registered mortgage bond—Decree—Cause of action—Payment.*—P lends money to S under a specially registered-bond pledging immovable property, and afterwards obtains a decree for principal and interest; more than four years later, he brings a further suit to recover the interest due under the same bond: meanwhile plaintiffs lend money to S under a bond by which the same property is pledged, and recover a decree in execution of which the property is sold. P proceeds to attach the property in execution of his second decree when plaintiffs object but ineffectually, and after that, to protect the property they have purchased, they pay a sum of money into Court, which is subsequently taken out by P. Held that after execution of P's first decree, he was not entitled to a second decree for interest, so as to reserve a lien upon the property pledged, and had no right to take out the money deposited by plaintiffs. Held too that, under the circumstances, the payment of the money into Court was not a voluntary payment, and the plaintiffs are entitled to recover. MUTHOORA MOHUN ROY CHOWDHRY v. PEAREE MOHUN SHAHA, 23 W.R. 344.

(6)—*Execution of decree—Order for payment into Court—Appeal by both parties—Payment by defendant into Court—Plaintiff's refusal to take—Attachment by another decree-holder of defendant and receipt of money by him—Confirmation of lower Court's order—Application by plaintiff for payment of amount—Effect of previous refusal.*—In execution of a decree by the plaintiff against the defendant, the latter

Payment into Court—continued.

was ordered to pay into Court a sum of Rs. 140. Both parties appealed against the order which was eventually confirmed. Meanwhile, the amount was paid into Court as directed by the lower Court, but the plaintiff refused to take it. And another decree-holder of the defendant attached this sum in execution of his own decree and was paid this sum. After the order of the appellate Court confirming that of the lower Court, plaintiff applied to the lower Court to recover the said sum. The defendant contended that he had already paid the amount into Court. *Held* that it was clear that, after the defendant paid the Rs. 140 into Court in execution of the decree, the Court held the money on account of the plaintiff, and the plaintiff, who had not obtained stay of execution, could not refuse to take it because an appeal was pending; that the plaintiff's refusal, therefore, to take the money could not justify the lower Court in treating the money as the defendant's and in ordering it to be paid to another judgment-creditor of the defendant without his having in any way expressed his assent to the money being so treated; and that the money should have remained in Court, i.e., paid into the treasury as a civil deposit; and that consequently, the plaintiff could not recover this amount from the defendant. **LAKSHMAN DADAJI v. DAMODAR AMBADAS, 15 B. 681.**

(7)—*Landlord and tenant—Deposit of rent.*—Tenants who have been in the habit of depositing in Court the rent due to a landlord, in his sole name are not justified, without receiving notice or order to that effect, in making the deposit in the joint names of that landlord and another. **JOHN RUDD RAINEY v. NUBO COOMAR MOOKERJEE, 24 W.R. 128.**

(8)—*Decree for rent—Payment by judgment-debtor under protest—Ejectment from tenure—Act VIII of 1862 (B.C.), s. 52.*—Where a judgment-debtor pays into Court, within 15 days from the date on which a decree for rent has been passed against him, the amount in arrear together with costs and interest with a protest in respect of the sum improperly charged against him as interest, *held* that the judgment-debtor, having fulfilled the spirit of s. 52 of Act VIII of 1869 (B.C.) was not liable to be ejected from his tenure. **SREESHTEDAR DEY v. DOORGA NARAIN NAG, 17 W.R. 462.**

(9)—*Decree amount paid to decree-holder, but not in Court—Effect.*—If the money payable under a decree is not paid into Court and the debtor prefers to pay direct to the creditor, he does so at his own risk. **GUNGA GOBIND GOOPTOO v. MAKHUN LALL HATTEE, 9 W.R. 362.**

(10)—*Act VI (B.C.) of 1862—Deposit—Payment without tender.*—A defendant is not entitled to any benefit from a deposit of money paid in under Act VI (B.C.) of 1862 without a tender to, and refusal by, the plaintiff. **KRISTO PROTIBAR v. ALLADINEE DOSSEE, 15 W.R. 4.**

Payment into Court—continued.

(11)—*Mortgage—Attachment of equity of redemption—Purchase by mortgagee—Payment to raise attachment—Right of suit—Decree—Non-registration—Effect.*—A mortgaged certain property to B who subsequently purchased the same from A. After the mortgage and before the said sale, C, who obtained a money decree against A attached the property and brought it to sale. The sale was afterwards set aside on the ground of irregularity. As the setting aside of the sale did not displace the attachment, C resumed proceedings in execution, got an order for sale, and the property was about to be sold pursuant to this order, when B released it from liability to be sold by paying into Court the money due which he now sought to recover back from C. *Held* that C had a right to sell the rights and interests of his judgment-debtor in the property attached, that, at the time of the attachment, those rights and interests amounted to an equity of redemption, and that consequently he was entitled to keep the money which saved the sale. The non-registration of a decree cannot, by any possibility, be a reason why the decree should not be executed. **GOSSAIN MUNRAJ POOREE v. DEEN DYAL LALL, 20 W.R. 19.**

(12)—*Execution—Attachment of allowance—Prohibitory order—Order directing payment into Court.*—In 1871, the Judge made an order upon M, which was in the nature of an order of attachment, in a case of execution of decree against one B, requiring M to pay into Court a sum of Rs. 700 out of the monthly allowance of Rs. 1,000 due from the estate of M to B, in the first instance for the months of August to November 1871, and then month by month. M objected by a petition that the allowance due from his estate to B had been paid up in advance from October 1870 to November 1871. But the Judge upheld his former order and directed M to pay into Court the sum of Rs. 1,400, the allowance for August and September, and thereafter Rs. 700 month by month. *Held* that the Judge should merely have said, "I dismiss the application; I decline to set aside the prohibitory order" and that his order directing M to pay the money into Court was one which was not justified by any of the provisions in the Civ. Pro. Code—an order which was illegal and could not be allowed to stand. **MAHARAJ COOMAR KISHEN PERTAUB SAHEE v. CHOW-TARINEE SREE BHOWYA DEBYA, 18 W.R. 40.**

(13)—*Decree—Payment—Judge—Duty.*—On money being paid into Court by a judgment-debtor in satisfaction of a decree, the Court is bound to pay it out immediately on the application of the judgment-creditor, and to inform the judgment-creditor, when asked to do so, what is the amount remaining due. **LUCHMAN PERSHAD v. SREERAM, 21 W.R. 271.**

(14)—*Tender—Payment.*—A plea of tender before action must be accompanied by a payment into Court after action. **Haji Abdul**

Payment into Court—continued.

RAHMAN v. HAJI NOOR MAHOMED, 16 B. 141. [Appl., 11 C.L.J. 226=14 C.W.N. 617=5 Ind. Cas. 165; R., 4 L.B.R. 108, 5 C.L.J. 270=34 C. 305, 4 M.L.T. 335; D., 5 C.L.J. 78, Note.]

(15)—*Execution—Payment into Court to prevent arrest—Voluntary payment—Payment to decree-holder—Objection.*—Payment of money into Court by a judgment-debtor, under pressure of an application to arrest his person, is not a voluntary payment. [R., 65 P.R. 1870.] Where a judgment-debtor paid into Court, under pressure of an application to arrest his person, a sum of money for the recovery of which the application was made, making at the same time but one objection, namely, that the decree-holder was not entitled to interest, and he did not pay the money to the use of the decree-holder: *Held* that the judgment-debtor did not thereby debar himself from making any other objection, that might arise and that he was entitled to be heard, and to take whatever objections of law or fact he could before the Court, previous to that money being paid away to the decree-holder. **PREONATH MOOKERJEE v. BINADIRAM SEN, 4 B.L.R. App. 25=13 W.R. 29.** [R., 65 P.R. 1870.]

(16)—*Decree providing for payment of money in 15 days—Party bringing sum into Court within time—Party ordered to pay on adjourned date—No default made by party.*—Where a decree provided that a sum of money should be paid within 15 days, and the defendant produced the money in Court within 15 days, but the Court, however, without receiving the money and without rejecting it as improperly tendered, i.e., as not being deposited in the Treasury as required by the Rules of Practice, handed it back to the party with order to produce it again on an adjourned date in Court, *held* that the Court must in the circumstances, be held responsible for the money not having been paid into the Treasury within the time allowed, and that the party obeyed the instructions of the Court in regard to the money, and must be held to conform to the terms of the decree, so far as the production of the money in Court on first and second occasion went. **PUTTA HEGADE v. KUSAMMA HEGADATHI, 8 M.L.J. 168.**

(17)—*Voluntary payment—Payment under legal necessity.*—Where money is voluntarily paid with full knowledge of all the circumstances, the party intending to give up his right cannot, afterwards, bring an action for money had and received; but it is otherwise where, at the time of paying the money, the party gives notice that he intends to resist the claim, and that he yields to it merely for the purpose of relieving himself from the inconvenience of having his goods sold (*Valfy v. Manley*, 1 Common Bench, 594 quoted by Norman J.). The plaintiff, in order to save his indigo factory from sale in execution of a decree obtained against a third party, paid the money due from the latter and sued for its recovery. *Held*, that

Payment into Court—continued.

the plaintiff was entitled to sue, as the payment should be held to have been made under a legal necessity and not voluntarily. **KAZEE RUM-ZAN ALI v. MAHARAJA SOORUJBHAN, 7 W.R. 403.** [R., 12 W.R. 128.]

(18)—*Foreclosure—Extension of time for payment by mortgagor—Court closed on due date—Option of mortgagor to deposit in Court or tender mortgage money—Deposit by mortgagor on next open Court-day, sufficiency of, to save estate from foreclosure.*—The mortgagee in this case allowed by petition a further term of payment to the mortgagor extending to the 25th November, 1863; if the mortgagor had tendered the mortgage money and interest, to the mortgagee on the 25th November he would have been in time; so he would have been clearly in time if he had taken his money into the Judge's Court on the 25th November. The Judge, however, had closed his Court on that day and extended the holiday until the Monday following. On that Monday, the plaintiff took his money into the Court, and deposited it there for the purpose of preventing a foreclosure of his estate. The question was whether the absence of the Judge from his Court was a sufficient answer to the mortgagor for not having deposited the money in the Judge's Court to prevent foreclosure. The High Court held that, although the mortgagee had extended the time for the payment to the 25th November, the mortgagor was prevented by the closing of the Court—a circumstance to which he was no party, and which was not caused by any default or misconduct on his part—from depositing the money in the Judge's Court on that day. He, therefore, had a reasonable excuse for not doing so, and consequently it would be contrary to any principle of justice, equity and good conscience to allow the mortgagee to take advantage of the mortgagor's inability to deposit the money in Court, and to treat the mortgage as foreclosed. It was further contended in this case that, inasmuch as the plaintiff was unable to deposit the money in Court on that particular day, he was bound to then make a tender to the mortgagee. But the High Court was of opinion that, when the Judge's Court was not open, the mortgagor was not bound to make tender to the mortgagee. The plaintiff had the option, either of depositing the money in the Judge's Court, or of tendering it; and if there was a sufficient excuse for not depositing it in the Judge's Court, he was not bound to tender the money and prove that tender. **DABEE RAWOOT v. HEERAMUN MUHATOON, 8 W.R. 223.** [F., 7 C. 690; Appl., 5 C. 906=6 C.L.R. 239; R., 1 N.W.P. 81, 14 C. 451, 21 M. 385, 10 C.W.N. 535=3 C.L.J. 339, 6 C.L.J. 176, 7 N.L.R. 176.]

(19)—*Payment required to be made into Court within particular time—Money paid into Post Office within but received in Court beyond time, not a good payment.*—The Post Office is not a part of the Court or the agent of the Court. A person bound to pay up money into Court within a particular date, if he chooses to remit

Payment into Court—concluded.

it through the Post Office, is not entitled to treat the time of payment into the Post Office as the time of payment, to the Court but, is bound, as in any other mode of sending the money, to so send it up that it may reach the Court in time. *RAMCHANDRA v. BELYA*, 22 B. 415.

See BEN. ACT VIII OF 1869, ss. 31 and 46, 20 C. 498, P.C. = 20 I.A. 25.

See COSTS—SPECIAL CASES, 14 W.R. 387.

Decree for payment of money into Court—What is a sufficient compliance—See DECREE—DECREE, CONSTRUCTION OF, 8 C. 528.

See INJUNCTION, SPECIAL CASES, 21 B. 502.

See INTEREST—SPECIAL CASES, 2 C.L.R. 183.

Right to draw money out of Court—See PRACTICE AND PROCEDURE, 26 C. 766.

See PRACTICE and PROCEDURE, 21 C. 566.

See RIGHT OF SUIT—REVENUE, SALE FOR ARREARS OF, 13 A. 195 = A.W.N. 1890, 228.

Payment of Money.

Mortgage—Re-payment of money lent by instalments—Mortgagee not bound to accept—English Law—See MORTGAGE—GENERAL, 24 A. 461 = A.W.N. 1902, 135.

Payment out of consideration.

Recital of—In deed—Effect of—See SPECIFIC RELIEF ACT, 1877, s. 21 (a), 8 O.C. 5.

Payment out of Court.

(1)—*Suit for money paid out of Court—Adjustment of decree.*—Where the judgment-debtor discharged, out of Court, certain bonds given by the decree-holder to third parties, on the promise that such sums should be credited to the amount due under the decree, a suit, by the judgment-debtor to recover the moneys, was not barred by the rule in 3 Mad. H. C. R. 188, as the payments had not been made directly in adjustment of the decree. *KUNHI MOIDIN KUTTI v. RAMEN UNNI*, 1 M. 203.

To one of several decree-holders, effect of—When judgment-debtor discharged and when not—See CIV. PRO. CODE, 1908, O. XXI, r. 15, 1 N.L.R. 24.

See PRACTICE AND PROCEDURE, 11 C. 219.

Pedigree.

(1)—*Proof of—Evidence of relatives—Hindus.*—To prove a pedigree in a reversioner's suit, evidence of a party's own kinsfolk may be adduced. The evidence of such persons would derive special weight from the fact that Hindu boys are taught the names of their paternal and maternal ancestors up to the seventh or even higher degree as matter of necessity. Such evidence should not be treated with more than

Pedigree—continued.

ordinary caution with which testimony is sifted, when sympathy with one side is to be taken for granted. Proof of pedigree, if it came from strangers, would be of very little value. *DEBI PERSHAD CHOWDHRY v. RANI RADHA CHOWDHRAIN*, 9 C.W.N. 161, P.C. = 32 C. 84 = 31 I.A. 160 = 8 Sar. 708.

(2)—*Evidence—Proof of pedigree in suit between Muhammadans—Admissibility of oral evidence.*—In a suit between Muhammadans, oral evidence is admissible to establish as pedigree. *MOHIDIN AHMID KHAN v. SYIID MUHAMMAD*, 1 M.H.C. 92.

(3)—*Proof of—Recognition by widow of relationship—Evidence Act (I of 1872), cl. 5 of s. 32.*—The appellants were held, in the absence of evidence to the contrary, to have sufficiently proved their title, as reversionary heirs to the estate of the deceased, by oral evidence of reputed common descent, relevant under s. 32, cl. 5 of the Evidence Act and by documentary evidence, that the widow of the deceased, had recognised, long before suit, under conditions, that her husband's heirs were entitled to succeed her, and that she was not prepared to contest the claim of the appellant's predecessors to be such heirs. *BAHADUR SINGH v. MOHAR SINGH*, 6 C.W.N. 169 = 29 I.A. 1 = 24 A. 94, P.C. = 4 Bom. L.R. 233 = 12 M.L.J. 56 = 8 Sar. 152.

(4)—*Probative value of pedigrees.*—The plaintiffs gave in evidence at the trial three pedigrees, namely: (1) a pedigree purported to have been signed in 1872 by one Maharaj Bahadur, a son of Sheo Narain, a deceased member of the plaintiff's family, who was however not examined as a witness. According to the evidence of Kalka Parshad, one of the plaintiffs, it was in the handwriting of the former and was obtained by him from Sheo Narain in the years 1894-1896 (the precise date was not fixed) as a statement of family descent, for, the purpose of being given in evidence in certain criminal proceedings; (2) a pedigree purporting to have been filed by Sheo Sahai in 1892 or 1894 in a civil suit concerning lands other than and different from lands sued for in the present action, in which Sheo Sahai was plaintiff and Kesho and others defendants. It was endorsed: "(Signed) Sheo Sahai, plaintiff by the pen of Sunder Lal, Special Agent." At the trial Sunder Lal gave evidence. It was held by the appellate Court in India not to be admissible on the ground that it was made *post litem motam* because, in a statement made by Massamat Parbati in the absence of Sunder Lal, in a suit instituted by him against her in the year 1891 for cutting down trees in a certain grove in a certain village, which he alleged was a halting-place, she had said that she had no kinship with him, nor was she on visiting and dining terms with him; (3) a pedigree filed in a suit brought for the recovery of the possession of certain lands in which Shanker Sahai (the son of the second defendant) was plaintiff, and Fazal

Pedigree—continued.

Husain and others were defendants. On a contention that the three pedigrees were inadmissible: *Held* (approving the finding of the Subordinate Judge) that the controversy out of which the appeal had arisen was but a stage in the dispute which arose on the death of Mussammat Parbati in 1896; (2) that the pedigrees were not ancient family records handed down from generation to generation and added to, as a member of the family dies or is born, but documents drawn up on a particular occasion for a specific purpose by members of the family, and must accordingly be treated as mere declarations made by the persons who respectively drew up or adopted them; (3) that the first pedigree was adopted by Sheo Narain, was not shown to have been made *post litem motam*, and was, therefore, admissible; (4) that the second pedigree was on the evidence of Sunder Lal clearly admissible as a declaration made by a deceased member of a family touching the family reputation or tradition on the subject of its descent and it was clear that the controversy to which the statement of Mussammat Parbati referred was not a controversy as to the heirship of Gur Sabai, but referred to an entirely different matter, and in order to make the statement inadmissible on the ground that it was made *post litem motam*, the same thing must be in controversy before and after the statement was made; (5) that the third pedigree was inadmissible, having been made *post litem motam*. **KALKA PARSHAD v. MATHURA PARSHAD**, 10 Bom. L.R. 1088=13 C.W.N. 1=18 M.L.J. 424=4 M.L.T. 380=30 A. 510=8 C.L.J. 447=5 A.L.J. 701=35 I.A. 166, P.C.

Mode of calculating degree of relationship in the Banu District Tahsil Isa Khel—*See* CUSTOMS—PUNJAB—ALIENATION, 48 P.R. 1908=98 P.W.R. 1908=166 P.L.R. 1908.

Value of pedigree tables which extend beyond the seventh or eighth degree—*See* CUSTOMS—PUNJAB—WILL, 11 P.R. 1908=13 P.W.R. 1908=92 P.L.R. 1908.

See EVIDENCE—HEARSAY EVIDENCE, 1 Hay 528, 13 C. 42.

See EVIDENCE—PAROL EVIDENCE, 1 Ind. Jur. O.S. 132.

Pedigree table prepared at settlement—Circumstances to show that parties are descended from common ancestor—*See* EVIDENCE—MISCELLANEOUS, 4 Ind. Cas. 549=60 P.W.R. 1909.

See EVIDENCE—MISCELLANEOUS, 10 M. 362.

See EVIDENCE ACT, 1872, s. 9, 18 A. 98=A.W.N. 1895, 236.

Statement of deceased persons in—*See* EVIDENCE ACT, 1872, s. 13 (b), 32 C. 6.

Prepared from statements and papers of bards is not admissible in evidence unless the bards or the person who prepared it are examined as a witness—*See* EVIDENCE ACT, 1872, s. 32, 2 Bom. L.R. 942.

Pedigree—concluded.

See EVIDENCE ACT, 1872, s. 32, 17 A. 456=22 I.A. 139, P.C.

Relationship, evidence of—Special means of knowledge—Family priest—*See* EVIDENCE ACT, 1872, s. 32, cl. 5, 4 C.L.R. 173.

Evidentiary value of—*See* EVIDENCE ACT, 1872, s. 32 (5), 8 Ind. Cas. 728.

Admissibility of—*See* EVIDENCE ACT, 1872, s. 32 (5), 10 Ind. Cas. 199.

See EVIDENCE ACT, 1872, s. 32 (5), 9 A. 467=A.W.N. 1887, 18.

Suit for possession as collateral heirs—Pedigree table when admissible as evidence—*See* EVIDENCE ACT, 1872, s. 32 (6), 23 A. 72=2 Bom. L.R. 492=5 C.W.N. 49=27 I.A. 183, P.C.

Family pedigree—Report of panchayat—Evidence—*See* HINDU LAW—ADOPTION, 3 C.W.N. 130=26 I.A. 48=25 B. 1, P.C.

See LIMITATION—MISCELLANEOUS, 1 M. I.A. 446.

Presumption of correctness of geneological table prepared at settlement—Contents of the table being vague—Effect—*See* RES JUDICATA—CAUSE OF ACTION, 58 P.W.R. 1908.

Peint Laws.

See BOM. ACT II OF 1894.

Peishcush.

Private agreement apportioning, not binding on government—*See* MAD. ACT I OF 1876, 16 M.L.J. 468=1 M.L.T. 421=30 M. 106.

Peishwa.

Inam granted by—. Grant with "present and future cesses and taxes and assessments"—Suit by inamdar to recover abkari revenue derived by Government—Want of jurisdiction in Court by reason of Pensions Act—*See* ACT XXIII OF 1871, 14 B. 573.

Sanad granted to inamdars by Peishwas' Government—Right of grantees to soil of forest, timber and jungle wood—*See* LAND TENURE—IN BOMBAY, 11 B. 688, Note=P. J. 1881, 276.

Vatan lands attached by—Continuance of attachment under and subsequent redemption by British Government—Possession by defendant as tenant to Government, if adverse—Plaintiff's incompetency to sue during attachment and resumption—*See* LIMITATION ACT, 1908, art. 144, 8 B. 585.

Penal Assessment.

Right of Government to impose penal assessment—Jurisdiction of Civil Court—Limitation—*See* MAD. ACT XII OF 1851, ss. 1, 17, 22 M. 100.

Levy of—For encroachment on *poramboke* land, legality of—*See* MAD. ACT, II OF 1864, 28 M. 312.

Penal Assessment—concluded.

Unauthorized occupation of Government land—Levy of—, Suit to recover—Payments made—Necessity for proof of coercion—Limitation—See LIMITATION ACT, 1908, arts. 14, 16, 13 M.L.J. 269.

Penal Code.

(1)—See HINDU LAW—CUSTOM, 21 M. 229.

(2)—S. 30—See ACCOUNTS — ACCOUNTS STATED, 2 M.H.C. 247.

(3)—S. 131—See LIBEL, 14 C.W.N. 713=6 Ind. Cas. 81=37 C. 760.

(4)—Ss. 153, 296—*Wantonly giving provocation with intent to cause riot—Disturbing religious assembly—Vadagalais forming separate Adhyapaka goshti from Tengalais—User of public highway for religious purposes*—A decree in a Civil Court declared the exclusive right of Tengalais to the Adhyapakam miras in a certain temple, one of the rights of that miras being declared to be the exclusive right of reciting the usual Tamil Prabandham in a certain temple and the shrines attached thereto. It also declared that the Tengalais were entitled to discharge the duties on all occasions on which the ceremony was performed, as well as at the time of the processions, and at services in the temple and its shrines. The Vadagalais were restrained from interfering with the Tengalais in the recital of the Mantrams and Prabandham, otherwise than as ordinary worshippers. Subsequently, a religious procession was being conducted along a public way. The Tengali goshti was reciting Prabandham in front of the God. Behind the idol, the Vadagalais, at the suggestion of the District Magistrate, formed a separate goshti and recited a different Prabandham. The Vadagalais were asked to refrain from doing so, but refused. They were charged under s. 153 for wantonly giving provocation with intent to cause riot, and under s. 296 for disturbing a religious assembly. It was found that the Tengalais could not hear what the Vadagalais recited. *Held* by the Full Bench (Sir Arnold White, C. J., dissenting) that the Vadagalais had not committed any offence either under s. 153 or under s. 296, as the acts of the Vadagalais, were not in contravention of the decree, as they were not acting wantonly, or maliciously or illegally, and as they did not disturb the worship of the Tengalais. [R., 32 M. 478; D., 19 M.L.J. 467, 19 M.L.J. 617.] *Per Bhashyam Ayyangar, J.*—Within the meaning of s. 296, no assembly can be lawfully engaged in the performance of religious worship or religious ceremonies on a highway, unless it is established, or can be reasonably presumed, that the dedication of the highway was subject to such restriction and user. Using the highway as a place of worship is not the legitimate user of it as a highway, i.e., "for the purpose of using it in order to pass and re-pass or for any reasonable or usual mode of using the highway as a highway. *Per Subramania Ayyar, J.*—Presumably, the object of s. 296 is

Penal Code—continued.

to secure freedom from molestation when people meet for the performance of acts which ordinarily take place in some quiet spot vested for the time being in the assembly exclusively; and one cannot but feel serious doubts as to whether the section was intended to secure to persons, who choose to engage in worship in an unquiet place open to all the public as a thoroughfare, the immunity from disturbance due to those who meet to worship in a church, a mosque, a temple or other place appropriate for such purpose. There is no peculiar right known to the law as a right of procession; though the law accords to members of a procession no recognition in their collective capacity, yet, the fact that a number of persons use a highway together for some common purpose does not detract in any way from such use being lawful; but the circumstances attending a procession may, in consequence of their being inconsistent with the paramount idea of passage already referred to, be of such a character as to render the user by the processionists otherwise than lawful. *Per Benson, J.*—No doubt a highway is primarily intended for the use of individuals passing and re-passing along it in pursuit of their ordinary avocation; but in every country, and especially in India, highways have, from time immemorial, been used for the passing and re-passing of processions as well as individuals, and there is nothing illegal in a procession or assembly being engaged in worship while passing along a highway, any more than an individual doing so. No doubt, if a religious or any other procession, interferes with the ordinary use of the highway by persons not members of the procession, it may be prohibited or controlled by the proper authorities, and no Court could convict a person under s. 296 on an allegation that he voluntarily disturbed a religious procession, if he could show that he was only using the road in the ordinary way and with due regard to the right of others equally entitled to use it. But, subject to such control and the rights of others entitled to use the highway, there is nothing illegal in a procession engaging in worship on a highway. VIJAYA-RAGAVACHARIAR v. EMPEROR, 26 M. 554=13 M.L.J. 171, F.B. [R., 32 M. 478; D., 19 M.L.J. 467, 19 M.L.J. 617.]

(5)—S. 174—*Disobedience of order of Munsiff—Professional misconduct—Jurisdiction of Munsiff.*—Where a Munsiff called upon a vakil to show cause on the 22nd November, why a report should not be made against him to the High Court for professional misconduct, and on the same date the vakil put in a written explanation and the matter was ordered to be put up on the 6th December for orders, and the vakil did not appear on the 6th December, and later, on the 20th December, proceedings were drawn up for the prosecution of the vakil under s. 174, I.P.C., for non-appearance on the 6th December, *held*; (a) that there was no order directing the vakil to appear personally before the Munsiff on the 6th December, and the proceeding under s. 174, I.P.C., ought to be quashed;

Penal Code—continued.

(b) that when the vakil had been called upon to offer an explanation, which he did on the 22nd November, to all intents and purposes, this was a sufficient compliance with the order. *In the matter of PROKASH CHUNDER SARKAR*, 7 C.W.N. 797.

(6) S. 174—Notice of issue of commission shown to party's pleader—Service—Refusing admission to commission—Proceedings under—See COMMISSION, 6 C.W.N. 927.

(7)—S. 175—See WITNESS—DEFAULTING WITNESS, 12 B. 63.

(8)—S. 182—See SANCTION TO PROSECUTE, A.W.N. 1892, 31.

(9)—Ss. 182, 211, 499—See MALICIOUS PROSECUTION, 19 B. 717.

(10)—Ss. 183, 186—See SANCTION TO PROSECUTE, 4 Ind. Cas. 97=6 M.L.T. 376.

(11)—S. 186—*Civil process—Resistance—Jurisdiction.*—The resistance of process of a Civil Court is punishable, under the Cr. P. C., by a Court of Criminal jurisdiction. *THE QUEEN v. BHAGAI DAFADAR*, 2 B.L.R. F.B. 21=10 W.R.Cr. 43. (9 W.R.Cr. 63, *Overruled*; S.D.R., 1852, 71, R.) [R., 1 P.R. 1871, Cr., 22 C. 759.]

(12)—S. 186—See BEN. ACT V OF 1875, s. 45, 6 C.W.N. 120.

(13)—S. 186—See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 2 B.L.R. A.C. 188=11 W.R. 62.

(14)—S. 186—See NO. 10, *supra*.

(15)—S. 188, *to what it applies.*—S. 188 of the Penal Code applies to orders made by public functionaries for public purposes, and not to an order made in a civil suit between party and party. *In the matter of the petition of CHANDRAKANTA DE*, 6 C. 445=7 C.L.R. 350. [F., 3 Cr. L.J. 151; R., 14 C.P.L.R. 174.]

(16)—S. 188—See CIV. PRO. CODE, 1908, O. XI, rr. 14, 21, 80 P.R. 1889.

(17)—S. 188—Disobedience of injunction—Not amounting to an offence under the section—Object of s. 493, Civ. Pro. Code—Sanction to prosecute under s. 195, Crim. Pro. Code—See CIV. PRO. CODE, 1908, O. XXXIX, r. 2, 14 Bur. L.R. 276.

(18)—S. 191—See SANCTION TO PROSECUTE, 3 Ind. Cas. 723=6 M.L.T. 346=10 Cr. L.J. 364.

(19)—S. 191—False verification of written statement—Civ. Pro. Code s. 115—False evidence—See WRITTEN STATEMENT, 6 A. 626=A.W.N. 1884, 52.

(19-a)—S. 191—See NO. 25, *infra*.

(20)—Ss. 191, 193—*Application for execution—Omissions to mention some of the parties.*—Where one of two joint decree-holders applied for execution of the decree, but omitted to

Penal Code—continued.

mention the name of the other decree-holder in the column for names of the parties, as required by clause (b) of s. 235, Civ. Pro. Code, held that, by such an omission, he was not guilty of an offence under s. 193, I.P.C. *EM-PRESS v. BEHARI LAL*, A.W.N. 1887, 223.

(21)—S. 193—*Fabricating false evidence—Application for partition—Application not required to be verified—Verification on behalf of a deceased person.*—In order to sustain the charge of fabricating false evidence against an accused, three things must be established :—(1) That he made a document containing a false statement, (2) that he intended such false statement to appear in evidence in a proceeding taken before a public servant and (3) that the false statement so appearing in evidence might cause any person who, in such proceeding, was to form an opinion on the evidence, to entertain an erroneous opinion, touching any point material to the result of such proceeding. Where, therefore, a petition is not required by law to be verified and the accused puts the signature of a dead man below the verification in such a petition, he cannot be guilty of making false evidence in respect of that petition. *GANESHI v. EMPEROR*, A.W.N. 1905, 52=2 A.L.J. 203.

(22)—S. 193—See NO. 20, *supra*.

(23)—Ss. 193, 196, 199, 200—See SANCTION TO PROSECUTE, 27 M. 223=14 M.L.J. 24.

(24)—Ss. 193, 199, 471—See CIV. PRO. CODE, 1882, ss. 622, 643, 4 O.C. 96.

(25)—Ss. 193, 210, 406, 191, 199, 511—See CIV. PRO. CODE, 1908, O. XXI, r. 2, 10 B. 288.

(26)—Ss. 193, 211—See SANCTION TO PROSECUTE, A.W.N. 1891, 40.

(27)—Ss. 193, 463—See SANCTION TO PROSECUTE, 1 C.W.N. 400.

(28)—Ss. 193, 463, 471—Order of Munsiff to prosecute certain persons for offences under the above sections, whether amounts to complaint—See CRIM. PRO. CODE, 1898, ss. 195, 476, 7 A. 871, F.B.=A.W.N. 1885, 267.

(29)—S. 196—See NO. 23, *supra*.

(30)—S. 199—See Nos. 23, 24, 25, *supra*.

(31)—S. 200—See NO. 23, *supra*.

(32)—S. 209—See CIV. PRO. CODE, 1877, Ss. 622, 643, A.W.N. 1882, 92.

(33)—S. 209—See SANCTION TO PROSECUTE, 13 C.W.N. 1038=4 Ind. Cas. 6=10 Cr. L.J. 454=37 C. 13.

(34)—S. 210—*Fraudulently causing a decree to be executed.*—The decree-holder held an *ex-parte* decree against two persons. He made an agreement with one of them, acknowledging receipt of half the decree-money, and admitting that he had no further claim against him. Subsequently he applied for execution of the decree as against the other judgment-debtor,

Penal Code—continued.

and in the application he stated that nothing whatever had been paid in satisfaction of the decree. The Court issued notices to both the judgment-debtors, calling upon them to show cause why the decree should not be executed. Notice was not served on the judgment-debtor with whom the aforesaid agreement was entered into, it being reported that he was dead. On the application of the other judgment-debtor the *ex-parte* decree was set aside, and the case was re-tried. The decree-holder was prosecuted and convicted under s. 210 of the Indian Penal Code. *Held*, that the conviction could not be maintained, as the execution of the decree could not begin until the judgment-debtor had appeared, and had either made no objection or had made an objection which had been formally overruled. The decree-holder did not cause the decree to be executed. The only result of his application was the issue of a notice calling upon the judgment-debtor to show cause why the decree should not be executed. NAURANG v. THE EMPEROR, 88 P.L.R. 1902. (23 C. 971, F.)

(35)—S. 210—See SANCTION TO PROSECUTE, 23 C. 971.

(36)—S. 210—See No. 25, *supra*.

(37)—S. 211—See Nos. 9, 26, *supra*.

(38)—Ss. 255-B and 353—Summons served not personally served and provisions of s. 82, Civ. Pro. Code, not complied with—Warrant issued for arrest of witness—Arrested witnesses rescued from custody and officers entrusted with warrants assaulted—Legality of conviction—Civ. Pro. Code, ss. 82 and 174.—A warrant was issued for the arrest of certain witnesses, who had failed to attend the Court. The warrant was issued under s. 174 of the Code, read with s. 193 of the N.W.P. Tenancy Act, 1901. One of the witnesses was arrested but rescued by the accused in the present case. The accused also assaulted the officers who had been entrusted with the warrants. It was found that three summonses were originally sent out to the witnesses but none of which was personally served. The serving officer affixed the summonses to the outer doors of the houses of the witnesses. It was found that the Court issuing the warrants did not comply with provisions of s. 82 of the Civ. Pro. Code. But the Court's order for the issue of the warrant shewed that the Court was of opinion that there was due service of the summonses and that the witnesses were keeping out of the way intentionally. The accused were convicted of offences, under ss. 255-B and 353, I.P. Code. *Held*, under the circumstances, that (1) the warrants were not absolutely illegal and (2) in any case the accused were guilty of the offence under s. 353, since the officers entrusted with the warrants were acting in execution of their duty. EMPEROR v. NARBADESHWAR, A.W. N. 1909, 66.

(39)—S. 283—See SANCTION TO PROSECUTE, 7 C.W.N. 423.

Penal Code—continued.

(40)—S. 294-A—See CONTRACT—MISCELLANEOUS, 22 M. 212.

(41)—S. 296—See No. 4, *supra*.

(42)—S. 353—See No. 38, *supra*.

(43)—S. 373—See HINDU LAW—CUSTOM, 19 M. 127.

(44)—S. 377—See DAMAGES—DAMAGES, SUITS FOR, A.W.N. 1893, 62.

(45)—S. 379—*Theft of bamboos, conviction for—Ownership of land and bamboos claimed by accused—Necessity for considering questions of ownership and bona fides of accused—Right of Revenue authorities to take summary possession—Civil Court, province of, to determine questions of ownership between Government and private persons.*—An accused person was convicted of theft of certain bamboos. The accused, however, claimed a right to the bamboos for a long time past. He said that his grandfather planted them as a hedge and that he had long been enjoying them. The Revenue authorities did not admit the claim, but, being of opinion that the bamboos were within the limits of the Government *poramboke*, took possession of the land and informed the accused that they had done so. The accused, however, after this, cut and removed some of the bamboos alleging that they belonged to him. *Held*, that the Head Assistant Magistrate was wrong in saying that "ownership has little to do with cases of theft, where possession is only the point at issue." The Revenue authorities had no right to oust the accused from possession. Their position in regard to these matters is the same as that of any private person. It is the province of the Civil Courts to decide questions of ownership of land between Government and private persons just as much as between two private persons. If Government Officers take summary possession of a man's land otherwise than under the Land Acquisition Act or other legal authority, his rights are no more affected by such illegal action than they would be by the illegal seizure of his land by a private person. In such a case, the Revenue Officers are mere trespassers and there is nothing dishonest in the owner re-taking possession of his property. The questions to be determined in this case were (1) whether the bamboos did, in fact, belong to accused or Government; (2) whether, if they did not belong to the accused, he *bona fide* believed that they did. Order of Head Assistant Magistrate, confirming conviction, set aside and appeal ordered to be disposed of in the light of the above observations, after allowing the accused to adduce further evidence, if necessary. ALAGARASAWMI TEWAN v. EMPEROR, 28 M. 304.

(46)—S. 405—See MORTGAGE—SALE OF MORTGAGED PROPERTY, 5 W.R. 230.

(47)—S. 406—See PARTNERSHIP—GENERAL, 35 C. 1103.

(48)—S. 406—See No. 25, *supra*.

Penal Code—continued.

(49)—Ss. 417, 420—*See* PRE-EMPTION—MISCELLANEOUS, A.W.N. 1904, 265.

(50)—S. 420—*See* No. 49, *supra*.

(51)—S. 421—*See* PRESIDENCY TOWNS INSOLVENCY ACT, 1909, ss. 17, 103, 12 Bom. L.R. 750.

(52)—S. 422—*Application to withdraw money paid into Court—Dishonestly or fraudulently preventing debt being available for creditors.*—Petitioners' estate was under mortgage and in the management of certain persons under certain conditions as to payment of moneys realized by them. In execution of a decree obtained by the managers in a suit brought by them in the name of the petitioners, a certain under-tenure was sold for Rs. 3,000. The judgment-debtor arranged with the petitioners that on payment of Rs. 1,000, the sale should be set aside, and accordingly paid that sum into Court, and an application was made by the petitioners to draw out the money upon which no order was made. They were thereupon convicted, at the instance of the managers, of an attempt to commit an offence under s. 422, I.P.C. *Held* that the application to obtain the money paid into Court might have been a breach of their contract with the mortgagors, but such conduct cannot necessarily be regarded as dishonest or fraudulent so as to render the petitioners liable to punishment, their attempt to get the money being more to put an end to the management than to prevent the money from being available to the payment of their debt under the mortgage. *HARA KUMARI CHAUDHURANI v. MR. SAVI*, 5 C.W.N. 174 = 28 C. 314.

(53)—S. 447—*Actual possession given to auction-purchaser in execution under s. 318, Civ. Pro. Code—Forcible entry and assault by sub-tenants of judgment-debtors.*—The right, title and interest of certain judgment-debtors in an agricultural holding were sold in execution of a money-decree against them and the auction-purchaser was put in actual possession of the lands sold, under s. 318, Civ. Pro. Code, without any opposition. The auction-purchaser also exercised acts of possession over the land by tilling and manuring the same. Thereafter, the accused, alleging themselves to be sub-tenants of the judgment-debtors under a lease-deed prior in date to the purchaser obtaining possession, forcibly entered upon the land, assaulted the purchaser's men, who were engaged on the lands and turned them out of possession. *Held*, the accused were guilty of an offence under s. 447 of the Penal Code; the accused must establish their rights, whatever they might be, against the auction-purchaser in a Civil Court; they ought not to take the law into their own hands. *KAILASH GHOSE v. JUGAL LOHAR*, 1 C.L.J. 104. (16 C. 206, F.; 7 B.H.C. A.C. 82, Disc. & R.)

(54)—S. 463—*See* Nos. 27, 28, *supra*.

(55)—Ss. 467, 471—*See* REGISTRATION ACT, 1908, s. 82, 30 C. 822 = 7 C.W.N. 639.

Penal Code—concluded.

(56)—S. 471—*Striking of the rolls—See* LEGAL PRACTITIONERS—PLEADER—REMOVAL, SUSPENSION, ETC., 22 A. 49, P.C. = 3 C.W.N. 736 = 26 I.A. 242 = 1 Bom. L.R. 708 = 7 Sar. 556.

(57)—S. 471—*See* LEGAL PRACTITIONERS—VAKIL, 3 C.W.N. 736 = 26 I.A. 242 = 22 A. 49, P.C.

(58)—S. 471—*See* Nos. 24, 28, 55, *supra*.

(59)—S. 494—*See* HINDU LAW—MARRIAGE, 18 C. 264.

(60)—Ss. 494, 497—*See* HINDU LAW—CUSTOM, 2 B.H.C. 117.

(61)—S. 497—*See* No. 60, *supra*.

(62)—S. 498—*See* MARRIAGE, 31 P.R. 1908 = 76 P.W.R. 1908 = 152 P.L.R. 1908.

(63)—S. 499—*See* DEFAMATION, 7 A. 205, F.B. = A.W.N. 1894, 340, 22 A. 234.

(64)—S. 499—*See* No. 9, *supra*.

(65)—S. 500—*Defamation—See* EVIDENCE ACT, 1872, s. 132, 9 C.W.N. 911 = 2 C.L.J. 105 = 2 Cr. L.J. 459.

(66)—S. 511—*See* No. 25, *supra*.

Penalty.

See CONTRACT ACT, 1872, s. 74.

See DAMAGES.

See INTEREST—STIPULATION IN THE NATURE OF PENALTY.

(1)—*Doctrine of penalty—Inapplicable to consent decrees.*—The doctrine of penalties is inapplicable to any stipulation contained in a decree giving effect to the compromise of a suit. (1 B. 73, R.) In the present case, a decree was made by consent of the parties. It created a perpetual tenancy, but contained a stipulation for the plaintiff's re-entry if the property was alienated or if the defendant failed to pay rent. The plaintiff sought to eject on failure by defendants to pay rent. It was contended by the defendants that the stipulation in the decree being penal was not enforceable. *Held* that the contention of the defendant was not maintainable, because the doctrine of penalty had no application to decree of Court. *SHIRAKULI TINNAPPA HEGDA v. MAHABLYA*, 10 B. 435. [Overruled, 31 B. 15 = 8 Bom. L.R. 813 = 1 M.L.T. 370, F.B.; Not F., 24 M. 265.]

(2)—*Doctrine of penalty—Applicability to decrees of Court.*—“The principles which govern the enforcement of contracts and their modification, when justice requires it, do not apply to decrees which, as they are framed, embody and express such justice as the Court is capable of conceiving and administering. The admission of a power to vary the requirements of a decree once passed would introduce uncertainty and confusion. No one's rights would, at any stage, be so established that they could be depended on, and the Courts would be overwhelmed with applications for the modification, on equitable principles, of orders made on a full

Penalty—continued.

consideration of the cases which they were meant to terminate. It is obvious that such a state of things would not be far removed from a judicial chaos." (*Per West, J.*) "And as ordinary decrees are thus unchangeable, so are those in which, through a special provision for the convenience of parties, their own disposals of their disputes are embodied. The doctrine of penalties is not applicable to such a class of cases; and those who, with their eyes open, have made alternative engagements and invited alternative orders of the Court must, if they fail to perform the one, perform the other, however greatly severe its terms may be." **BALPRASAD v. DHARNIDHAR SAKHARAM, 10 B. 437, Note.** [*F.*, 10 B. 435; *Expl.*, 31 B. 15=8 Bom. L. R. 813=1 M.L.T. 370; *R.*, 15 A. 232.]

(3)—*Undertaking by third person on behalf of obligor to perform engagement—Technicalities of English law of penalties if applicable.*—Their Lordships of the Judicial Committee laid down in this case that where a person, being himself under no liability on account of another person, binds himself in a penalty for the due performance of the engagement, the nice technicalities of the English law of penalties should not be applied, but the agreement between the parties must be looked to with a view to see what the real intention was. In the result, their Lordships were satisfied that there was a *bona fide* endeavour on the part of the respondent fairly to perform his engagement, and that there was much reason to believe, with some of the Judges in the Court below, that there was desire on the part of the appellant to throw obstacles in the way of the performance, in order to obtain payment of the penalty which he expected would be the consequence of non-performance, and consequently recommended the dismissal of the appeal with costs. **RAM GOPAL MOOKERJEE v. MASSEYK, 2 W.R. 43, P.C.=8 M.I.A. 239.** [*R.*, 2 Agra 1.]

(4)—*Contract—Penalty—Liquidated damages—Distinction pointed out.*—The question in this case was whether plaintiff was entitled to recover from the defendant Rs. 500 which he had agreed to pay the plaintiff in the event of the non-performance of his agreement to sell a plot of land to plaintiff. The plaintiff had stipulated to receive and the defendant intended to give the plaintiff Rs. 500 in the event of a breach of the recorded agreement. Plaintiff was therefore held entitled to Rs. 500, as it must be considered to be liquidated damages. If the damages accruing from a breach of contract are of uncertain nature and the parties chose to assess and fix them beforehand by agreement amongst themselves, and the amount agreed upon is no more than what may be a fair and reasonable measure of damages, it is not a penalty and no relief will be granted from payment of it. **JOTI MULL v. MEHTAB SINGH, 26 P.R. 1871.**

(5)—*Contract—Liquidated damages—Penalty.*—The defendant having sold certain land to

Penalty—continued.

plaintiff agreed to register the sale-deed when he should receive the balance of purchase money, and if he refused to write and attest the deed of sale or to make *dakhil kharij*, he should pay to the plaintiff Rs. 500 by way of damages. Plaintiff duly paid the balance of the purchase-money. Defendant refused, without sufficient reason, to make *dakhil kharij* as agreed upon. Hence this suit by plaintiff to recover Rs. 500 as damages. *Held* that the plaintiff was entitled to recover the full amount of Rs. 500 as the amount was liquidated damages and not mentioned by way of penalty only, inasmuch as the parties fixed the sum as estimated damages which were to be paid in the event of the non-performance of either condition, and did not intend that the actual loss that might accrue should be ascertained after breach of contract, and also because the estimate could not be considered exorbitant. **TELU MALL v. MOHKAMKHAN, 69 P.R. 1873.**

(6)—*Bond—Provision for enhanced rate of interest—Penalty—Indian Contract Act, s. 74.*—A provision for payment of a heavy rate of interest in default of the fulfilment of the terms of a bond is not a penalty or naming a "fixed sum" within the meaning of s. 74 of the Contract Act, and the Court is bound, under Act XXVIII of 1855, to adjudge interest at the stipulated rate, provided there has been no deception or fraud and the parties contract on equal terms with each other. M borrowed a certain sum from plaintiff for 6 months at 3 per cent. per mensem, and executed a bond which provided that if the money were not repaid within 6 months, interest should be paid on the total amount of principal and interest at 10 per cent. per mensem. The loan was not repaid in time. Subsequently M paid interest for 2 months at 10 per cent. In a suit then brought on the bond for balance of principal and interest, *held* that the provision for payment of enhanced rate of interest was not a penalty, that the parties really agree that interest at 10 per cent. should be paid, and that the plaintiff was entitled to recover interest at that rate according to the terms of the bond. **TEK CHAND v. MORICE, 5 P.R. 1877.** [*R.*, 25 P.R. 1879, 150 P.R. 1883, F.B.; *D.*, 51 P.R. 1879.]

Compromise of doubtful rights—Stipulation to pay smaller sum by certain date, or to pay full amount on default—Whether penalty—Whether stipulation enforceable—*See AGREEMENT, 6 M.L.T. 326.*

Stipulation by mortgagor to pay on redemption the principal sum and half as much again—*Deorha*—Whether amounts to penalty—*See CIV. PRO. CODE, 1908, O. XLI, r. 22, 10 O.C. 214.*

Stipulation in Razinama decree when amounts to a—*See COMPROMISE—MISCELLANEOUS, 2 Ind. Cas. 850.*

See CONTRACT—GENERAL, 1 C.P.L.R. 175.

See CONTRACT—BREACH OF CONTRACT, 6 C.P.L.R. 11, 5 C.P.L.R. 108.

Penalty—concluded.

See DAMAGES—DAMAGES, SUITS FOR, 3 C.W.N. 43.

Liquidated damages—Contract Act, s. 74—Discretion of Courts—See DAMAGES—MEASURE AND ASSESSMENT, 5 A. 238=A.W.N. 1883, 2.

Lease—Agreement to pay additional rent in case of breach—Penalty or liquidated damages—See DAMAGES—MEASURE AND ASSESSMENT, 22 M. 453.

Stipulation regarding postponement of redemption—not penal—See MORTGAGE—REDEMPTION, 10 Ind. Cas. 243.

Bond written partly on one and partly on another stamp paper—admissibility in evidence—Stamp duty and—See STAMP ACT, 1869, s. 49, 7 M.H.C. App. 36.

Agreement with a penal clause—Bond for amount of—See STAMP ACT, 1879, s. 7, sch. I, No. 5 (c), 2 A. 654, F.B.

Indian Stamp Act (I of 1879), s. 34—Original instrument chargeable with penalty—Documents constituting secondary evidence not governed by the section—See STAMP ACT, 1879, s. 34, 23 M. 49=26 I.A. 262=4 C.W.N. 117, P.C.

Suit to recover—paid on unstamped document—See STAMP ACT, 1879, ss. 34, 41 A.W.N. 1884, 328.

Suit for the amount of stamp duty and—Stamp Act, 1879, s. 41—Costs—Civ. Pro. Code, s. 13—See STAMP DUTY, 6 A. 70=3 A.W.N. 1883, 211.

Stamp—Penalty—Obligor if liable to pay amount paid by obligee—See STAMP DUTY, 1 M.H.C. 124.

Contract for sale of land—Deposit by vendee—Stipulation for forfeiture of deposit on failure to pay balance of purchase-money and to complete sale by certain date—Whether the stipulation a penalty—"Penalty," meaning of—Distinction between "penalty" and "damages"—See VENDOR AND PURCHASER—BREACH OF COVENANT, 6 M.L.T. 334=20 M.L.J. 230=3 Ind. Cas. 941=33 M. 375.

Pendency of Suit.

See LIS PENDENS.

See TRANSFER OF PROPERTY ACT, 1882—s. 52—In another Court—Deduction of time—See LIMITATION ACT, 1908, s. 14, 1 P.L.R. S.N. 12 C.

Pending Proceedings.

Pending suits and pending proceedings, distinction between—See PENDING SUITS, 12 A. 440=A.W.N. 1890, 103, F.B.

Subsequent passing of statute—Construction—See STATUTES, CONSTRUCTION OF, 18 B. 429.

Pending Suits.

(1)—*Pending suits and pending proceedings, distinction between.*—There is an essential distinction between pending suits and pending proceedings in execution. In the one case, the rights of the plaintiff against the defendant have to be ascertained. In the other case, and before execution of the decree is had, these rights have been already ascertained, and it only remains to enforce the decreed rights by execution. SHEO PRASAD v. HIRA LAL, 12 A. 440=A.W.N. 1890, 103, F.B. [R., 12 C.P.L.R. 73.]

See BEN. ACT VIII OF 1885, s. 21, 14 C. 553.

See BEN. ACT VIII OF 1885, s. 21 (2), 15 C. 376, F.B.

Applicability to, when Act came into force—Agreements restricting right of occupancy—See BEN. ACT VIII OF 1885, s. 178, 14 C. 621.

Include suits remitted for trial on questions of fact—See LIMITATION ACT, 1908, s. 31, 16 C.W.N. 489, P.C.=11 M.L.T. 313=39 I.A. 96=M.W.N. 1912, 433=9 A.L.J. 564=15 C.L.J. 466=14 Bom. L.R. 455=23 M.L.J. 16=35 M. 191=15 Ind. Cas. 222.

Suit to recover balance of rent due on lease—Previous suit by lessee against lessor for damages for illegal dispossession, still pending—No bar—Discretion of Court—See RENT, SUIT FOR, 3 M.H.C. 158.

Pension Fund.

See STAMP ACT, 1879, ss. 3 (15), 25 (c), 19 C. 499.

Pensions.

See ACT VI OF 1849.

See ACT XXIII OF 1871.

See ATTACHMENT—SUBJECTS OF ATTACHMENT.

See CIV. PRO. CODE, 1908, s. 60.

(1)—*Bonus—Attachment of.*—A bonus granted by Government is not a pension and if proceedings in execution had commenced prior to 1st June, 1882, the bonus is attachable. KHASIM v. CARDIEN, 5 M. 272. [R., 30 M. 153=2 M.L.T. 33.]

(2)—*Attachment of pension—Act VI of 1849.*—An application to attach a pension was rejected by a District Judge on the ground that, being a political pension, it could not be attached under Act VI of 1849. The High Court, on petition, reversed the order of the Judge and directed the pension to be attached. *Ex parte HAR HAT BIN RAMCHANDRA BHAT*, 4 B.H.C. A.C. 67.

(3)—*Act VI of 1849—Pension—Attachment.*—The Court will not interfere with an order of attachment placed on a pension, where the recipient thereof does not show that the pension is one enjoyed for past services rendered by him, and in consideration of his

Pensions—concluded.

infirmities or old age. *Ex Parte VITHAL-RAV ESWANTRAV*, 4 B.H.C.A.C. 65. [R., 18 W.R. 124.]

(4)—Act VI of 1849, s. 2—*Pension in lieu of Saranjam—Assignment—Compromise*.—A pension was granted by Government to the defendant in lieu of a Saranjam held by his grandfather. Subsequently a compromise was made of the claim which the plaintiff had to a share of the pension, by which the defendant agreed to pay them a certain proportion thereof yearly. *Held* that, as this was not a pension granted in "consideration of past service and present infirmities or old age," it did not come within the terms of s. 2 of Act VI of 1849 and that the agreement was therefore valid. *MADHAVARAV T. PANSE v. BAPURAV K. PANSE*, 4 B.H.C. A.C. 62.

This circular gives the revised Rules under Pensions Act, s. 14, Rev. Cir. No. 5, 24 W.R. **Rev. Cir.**, p. 18.

Loan on security of pension — Liability of pension—*See CIV. PRO. CODE*, 1908, s. 60, A. W.N. 1881, 147.

Pensions Act XXIII of 1871, s. 7—*Alienability of a—Under—Gift of right to pension—See MAHOMEDAN LAW—GIFT*, 9 A. 213=A.W.N. 1887, 22.

See ST. 11 AND 12 VIC., CH. 21, ss. 7, 27, 19 B. 232.

Arrangement between two Sovereign powers—Taking effect as treaty—Construction of Treaty—Perpetual—By payments—Construction of the word "issue"—Effect of subsequent correspondence—*See TREATY, CONSTRUCTION OF*, 17 C. 234=16 I. A. 175, P.C.

Peon.

(1)—Act V of 1863 (B.C.) —*Appointment of peons—Authority of Nazir*.—By the Bengal Act V of 1863, the appointment of peons in the Civil Court is vested in the Nazir, subject to the approval of the Judge, by whatever title he be designated; and no superior authority whatever is competent to control such appointments, or to restrict the choice of the Nazir in anyway whatever, the intention of the framers of the Act being manifestly that the selection of proper agents should rest with the person under whose direction they are to act. *GOOROO DYAL SINGH, PETITIONER*, 9 W.R. 333.

(2)—*Peons in Munsiff's Court, appointment of—Interference by Judge—Act V (B.C.) of 1863, s. 3*.—Under s. 3 of Act V of 1863 (B.C.) peons in a Civil Court are appointed by the Nazir of the Court, subject to the approval of the Court, i.e., of the presiding officer. The Act is not superseded by the provisions of s. 9 of Act XVI of 1868, and a Judge is in error in interfering with the appointment of peons in a Munsiff's Court, made and approved of by the Munsiff under the provisions of s. 3 of Act V of 1863. *IN THE MATTER OF SOMEROOD-DEEN*, 11 W.R. 169.

Peon—concluded.

This circular is one relating to peon's Badges and Belts. Cir. No. 33, dated the 25th Oct., 1864, 1 W.R. **Civ. Cir. Orders**, p. 4.

Deputation and appointment of peons to assist civil ameens. Cir. No. 29, dated the 28th November, 1865, 4 W.R. **Civ. Cir. Orders**, p. 3.

This circular deals with the grant of half-pay to peons while sick in Hospital or receiving medical aid as out-door patients of the Hospital. Cir. No. 11, dated the 23rd March, 1866, 5 W.R. **Civ. Cir. Orders**, p. 5.

This circular deals with the employment and remuneration of extra peons by Civil Judges for the service and execution of processes on special occasions. Cir. No. 18, dated the 11th May, 1866. 5 W.R. **Civ. Cir. Orders**, p. 9.

This circular directs that toll on Civil Court Peons is to be debited to the Peon's Fee Fund. Cir. No. 14, dated the 9th April, 1867, 7 W.R. **Civ. Cir. Orders**, p. 8.

This circular deals with the increase in the Salaries of Peons. Cir. No. 18, dated the 28th June, 1867, 8 W.R. **Civ. Cir. Orders**, p. 1.

This circular directs Judges, when preparing lists of peons to be appointed under the Court Fees' Act, to take into consideration the claims of Revenue peons who have been thrown out of employment by the transfer of rent-suits to the Civil Courts. Civ. Cir. No. 12, dated 27th May, 1870, 13 W.R. **Civ. Cir.** 17.

Promotion of process peons, how to be regulated. Civ. Cir. Order No. 14, 24 W.R. **Rules and Orders of H.C.**, p. 14.

Arrest in execution of decree—Practice—Delegation by Nazir to—Civ. Pro. Code, s. 343—Endorsement of particulars of arrest by Naib Nazir—*See ARREST*, 6 A. 385=A.W.N. 1884, 133.

Periodical Returns and Statements.

This circular prescribes latest dates for despatch of Periodical Returns and Statements. Civ. and Crim. Cir. O.No. 4, 24 W.R. **Rules and Orders of the H.C.**, p. 3.

Perishable Property.

Attachment and sale of—Disposal of sale proceeds—*See CIV. PRO. CODE*, 1908, O. XXI, r. 58, O. XXXIX, r. 6, 4 L.B.R. 16.

Sale of—Claim to—Right of successful claimant—*See CLAIM*, 8 Ind. Cas. 77.

Perjury.

(1)—*Charge of fraud, forgery and perjury—Appeal to Privy Council—Costs*.—Charges of fraud, forgery, and perjury having been made by the respondents against the appellant, the party who propounded the will, costs of the Court of India, and upon appeal to England, were, upon the reversal of the decree of the

Perjury—concluded.

Sudder Court, ordered to be paid by the respondents. *NANA NURAIN RAO v. HUREE PUNTH BHAO*, 9 M.I.A. 96.

See HIGH COURT, JURISDICTION OF—CALCUTTA, B.L.R. Sup. Vol. 426=5 W.R. Mis. 24.

See OFFENCE, 5 W.R. Cr. 8=1 Ind. Jur. N.S. 97.

Liability of judgment obtained by deliberate—to be set aside in a fresh suit on the ground of fraud—See RIGHT OF SUIT—GENERAL, 16 M.L.J. 59=29 M. 179.

Statement that two persons were partners—Another statement that one of them stood surety to the other—Whether contradictory.—See SANCTION TO PROSECUTE, 10 M.L.T. 278=2 M.W.N. 1911, 259.

Sanction to prosecute for—Requisites of a valid sanction—See SANCTION TO PROSECUTE 6 A. 105=A.W.N. 1883, 227.

See SANCTION TO PROSECUTE, 16 B. 729.

Permanent Advance.

This circular substitutes fresh clauses for cls. 9, 10, & 10 A of s. 4, Ch. XI, relative to permanent advances. Rev. Cir. No. 4, 24 W. R. Rev. Cir., p. 3.

Permanent Lease.

See LEASE—MISCELLANEOUS, 3 Bom. L.R. 768.

Permanently-settled Estate.

Separate registration of alienated portion of, —Jurisdiction of Collector—Private agreement apportioning *peishcush* not binding on Government—See MAD. ACT I OF 1876 (LAND REVENUE ASSESSMENT), 16 M.L.J. 468=1 M.L.T. 421=30 M. 106.

Permanent Occupancy Right.

Payment of rent at an unaltered rate—See LANDLORD AND TENANT—EJECTMENT, 32 C. 41, P.C.=31 I.A. 144=8 C.W.N. 889.

Permanent Settlement.

See ENHANCEMENT OF RENT—ENHANCEMENT, EXEMPTION FROM.

(1)—*Act X of 1859—“Permanent Settlement.” meaning of.*—The words “Permanent Settlement” referred to in Act X of 1859, refer to the Permanent Settlement of Bengal, Behar and Orissa, which was sanctioned in 1793. They do not refer to settlements subsequently made. *SHEOBURN LAL v. RAM PURTAB SINGH*, 3 W.R. Act X Rul., 20.

(2)—*Ancient palayams—Permanent Settlement, effect of.*—Where ancient Palayams and Zemindaris have been brought under the permanent settlement, such settlement only changes a precarious tenure into permanent property, and a varying assessment into a fixed

Permanent Settlement—continued.

demand, and does not otherwise alter the incidents of the estates either in regard to their mode of descent or partibility as evidenced by family usage. *NARAYANA v. CHENGALAMMA*, 10 M. 1.

(3)—*Permanent Settlement Regulations of Bengal, effect of.*—By the Permanent Settlement Regulations, Government withdrew its sovereign right to vary the assessments as regards the estates that came within the scope of the permanent settlement. The Regulations do not go further, and do not certainly constitute a contractual relationship between the Government and the owners of permanently-settled estates, or any such relationship as would debar Government from claiming and exercising against those owners the rights of an ordinary proprietor. *KRISTO MONI GUPTA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL*, 3 C.W.N. 99.

(4)—*Date of Permanent Settlement in Jessore.*—The date of Permanent Settlement in Jessore was the 11th April 1870 *BABOO HURONATH ROY v. AMEER BISWAS*, 1 W.R. 230.

(5)—*Permanent Settlement, meaning of—Act X of 1859.*—The words “Permanent Settlement” referred to in Act X of 1859, refer to the Permanent Settlement which was sanctioned in the year 1793. *SHEOBURN LAL v. RAM PURTAB SINGH*, 3 W.R. Act X Rul., 20.

(6)—*“Time of Permanent Settlement”—Act X of 1859.*—“The time of the Permanent Settlement” mentioned in ss. 3 and 4, Act X of 1859, was held to be the date of the Permanent Settlement of the Provinces of Bengal, Behar, and Orissa referred to in Regulation I, 1793, and not the date of the actual settlement of a particular zemindar, with the owner thereof. *MUSSAMUT PARAN BEBEE v. LEDEE NAZIR ALLY KHAN*, W.R. 1864, Act X Rul., 71.

(7)—*Reg. XXV of 1802—Misdescription in Settlement papers—No forfeiture of rights—Grant made before permanent settlement—Objections.*—It cannot be said that, as a matter of law and of right, the tenants have forfeited the interest which they would otherwise have in their lands by reason of the misdescription of the village in the Settlement papers. Reg. XXV of 1802 does not contain anything which says that if the parties, by carelessness or by accident, allow their village to be misdescribed, they are to forfeit their rights. Grants made by a zamindar before the estate was permanently settled, and became subject to the rules which may have been laid down in the Madras Regulations as to subsequent alienations, are binding on the successors of the grantor. *STRI RAJA VYRICHERALA RAJA BAHADOOR v. NADIMINTI BAGAVAT SASTRI*, 25 W.R. 3, P.C.

(8)—*Permanent settlement with zemindars of Bengal.*—Exposition of the principles which induced the Government to recognize the title of the Zemindars in Bengal, as land owners, and

Permanent Settlement—concluded.

to make the settlement with them for a permanent annual *jumma*. **RAJAH LELANUND SINGH BAHADOOR v. THE GOVERNMENT OF BENGAL**, 4 W.R. 77, P.C. = 6 M.I.A. 101.

(9)—*Claim as heir to invalid jagheerdar—Reg. I of 1804, Reg. I of 1793.*—The plaintiff claimed as heir to an invalid *jagheerdar* whose case came within the provisions of Regulation I of 1804. It was held that she could not be allowed to plead the provisions of Reg. I of 1793 which provided for a right of a recusant to apply for a permanent settlement after the expiration of the period or the periods of one or more intervening temporary settlements. Her case was to be dealt with as under Reg. I of 1804 and not as subject to the provisions of Reg. I of 1793, which latter law applies only to the proprietor or heir of the proprietor of an estate or talook paying revenue to Government, in respect of which the proprietors may have refused to settle when the Permanent Settlement was offered before and not to these *jagheerdars*. **MUSSAMUT SANOO v. THE GOVERNMENT OF INDIA**, 6 W.R. 311.

(10)—*Uniform rate of rent for 20 years, presumption arising from, of holding from Permanent Settlement—Rebuttal of presumption.*—In this suit for enhancement, it was found that the defendant had paid an unvarying rent for 20 years, and that plaintiff, not having proved any earlier variation or shewn when the tenure was created, the presumption of holding from the time of Permanent Settlement arose. The plaintiff however pointed out an admission made by the defendant in his examination to the effect that the tenure was acquired by his father from the landlord 30 or 35 years previously; and the High Court held that such admission was sufficient to rebut the presumption of holding from the Permanent Settlement, and nothing to the contrary having been shown, the case was remanded for the purpose of passing a fresh decision with reference to the said admission of the defendant. **MUGNO MOYEE DEBIA v. HURO CHUNDER RAWUT**, 6 W.R. Act X Rul., 27.

Of 1793—See ACT IX OF 1847, ss. 3, 5, 6, 30 C. 291, P.C. = 30 I.A. 44 = 7 C.W.N. 193 = 5 Bom. L.R. 1.

See BEN. ACT X OF 1859, ss. 15, 16, 8 B.L.R. 280 = 16 W.R. 289.

Noabad Taluqs, Chittagong—Perpetual or—Onus of proving—See BURDEN OF PROOF—GENERAL, 26 C. 792 = 3 C.W.N. 695.

Enhancement of rent of lands not subject of—Government, position of, under Rent Law.—See ENHANCEMENT OF RENT—ENHANCEMENT, GROUNDS OF, 5 C.L.R. 33.

See RENT, SUIT FOR, 1 Ind. Jur. N.S. 6 = 4 W.R. Act X Rul., 41.

See SURVEY MAPS, 5 Bom. L.R. 1.

Permanent Structure.

Erection of, by tenant—See LANDLORD AND TENANT—NATURE OF TENANCY, 1 Bom. L.R. 400.

Permanent Tenancy.

See LANDLORD AND TENANT — NATURE OF TENANCY.

Permanent Tenant.

Of a *bhagdar* can alienate the fruit of the trees on his tenement—See BOM. ACT V OF 1862, 9 Bom. L.R. 50 = 31 B. 183.

Permanent Tenure.

See LANDLORD AND TENANT.

(1)—*Amaram tenure—Resumability—Circumstances telling against the right of permanent occupancy.*—Lands held on “amaram” tenure are resumable. Where the original owners of the land raised the “jodi” or rent from time to time and also resumed the lands on two occasions for a long period, these circumstances tell against the right of permanent occupancy. **RAJA OF VENKATAGIRI v. MUKKU NARASAYYA**, 8 M.L.T. 258 = 7 Ind. Cas. 202.

(2)—*Proof of—Origin of grant not known—Grant for residential purposes—Substantial structures.*—Where the original nature of the grant was unknown and it was found that the predecessor in interest of the defendants, who were purchasers in execution of a decree, were tenants on the land and were in occupation for nearly sixty years, and that they raised substantial structures on the land, and the grant was for the purpose of residence. Held, that lower Courts were justified in drawing the inference that the holding was permanent. **WILLIAM M. GRANT v. MRS ROBINSON**, 11 C.W.N. 242 = 5 C.L.J. 178. [R., 11 C.W.N. 255, 12 C.W.N. 236. Note; D., 2 Ind. Cas. 148.]

Mirasi, or permanent tenure—Circumstances necessary to infer the existence of—See BEN. ACT VIII OF 1876, ss. 111, 149, 37 C. 662 = 7 Ind. Cas. 881.

Evidence of—See BEN. ACT VIII OF 1885, s. 7, 7 Ind. Cas. 785.

Under the Land Revenue Code—See BOM. ACT V OF 1862, 9 Bom. L.R. 50 = 31 B. 183.

What amounts to—See LANDLORD AND TENANT—MISCELLANEOUS, 6 C.L.J. 122, P.C. = 11 C.W.N. 865 = 4 A.L.J. 570 = 9 Bom. L.R. 846 = 17 M.L.J. 397 = 34 C. 902 = 2 M.L.T. 433.

Payment of unvarying rent for a long period—Effect—See LANDLORD AND TENANT—MISCELLANEOUS, 9 Ind. Cas. 141 = 9 M.L.T. 224 = 21 M.L.J. 166.

The holder of a, possesses all rights attaching to the lands from the centre of the earth to the sky—See MINING RIGHTS, 3 C.L.J. 59 = 33 C. 54 = 10 C.W.N. 425.

Arising out of adverse possession—See POSSESSION—ADVERSE POSSESSION, 5 Bom. L.R. 186.

Perpetuity.

Rule against—How far affects Mahomedan endowments — See MAHOMEDAN LAW — WAKF.

(1) *Rule against perpetuities—Applicability to moveable property.*—The rule against perpetuities is not confined to immoveable property. It equally applies to moveable property (*Hoare v. Osborne*, L.R. 1 Eq. 585, *Cooper v. Laroche* 17 Ch. D. 368 at p. 372, R.) COWASJI N. POCHKHANAWALLA v. R. D. SETNA, 20 B. 511. [R., 33 B. 122 = 10 Bom. L.R. 417 = 1 Ind. Cas. 834.]

Idol—Dedication—Debutter estate—Trust—See HINDU LAW—WILL, 14 B.L.R. 177.

According to Hindu Law—See HINDU LAW—WILL, 2 B.L.R. O.C. 11.

Recital in will indicating intention to create perpetuity—Valid trusts—See HINDU LAW—WILL, 7 C.L.R. 241.

See HINDU LAW—WILL, 4 B.L.R. O.C. 231, 4 Bom. L.R. 893.

Rule against—Application of rule—See LEASE—GENERAL, 9 C.L.J. 523 = 36 C. 675 = 1 Ind. Cas. 626.

See LEASE—CONSTRUCTION OF LEASE, 4 O.C. 139.

Covenant in contravention of rule against—Effect—See PATNI, 14 C.W.N. 601 = 5 Ind. Cas. 487.

See PRE-EMPTION—RIGHT TO PRE-EMPT, 5 C.W.N. 343.

Rule against—See SUCCESSION ACT, 1865, s. 101, 8 Bom. L.R. 268 = 30 B. 477.

Rule against—Trust for Masses—See WILL—CONSTRUCTION, 15 M. 424.

Creation of Trust fund—Rule against—See WILL—CONSTRUCTION, 15 M. 448.

Trusts for maintenance—See WILL—CONSTRUCTION, 5 C.L.R. 496.

Person.

Court of Wards not a—Letters of Administration—See LETTERS OF ADMINISTRATION, 25 C. 795 = 2 C.W.N. 349.

Personal Action.

Suit for, dismissed—Defendants' death pending appeal—Abatement—Representative's right to costs—See CIV. PRO. CODE, 1908, O. XXII, r. 1, s. 107 (2), O. XXII, r. 11, 7 M.L.T. 195 = 5 Ind. Cas. 937 = 20 M.L.J. 761.

Personal Attendance in Court—Exemption from.

Exemption of Rajah Indro Bhoosun Deb Roy of Newaldangah, Jessore, from personal attendance in the Courts. Cir. No. 29, dated the 22nd Sep. 1847, 1 W.R. Civ. Cir. Orders, p. 2.

Exemption of Prince Feroze Shah, of the Mysore Family, from personal attendance in

Personal Attendance in Court—Exemption from—concluded.

the Civil Courts of Lower Bengal, Cir. No. 3, dated the 7th March, 1865, 2 W. R. Civ. Cir. Orders, p. 2.

Three Chiefs of Mahomedan Religious Institutions exempted from personal attendance in the Civil Courts. Cir. No. 3, dated the 15th Feb., 1866, 5 W.R. Civ. Cir. Orders, p. 1.

Exemption of Zemindar of Soosung from personal attendance in Civil Courts. Cir. No. 14, dated the 18th April, 1866, 5 W.R. Civ. Cir. Orders, p. 7.

Exemption of Syud Sudfer Ali Khan of Moorshedabad from personal attendance in the Civil Courts. Cir. No. 25, dated the 6th July 1866, 6 W.R. Civ. Cir. Orders, p. 1.

Exemption of certain Native Gentlemen from personal attendance in the Civil Courts. Cir. No. 7, dated the 20th Feb., 1867, 7 W.R. Civ. Cir. Orders, p. 3.

Exemption of Syud Humayoon Kuddi Mahomed Ali Mirza from personal attendance in the Civil Courts. Cir. No. 21, dated the 18th July 1867, 8 W.R. Civ. Cir. Orders, p. 2.

This circular exempts Rajah Gopal Singh Bahadoor from personal attendance in the Civil Courts. Cir. Memo. No. 1, dated 12th May 1868, 9 W.R. Civ. Cir. 5.

This circular exempts Nawab Syud Mahomed Zamiool Abdeen from personal attendance in the Civil Courts. Civ. Cir. No. 2, dated 23rd June, 1868, 10 W.R. Civ. Cir. 1.

This circular circulates names of 12 Chiefs and Landholders in Chota-Nagpore, who have been exempted by the Government of Bengal from attendance in Civil Courts. Civ. Cir. No. 4, dated 12th July, 1870, 14 W. R. Civ. Cir. 7.

This circular states that the Government of Bengal has exempted Rajah Rajendro Narain Deb Bahadoor, of Calcutta, from personal attendance in Civil Courts. Civ. Cir. Memo. No. 5, dated 23rd July, 1870, 14 W. R. Civ. Cir. 7.

Personal Injuries.

Personal injuries from fall in unfenced pit dug in path, suit for damages for—Test of negligence—Liability of property, lessee and contractor—See DAMAGES—DAMAGES, SUITS FOR, 11 B. 329.

Personal Insult.

See INSULT.

Personal insult, effect of in India—Unadvanced countries like India present a state of society where personal insult needs more checks than in more civilized countries like England. DAWAN SINGH v. MAHIP SINGH, 10 A. 425 = A.W.N. 1888, 157.

Defamation and personal insult, distinction between—See DEFAMATION, 10 A. 425 = A.W.N. 1888, 157.

Personal Law.

Right to resort to—*See* CUSTOMS—PUNJAB—INHERITANCE, 2 P.R. 1909=25 P.W.R. 1909=1 Ind. Cas. 457.

Inheritance—No initial presumption in favour of applicability of personal law—Duty of Court—*See* CUSTOMS—PUNJAB—INHERITANCE, 140 P.R. 1908.

Personal Liability.

(1)—*Contract by guardian on behalf of a minor—Personal liability of the minor, extent of.*—Plaintiff's case in the Court of first instance was that the defendant U sent her servant, the defendant S, to plaintiff's shop and borrowed money on account of her minor son, the defendant R. The Munsiff decreed against the minor and his mother, but, on appeal, the District Judge exonerated the minor on the ground that the debts for the discharge of which the money was borrowed were not proved to be such as were binding on the minor. On the present petition put in by the plaintiff to revise the said order discharging the minor from the suit *held*, that the suit as against the minor must fail for the simple reason that a minor cannot be bound personally by contracts entered into by a guardian which do not purport to bind the estate. It would be a very improper thing to allow the guardian to make covenants in the name of his ward so as to impose a personal liability upon the ward and there is not in Indian Law any rule which gives a Guardian and Manager greater power to so bind the infant than exists in English Law. (14 I.A. 89, R.) So in claims for money borrowed on behalf of and expended on necessities for a minor he might be liable for the debt, but he would not be so liable by reason of the contract binding him personally. His liability would have to be based on the ground that there was a pre-existing liability on his part at the time when the guardian entered into the contract on his behalf. *TUKARAM MANAJI DHANGAR v. RAMCHANDRA HARI PESHKAR*, 2 N.L.R. 25. (26 M. 330=20 B. 61, 16 C. 330, R.)

May be excluded by contract—*See* CONSIDERATION, 8 Ind. Cas. 302.

Peruarthum Mortgage.

See MALABAR LAW—MORTGAGE, 1 M. 57.

Petition.

Form of will—Testamentary declarations in—*See* HINDU LAW—WILL, 14 B.L.R. 226, P.C.=2 I. A. 7=22 W. R. 409.

See INSOLVENCY—MISCELLANEOUS, 6 B. L.R. 310.

Photograph.

See PROBATE—MISCELLANEOUS, 29 C. 311=6 C.W.N. 477.

Appearance of signatures—Neither party applied to have originals or to have transmitted—Taken of them—Evidence in favour of will—*See* PROBATE AND ADMINISTRATION ACT, 1881, 19 C. 65, P.C.=18 I.A. 132.

Physical Weakness.

Mental faculties affected by physical weakness—Testamentary capacity—*See* WILL—EXECUTION, 23 C. 1, P.C., 22 I.A. 171.

Physician.

See CONTRACT ACT, 1872, s. 27, 23 B. 103.

Pilgrimage.

Debts contracted for—Expenses, if for necessities—*See* GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 20 B. 61.

To Gya, whether a pious duty—*See* HINDU LAW—ALIENATION, 21 C. 190, Note.

Pilgrims' Tax.

See ASSETS, 5 W.R. 14, P.C.=10 M. I.A. 329.

Pilot.

Liability of ship for fault of—Port rules, 1856—*See* SHIPPING LAW, Bourke, Ad., 15.

Pin-money.

Personal allowance—Wife not claiming and recovering it during life-time—Whether her heirs could enforce it after her death—*See* MAHOMEDAN LAW—PARTITION, 13 C.W.N. 153=4 Ind. Cas. 462.

Agreement to pay, to daughter-in-law—Unchastity and refusal to reside with husband—Whether daughter-in-law entitled to enforce it—*See* MARRIAGE, 4 A.L.J. 13=A.W.N. 1907, 3=29 A. 151.

Pious Purposes.

See HINDU LAW—ALIENATION, 8 M. 552.

Piratlavaru Cess.

Right of Zemindar to include, in the pattah.—*See* LANDLORD AND TENANT—MISCELLANEOUS, 4 M.L.T. 438.

Place of Business.

Suit against Government—Residence or—Of Government—*See* JURISDICTION—CAUSES OF JURISDICTION, 1 Hyde 37.

Place of Performance.

Of contract—Debtor to follow his creditor and pay the debt where no place of payment is specified—*See* CONTRACT—MISCELLANEOUS, 11 O.C. 191.

Place of Suing.

See CONTRACT ACT, 1872, ss. 4 and 5, 76 P.R. 1896.

Plague.

Lease—Lessee's enjoyment interrupted by—Officials—Epidemic Diseases Act (III of 1897)—Covenant for quiet enjoyment—Breach—Liability of lessee to pay rent—*See* LEASE—MISCELLANEOUS, 23 B. 510=1 Bom. L.R. 267.

Plague—concluded.

Plaint sent to Court unstamped—Requisite Court-fee paid after expiry of the period of limitation—Plague restriction—See **LIMITATION—GENERAL**, P.L.R. 1900, p. 191.

See **LIMITATION—GENERAL**, 6 P.R. 1901.

Plaint.

- 1.—GENERAL.
- 2.—ADMISSION OF PLAINT.
- 3.—AMENDMENT OF PLAINT.
- 4.—CONSTRUCTION OF PLAINT.
- 5.—FORM AND CONTENTS OF PLAINT.
- 6.—REJECTION OF PLAINT.
- 7.—RETURN OF PLAINT.
- 8.—VERIFICATION AND SIGNATURE.
- 9.—MISCELLANEOUS.

See **CIV. PRO. CODE**, 1908, O. IV, r. 1, O. VII.

See **LIMITATION ACT**, 1908, ss. 3 and 4.

See **PLEADINGS**.

See **VARIANCE BETWEEN PLEADING AND PROOF**.

—1.—General.

(1)—*Petition sent by post—Not a substitute for a plaint—Madras Act*, VIII of 1865, s. 50.—A petition sent by post is not a substitute for the presentation of a plaint as required by s. 50 of Madras Act VIII of 1865. **MOPARTI PITCHI NAIDU v. VUPPALA KONDAMMA**, 6 M.H.C. 136. [Appr., 8 M. 411; R., 7 M.H.C. 387.]

(2)—*Punjab Government Notification No. 2357—Written authority necessary—Presentation of plaint.*—The authority given to a recognised agent under cl. (d), Punjab Government Notification, No. 2357 (dated 3rd October 1877) to present the plaint in a suit need not be in writing. **SIRDAR HARCHARAN DAS v. LACHMI SAHAI**, 191 P.R. 1883. (9 P.R. 1878, F.)

(3)—*Civ. Pro. Code*, 1882, s. 54—*Plaint containing alternative prayer—Duty of Court.*—Plaintiff sued to redeem a *kanom* of 1858 and paid Court-fees on the *kanom* amount. The plaint further stated that the defendants were setting up a renewed *kanom* of 1874 for an enhanced amount which was not binding upon the plaintiff and that, if the Court were to find the renewed *kanom* valid, plaintiff might be allowed to redeem on the footing of that renewed *kanom*. The District Munsiff decreed the suit on the footing of the *kanom* of 1858. The District Judge on appeal held that the renewed *kanom* of 1874 was binding on the plaintiff and dismissed the suit as the plaintiff had not paid Court-fees on the alternative relief. *Held* that the District Judge was wrong in dismissing the suit, that he might have given the plaintiff time to pay the difference as required by s. 54, **Civ. Pro. Code**, and that, except for that section, there was no provision of law entitling the

Plaint—continued.**—1.—General—continued.**

District Judge to dismiss the suit unconditionally on account of the defective Court-fee stamp. **SUBRAHMANIA PATTAR v. VALIA NAYAR**, 8 M.L.J. 187.

(4)—*Relinquishment of portion of claim—Effect.*—The statement in the plaint was "I claim Rs. 1,191 as due to me, but I shall be satisfied with a decree for Rs. 700." *Held* that, though his relinquishment of Rs. 491 was based on the supposition that Rs. 1,191 was due to him, he ought not to be tied down to such relinquishment, when, as a matter of fact, what is found due to him is less than Rs. 1,191, provided he does not get more than Rs. 700 for which he asked for a decree. **SINNATHAMBI ROWTHER v. S. M. SELLAM CHETTI**, 8 M.L.T. 436 = 8 Ind. Cas. 943.

(5)—*Practice—Grounds not taken in plaint—Relief not to be granted on.*—No relief can be granted on grounds not taken in the plaint. **MUHAMMAD ALADAT KHAN v. NARPAT**, A.W.N. 1887, 130.

(6)—*Written statement—Set-off—Plaint—Stamp duty.*—A written statement containing a claim of set-off must be regarded as a plaint in regard to such set-off, and should be stamped accordingly. **CHENNAPPA v. RAGHUNATHA**, 15 M. 29 = 1 M.L.J. 598.

(7)—*Dismissal in default—Case heard—Absence of plaintiff to hear judgment—Effect of—Plaint not signed by plaintiff—Procedure.*—*Held*, that, where a case is heard and a certain amount of discussion has taken place in presence of the parties and judgment is deferred, a Court is not justified in dismissing the suit in default, if the plaintiff is absent when the case is called on for delivery of judgment. *Held*, also that, where a plaintiff omits to sign the plaint, but signs only the verification, the plaint ought to be returned for amendment, or it should be amended in open Court, but cannot be rejected. **NAND LAL v. SHANKRU**, 165 P.W.R. 1911. (22 A. 55, F.)

(8)—*Civ. Pro. Code*, s. 435—*Unincorporated society, suit not maintainable by, in the name of officer or agent.*—Plaintiffs, described in the plaint as the Board of Foreign Missions of the Presbyterian Church of New York in America through the Rev. W.F. Johnson, Principal Officer, sued to eject the defendant from certain land. The claim as brought was decreed by the lower Appellate Court, but the contention raised by the defendant on second appeal was upheld to the effect that the said Board of Foreign Missions was not a corporation authorised to sue and be sued in the name of an officer within the meaning of s. 435 of the **Civ. Pro. Code**. Moreover, there was nothing in the plaint to show that the person who signed it as such officer was a member of that Board or that he set up a possessory title on his own behalf, and the suit was therefore not maintainable in the shape in which it was

Plaint—continued.—1.—**General**—continued.

brought by the plaintiff **YUSUF BEG v. THE BOARD OF FOREIGN MISSIONS**, 16 A. 420 = A.W.N. 1894, 154. (A.W.N. 1882, 132, A.W.N. 1887, 57, D.) [F., 20 A. 167; R., 30 C. 103]

(9)—**Plaint—Cause of action—Railway—Damage**.—Where the plaintiff alleged that the Railway which was in plaintiff's possession has been seriously damaged by water escaping from the defendant's land in consequence of the bursting of a tank which was his property and at the time of bursting was under his control, but the plaintiff did not contain any direct allegation of negligence on the defendant's part, *held*, that the plaintiff disclosed a cause of action, and that the case stated in the plaintiff called for an answer on the part of the defendant. **THE MADRAS RAILWAY COMPANY v. SALUA MAKARAJU**, 5 M.H.C. 139.

Early Registration of plaints enjoined by this circular. Cir. No. 10, dated the 19th June 1865, 3 W.R. Civil Circular Orders, p. 2.

Plaint whether to contain exact extent and boundaries of land—*See* BEN. ACT VIII OF 1885, s. 148, cl. (b), 5 C.W.N. 121.

See BOM. ACT II OF 1906, s. 8, 1 Bom. L.R. 67.

Appeal—Order—Decree—Dismissal of suit on the ground that no plaintiff was to be found on the record—*See* APPEAL—CASES WHERE APPEAL LIE OR NOT, A.W.N. 1896, 54.

Not disclosing cause of action—Objection in special appeal—Duty of Court—*See* APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 5 B.L.R. 154 = 14 W.R. 420.

See ATTACHMENT—SUBJECTS OF ATTACHMENT, 4 B. 222.

Suit in ejectment—Notice to quit—Whether plaintiff itself can be accepted as notice—Rights of a party to suit, how ascertained—*See* BERAR LAND REVENUE CODE, s. 79, 6 N.L.R. 17 = 5 Ind. Cas. 699.

Cause of action—Erroneous date of cause of action assigned in—Cause of action not barred by limitation—Error as to date immaterial—*See* CAUSE OF ACTION, A.W.N. 1900, 25.

Secretary of State, suit against—Plaint—*See* CAUSE OF ACTION, 4 O.C. 29.

See CIV. PRO. CODE, 1908, s. 47, 22 A. 376 = A.W.N. 1900, 129.

Signature of plaintiff by unauthorized person but subsequently authorized—*See* CIV. PRO. CODE, 1908, s. 85, 25 A. 635 = A.W.N. 1903, 189.

Death of defendant before presentation of plaintiff—Jurisdiction of Courts to substitute his legal representatives—*See* CIV. PRO. CODE, 1908, O. XXI, r. 4, 17 M.L.J. 551 = 3 M.L.T. 12 = 31 M. 86.

Plaint—continued.—1.—**General**—continued.

Mis-description of defendant in—Summons served on wrong person—Witness, payment of expenses to—*See* COSTS—SPECIAL CASES, 4 B. 619.

Plaint engrossed on insufficient stamp paper—*See* COURT-FEES, 3 B. L. R. App. 72.

See COURT FEES, 7 B.L.R. 663, F.B. = 16 W. R. F.B. 10.

Civ. Pro. Code, s. 50—does not prevent plaintiff from entering in plaintiff approximate amount of damages claimed and offering to pay more Court-fees if the damages should prove heavier than anticipated—*See* COURT-FEES ACT, 1870, s. 11, 17 M.L.J. 625.

Insufficient stamp on—Power to, extend time *ex post facto*—*See* COURT FEES ACT, 1870, s. 28, 6 Ind. Cas. 424 = 14 C.W.N. 882 = 12 C. L. J. 62.

Unstamped—*See* COURT FEES ACT, 1870, s. 28, 38 P. R. 1900.

Second appeal, statement of plaintiffs in paper book, not part of decree—Claim to be construed as in plaintiff—*See* DECREE—DECREE, CONSTRUCTION OF, 11 B. 177.

Declaratory suit—Rejection of—*See* DECLARATORY DECREE, SUIT FOR—GENERAL, 129 P.L.R. 1910 = 8 Ind. Cas. 553.

Prayer for general relief—Effect of possession—*See* DECLARATORY DECREE—SUIT FOR DECLARATION OF TITLE, 20 B. 798.

See ENGLISH LAW, 5 M.I.A. 234.

Insanity as disqualification for inheritance, proof of—Description in plaintiff—Family treatment—*See* HINDU LAW—INHERITANCE, 18 C. 111 = 17 I.A. 173.

Plaintiff suing in representative character—Form of—Practice—Suit by manager of Hindu family—*See* HINDU LAW—JOINT FAMILY, 7 B. 467.

Power to return plaintiff for presentation in Court in Native State—*See* JURISDICTION—GENERAL, 9 Ind. Cas. 824.

Civil or Revenue Court returning plaintiff—Reference to Chief Court—Practice—*See* JURISDICTION OF REVENUE COURTS, 49 P.W.R. 1912.

See JURISDICTION OF—REVENUE COURTS, 3 B.L.R. App. 72.

Limitation—Plaint sent to Court by post unstamped—Plaintiff restrained from going to Court owing to plague under executive orders—Court-fees Act, 1870, s. 28—*See* LIMITATION—GENERAL, P.L.R. 1900, p. 189.

Plaint sent to Court unstamped—Requisite Court-fee paid after expiry of the period of limitation—Plague restrictions—*See* LIMITATION—GENERAL, P.L.R. 1900, p. 191.

Insufficiently stamped—Limitation—*See* LIMITATION ACT, 1908, s. 3, 19 C. 780.

Plaint—continued.—1.—**General**—continued.

Insufficiently stamped—See **LIMITATION ACT**, 1908, s. 3, L. B. R. 1893—1900, 33.

See **LIMITATION ACT**, 1908, s. 3, 15 A. 65 = A.W.N. 1893, 29, 74 P.R. 1903.

Presentation of, to wrong Court—Suit barred on day of presentation—Return for presentation to the right Court—Limitation—See **LIMITATION ACT**, 1908, ss. 4, 14, 10 M.L.T. 254 = 21 M.L.J. 1000 = 2 M.W.N. 1911, 221.

Return of—See **LIMITATION ACT**, 1908, s. 14, A.W.N. 1888, 168.

Original plaint not found—Proof of its contents by producing certified copy of judgment—See **LIMITATION ACT**, 1908, s. 19, 82 P.W.R. 1911.

By authorised vakil—See **LIMITATION ACT**, 1908, s. 19, 8 B. 99.

Case set up in plaint—Different case proved—Remedy—See **MALABAR LAW—MISCELLANEOUS**, 11 M. 106.

Admission of—See **MINOR—SUITS BY AND AGAINST MINORS**, 10 C. 134 = 13 C.L.R. 285.

Suit against minors—Misdescription in title of—and in decree—Effect—See **MINOR SUITS BY AND AGAINST MINORS**, 14 C. 754.

Non-joinder—Mis-joinder—Whether justifies, rejection of—See **MISJOINDER OF PLAINTIFFS AND CAUSE OF ACTION**, 132 P.L.R. 1911.

Cause of action set forth in—Onus on plaintiff to establish—Plaintiff in suit for redemption, bound to prove particular mortgage sued on—See **MORTGAGE—REDEMPTION**, 18 A. 403 = A.W.N. 1896, 132.

See **MORTGAGE—SALE OF MORTGAGED PROPERTY**, 6 B.L.R. App. 117.

Plaint disclosure of cause of action in, when deemed sufficient—See **MORTGAGE—MISCELLANEOUS**, 25 M. 50.

Presentation of, by managing member of partnership—See **PARTNERSHIP—GENERAL**, 1 S.L.R. 191.

See **PARTNERSHIP—SUITS RELATING TO THE PARTNERSHIP**, 34 P.R. 1873.

Presentation of plaint—Limitation—Suit when to be considered as commenced—See **PAUPER SUITS**, Marsh 174.

See **POSSESSION—ADVERSE POSSESSION**, 2 C. 418.

Suit for possession on title by purchase—Title not proved—Plaint not specific about possession for more than 12 years—Effect—See **POSSESSION—SUITS FOR POSSESSION**, 4 M. L.T. 344.

Relief not asked for in,—When awardable—See **PRACTICE AND PROCEDURE**, 21 A. 53, P.C. = 2 C.W.N. 681 = 25 I.A. 195.

Plaint—continued.—1.—**General**—concluded.

Practice—Pleadings—Defective plaint—Extension of plaint by subsequent statement of plaintiff—Civil Procedure Code, ss. 118, 146, 147—See **PRACTICE AND PROCEDURE**, A.W.N. 1902, 35.

Grant of relief not prayed for—See **PRACTICE AND PROCEDURE**, A.W.N. 1881, 10.

Loss of plaint—See **PRACTICE AND PROCEDURE**, 1 A.L.J. 695.

Allegations in the—Not traversed in the answer not to be taken as admitted—See **PRIVY COUNCIL, PRACTICE OF—PRACTICE AS TO OBJECTIONS**, 2 W.R. 19, P.C. = 9 M.I.A. 287.

See **PUBLIC WAY**, 113 P.L.R. 1901 = 91 P. R. 1901.

Whether Court can grant relief on other grounds than those put forward in plaint—Practice—See **RELIEF**, A.W.N. 1887, 43.

Relief granted on grounds not stated in plaint—See **RELIEF**, A.W.N. 1881, 158.

Addition of defendant—Plaint not amended—Petition treated as part of plaint—See **SPECIFIC PERFORMANCE**, 10 Ind. Cas. 503.

See **TRANSFER OF CIVIL CASES**, 28 M. 500.

Making new case for plaintiff, not set up in—See **USE AND OCCUPATION**, 5 O.C. 222.

Practice—Plea not alleged in plaint—Power of Court to set up plea at hearing—See **VARIANCE BETWEEN PLEADING AND PROOF**, 20 B. 569 = P.J. 1895, 161.

—2.—**Admission of Plaint.**

(1)—*Civil Procedure Code*, s. 57—*Plaint presented in wrong Court.*—In all cases where no option as to the selection of the Court is allowed by law to the plaintiff, a plaint presented in a wrong Court must be returned for presentation in the proper Court. **MUTTIRULANDI v. KOTTAYAN**, 10 M. 211. [R., 23 B. 679.]

(2)—*Presentation to Munsarim and not to Judge.*—The presentation of the application to the munsarim of the District Court instead of to the Judge, was held to be improper. **MUNRO v. THE CAWNPORE MUNICIPAL BOARD**, 12 A. 57 = A.W.N. 1889, 197.

(3)—*Subordinate Judge's Court, to which plaint, presentable, closed temporarily—Plaint presented to District Court—Plaint not presented to Court of first instance.*—Owing to the temporary closing of the Court of the Subordinate Judge, the plaintiff presented his plaint to the District Court. Held, that the District Court was not a Court of the first instance competent to receive such plaint. **RAMAYA v. MUHAMADBHAI**, 10 B.H.C. 495. (5 B.H.C. A.C. 117, Overruled; 2 B.H.C. A.C. 42, F.)

(4)—*Unstamped plaint—Presentation—Validity—Limitation Act*, 1908, s. 5.—The presentation of an unstamped plaint is not valid for

Plaint—continued.**—2.—Admission of Plaint**—concluded.

any purpose whatever and not a proper presentation under explanation to s. 5 of the Limitation Act. **PARTAB SINGH v. KISHEN DAYAL**, 130 P. R. 1890. [R., 123 P. R. 1907 = 3 M. L. T. 63 = 82 P. W. R. 1907.]

(5)—*Close holiday—Plaint, presentation of—Legality.*—There is no reason why a plaint should not be received and admitted by a Moonsiff on a Sunday or other holiday. **UNUNTO RAM CHATTERJEE v. PROTAB CHUNDER SHIROMONEE**, 16 W. R. 230. (11 W. R. 538 and 3 W. R. S. C. 6.) [R., 29 A. 562 = A. W. N. 1907, 168, 22 M. L. J. 212 = M. W. N. 1912, 65.]

(6)—*Filing of supplemental plaint.*—A Judge has no authority to allow a plaintiff to file a supplemental plaint after the Ameen's report has been given in. **CHUNDER SEKUR DEB ROY KUT v. WOOMA NATH SARMA**, 1 W. R. 278.

(7)—*Presentation of plaint or petition, duty of Court to note date of.*—If the rule laid down in the Sudder Court's Circular Order of 29th July 1859, in respect of plaints, viz., that, upon a plaint being presented, the Judge should cause the date of presentation to be noted on the petition, be applied by the Courts to all applications made to them, much trouble and annoyance would be saved to parties having business to transact. **SREENATH CHURN NUNDEE v. MOYNA KOOMAREE BEEBEE**, 3 W. R. Mis. 29.

(8)—*Civ. Pro. Code (Act VIII of 1859), s. 32—No cause of action—Rejection of plaint—Appeal—Admission of plaint—Right of defendant.*—In this case, a plaint which had been rejected was admitted on appeal, the defendant having been given the liberty, if so advised, to apply to have it taken off the file. **DORAB ALLY KHAN v. KHAJAH MOHEEOODEEN**, 19 W. R. 16.

—3.—Amendment of Plaint.

See CIV. PRO. CODE, 1908, O. VI, r. 17.

See LIMITATION ACT, 1908, S. 3.

(1)—*Amendment of plaint.*—The Legislature intended the Court to have power to make all such amendments first in the plaint, and afterwards in the issues—the two essential parts of what are commonly termed the pleadings—as might in any case be necessary under the prescribed practice in order to bring about a fair and proper trial of the matter which the plaintiff came into Court to have tried. The Court has power, after the plaint has been filed and the summons served, on the application of the plaintiff himself, to amend the plaint, if an amendment be needed in order to have it more correctly set out the plaintiff's case and the right of suit, but the Court will not allow this to be done to the detriment of defendant. **GOBIND CHANDRA DUTT v. GANGA DHYE AND NALIT MOHAN DAS v. GANGA DHYE**, 7 B. L. R. 333. [R., 7 B. L. R. App. 65].

Plaint—continued.**—3.—Amendment of Plaint**—continued.

(2)—*Amendment of—When allowable.*—Where, by the proposed amendment, no new claim is introduced, nor a claim founded on a new cause of action and the opposite party is in no way prejudiced, an amendment of the plaint may be allowed. **RAJA PEARY MOHAN MOOKERJEE v. NARENDRA NATH MUKERJEE**, 9 C. W. N. 421 = 32 C. 582.

(3)—*Amendment of plaint, when to be allowed.*—As a general rule, the plaintiff may be permitted even on appeal to amend the plaint, when he had framed it *bona fide* under a mistake or erroneous advice, and the other party could be adequately compensated by an award of costs; but it must be observed that when such amendment might possibly create a necessity for fresh written statements and for fresh issues, and practically amount to a trial *de novo* from the commencement, it is much more convenient to leave the plaintiff to the liberty of maintaining a separate suit, so that the opposite party might in no way be prejudiced in his defence, or harassed with a second trial of the same suit. **NARAYANA v. SHAN KUNNI**, 15 M. 255. [R., 28 B. 332.]

(4)—*Amendment of plaint, when allowable.*—The plaintiff may be allowed to amend his case at any stage of suit before final decision provided it does not inflict any hardship on the defendant, and if a new suit of the plaintiff, the amendment being disallowed, should be open to the objection of limitation. **RAMDYAL KHAN v. AJOODHIA RAM KHAN**, 2 C. 1 = 25 W. R. 425. [F., 22 C. 692.]

(5)—*Rejection of plaint for prolixity—Civ. Pro. Code, 1859, s. 29.*—If a plaint not only asks for relief which a Court can afford, but seeks to open up matters already adjudicated upon in another suit, the Judge (instead of rejecting the plaint for prolixity under s. 29) should entertain the suit and adjudicate upon the matters not adjudicated upon in the former suit, amending the plaint by striking out the issues relating to the matters adjudicated upon. **ROSUN JEHAN v. ENEYUT HOSSEIN**, W. R. F. B. 41 = Marsh, 127 = 1 Ind. Jur. O. S. 44 = 1 Hay 269.

(6)—*Time for amending plaint—Extension—Court's power.*—The Civ. Pro. Code does not prohibit the Court from extending the time originally granted for amending the plaint. **CHANDA SINGH v. ISHAR SINGH**, 113 P. R. 1894. [R., 78 P. R. 1909.]

(7)—*Act VIII of 1859, s. 2.*—The plaintiff was allowed to amend his plaint, complying with the provision of s. 2, Act VIII of 1859, by stating when his cause of action accrued, and, if it accrued beyond the period ordinarily allowed for commencing such suit, by stating the ground on which he claimed exemption. **HEERA MONEE DABEE v. KOONJ BEHARY HOLDAR**, B. L. R. Sup. App. 8 = 2 W. R. 207.

(8)—*Act XI of 1865—New trial under—Amendment of plaint—Stage at which plaint may be amended.*—Where a new trial has been

Plaint—continued.**—3.—Amendment of Plaint**—continued.

granted under s. 21 of Act XI of 1865, the Judge of the Small Cause Court is competent to permit the plaint to be amended at the second trial under the same circumstances under which amendment of plaint would have been allowable at the original trial. **MEHNDU KHAN v. CHUNNU KHAN**, 110 P.R. 1882. (5 B. 609, R. & Appr.) [R., 43 P.R. 1885]

(9)—*Civ. Pro. Code*, 1882, s. 53—*Amendment of plaint*.—Where the objection, that a suit for a mere declaration of title is not maintainable, is not taken in the Court of first instance, the plaintiff may be allowed on appeal to pay additional stamp duty and to amend the plaint so as to include a prayer for consequential relief. **ABDUL KADAR v. MOHAMMAD**, 15 M. 15. [R., 14 M.L.J. 290, 5 Bom. L.R. 329, 28 B. 332, 1 C.L.J. 73, 135 P.R. 1906=117 P.L.R. 1903; D., 15 M. 255.]

(10)—*Plaint, amendment of*—*Practice*—*Civ. Pro. Code*, 1882, s. 53.—The plaintiffs in this suit originally claimed a declaration of their right to a three-quarters share of a garden. Two or three days after the date fixed for the first hearing, the plaintiffs caused their plaints to be amended by the addition of a prayer for possession. *Held*, that the plaintiffs could do so. **SHEONARAIN v. NAGO**, A.W.N. 1884, 26.

(11)—*Civ. Pro. Code*, s. 53—*Amendment of plaint*—*Practice*.—Though, ordinarily speaking, when a plaintiff is permitted to amend his plaint such amendment should be made upon the face of the plaint already before the Court, yet an amendment, if not otherwise defective, will not be a bad amendment merely by reason of its being written on a separate sheet of paper. **KHAYALI RAM v. BHUP SINGH**, A.W.N. 1893, 225.

(12)—*Civ. Pro. Code*, s. 53 — *Amendment of plaint*.—A Court has no power under s. 53 of the Code of Civil Procedure to amend or allow the would-be plaintiff to amend a plaint which, by reason of its having been signed by an unauthorized person, is *ab initio* invalid. **KATE-SAR NATH v. AGGYAM**, A.W.N. 1894, 95. [Cons., 22 A. 55.]

(13)—*Cause of action*—*Civ. Pro. Code*, 1882, ss. 43, 53.—After the institution of a suit, the plaint can be allowed to be amended so as to enable the plaintiff to fulfil the provisions of s. 43 and include the whole of the claim which he is entitled to make in respect of the same cause of action. **DENI PRASAD v. SHAMBHU NATH**, A.W.N. 1885, 167.

(13-a)—*Plaint not disclosing cause of action*—*Proper procedure*—*Return of plaint*—S. 32, *Civ. Pro. Code*.—If a plaint did not sufficiently disclose the cause of action, the proper course for the Court was, not to dismiss the suit altogether, but to reject and return the plaint to the plaintiff, or, more properly still, to allow it to be amended under s. 32 of the *Civ. Pro. Code*; and where this was not

Plaint—continued.**—3.—Amendment of Plaint**—continued.

allowed, the plaintiff was at liberty to prove any cause of action which was not inconsistent with the plaint. **LUCKHEE PREA DEBIA v. BRINDABUN DEY**, 12 W.R. 313.

(14)—S. 53, *Civ. Pro. Code*, 1882—*Plaint—Amendment*.—Where an incorrect statement is made in the plaint without any fraudulent intention, and without any intention to overreach the other party, then, if the latter cannot suffer any hardship by an amendment, and if the proposed amendment is not likely to result in the inclusion of any new claim barred by limitation at the date of the proposed amendment, the plaint may be allowed to be amended. (*Cropper v. Smith*, 26 Ch. D. 700, 2 C. 1, F.; *Weldon v. Neal*, 19 Q.B.D. 394, *Kurtz v. Spence*, 36 Ch. D. 770, R.) **DHANI RAM SAHA v. BHAGIRATH SHAHA**, 22 C. 692. (11 M.I.A. 468, 18 W.R. 424, R.) [R., 5 C.W.N. 273.]

(15)—Ss. 42, 45, 53, *Civ. Pro. Code*, 1882—*Plaint—Amendment*.—Regarding amendment of plaint, s. 53, *Civ. Pro. Code*, 1882, should be read particularly with ss. 42 and 45 of the Code. Reading ss. 42 and 45 of the Code, the intention of the Legislature is that, as far as possible, all matters in dispute between the parties, relating to the same transaction, should be disposed of in the same suit. The proviso to s. 53 is not intended to interfere with this. [*Nelson v. Stocker* (1859, De. Gex. and J. 458), *per Turner, L.J., applied*]. **SARAL CHAND MITTER v. MOHUN BIBI**, 25 C. 371=2 C.W.N. 18 and 201. [Relied on, A.W.N. 1907, 203.]

(16)—*Civ. Pro. Code*, 1882, s. 53—*Suitor not entitled as of right to amendment of plaint*—*Discretion of Court*.—The power to get a plaint amended is subject under s. 53 of the *Civ. Pro. Code*, to the discretion of the Judge, and is not claimable as a right of the suitor in all circumstances. To be successful in an application for amendment of his plaint it is not enough for the plaintiff merely to show that the amendment sought by him cannot have the effect of changing the character of the suit. **TAPIRAM v. SADU**, 21 B. 570. [D., 57 P.R. 1904.]

(17)—*Plaint—Court's powers of amendment*.—The Court has ample power to amend the plaint so long as it does not substitute an entirely new cause of action. **KAUR SEIN v. MUSSUMAT SAMIRO**, 66 P.R. 1873.

(18)—*Amendment of plaint—Change introduced by the new Code*—*Court's extended powers*—*Plaintiff's neglect to be remedied with sufficient compensation to defendant*.—S. 53 of the old *Civ. Pro. Code*, expressly provided that a plaint should not be amended so as to convert a suit of one character into a suit of another and inconsistent character. That limitation on the Court's power has been omitted from O. VI, r. 17, of the new Code. The cases with regard

Plaint—continued.**—3.—Amendment of Plaint**—continued.

to amendment must be regarded as falling under two heads,—*first*, those in which the amendment is sought to be made at the hearing of the suit, and *secondly*, those in which it is sought to be made before such hearing, or in which, if the suit were called on for hearing it, were intended to grant an adjournment to enable the defendants to meet the new case set up. Plaintiff made an application for leave to amend the first paragraph of the plaint, which, as originally framed, alleged that, by a written agreement of the 21st December 1909, the plaintiff agreed to advance money to first defendant from time to time on the security of goods to be deposited by way of pledge for such advances and that promissory notes were to be executed. It was clear from the agreement relied on that its effect only related to the first of the advances, and the plaintiff now sought to set up a succession of advances made on oral agreements. The question was whether such an amendment should be allowed: *Held*, that the original framing of the plaint was a pure error due to neglect, and that "it was not fraudulent or intended to overreach," nor could it be said to be such an error that the other side could not be compensated in costs. *Held*, therefore, that the proper course to take, under the circumstances, was to allow the amendment and to compensate the defendants as far as possible for loss occasioned to them by all steps taken in the action up to the present date having become infructuous. **KASTURCHAND v. MAUNG BATHAW, 11 Ind. Cas. 856.**

(19)—*Plaint, when defective to be amended.*—After a plaint is admitted and registered, if it is found to be wanting in precision or defective in form, the Court should direct its amendment and not reject it. **PITAMBUR MOOKERJEE v. HUREE NARAIN THAKOOR, W R. 1864, 50.**

(20)—*Irregular petition — Amendment.*—A petition, which is an irregular or incomplete plaint, may be allowed to be amended, and when that is done, it relates back to the date on which the original petition was presented. An irregular joint plaint, by several tenants to contest a dicalaint by their landlord, may be allowed, to be amended into several plaints by a Revenue Court. **MANAPPA v. DASINANI, 7 M. 138.**

(21)—*Act VIII of 1859, ss. 26, 29, 31, 139, 141—Lower Courts, Power of.*—The power of the Lower Courts to amend a plaint extends by a *viva voce* examination to the elucidation of what is ambiguous in the claims of the contending parties, to the amendment of what is erroneous and the supplying what is defective, but not to the conversion of a suit of one character into another inconsistent with, and opposed to it, *e.g.*, of a suit for possession with mesne profits into a suit for resumption. **GOBINDO MAHAPATRO v. GOPEENATH PANDIT, B.L.R. Sup. Vol. 581=6 W.R. 211.**

(22)—*Amendment of plaint—Court's power to grant—Amendment when to be allowed — Civ.*

Plaint—continued.**—3.—Amendment of Plaint**—continued.

Pro. Code (Act V of 1908), O. VI, r. 17.—The Court's power to amend depends upon order VI, rule 17 of the Code, which, for the present purpose, is identical with O. XXVIII, r. 1 of the English Rules. The plaintiff originally sued for the price of goods sold and delivered, and for interest on such price. In January last, he applied for leave to amend his plaint. His claim as amended was for nearly Rs. 12 000, as price of goods sold and delivered, Rs. 450 as interest and Rs. 2,800 loss sustained by him on the re-sale of goods of which the defendant had failed to take delivery. But for a clerical error in calculation in the first plaint, the amount claimed for goods sold and delivered with interest would have been identical with the total amount claimed in the second plaint. The defendant objected to this plaint. *Held*, that the vast bulk of the claim remained unaltered and the part that was altered related to the same contract and was similar in amount to the part now given up; that the claim as originally framed was due purely to an oversight and was not fraudulent or intended to overreach, and consequently the amendment should be allowed. (19 C. 372, F.) The Courts in England do not refuse to grant an amendment simply because it introduces a new case, though they do so where this amendment would change the action into one of a substantially different character which would more conveniently be the subject of a fresh action. If the amendment altered the nature of the case, it should be refused, no matter at what stage it was sought to be made. **STEEL BROTHERS AND CO., LD. v. CASSIMJI AHMED MADHA, 11 Ind. Cas. 827.**

(23)—*Plaint—Omission to ask for proper reliefs—Facts proved for grant of proper reliefs—Dismissal of suit not proper—Amendment allowed.*—Where a plaintiff's suit was dismissed on the ground that he misconceived the appropriate reliefs to which he was entitled, *held*, that he ought to be allowed to amend his plaint by inserting a prayer for proper reliefs, if such reliefs are those that could be granted on the facts proved. **SHEIK ABDUL KADIR SAHIB v. BANGARUSWAMI NAICKEN, 9 M.L. T. 429.**

(24)—*Plaint, construction of.*—If there is any doubt as to the precise meaning of a plaint in a declaratory suit, whether the suit was for a declaratory decree only, or also for consequential relief, the plaint ought not to be rejected, but should be returned for amendment. **PIR MAHOMED v. GHULAM HYDER, 42 P.R. 1874.**

(25)—*Pleadings—Amendment of plaint or issues—Mistake.*—It is in the discretion of the Court to amend the plaint or the issues, and to allow it to be tried. Where the omission of an alternative claim in the plaint appears to have been from inadvertence or by mistake, it would be proper to allow amendment. But where there is reason for thinking that the

Plaint—continued.—3.—**Amendment of Plaint**—continued.

omission was deliberate, it would generally not be proper. **LUKEE KENTO DASS CHOWDHRY v. SUMEERUDDI LUSKER**, 13 B.L.R. 243, F.B = 21 W.R. 208. [R., 10 B. 451, 22 C. 752, 10 C.L.J. 538 = 6 M.L.T. 255 = 3 Ind. Cas. 346.]

(26)—*Act VIII of 1869 (B.C.), s. 30—Suit brought under, by mistake—Amendment.*—A suit erroneously brought under s. 30, Act VIII of 1869 (B.C.) must be allowed to be amended, on the application of the plaintiff, and not dismissed. *In the matter of GOBIND CHUNDER BOSE v. BYKUNTATH GHOSE*, 19 W.R. 61.

(27)—*Civ. Pro. Code, 1908—O. VII, r. 17—Amendment of plaint—Deliberately deferred till decision of another suit—Not bona fide mistake.*—Although r. 17 of O. VII is in wider terms than s. 53 of the old Code, amendments are still to be made on such terms as may be just, and this cannot mean that they may be allowed, so as to defeat the object of limitation and of the rules as to the framing of suits. Thus generally an amendment should not be allowed, save when the plaintiff by some mistake or misapprehension has failed to put things properly before the Court. An amendment will not be allowed where the amendment was deliberately not sought to be made and was deferred till the failure of another suit made it clear to the plaintiff that without amendment he had no chance of obtaining the relief he desired. **MAUNG THAN DAING v. U. THE**, 8 Ind. Cas. 600.

(28)—*Incorrect statement of claim—Amendment—Whether allowed—Ss. 18, 19, 49—Lease for one year—Option of renewal—Registration—Unregistered lease—Whether admissible to prove claim to moveables.*—A party must be limited to the case he puts forward in his plaint and if he fails to prove his case as originally laid, he must not be allowed to succeed. But a plaintiff who has not put forward an alternative case may state his case correctly by amending the plaint, if he had based his claim on wrong grounds from misinformation, ignorance of law or fact, mistake or misconstruction of documents. A lease for one year certain with the option of renewal at the will of landlord is one for one year only and does not require registration. But if the term is extensible at the option of the tenant, it requires registration. A lease compulsorily registrable could not if unregistered, be received in evidence under s. 49. The said lease is not even admissible to prove a claim relating to compensation in respect of moveable property contained in the house leased if the document is indivisible and discloses one transaction only. **POOL v. SECRETARY OF STATE**, 68 P.R. 1886.

(29)—*Plaint disclosing no cause of action—Defect in plaint how curable.*—Where a plaint discloses, when strictly read, no cause of action

Plaint—continued.—3.—**Amendment of Plaint**—continued.

it is not compulsory to dismiss the suit; the defect in the plaint may be cured by the facts elicited during the examination of the parties which do appear to show a cause of action, but the plaintiff should not be allowed to make a case absolutely inconsistent with the plaint. The Court has to frame issues, not only from the pleadings, but also from the examination of the parties. The pleadings are often defective owing to bad drafting, and the parties are not to be bound rigidly by their pleadings, but where there is absolute inconsistency between a statement in the plaint and a statement made by the plaintiff under examination on a material point, the proper course is to have the plaint amended, if such amendment is not barred by the proviso to s. 53, Civ. Pro. Code. The fact that the plaint discloses no cause of action has been held not to be fatal to the suit. **MA NGWE U. v. SIT PYAW**, L.B.R. 1893—1900, 337. (16 W.R. 218, 7 C. 343, F.)

(30)—*Debt wrongly described as due under an agreement of one date instead of another.*—In a suit for recovery of a debt attached, the debt was wrongly described as due under an agreement of one date instead of another. An amendment correcting the date could not be made. The intention of the parties is immaterial. [*Way v. Hearn*, (1862).] **BENODE BEHARY MOOKERJEE v. RAJ NARAIN MITTER**, 30 C. 699 = 7 C.W.N. 651. (13 C.B. N.S. 292, 304, D.) [D., 34 C. 305 = 5 C.L.J. 270.]

(31)—*Suit for possession—Misstatement of cause of action—Amendment of plaint.*—The plaintiff whose charge of criminal trespass against the defendant under s. 441, I.P.C., had been thrown out, brought the present suit for possession of the lands which formed the subject of the charge and for the demolition of a wall or fence put up by the defendant, and dated the cause of action from the date of the failure of the criminal charge. The suit was decreed by the first Court but dismissed by the lower appellate Court on the ground that it had no power to set aside a Magistrate's order under s. 441, I.P.C. Held that the case was an ordinary one of a party who had been dispossessed by the alleged wrongful act of another, and that, if the lower appellate Court was of opinion that the plaintiff had mis-stated his cause of action, it ought to have directed him to amend the plaint instead of refusing to try the suit, and that this was all the more necessary as the parties went to trial upon the whole case in the Court of first instance, well understanding the plaintiff's cause of action to be that he had been dispossessed by the defendant's encroachment upon his lands. **DABOO JHA v. LUWA JHA**, 11 W.R. 223.

(32)—*Amendment of—Decree—Error in description of plot.*—A plot of land, part of the subject matter of the suit, was wrongly described in the plaint and in the decree of the Court of first instance as No. 182, instead of 184. On discovery of the mistake in the

Plaint—continued.**—3.—Amendment of Plaint**—continued.

appellate Court, an application was made for the amendment of the decree and if necessary, of the plaint. The lower appellate Court declined to alter the decree and passed no definite order on the prayer for the amendment of the plaint, *held*, that the decree could not be amended, but the mere fact that an issue as to the particular number of the plot would have to be tried *de novo* was no reason for refusing the prayer for the amendment of the plaint. The Court should exercise its discretion in deciding whether or not the amendment of the plaint should be allowed and the plaintiff was entitled to a distinct order on the point. **JIVAN SAHAI v. KALVAN MAL, A.W.N. 1906, 220.**

(33)—*Jurisdiction—Pro-note for money due under contract—Suit on original cause of action.*—Where a promissory note was taken in Calcutta from a person resident in Mymensingh for payment of money due on a contract for the sale of land made in Dacca, under which the money was due in Dacca, the Court of the Munsif in Dacca had jurisdiction to try a suit on the original cause of action, *viz.*, the contract made in Dacca. **PROBY v. BELL, 20 W.R. 6.**

(34)—*Misdescription of parties—Amendment of plaint—Limitation.*—Where a Court, under the mistaken impression that a co-plaintiff (already on record), who had not signed and verified the plaint, could not be considered a plaintiff at all, order the plaint to be amended, *held*, that the date of the original presentation of the plaint, and not the date of the amendment, determined the question of limitation, there being no addition of any new party by the amendment. **MOHINI MOHUN DAS v. BURRYSI BUDDAN SAHA DAS, 17 C. 580, P.C.**

(35)—*Non-joinder—Objection not taken in first Court—Remand of suit on appeal—Right of plaintiff to amend plaint thereafter.*—Where no objection was raised to a suit in the first Court on the ground of non-joinder of parties and the suit was remanded on appeal, there was nothing to prevent the plaintiff from amending the plaint thereafter. **INNASI PILLAI v. SIVAGNANA DESIKAR, 5 M.L.J. 95.**

(36)—*Civ. Pro. Code, 1882, ss. 562, 564, 53—Misjoinder—Power of appellate Court—Practice.*—In a case in which the lower Court should have simply returned the plaint for amendment, allowing the plea of misjoinder but failed to do so, the appellate Court has got the power to dispose of the suit in the mode in which the lower Court ought to have disposed of it. **LINGAM MAL v. VENKATAMMAL, 6 M 239. (2 A. 669, Diss.) [R., 19 B. 303, 2 L.B.R. 4.]**

(37)—*Plaint, amendment of—Substitution of parties.*—Plaintiff applied to amend the plaint, by substituting the names of Messrs. Latournoux Labadei for the Official Assignee as defendants. The defendants had been adjudicated insolvents, and one of them had

Plaint—continued.**—3.—Amendment of Plaint**—continued.

obtained his personal discharge. As to this, there was a mis-statement in the plaint, permission to amend which was also asked in the present application. No written statement had been filed by either party to the suit. The Court allowed the amendment directing that the costs of the amendment thereby incurred should be paid by the plaintiff. **THE DELHI AND LONDON BANK v. MILLER, 7 B.L.R. App. 65.**

(38)—*Plaint—Amendment—Plaint barred by time on the face of it—Amendment to bring the claim within time cannot be allowed.*—*Civ. Pro. Code, 1882, s. 50.*—A suit was brought to recover a sum of money from defendants. The claim as made out in the plaint was on the face of it barred by time. At the hearing, the plaintiff sought leave to amend the plaint by relying on a document which brought the claim within time, but which was not mentioned in the list of documents annexed to the plaint:—*Held*, that the plaint which was bad on the face of it could not be allowed to be amended in the way suggested. All amendments in a plaint which do not cause an injustice to the other side are allowed; but if the amendments put the other side into such a position that they must be injured they ought not to be made. **GUNNAJI v. MAKANJI, 10 Bom. L.R. 969.**

(39)—*Law of limitation—Duty of Court receiving plaint—Special appeal—Act VIII of 1859.*—The Civ. Pro. Code has imposed on the Civil Courts the duty of examining whether the whole or any portion of the claim is barred, under any existing law, by lapse of time, and of deciding in accordance with such law; and that, consequently, if it be manifest, from the declaration in the plaint, that the recovery of a portion of the claim is barred by a particular statute, the omission to notice this circumstance, even if it should not have been specifically urged in defence, is an error in law, for the correction of which a special appeal will lie. **SALUJI KESRAJI v. RAJSANGJI JALAMSANGJI, 2 B.H.C. 162. [Doubted, 2 B. 120; R., 7 B.H. C. A.C. 99.]**

(40)—*Plaint amended—Limitation—Act XV of 1877, sch. II, art. 144.*—For purposes of limitation, a suit must be considered to have commenced not from the date of the amendment of the plaint but only from the date on which the plaint was originally presented. **PATAL MAFATLAL NARANDAS v. BAI PARSON, 19 B. 320. [R., 5 Bom. L.R. 643; D., 9 O.C. 1.]**

(41)—*Amendment of plaint after first hearing—Civ. Pro. Code, 1882, s. 53.*—Amendment of a plaint for any of the grounds mentioned in s. 53, Civ. Pro. Code, cannot be allowed after the first hearing, but amendments on other grounds need not necessarily be confined to a period prior to the first hearing. An amendment of a suit for maintenance of possession

Plaint—continued.**—3.—Amendment of Plaint**—continued.

into one for recovery of possession may be allowed even after the first hearing. **RAM-KISHAN SINGH v. MOTI SINGH, A.W.N. 1886, 248.** (7 A. 79, F.B., D.)

(42)—*Civ. Pro. Code (Act X of 1877), ss. 53, 578—Amendment of plaint permitted subsequent to first hearing, how far legal—Alteration not inconsistent with original allegation—Amendment after hearing—Irregularity not affecting merits—Specific Relief Act, ss. 39, 40—Suit for cancellation on ground of failure of consideration—Voidable contract—Evidence Act, s. 92, proviso 3—Oral evidence if admissible to add to written contract.*—This suit was originally brought in the form of one for accounts with respect to two bond transactions which the plaintiff had contracted with the defendant, but with respect to which the plaintiff contended that he had not received full consideration. Finding that no consideration beyond the actual advance of Rs. 200 and a book-debt for Rs. 100 reached the plaintiff, the Court gave a decree declaring that the balance of consideration had not been proved and that defendant would not be entitled to recover from the plaintiff the sum of Rs. 1,000 included in the bond. On appeal the Commissioner considered that the lower Court had acted improperly in permitting the plaintiff to amend his plaint so as to completely alter the character of the suit from one for accounts to one for the cancellation of an instrument on the ground of want of consideration. On the evidence, the plaintiff, on whom the burden of proof lay, failed to prove the oral agreement alleged to have been made by the defendant to employ Rs. 1,000 of the amount for which the bond was given in settling with the plaintiff's creditors. The Commissioner accordingly reversed the decision of the lower Court and dismissed the plaintiff's claim. On further appeal to the Chief Court the plaintiff contended that the suit was rightly treated by the first Court as one to cancel the bond, *qua* the item of Rs. 1,000 on the ground of failure of consideration and that, on the merits, the Commissioner was not justified in reversing the decision of the first Court. As regards the amendment changing the nature of the suit, it was on the defendant's own objection that the plaintiff was made to do so; and it cannot be held, on a purely technical objection that the amendment was not made at the first hearing and was not duly carried out by a formal alteration of the plaint, that the suit failed altogether. According to the decisions, the language of s. 53 is merely directory and not mandatory, and therefore an amendment may be permitted at a stage later than the first hearing, provided that the character of the suit be not so altered as to become inconsistent with the suit as originally brought. Further, there is nothing in the Code which expressly forbids an amendment after the first hearing, and thus, at most, where it is allowed, it can only be regarded as an irregularity which, when it neither affected the jurisdiction of the Court

Plaint—continued.**—3.—Amendment of Plaint**—continued.

nor the merits of the case could not justify the disturbance by the lower Appellate Court of the decree of the first Court, with reference to the provisions of s. 578, Act X of 1877. The alteration in this case was not inconsistent with what the plaintiff first prayed for the amendment really only affected the form of relief to which the plaintiff was entitled, and was actually necessary in order that the controversy between the parties might be settled once for all. The Chief Court was of opinion that the suit, should, under the circumstances, be treated, as it was treated by the parties in the first Court, as one brought under the provisions of s. 40 of the Specific Relief Act; admittedly there would be a reasonable apprehension that if the bond for Rs. 1,300 were left outstanding, it might cause him serious injury, and therefore the plaintiff was entitled under ss. 39 and 40 of the Specific Relief Act to have that portion of the bond adjudged voidable which had become unenforceable by the defendant. **KHUDA BAKSH v. BUDHAR MAL, 186 P.R. 1882.** (5 B. 609, 124 P.R. 1881, R.)

(43)—*Practice—Civ. Pro. Code, s. 53—Rejection, amendment, etc., of plaint after first hearing—By the Full Bench (Oldfield, J., dissenting).*—Under s. 53 of the Civ. Pro. Code, a plaint can be rejected, returned for amendment or amended by the Court of First Instance, only at or before the first hearing, and not afterwards. *Per Mahmood, J.*—A plaint may be amended after the first hearing, for causes other than those mentioned in s. 53. **DAMODAR DAS v. GOPAL CHAND, 7 A. 79, F.B. = A.W.N. 1884, 303.** (5 B. 609, Diss.; 2 C. 272, 10 C. 557 = 11 I.A. 7, 6 A. 250, D.) [*F.*, 7 A. 860, 71 P.R. 1907 = 37 P.L.R. 1908; *Appr.*, 12 A. 553; D., 6 A.W.N. 248.]

(44)—*Plaint—Amendment after issue.*—A plaint that is bad on the face of it, and shows that the plaintiff is not entitled to what he prays for, ought not to be admitted but should be rejected in the first instance. Such a plaint cannot be amended after the issues have been fixed. **AMUR NARAIN alias NERPUT SUH-HAYE v. MUSST. RAGHOOBUNSEE KOONWUR, 5 W.R. 234.**

(45)—*Civ. Pro. Code, Act XIV of 1882, s. 53—Amendment of plaint after framing of issue.*—The power to amend a plaint after the framing of issues rests with the Court alone. So, where the Court finds that there is a misjoinder of causes of action, the Court should itself amend the plaint or allow the plaintiff to withdraw. **BAIJ NATH v. CHHOWARO, 26 A. 213 = A.W.N. 1903, 240.** [*Cited*, 6 A.L.J. 926.]

(46)—*Defect on face of plaint—Amendment at final hearing.*—A defect appearing on the face of the plaint, which would have rendered it inadmissible, is not a matter for amendment at the final hearing of the suit. **RAMASAMI AYYAN v. RAMA MUPAN, 3 M.H.C. 372.**

Plaint—continued.**—3.—Amendment of Plaint**—continued.

(47)—*Changing case in second appeal.*—A plaintiff will not be allowed to change his case in second appeal. **DASSORATHY HURI CHUNDER MAHAPATTRA v. RAMA KRISHNA JANA, 9 C. 526=13 C.L.R. 114.**

(48)—*Civ. Pro. Code, Act XIV of 1882, ss. 27, 53—Amendment of plaint in second appeal.*—Where a suit was filed by the persons mentioned in the will, in the capacity of executors, the plaint was allowed to be amended in second appeal, the amendment taking the form of substituting the adopted son as a plaintiff with one of the original plaintiffs as next friend. **SESHAMMA v. CHENNAPPA, 20 M. 467.** [R., 5 C.W.N. 273, 3 O.C. 347, 2 L.B.R. 4, 33 C. 657=10 C.W.N. 662, 4 L.B.R. 95.]

(49)—*Amendment of—Appeal—New case.*—The plaintiff sued the defendants on the allegation that he and his brother R at the time of R's death constituted a joint Hindu family; that, on R's death, he was entitled by right of survivorship to the whole property which had been jointly owned by R and himself; and that the defendants, who were the sons of two pre-deceased brothers, had no right therein. The defence was that the plaintiff and his brothers remained joint until the death of their father after which they separated. It was further alleged that, under the custom of the family, the defendants were entitled to inherit the property in suit. Issues upon the question of separation and the alleged family custom were framed. The Court of first instance decided the question of separation in favour of the plaintiff. The Court of first appeal set aside this finding, whereupon the plaintiff applied to be allowed to amend his plaint so as to base his claim in the alternative, namely, that, if the joint family, as alleged by him, was not proved, still under the ordinary Hindu Law he, as the only surviving brother of R, had a preferential right to succeed to this property over the defendants who were his nephews; but the application was disallowed. *Held*, that the application to amend the plaint should have been allowed. *Held*, further, that if a Court sees that the plaintiff is entitled to the relief which he claims, although on grounds other than those put forward in his claim, the Court should grant that relief if the defendants are not thereby taken by surprise. **RAM AWADH v. BHAGAN, 8 O.C. 266.** (A.W.N. 1901, 188, 25 A. 498, A.W.N. 1903, 18, R.)

(50)—*Amending plaint in appellate Court.*—A plaint cannot be amended in an appellate Court. **ABDUL GAFUR v. MUSSAMAT NUR BANU, 1 B.L.R. A.C. 78=10 W.R. 111.**

(51)—*Amendment of plaint on appeal, inadmissible.*—Where all the co-sharers had not been made parties, the plaint could not be amended by adding them as parties at the hearing of the appeal. **OBHOY GOBIND CHOWDHRY v. HURY CHURN CHOWDHRY, 8 C. 277.**

Plaint—continued.**—3.—Amendment of Plaint**—continued.

(52)—*Civ. Pro. Code, 1882, ss. 53, 582—Power of Appellate Court—Amendment seeking relief ancillary to principal prayer.*—An Appellate Court has power under s. 582 read with s. 53, Civ. Pro Code, to allow an amendment of the plaint. (9 C. 695, 22 C. 692, 20 M. 467, R.) Where the object of the amendment of a plaint is merely to seek relief ancillary to the principal prayer of the plaint, such amendment does not alter the character of the suit. **RAJAH PEARY MOHAN MUKERJEE v. NARENDRA KRISHNA MUKERJEE, 5 C.W.N. 273.**

(53)—*Amendment of plaint in second appeal—Radical change cannot be allowed—Declaratory suit based on partition—Amendment to base claim on inheritance—Pleadings.*—Amendments involving an entire change in the form and character of a suit are radical and cannot be allowed in a second appeal. Where plaintiff sued for a declaration of her title to a specific area on the basis of an alleged partition of the parent's property, she was not allowed, in second appeal, to amend the plaint and substitute a claim by way of inheritance to an undefined fifth-share of the same. **M.R.P.L.P. PALANEAPPA CHETTY v. MA SHWE ME, 9 Ind. Cas. 774.**

(54)—*Amendment of plaint in second appeal—New case—Practice—Second appeal.*—Where the suit was brought on an oral agreement, which was found against, and amendment of the plaint was asked for so as to enable the plaintiff to claim on his title under a written contract, *held*, the amendment ought not to be allowed in second appeal, especially as the effect would be to deprive the defendant of defences which would be open to him if a separate suit were brought on the alleged cause of action. **ERESEAN NAIR v. RAO BAHADUR YASAVA MENON, 7 M.L.T. 225=6 Ind. Cas. 288.** (18 M. 33, R.)

(55)—*Amendment in second appeal.*—Where the plaintiff stated a wrong date as to a certain event in his plaint, and the first Court disposed of his case on that allegation; and an appeal before the District Judge on the day of hearing, he, for the first time, gave out a suggestion that that date was wrong, but did not ask for the amendment of the plaint. *Held*, that he could not be allowed to amend his plaint in second appeal. **BADRI PRASAD v. DILA, 6 Ind. Cas. 542.**

(56)—*Amendment of plaint—High Court's power.*—Where the plaintiff misconceives his cause of action, but equity is on his side, the High Court may allow him an opportunity to apply for amendment of the plaint, and also allow an application made with such object. **SHYAMCHAND KOONDOOR v. THE LAND MORTGAGE BANK OF INDIA, LTD, 9 C. 695=12 C.L.R. 440.** [F., 2 L.B.R. 4; R., 5 C.W.N. 273.]

(57)—*Plaint—Omission of plaintiff to amend plaint in original Court and two Courts of ap-*

Plaint—continued.**—3.—Amendment of Plaint**—continued.

peal—Amendment in Privy Council—Permissibility.—Where a plaintiff failed to amend the plaint in the original Court and the two appellate Courts, notwithstanding that the defendant drew his attention to the defect in the plaint, the Privy Council would not permit such amendment and thereby allow the plaintiff to shift his ground and make a new case, as such a course is wrong in principle and is calculated to work practical injustice. **MALLKARJUN BIN SHIDRAMAPPA PASARI v. NARHARI BIN SHIVAPPA**, 10 M.L.J. 368, P.C.=25 B. 337=27 I.A. 216.

(58)—*Refusal of, by lower Courts—Discretion—Whether Appellate Court would grant amendment.*—Where the Courts below have, after a full consideration of the circumstances of the case, refused to exercise, in favour of the plaintiff, their discretion to allow an amendment of the plaint, and where the consequences of such refusal are not serious, *held*, that the Chief Court will not interfere with that discretion. **ABDUL GHAFUR v. MUSSAMMAT MEHAR-UN-NISSA**, 101 P.R. 1909. (1 P.R. 1900, D.; 26 A. 238, P.C., R.)

(59)—*Amendment of plaint—Discretion of lower Court, how to be interfered with.*—*Per Shephard, J.*—Where the lower Court refuses to allow an amendment of a plaint, the High Court would not interfere with the discretion of the lower Court, unless the lower Court was clearly in error or an honest mistake had been made by the plaintiff or his pleader. Where the plaintiff's object was to secure the whole of a certain property for himself, and it was only at the eleventh hour when he found that he was likely to have his suit dismissed that he changed his front and sought amendment of the plaint by claiming only a share of the property, *held* that, under such circumstances, the lower Court was right in having refused to allow the amendment. **GOPALASAMI v. PERIASAMI TEVAR**, 6 M.L.J. 27.

(60)—*Punjab Courts Act (XVIII of 1884), as amended by Act XXV of 1899, s. 70 (1) (a)—Civ. Pro. Code (Act V of 1908), O. VI, r. 17 and O. XIV, r. 5—Amendment of pleadings and issues—Discretion—Revision.*—The exercise of the power of a Court to allow pleadings and issues to be amended, under O. VI, r. 17 and O. XIV, r. 5, is discretionary; and this discretion cannot be interfered with in revision until it is shown to have been absurd or perversely exercised. **INDAR NARAIN v. NANAK CHAND**, 9 Ind. Cas. 267=51 P.L.R. 1911.

(61)—*Civ. Pro. Code, 1882, s. 54—Amendment—Time fixed—Power of Court to extend time.*—Courts have always power to grant such further time as they think fit after the expiry of the period allowed for the amendment of a plaint. **BHUGWANDAS BAGLA v. HAJI ABU AHMED**, 16 B. 263. [F., 2 Ind. Cas. 1; R., 19 A. 240, 4 O.C. 108, 78 P.R. 1909=144 P.L.R. 1909=3 Ind. Cas. 605, 14 C.W.N. 882=6 Ind. Cas. 424=12 C.L.J. 62.]

Plaint—continued.**—3.—Amendment of Plaint**—continued.

(62)—*Civ. Pro. Code, 1877, ss. 53, 149—Amendment of plaint, when can be made—Court's power to frame additional issues before decree.*—The only part of s. 53 which contains an express negative enactment is the proviso near its end, "that a plaint cannot be altered so as to convert a suit of one character into a suit of another and inconsistent character;" but this is restrictive as to the nature only of the amendment, and not as to the time within which it may be made. There being in s. 53 no positive prohibition of the amendment of the plaint at any time before decree, and the result of holding that the words "at or before the hearing" constitute an implied prohibition of an amendment after the hearing, being to create a conflict between cl. (f) of s. 53 and the second passage in s. 32, which it is not to be supposed that the Legislature intended, and the Legislature having used negative words where it resolved to prevent amendments wholly inconsistent with the case originally made in the plaint, the words "at or before the hearing" must be taken to be merely directory and not mandatory. Where, therefore, a mortgagor in his suit against the mortgagees sought only for the production of the mortgage deeds and for an account of what, if anything, was due to the defendants on the mortgage, although the averments contained in the plaint, warranted a prayer for redemption; and where, after the first hearing of the suit, the plaintiff applied to be allowed to amend the plaint by adding a prayer for redemption, *held* that the Court could permit the amendment to be made, and that there was nothing in s. 53 of the Code to prevent the Court from doing so. [Diss., 7 A. 79; R., 110 P.R. 1882, 7 B. 155, 159 P.R. 1889, 14 B. 31, A.W.N. 1902, 35.] *Held* that, in the above circumstances, even if the plaintiff be not entitled to amend his plaint by praying that he may be at liberty to redeem the mortgage, it is still competent to the Court under s. 149 of the Code "at any time before passing a decree," to frame an additional issue. The additional issue framed may embrace matter not included in the plaint (provided it be not inconsistent with it) or in the written statement, but which may appear upon the allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties or persons. **R & N. MODHE v. S. DONGRE**, 5 B. 609. [R., 13 B. 664.]

(63)—*Application to amend with reference to objection taken at filing of plaint.*—A plaint may be amended upon subsequent application, with reference to an objection taken when it was filed. **TOULTON v. GWYTHYR, Bourke O.C. 273.**

(64)—*Civ. Pro. Code, 1877, s. 53—Amendment of plaint.*—It would seem that a plaint once returned for amendment, under s. 53 of the Civ. Pro. Code, and amended accordingly, cannot be again returned for amendment. **BADR-UN-NISSA v. MUHAMMAD JAN**, 2 A. 671.

Plaint—continued.**—3.—Amendment of Plaint**—continued.

(65)—*Alteration of plaintiff's case—Variance between pleading and proof*—The Court will not add an issue or amend the plaint so as to raise a wholly different question to that upon which the parties have come into Court. **BIZJIE BIBEE v. MONOHUR DOSS, 2 Ind. Jur. N.S. 118.**

(66)—S. 53, Act XIV of 1882, Civ. Pro. Code, —*Alteration in relief does not alter character of suit*.—S. 53, cl. (c), Civ. Pro. Code, distinctly provides that an amendment, so long as it does not alter the character of the suit, may be allowed of any kind before judgment. The restriction is only as to the nature of a suit; the law prohibits any such amendment as would change the fundamental character of the suit; for example, a plaint cannot be so amended as to convert a claim based on contract into an action on tort. But an alteration in the relief does not alter the character of a suit. **KASHI-NATH DAS v. SADASIV PATNAIK, 20 C. 805.** [F., 2 L.B.R. 4, 135 P.R. 1906; Appr., 28 B. 153=5 Bom. L.R. 892; Cons., 14 C.P.L.R. 5; R., U.B.R. 1897—1901 231, 26 B. 305, 34 C. 662=11 C.W.N. 680, 117 P.L.R. 1908.]

(67)—*Suit for declaration—Amendment by adding relief for possession*—S. 53 of Civ. Pro. Code.—S. 53, Civ. Pro. Code, does not apply to a case where a suit for a mere declaration of title was brought by plaintiff against defendant, (the plaintiff having already been put in possession, by virtue of a decree in a former suit, which was ultimately dismissed by the High Court as not having been properly framed), and an amendment of the plaint was allowed by adding a prayer for possession, owing to plaintiff's dispossession effected subsequently to the institution of the new suit. **BISHOP MELLUE v. VICAR APOSTOLIC OF MALABAR, 2 M. 295.**

(68)—*Amendment of plaint—Material alteration*—Ss. 53, 562, Civ. Pro. Code, 1877.—Where a suit for the restoration, to its original condition, of a pond, which the defendants were alleged to be wrongfully filling up, was allowed to be amended so as to become a claim for the protection of the plaintiffs from any infringement of, or for a declaration of, their right to a share in the produce, and to the use of the water by way of easement, *held*, that the alteration was a material one. [R., U.B.R. 1897—1901, Vol. II, 231.] An appellate Court cannot order or allow a plaint to be amended, and cannot remand a case under s. 562 of the Civ. Pro. Code, for the purpose of such amendment. **FARZAND ALI v. YUSUF ALI, 2 A. 669.** [Diss., 6 M. 239; R., A.W.N. 1881, 121, 19 B. 303.]

(69)—*Amendment of plaint—Altering nature of suit*—Civ. Pro. Code, 1877, s. 53.—In the suit as originally framed, the plaintiff sued for maintenance of possession, but subsequently applied to be allowed to amend the plaint and convert the suit into one for possession of property, on the ground that the defendant had

Plaint—continued.**—3.—Amendment of Plaint**—continued.

obtained possession of it. The Court ordered the amendment, but subsequently refused to entertain the suit on the ground that, by the amendment the nature of the suit had been altered. *Held* that the nature of the suit had not been changed and that the lower Court should dispose of the case on the merits. **SUNDER LAL v. BUNYAD ALI, A.W.N. 1882, 129.**

(70)—Civ. Pro. Code, ss. 50, 53—*Amendment of plaint—Change in form of suit, cause of action being the same*.—An Appellate Court is not precluded from decreeing a relief less than that claimed by the plaintiff in his plaint, provided that the specific right and its infraction alleged are not altered in appeal. Where restrictions imposed in regard to the specific crops which the defendants are to raise, and the time when they are to raise them, are not necessary for the protection of the interests of the plaintiff, they are an unwarranted interference with freedom of enjoyment, and as such should be set aside. **PULAMADA v. RAVUTHU, 11 M. 94.** [R., U.B.R. 1897—1901, 231.]

(71)—S. 53, Civ. Pro. Code, 1882—*Plaint—Amendment—Changing the character of suit—Declaration—Possession*.—S. 53 of the Code of Civil Procedure, 1882, directs that a plaint shall not be amended so as to convert a suit of one character into a suit of another and inconsistent character. The amendment of a suit for a mere declaration into one for possession does not change the suit into one of an inconsistent character. The relief for declaration is in most cases for recovery of possession claimed as ancillary to the latter, and there can be no inconsistency between the two. But, notwithstanding this, a Court should not allow a suit for mere declaration to be amended into one for possession, unless a good case is made out for such amendment. The Court has to exercise a judicial discretion where it is asked for, and that discretion may well be exercised where the plaintiff has either mis-conceived his case and there has been a *bona fide* mistake on his part and the amendment may be made without injustice to the defendant, or any contradistinction between the injury averred by the plaintiff and that assumed by the Court, or where the objection, that the suit for a mere declaration of title was not maintainable, was not taken in the first Court. **RAGHU v. VISHNU, 5 Bom. L.R. 329.**

(72)—*Suit for confirmation of possession—Change in form of suit—Suit for recovery of possession—Bona fides*.—When a plaintiff has a *bona fide* case, which he has proved in substance, but not in form, there are circumstances, under which the Courts assist him. But, where a plaintiff put forward a distinct allegation of possession founded on a deed of sale, which is found by the Court to be false, this is not a case in which the general rule ought to be relaxed and the plaintiff assisted to establish a

Plaint—continued.**—3.—Amendment of Plaint**—continued.

case which he did not originally put forward. *TERIETPUT SINGH v. GOSSAIN SUDERSAN DAS*, 4 C. 46. (15 W.R. 286, 16 W.R. 27 and 1 L.A. 192, D.; on the ground that they were *bona fide* cases.)

(73)—*Civ. Pro. Code, Act VIII of 1859, ss. 29, 31—Amendment of plaint — Addition of new causes of action by supplemental plaint.*—Ss. 29 and 31, *Civ. Pro. Code*, empower Courts to permit such amendments in the plaint as may enable the Court to give relief in respect of the wrong originally complained of, but not to allow totally new causes of action to be added by a supplemental plaint. *RAILOO MULL v. NANUK*, 1 N.W.P. 250.

(74)—*Amendment of plaint with additional prayer—Issue framed—Appeal—Civ. Pro. Code, s. 588.*—Where, on second appeal, the High Court returned a plaint to be presented to the proper Court, and the plaintiff returned the plaint to the proper Court but after amending it by asking for an additional prayer, i.e., for a permanent injunction, and also put in a petition to admit the amendment, and the defendant objected to the amendment in his written statement on the ground that the amendment materially altered the suit, and the Court framed an issue on the point and decided it in plaintiff's favour, and made an order admitting the amended plaint, *held* that no appeal lay from the order under s. 588, *Civ. Pro. Code*. *SIMHADRI v. GAJAHAPADHI*, 3 M.L.J. 253.

(75)—*Mortgage by unregistered deed—Suit for money decree for mortgage debt—Absence of acknowledgment or promise in the deed—Proof of debt by acknowledgment in another deed—Evidence Act (I of 1872), s. 91—Admission of debt by defendants, effect of—Civ. Pro. Code, s. 53—Amendment of plaint asking for remedy originally omitted.*—The plaintiffs asked for a money decree for Rs. 699 being the amount of a mortgage debt, alleged to be due to them under two unregistered mortgage deeds, one for Rs. 600, and the other for Rs. 99. It being found that the deed for Rs. 600, contained no acknowledgment of any previously existing debt, nor any promise to pay the money so that there was nothing in it which could be admitted as evidence, the plaintiffs contended that the debt for Rs. 600 may be proved by an acknowledgment contained in the bond for Rs. 99. *Held* that, as the terms of the mortgage were reduced to writing, they could not be proved apart from the mortgage deed itself, and as it was not alleged that there was any debt apart from the mortgage transaction, if the defendants denied the debt of Rs. 600, it would be out of the power of the plaintiffs to prove it, the mortgage being unregistered, but that if all the defendants admitted that the Rs. 600 had been borrowed, then, there would be no issue as to whether this debt had been incurred, and it would not be necessary for the plaintiff to produce any evidence of this fact. Where a person entitled to more than one

Plaint—continued.**—3.—Amendment of Plaint**—continued.

remedy in respect of the same cause of action, sues only for some of the remedies, an amendment of the plaint for the purpose of asking for another remedy originally omitted is not a conversion of the suit into one of an inconsistent character, and is therefore not barred by s. 53, *Civ. Pro. Code*. Thus where a plaintiff who sued for possession of a house alleged to have been mortgaged to him by an unregistered mortgage-deed, put in an amended plaint stating that, as possession could not be given to him, he asked for a decree for the money, *held* this amendment of the plaint was not barred by s. 53, *Civ. Pro. Code*. *FATTEH SINGH v. MIAN SINGH*, 131 P.R. 1883.

(76)—*Practice — Pleading — Amendment of plaint—Prayer for addition of further relief—Maintainability—Account books — Suit for recovery of—Whether lies—Civ. Pro. Code, 1908, O. VI, r. 17.*—Where, in a suit as originally framed, the plaintiff prayed only for the recovery of certain account books from the defendants who were his servants, but subsequently put in a petition to amend his plaint by the addition of a prayer for the recovery of the moneys due from the defendants, on the same facts already alleged in his plaint. *Held*, that the application was proper and that the amendment should be allowed. (33 B. 644, 21 M.L.J. 475, R.) The mere fact that the further relief then asked had become barred in the interval does not by itself render the amendment improper. A suit lies for the recovery of account books kept by the defendants for the plaintiff. *A.R.R.M.S.V. SEVUGAN CHETTY v. KRISHNA AIYENGAR*, 10 M.L.T. 557.

(77)—*Specific Relief Act (I of 1877), s. 42—Declaratory suit—Civ. Pro. Code, 1882, s. 54, amendment of plaint by adding prayer for consequential relief.*—The plaint, in this case, (as one praying for a mere declaration) was held by the lower Court to be inadmissible by reason of s. 42 of the Specific Relief Act, as the plaintiff could have prayed for an account against the defendant, in whose favour a certificate of heirship had been granted in respect of all moneys received by him under such certificate, and for payment to plaintiff of all moneys so received but not properly accounted for. The High Court, however, held that in such a case the plaintiff could be allowed to amend the plaint within a given time by adding a prayer for an account. *BAI ANOPE v. MULCHAND GIRDHAR*, 9 B. 355. [Appr., 14 B. 395.]

(78)—*Civ. Pro. Code, Act XIV of 1882, s. 53—Proposed amendment inconsistent with original plaint—Amendment not allowable.*—The claim as set forth by the plaintiff originally in his plaint was entirely based on the invalidity of a Will. The claim sought to be raised by the amendment of the plaint subsequently, started with the validity of the Will, as its basis but said that the Will did not deal with all the

Plaint—continued.**—3.—Amendment of Plaint—continued.**

property and asked for an account of what property came under the alleged intestacy. The latter claim not having been from the first in controversy between the parties, the proposed amendment was refused on the ground that the parties should not be allowed to raise, by means of the amendment, a case inconsistent with the action as it originally stood. **DAMODAR MADHOWJEE v. PURMANANDAS JEEWANDAS**, 7 B. 155. [R., 13 B. 664, 14 B. 31, 1 L.B.R. 184.]

(79)—*Civ. Pro. Code*, 1882, s. 54 (d)—*Plaint insufficiently stamped, filing of—Court-fee, order of Court to make up deficiency of—Suit, when may be said to be properly instituted—Limitation Act*, s. 4—*Amendment of plaint, extension of time by Court for—Res judicata—Civ. Pro. Code*, s. 13.—S. H. died leaving him surviving his second wife and two daughters by her (defendants) and a son and a daughter (plaintiff) by his first wife. The plaintiff sued the defendants for her share under the Mahomedan Law of inheritance in the property of S. H. The plaint in the suit was presented to the Munsarim of the Subordinate Judge's Court, who was the officer to whom it should have been presented, on the 21st October 1879, i.e., 13 days before the expiration of twelve years from the death of S. H. On certain objections, taken by the defendants in their written statements, to the plaintiff's suit, the Court on the 16th July 1898 ordered the plaint to be returned for amendment within two weeks from its actual return. On the 26th July 1898 the Court directed the plaintiff within three weeks to pay an additional Court-fee. On the 11th August 1898 the plaintiff asked that the time granted by the order of 26th July 1898 might be extended, and on the 15th August the Court granted an extension of one month. On the 13th September 1898 the plaintiff again presented the plaint paying the additional Court-fee. The Court dismissed the suit on several grounds, one of which was that inasmuch as the plaint was not sufficiently stamped until twelve years from the death of S. H. had expired, the suit could not be deemed to have been instituted within time and was barred by the law of limitation. *Held*, that the suit was not barred by limitation. Where a plaint has been filed in time, the fact, that it was not duly stamped when the period of limitation expired, does not render it time-barred, since it must be regarded as having been presented on the day upon which it was filed. In the Explanation to s. 4, Indian Limitation Act, 1877, that "a suit is instituted, in ordinary cases, when the plaint is presented to the proper officer," the Legislature used the expression "plaint" without reference to the law as to court-fee. *Held* also, that where a plaint has, under s. 54 (d), *Civ. Pro. Code*, been returned for amendment within a time fixed by the Court, the Court can extend the time both before and after it has expired. Another ground upon which the Court dismissed the

Plaint—continued.**—3.—Amendment of Plaint—continued.**

suit was that, inasmuch as in a previous suit brought by the plaintiff's brother against the plaintiff and the defendants for the whole property of S. H. or, in the alternative, for his share under Mahomedan Law in the same, the plaintiff's brother was decreed his share in the property, and certain other questions raised in the present suit were decided in that suit, the present suit was barred by s. 13, *Code of Civil Procedure*. *Held*, that the matters decided in the former suit and raised in this suit were not in issue between the plaintiff and the defendants, that there was no active controversy between them as to such matters, that those matters were not decided as between the plaintiff and the defendants *inter se*, and that the plaintiff's suit therefore was not barred by s. 13, *Civ. Pro. Code*. A decision may be *res judicata* between the parties on the same side, the mere circumstance of persons having been formally arrayed on the same side in a suit being immaterial. If a matter has been actively in issue between them, and if as to that matter they had an active controversy against each other, they will be estopped by the decision in that matter. **AZIZ-UNNISSA v. MUKIMUNNISSA**, 4 O.C. 108. [R., 8 O.C. 241.]

(80)—*Case made in plaint—Relief on a different title—Duty of appellate Court*.—After the dismissal of the plaintiff's suit by the first Court, an appellate Court will not be justified in giving the plaintiff a decree on a title different from that put forward in the plaint. Any amendment allowed must be such as is either raised in the pleadings or is consistent with the case as originally laid, and the state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff must not be departed from. **MUKHODA SOONDURY DASI v. RAM CHURN KARMOKAR**, 8 C. 871. (11 M.L.A. 7, *Cited*.) [R., L.B.R. 1893—1900, 518; *Expl.*, 12 C.W.N. 172, *Note*.]

(81)—*Prayer for relief on footing of defendant's story*.—When the parties to a suit have come to trial to determine which of two stories is true, the Court cannot allow the plaintiff to amend the plaint, by abandoning his own story and adopting that of the defendant and asking relief on that footing, the question whether on that footing the plaintiff is entitled to relief being one to which the defendant's attention has not been called, and as to which he has had no opportunity of answering. **SHIBKRISTO SIRCAR v. ABDOOL HAKEEM**, 5 C. 602=5 C.L.R. 455. [R., 10 B. 451.]

(82)—*Suit for money dishonestly misappropriated—Defendant denying entire allegations in plaint and pleading limitation—Demand and refusal—Demand—Right of suit*.—A suit for money dishonestly misappropriated by the defendants cannot be dismissed on the technical ground that the plaint does not contain any allegation of demand and refusal, especially when the defendants have, by their answer, traversed the whole of the allegations in the

Plaint—continued.**—3.—Amendment of Plaint**—continued.

plaint and pleaded limitation. A debtor to whom money has not been lent for a fixed term is not *in mora*, if he does not pay until demand. A creditor who sues before demand would justly be deprived of costs, and if the suit was not resisted, perhaps properly be made to pay the defendant's. To say, however, that a right of demand is not clothed with an action because, in consequence of special provisions, the action will not be subject to destruction by prescription until something more happens, is to make this legal anomaly the means of creating a perfectly existent legal right uninvested with legal protection—a monster. **R. M.R. LAKSHMAYAH v. VENKATA GOPAL ROW, 7 M.H.C. 400.**

(83)—*S. 50, Civ. Pro. Code, 1882—Plaint, amendment of, by referring to a document not included in the list of documents annexed.*—The amendment of a plaint, by referring to a document not included in the list of documents annexed to the plaint, is not such an amendment as will convert the suit into a suit of different and inconsistent character. **GUNNAJI BHAVAJI v. MAKANJI KHUSHALCHAND, 11 Bom. L.R. 498 = 6 M.L.T. 234 = 3 Ind. Cas. 159 = 34 B. 250.**

(84)—*Relief on facts and documents not stated in pleadings.*—Although the Judicial Committee is disposed to give a liberal construction to pleadings in Indian Courts, so as to allow every question to be raised and discussed in the suit, yet a plaintiff cannot be entitled to relief upon facts and documents neither stated nor referred to in the pleadings. **MOHAMMUD ZAHOR ALI KHAN v. MUSSUMUT THAKOORANEE RUTTA KOER, 11 M.I.A. 468.**

(85)—*Ground of pre-emption in plaint—Relief to be based on plaint.*—A plaint alleging a right of pre-emption on the ground of the plaintiff being a co-parcener of the vendor, could not be amended so as to allege the right on the ground of vicinage. Even though the relief claimed and granted by the Court is the same, it should be seen that the relief is granted only on the grounds set up in the plaint. **KUNJABEHARI LAL v. GIRIDHARI LAL, 1 B.L.R. S.N. 12-B. = 10 W.R. 189.**

(86)—*Suit for pre-emption—Amendment of plaint as to price at last stage—Court may refuse.*—In a suit for pre-emption, in which the plaintiff claimed the right of payment of a sum less than that mentioned in the sale-deed, on the ground that that was the actual price, and did not, in his plaint, say that he was ready and willing to pay whatever price the Court might find to be the actual price, *held* that the Court was not bound, as a matter of law, to allow him to supply this defect by amending the plaint at the very last stage, when the suit was about to be disposed of, and to bring in the very much larger price which he should have offered to pay when he brought the suit. **DURGA PRASAD v. NAWAZISH ALI, 1 A. 591. [D., 3 A. 753.]**

Plaint—continued.**—3.—Amendment of Plaint**—continued.

(87)—*Civ. Pro. Code, s. 53—Suit for pre-emption—Error in plaint in extent of property claimed—Power of Court as to amendment.*—Where, from the tenor of the plaint in a suit for pre-emption, the Court is satisfied that the intention of the plaintiff was to institute a claim in respect of the entire property sold, but that from inadvertence or by mistake he had omitted to claim in his plaint a small fraction of the property, it is competent to the Court to return the plaint for the necessary amendment being made, even though, at the time of such return, the period of limitation for the suit may have expired. Nor could the defendant, under such circumstances, take objection to the suit on the ground that the plaintiff was seeking pre-emption only in respect of a portion of the property sold, since the case was not one in which the pre-emptor was seeking to break up the bargain or to pick and choose out of the property sold. **BARKAT-UN-NISSA v. MUHAMMAD ASAD ALI, 17 A. 288 = A.W.N. 1895, 80.**

(88)—*Pre-emption, Suit for—Limitation—Dispute as to share sold—Share claimed less than what vendor had sold—Amendment of plaint beyond limitation—Relates back to date of institution of suit.*—The Courts are allowed by the Code of Civil Procedure ample power to amend, and the High Court is slow to interfere with their exercise of discretion, but no Court has power to allow a new cause of action to be introduced into a plaint after that cause of action has become barred by limitation. Where the amendment amounts to a mere correction of the description of the property, the amendment is within the power of the Court to make, and when so made, limitation must be reckoned as from the date of presentation of the plaint. **MUHAMMAD SADIQ v. ABDUL MAJID, 8 A. L. J. 636.**

(89)—*Civ. Pro. Code, 1882, s. 53—Pre-emption suit.*—In a suit for pre-emption, where the plaintiff based his claim broadly on the legal status he enjoyed under the *wajib-ul-arz* with reference to pre-emption, he applied at the first hearing for permission to amend his plaint by explaining that the condition of the *wajib-ul-arz* was also the condition of the Mahomedan Law of pre-emption. *Held* that the proposed amendment would not have the effect of converting the suit into one of a different character, that the suit would continue to be a suit for pre-emption, and the right of action would continue to be based, as it originally was, on the *wajib-ul-arz*, the *wajib-ul-arz* being itself a declaration that the Mahomedan Law applied to a case of pre-emption of the kind in suit, and that therefore the amendment should be allowed. **HABIBULLAH v. DHUMAN KHAN, A.W.N. 1887, 28.**

(90)—*Amendment—Plaint—Suit for partition—Amendment into suit partly for partition and partly for recovery of own or exclusive property—Jurisdiction to grant—Powers of amendment*

Plaint—continued.**—3.—Amendment of Plaint—continued.**

under Civ. Pro. Code, 1908—Extent.—Where, by allowing a plaint to be amended, a suit which was originally one for partition was altered into a suit partly for partition and partly for the recovery of certain property as plaintiff's own or in the alternative for partition: *Held*, that the Court had jurisdiction to grant the amendment. Under the Civ. Pro. Code, 1908, the Court's power to allow amendments is very comprehensive. JOTHY MAHALINGA IYER, 10 M L T. 188.

(91)—*Mortgage—Partition—Costs.*—Where the mortgagee brought a suit for possession at first, he was permitted at the hearing to amend his plaint so as to make it a suit for partition, on condition of his paying the costs of the defendants. KRISHNAJI LAKSHMAN RAJVADE v. SITARAM MURARRAN JAKHI, 5 B. 496. [R., 21 B. 570.]

(92)—*Amendment of plaint—Mortgage—Redemption—Limitation—Practice—Variance—Costs of repairs and improvements—Accounts—Civ. Pro. Code, 1882, s. 53.*—Plaintiff sued to redeem a house mortgaged in 1841. Defendant 3, a purchaser from assignees of original mortgagee, denied the mortgage and claimed costs of repairs and improvements if the claim for redemption were granted. After evidence had been heard and before judgment the plaintiff applied for amendment of the plaint basing the claim for redemption on a previous mortgage of 1837, in case the alleged mortgage of 1841 were not proved. The mortgage of 1837 was admitted in a suit for possession in 1841, while the present suit was instituted within 60 years from the date of the admission, but the period of limitation had run out on the date the application for amendment of the plaint was made. The Court of first instance allowed the amendment to be made and decreed redemption, but allowed defendant 3 the benefit of the repairs and improvements. The lower appellate Court reversed the original Court's decision on these points. On second appeal—*Held*, (1) that the mortgage of 1837 was still outstanding and that the suit based on that mortgage was not barred by time: (2) that defendant 3 was not entitled to the benefit of the improvements; but that it was within the discretion of the lower appellate Court to consider his claim to the benefit of repairs as distinguished from improvements. PARASHAR v. GANU, 5 Bom. L.R. 643.

(93)—*Suit premature when plaint filed—Plaint returned for amendment—Suit maintainable when plaint represented—Mortgage—Payments by mortgagor towards interest and principal—Mode in which accounts may be made up.*—*Held*, that when a suit is premature on the date the plaint is filed, but is not so on the date when the plaint is represented after amendment, the suit should not be dismissed for being premature when it was filed. *Held*, that in taking the accounts, interest is, as a general rule, allowed on the payments of both

Plaint—continued.**—3.—Amendment of Plaint—continued.**

parties. There are two modes in either of which the accounts may be made up. They may be permitted to run on, from the date of loan to the date of settlement, interest being allowed to the one party on the whole sum lent, and to the other on the sums realized, over and above the interest to which the mortgagee is entitled, from the date of realization: or the amount collected by the mortgagee in possession may be carried first to interest, and after paying that, to the liquidation of the principal, the account being closed at the end of each year, and there being allowed from year to year only reduced interest on the reduced principal. GANDA MAL v. THAKAR HARKISHEN, 4 P. L.R. 1900.

(94)—*Civ. Pro. Code (Act XIV of 1882), s. 53—Amendment of plaint—Accounts, suit for.*—In a suit for accounts the Court returned a plaint on the ground that there were transactions between the parties not disclosed by the plaintiff forming part and parcel of those which formed the subject matter of the suit, *held*, that the order returning the plaint for amendment was wrong. LADHA MAL v. SAYAD GANG BAKHSI, 117 P L.R. 1904.

(95)—*Fraud as originally specified in pleadings, party bound to prove—Amendment of pleadings, when permissible.*—The main charge against the defendants as originally laid down in the plaint was the fraud said to consist in their concealment from the Official Assignee of the payment under a compromise. In the plaint, after its amendment, the fraud was alleged to consist in that the payment of money to Z was itself a fraud upon the Court which the Official Assignee had no power to consent to. With reference to the amendment of the plaint by introducing a new and distinct charge of fraud after all the evidence had been given and the case closed, their Lordships remarked that the allowance of it was contrary to every principle of justice; it was wholly unprecedented and did not exhibit a sound exercise of judicial discretion as it contravened the well known rule that a charge of fraud must be substantially proved as laid, and that, when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. ABDUL HOSSEIN ZENAIL ABADI v. CHARLES AGNEW TURNER, 11 B. 620, P.C. = 14 I.A. 111 = 5 Sar. 25. [R., 1 O. C. 63, 16 C.P.L.R. 133.]

(96)—*Allegations of fraud in plaint—No specific instances—Plaint to be returned for amendment—Practice.*—With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. So, a plaint containing general allegations of fraud against the defendant but mentioning no specific instances, must, on presentation, be either rejected or returned for

Plaint—continued.**—3.—Amendment of Plaint—continued.**

amendment, as it discloses no cause of action. **KRISHNAJI v. WAMNAJI**, 18 B. 144. [R., 19 B. 593, 5 Ind. Cas. 179.]

(97)—*Civ. Pro. Code, s. 53—Plaint in suit for money against executrix of debtor, description of defendant in—Verification, requirements of the Civ. Pro. Code, in respect of.*—The plaintiff in this suit brought by the plaintiff Bank, on a bond executed in its favour, against the executrix of the deceased obligor, had been returned for amendment by the lower Court. The order was set aside by the High Court, on appeal, as there were no sufficient grounds for the return of the plaint. The defendant was stated in the plaint to be the executrix of the deceased obligor and the suit had been brought against her in that capacity. Nor was the plaint bad, merely because the claim was therein set out, not as made on the part of the Bank directly, but only as made by the manager of the Bank. The signature and verification of the plaint as follows:—"For the Mussoorie Bank, Limited, G. H. Webb, Manager" was also held to be sufficient for the purposes of s. 53 of the Code of Civil Procedure. The plaint sufficiently fulfilled the requirements of the Procedure Code and the rule therein that the verification of the plaint should be made by some one acquainted with the facts set out in it. **THE MUSSOORIE BANK, LIMITED v. BARLOW**, 9 A. 188 = A.W. N. 1887, 17.

(98)—*Plaint—Defective averments—Amendment to be allowed—Suit for declaration—Non-avowment of ownership—Dismissal of suit—Illegality.*—Where the plaintiff, in a suit for declaration of right in respect of a tank, stated in the plaint that he had been in enjoyment, that he made repairs and took the fish from the tank, but omitted to make any averment as to his ownership, and the Court in consequence dismissed the suit: *Held*, that the order of dismissal was illegal and that the plaintiff should have been allowed to amend the plaint to make his meaning clear. **MUKTI GOPALUDU v. KRISHNA CHANDRA**, 6 Ind. Cas. 876 = 8 M.L.T. 245.

(99)—*Civ. Pro. Code, s. 53—Plaint in suit for declaration not to be amended as one for possession.*—Where the plaint in a suit was filed, based on a right to sue for a mere declaration of title, but, subsequent to the suit, such right was replaced by a right to sue for possession, by reason of the reversion having become an estate vested in possession, an amendment of the plaint as including the claim for possession ought not to be allowed, as it would substantially alter the original cause of action. **GOVINDA v. PERUMDEVI**, 12 M. 136. [R., 6 C.L.J. 74 = 11 C.W.N. 732.]

(100)—*Suit for declaration—Amendment Practice.*—A Court of appeal must not dismiss a suit, because it is one praying only for a declaratory decree without any consequential relief, where the defendants had not taken that

Plaint—continued.**—3.—Amendment of Plaint—continued.**

objection, but must allow the plaint to be amended. **LIMBA bin KRISHNA v. RAMA bin PIMPLU**, 13 B. 548. [F., 14 M. 46; R., 15 M. 15, U. B. R. (1897—1901, 231, 5 Bom L. R. 329, 12 C. L. J. 74 = 14 C. W. N. 1057; *D., 15 M. 255, 19 A. 429, 26 C. 845.]

(101)—*Civ. Pro. Code, s. 53—Plaint in a suit for injunction, whether could be amended into one for possession—Alteration in the relief prayed for, whether alters character of suit.*—Plaintiffs sued for an injunction restraining the defendant from interfering with their dealings, in respect of certain property of theirs, of which the defendant had taken wrongful possession. On the defendants pleading title to the property, plaintiffs prayed for amendment of their claim by claiming possession and damages. *Held*, that a suit for a declaration cannot be regarded as inconsistent with one for possession (11 M. 295, 15 M. 15, F.) and that an alteration in the relief prayed for, would not alter the character of the suit, so as to prevent an amendment of a plaint in that respect. **HARJI MAL v. POKHAR DAS**, 135 P. R. 1906 = 117 P.L.R. 1908. (20 C. 805, 26 C. 845, F.; 1 P. R. 1900, 61 P. R. 1888, R.)

(102)—*Estoppel—Acceptance of order of Court and action under it on protest—Right of appeal from order, if barred—Civ. Pro. Code (Act V of 1908), O. VI, r. 97—Plaint—Amendment—Prayer for injunction to restrain defendant from executing fraudulent decree—Subsequent amendment of plaint by alleging that plaintiff's claim is preferential to defendant's decree—Amendment, whether changes character of suit—Amendment, order of—Discretion of Court.*—A party, who has adopted an order of the Court and acted under it, cannot, after he has enjoyed a benefit under the order, contend that it is valid for one purpose and invalid for another. But where the party accepts the order under protest, he is not debarred from appealing against it. The plaintiff claimed to have acquired title to the disputed property by purchase at an execution sale, and alleged that the defendant was about to bring it to sale in execution of a fraudulent mortgage decree, and, therefore, he prayed that the defendant might be perpetually restrained from proceeding with execution of his decree. Subsequently the plaintiff asked leave to amend his plaint, and the object of the amendment was to show that, apart from the fraud, the mortgage decree of the defendant was not enforceable against the property, because the transaction under which the plaintiff derived his title gave him in law a preferential title to that of the defendant. *Held*, that the amendment was rightly allowed; that it merely enabled the plaintiff to urge an alternative ground in support of his claim for injunction; that the plaintiff would have been seriously prejudiced if the amendment had not been allowed, for he could not have asserted this ground in another litigation; and that the effect of the amendment was not to alter the fundamental character of a suit and to convert

Plaint—continued.**—3.—Amendment of Plaint**—continued.

it into another of a different and inconsistent character. Amendments must not be allowed to prejudice the substantial rights of the party in favour of whose opponent they are allowed; but observing due caution in that regard, the time and extent of each amendment are in the judicial discretion of the Court. **MANI LAL v. HARENDRA LAL ROY**, 8 Ind. Cas. 79 = 12 C. L. J. 556.

(103)—*Suit by co-sharer for possession—Amending it into a declaratory suit—Legality.*—A suit by a co-sharer for possession of joint holding on the ground of forcible eviction therefrom was allowed to be amended into one of a declaratory nature. **MULA MAL v. BASANT MAL**, 106 P.R. 1893.

(104-105)—*Practice—Plaint—Amendment of—Suit brought against the idol of a temple—Dismissal of suit—Limitation.*—An idol is a juristic person who can hold property. Therefore, when a suit is brought in respect of property held by an idol, it is the idol who is the person bringing the suit or against whom the suit is brought, the idol being the person beneficially interested in the suit. But as in every suit the party bringing it or against whom it is brought must, when he is suffering from an incapacity, be represented by some other person, so when a suit is brought on behalf of or against an idol, there must be on the record a person who represents the idol, such as the manager of the temple in which the idol is installed, every pleading must be signed by a sentient being, and this can be done by the manager, as in the case of a minor. The amendment of the plaint by correcting the description of the plaintiff would not have the effect of introducing a third party on the record, and no question of limitation would arise. **JODHI RAI v. BASDEO PRASAD**, 8 A. L. J. 817, F.B. (19 A. 330, Overruled.)

(106)—*Suit relating to temple property—Plaint in name of idol—Amendment on second appeal—Substitution of manager of temple as plaintiff.*—The Civ. Pro. Code, which requires that there must be a plaintiff to a suit, cannot be taken to contemplate an idol of a temple being made a plaintiff. Difficulties might arise in enforcing the process of the Court if an idol or a God of a temple were accepted as a plaintiff in a suit. So in a suit which related to property alleged to belong to a temple and which had been brought in the name of the idol of the temple, the Court on second appeal allowed an amendment of the plaint to be made by substituting the name of the manager of the temple as plaintiff in the place of that of the idol, on certain conditions as to the payment of the defendant's costs, and stating that the amendment should have effect without prejudice to any rights which may have been acquired by limitation, or as to any question which may arise as to the right to sue of the person to be substituted as plaintiff by way of amendment.

Plaint—continued.**—3.—Amendment of Plaint**—continued.

THAKUR RAGHUNATHJI MAHARAJ v. SHAH LAL CHAND, 19 A. 330 = A.W.N. 1897, 75. [Appr., 23 A. 167.]

(107)—*Plaint, amendment of—Amendment of plaint in suit in which plaintiff, is held not a minor at the time of its institution—Minor, suit on behalf of, procedure in, when discovered that plaintiff was not a minor at the time of its institution.*—In a suit instituted on behalf of a minor by his next friend it was pleaded in the plaintiff's replication that, if the Court was of opinion that the plaintiff was not a minor, the suit ought not to be dismissed, and that the Court "could take his signature on the plaint only." The second and third issues were whether the plaintiff was a minor, and whether, if he were not, the suit should be dismissed. The Court decided these two issues against the plaintiff, and at the time it did so it was asked by the plaintiff for permission to amend the plaint. Held that, as the suit was instituted with the knowledge and by the authority of the plaintiff, the plaint could properly be amended when the Court decided that the plaintiff was a minor. **BHULAI v. SHEO BALAK**, 5 O.C. 355. [R., 7 O.C. 234.]

(108)—*Suit on behalf of minor—Procedure on discovery that plaintiff was not minor at time of instituting suit.*—In a suit on behalf of a person alleged to be, but not in fact a minor, held, on discovery that the plaintiff was of full age at the commencement of the suit, that the plaint could not be amended and that the suit must be dismissed. **SHEORANIA v. BHURAT SINGH**, 20 A. 90 = A.W.N. 1897, 203. (21 C. 866, Diss.) [R., 5 O.C. 355, 7 O.C. 234, 11 O. C. 159; D., 2 L.B.R. 246, 28 A. 416 = 3 A.L.J. 187 = A.W.N. 1906, 73.]

(109)—*Joint family—Suit by manager—All co-parceners, whether necessary parties—Objection as to parties to be taken at early stage—Amendment of plaint by adding parties allowable in second appeal.*—Plaintiff sued alone as manager of a family to recover land from the defendant, who took the objection of non-joinder, stating that the other members of the family should be made parties to the suit, and it was held that in such a case, the defendant is always entitled when he has taken the objection of non-joinder at an early stage, to have all the members of the family placed on the record to ensure him against the possibility of the plaintiff's acting without authority. Under the circumstances the High Court directed that the plaintiff be allowed to amend his claim by making the other members of the family mentioned by the defendant parties to the suit. **HARI GOPAL v. GOKALDAS KUSHABASHET**, 12 B. 158. [Appr., 9 Bom. L.R. 1126; R., 21 B. 154, 28 B. 11 = 5 Bom. L.R. 621.]

(110)—*Hindu family trade—Partnership—One member alone suing—Non-joinder.*—One member of a joint Hindu trading family cannot sue in respect of the partnership without making the other partners parties. If, by adding

Plaint—continued.**—3.—Amendment of Plaintiff—continued.**

the parties, the defendants were deprived of the defence of limitation, the amendment ought not to be allowed. *ALAGAPPA CHETTY v. VELLIAN CHETTI*, 18 M 33=4 M.L.J. 283. [F., 23 M. 190, 29 A. 311=4 A.L.J. 194=A.W. N. 1907, 58, 17 M.L.J. 25, Note.; R., 28 B. 11, 25 A. 378, 57 P.R. 1905=76 P.L.R. 1905, 118 P.L.R. 1906=69 P.R. 1906, 2 N.L.R. 79, 5 M.L.T. 351, 32 M. 284=19 M.L.J. 372; D., 10 P.W.R. 1907=58 P.L.R. 1907=127 P.R. 1906, 103 P.L.R. 1902.]

(111)—*Amendment—Plaint—Negligence, basis of suit—Suit sought to rest on nuisance—Amendment, not allowed.*—Where, in a suit against the Secretary of State for India in Council instituted after notice required by s. 80, Civ. Pro. Code, 1908, the plaintiff proceeded upon negligence, and where the plaintiff was sought to be amended so as to make it proceed upon nuisance, in the form of obstruction on the highway. *Held*, that the amendment had the effect of altering the cause of action and could not be allowed. *MCINERNEY v. THE SECRETARY OF STATE FOR INDIA*, 38 C. 797.

(112)—*Contract with Municipal Overseer for doing Municipal work—Personal liability—Quasi contract—Amendment of plaintiff.*—The plaintiff sued one M, overseer of the Municipal Office, for the recovery of a sum of money due on a contract under which plaintiff had done a quantity of earth work for the Municipality. There was no evidence to show that the defendant had pledged his personal credit. The defendant clearly contracted for the Municipality, and for the performance of work well known by the plaintiff to be a Municipal work. The Municipality ignored the contract. *Held* that the contract in the present case was a quasi contract and that the defendant could not be made personally liable in the present action of contract. *Held*, further, that the plaintiff could not be amended so as to make the defendant liable in tort for a misrepresentation of his authority. *MOHENDRONATH MOOKERJEE*, 9 W. R. 206.

(113)—*Suit for damages for collusion—Plaint originally presented against owners of ship—Whether could be subsequently amended joining ship as defendant.*—In this suit for damages for loss incurred by plaintiffs on account of a collision between their steamship and a steamship of the defendants, the plaintiff was originally filed against the owners of the ship and not against the ship as will. Plaintiffs subsequently put in this application to amend the proceedings by adding the defendants' ship also as an additional defendant in the suit. *Held*, such amendment was permissible according to the practice and procedure of the High Court where it is often usual to make the ship and her owners defendants in cases of damage arising out of collision. There was no room for the contention of the defendants that in a proper case the initial proceedings cannot be so amended as to bring them into the form

Plaint—continued.**—3.—Amendment of Plaintiff—continued.**

which they would have assumed in the first instance had it not been for the supposition that the ship was not amenable to the process of the Court. The word "defendant" used in s. 28 of the Code was held to include a vessel which, for the purpose, should be deemed as invested with a personal and the amendment sought for by way of adding the ship as a defendant along with its owners who had alone been impleaded as defendants on the record at the time the plaintiff was filed, was therefore allowable. *THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LTD. v. MESSRS. SHEPHERD AND HAJI ISMAIL HOSSEIN*, 12 B. 237.

(114)—*Election—Damages.*—Plaintiff opened a shop for the sale of "tari" after the purchase at a Government auction of a license to vend liquors, but before the receipt by him of the license. The sale having been stopped by the Extra Assistant Commissioner, the plaintiffs sued the Government, represented by the Deputy Commissioner for damages for wrongful acts of the Extra Assistant Commissioner who was made second defendant; the Judge left the plaintiff to elect against which of the two he would proceed, and plaintiff elected to proceed against Government and obtained a decree for a part of his claim. *Held*, that the plaintiff ought not to have been put to the option of abandoning his suit against one or other defendant, but the suit should have been tried out, the allegations against the two defendants being distinct but not inconsistent. *VYTHEELINGUM v. THE GOVERNMENT*, 21 W.R. 199.

(115)—*Alternative claim for the full rent—Amendment of plaintiff—Civ. Pro. Code (1882), s. 53 (=O. VI, r. 17, Civ. Pro. Code, 1908).*—A suit by a co-sharer landlord for his proportionate share of the rent cannot be treated as claiming in the alternative either the individual share of the plaintiff or the full rent, nor can the plaintiff be allowed to be amended to convert the suit into one for the recovery of the full rent, as that would contravene the provisions of s. 53, Civ. Pro. Code. *LALA RAM SARAN LAL v. NEM NARAIN SINGH*, 6 C.W.N. 326.

(116)—*Suit for kubooleut relating to rent of specific portion of land—Plaintiff to be permitted to amend or explain plaintiff.*—This suit for a kubooleut at an enhanced rate of rent was dismissed by both the Courts below, on the ground that the suit was not for the enhancement of the plaintiff's share of the rent, but for a kubooleut at an enhanced rate for the rent for a specific portion of land. Taking the plaintiff and the deposition of the plaintiff's agent on his examination together, it was clear that it was not the intention of the agent to ask for a kubooleut for specific lands but that he alluded to the quantity of land as in explanation of his employer's share over the total area in the estate. The High Court was also of opinion that there was nothing to prevent

Plaint—continued.**—3.—Amendment of Plaint**—continued.

the Courts below, if the plaintiff had asked too much, from giving him what he was actually entitled to, under the law, or to have permitted him to amend or explain his plaint if necessary, and that, therefore, the lower Courts were wrong in having wholly dismissed the plaintiff's suit. Where a plaintiff asks for a kubooleut for a term of one year or any such specific term, it is not necessary that he should have mentioned the date of the commencement of such term, for, it is, in such a case, in the discretion of the Court to itself fix the proper term. **POORNA CHUNDER ROY v. MR. W. STALKART**, 10 W.R. 362.

(117)—*Suit for rent on Kabuliat—Decree at old rate on failure to prove Kabuliat—Discretion of Court.*—Where, in a suit on a Kabuliat, no alternative claim for rent at the old rate is made in the plaint, and the Kabuliat is not proved, it is in the discretion of the Court to allow an amendment and an alternative claim to be tried; when the omission to make the claim is inadvertent, it is right the Court should do so. **ROUSHAN BIBEE v. HARRY KRISTO NATH**, 8 C. 926. (13 B.L.R. 243=21 W.R. 208, *Com. on.*)

(118)—*S. 53, Civ. Pro. Code, 1882—Suit for rent not allowed to be amended into one for use and occupation in second appeal.*—A suit for rent ought not, in second appeal, to be allowed to be amended into one for use and occupation, because such amendment would raise issues of an entirely different character from which the trial as a suit for rent has been held and necessitate a new trial of the case by the lower Court on fresh evidence. **SURENDRA NARAIN SINGH v. BHAIL LAL THAKUR**, 22 C. 752. (13 B.L.R. 243, 11 M.L.A. 20, Marsh 70, R.) [F., 27 C. 239; R., 2 P.R. 1905=129 P.L.R. 1904.]

(119)—*Civ. Pro. Code, 1882, s. 53—Suit for enforcing execution of Muchilika—Amendment of plaint by addition of prayer for declaration.*—Where the plaint in a suit by a landlord against his tenant asked only for the relief that the defendant be compelled to accept the patta tendered and to execute a muchilika in like terms, but contained no prayer for a declaratory decree, the suit should not be dismissed, but the plaint should be allowed to be amended by the insertion of a prayer for declaration of the plaintiff's right. **NARASIMHA v. SURYANARAYANA**, 12 M. 481. [F., 2 L.B.R. 4; R., 14 M. 441, 13 M. 361.]

(120)—*Civ. Pro. Code, ss. 31, 53—Amendment of plaint.*—Where the right in contest in a suit vests in the plaintiff and the other raiyats jointly and severally, an amendment striking out the names of other persons joined as co-plaintiffs may be allowed, and the plaint allowed to stand as one framed for the purpose of establishing the plaintiff's right alone. **VENKATACHALA v. KUPPUSAMI**, 11 M. 42. [R., 8 C.W.N. 425, P.C.]

Plaint—continued.**—3.—Amendment of Plaint**—continued.

(121)—*Land declared by Magistrate to be public thoroughfare—Suit against Magistrate as defendant—Amendment of plaint allowing substitution of Secretary of State as defendant.*—The lower Court dismissed the plaintiff's suit brought against a Magistrate, as defendant, in respect of certain plots of land which the defendant had wrongly declared to be part of a public thoroughfare; but, on appeal, the High Court was of opinion that the lower Court might properly have permitted the plaintiff to amend his suit by striking out the name of the Magistrate as defendant, and substituting, in that capacity, the Secretary of State for India in Council, and reversed the lower Court's decree and remanded the suit for retrial on the merits. **NILKANTHAPA MALKAPA v. THE MAGISTRATE IN CHARGE OF SHOLAPORE**, 6 B. 670. [F., 6 B. 672; R., 15 C. 460, F.B., 4 O.C. 133.]

(122)—*Plaint filed as against Magistrate, amendment of, substituting Secretary of State as defendant.*—This suit brought against a Magistrate, as defendant, for cancellation of an order by the latter directing the plaintiff to remove his "ota" as having been built upon a public thoroughfare, was dismissed by the lower Court on the ground that it could not be maintained as against the defendant. The High Court following the decision in 6 B. 670, reversed the decree of the lower Court and remanded the case for re-trial after allowing the plaintiff to amend his suit by striking out the name of the Magistrate, and substituting that of the Secretary of State as defendant. **BALARAM CHATRAKALAL v. THE MAGISTRATE IN CHARGE OF IGATPURI**, 6 B. 672. [R., 15 C. 460, 4 O.C. 133.]

(123)—*Civ. Pro. Code (XIV of 1882), s. 53—Suit against defendants who were dead before its institution—Amendment of plaint by substitution of the representatives, when allowable—Limitation.*—The tenants impleaded as defendants in these suits for rent had died before the suits were filed. On appeal, the plaintiff sought to be permitted to amend his plaint by substituting, for the names of the dead persons recorded as defendants, the names of their sons, notwithstanding that fresh suits as against the sons would then be barred by time. The leave to amend not having been asked for in the Court of first instance before decree, the Appellate Court refused to allow the amendment, since the representatives sought to be substituted would be precluded from pleading the point of limitation otherwise available to them. **MALLIKARJUNA v. PULLAYYA**, 16 M. 319. [R., 18 M. 33, 103 P.L.R. 1902, 1 N.L.R. 117, 2 N.L.R. 79, 31 M. 86=17 M.L.J. 551, 3 M.L.T. 12.]

(124)—*Jurisdiction—Suit to declare land liable to sale in execution—Withdrawal of part of claim—Civ. Pro. Code, s. 373.*—Where a suit has been brought in the District Munsif's Court, for a declaration that certain land is

Plaint—continued.**—3.—Amendment of Plaint**—continued.

liable to be sold in execution of a decree, the amount of which exceeds Rs. 2,500, the plaintiff cannot be properly amended under s. 373, Civ. Pro. Code, so as to bring it within the pecuniary limits of Munsiff's jurisdiction, as the claim is not for a sum of money, but for a declaration of the liability of the whole of the land to sale. **ANNAJI v. RAMAKURUP**, 10 M. 152.

(125)—*Amendment of plaintiff—Appeal—Civ. Pro. Code, 1877, ss. 53, 588 (6).*—It is only orders "returning plaintiff for amendment" that are made appealable by s. 588 (6) of the Civ. Pro. Code. An order amending a plaintiff then and there without returning it, is therefore not appealable. **RAJINDRA KISHORE SINGH v. RADHA PRASAD SINGH**, 3 A. 854.

(126)—*Frame of suit improper—Remand—Amendment of plaintiff.*—In this case, the suit as originally brought against nine persons was held by the Privy Council to have been wholly misconceived; but they nevertheless thought that there was in all probability a good cause of action against one of those defendants upon a bond and remanded the case to the High Court with directions to allow the plaintiff to amend his plaintiff so as to make it a plaintiff against that defendant alone for the recovery of money due on a bond. **MAHOMED LAHOOR ALI KHAN v. THAKOORANEE RUTTA KOORER**, 9 W.R. P.C. 9=11 M.I.A. 468. [F., 2 C. 1=25 W.R. 425, 3 C. 785=2 C.L.R. 385, 5 B. 609, 8 B. 313, F.B., 9 B. 373, 14 B. 31, 22 C. 692, 2 L.B.R. 4; R., 18 W.R. 424=9 B.L.R. 441, 11 M. 482; D., 18 B. 144, 18 M. 33=4 M.L.J. 283, 1 C.L.J. 73.]

(127)—*Amendment of plaintiff—Declaration, suit for—Securing of possession by defendant after suit—Adding of prayer for possession—Power of Appellate Court to order amendment.*—Courts have power to allow an amendment of plaintiff with reference to events that transpire after the institution of the suit. If, pending a suit for declaration, the defendant takes possession, the plaintiff may be allowed to amend his plaintiff by asking for possession, and he need not be put to the necessity of filing a separate suit for ejectment. Such amendment may be allowed by the Appellate Court. **SUBBA NAICKEN v. RAMI NAICKEN**, 16 Ind. Cas. 734.

(128)—*Amendment of plaintiff—When allowing amendment, opportunity to be given to defendant to amend written statement and to adduce new evidence—Opportunity not given to defendant as case was pending for long time—Reason deprecated.*—When an application to amend a plaintiff is made, the only matter for consideration is, whether the amendment can be allowed without injustice to the defendant, an injustice which cannot be remedied by an appropriate order for costs. Where the plaintiff is allowed to amend his plaintiff by including certain property in his claim, which has been omitted by mistake, the defendant should be allowed an opportunity to amend his written

Plaint—continued.**—3.—Amendment of Plaintiff**—continued.

statement and produce evidence to rebut the new claim of the plaintiff. Where the defendant was not given this opportunity because the case had been pending for a long time; *Held*, that it was undesirable that the interest of justice should be subordinated to the fact that the suit had been pending for some time and had become "explanatory." **MANJI DUTT MISSER v. KALANAND SINGH**, 16 Ind. Cas. 785.

This circular directs that amendments allowed in plaintiffs are to be made at once. 25 W. R.H.C. Rules Cir. Or. No. 7, dated 1st May, 1876 p. 10.

See ACT IV OF 1869, s. 11, 3 B.L.R. App. 9.

Of plaintiff—Where in a declaratory suit it is found that the defendant has come into possession subsequent to the suit, the plaintiff can amend his plaintiff so as to make it appropriate to a suit for possession—See BEN. ACT VIII OF 1876, 36 C. 726=10 C.L.J. 189=1 Ind. Cas. 549.

In a possessory suit—See BOM. ACT II OF 1906, s. 8, 1 Bom. L.R. 67.

Amendment of—By adding a new cause of action—Limitation, date of institution for purposes of—See C.P. ACT XVIII OF 1881, s. 65, 1 N.L.R. 117.

See U.P. ACT XXII OF 1886, ss. 62, 124-B, 4 O.C. 314.

Description in—Of property claimed—When misdescription not fatal—See ALLUVION—FORMATION OF CHURS OR ISLANDS, 3 C.L.J. 560, P.C.=1 M.L.T. 175.

See APPEAL—ORDERS, 6 M.L.J. 2, A.W.N. 1889, 83, 2 O.C. 5.

Amendment of the heading of appeal whether allowed by appellate Court—See APPEAL—MISCELLANEOUS, 8 M.L.T. 199=7 Ind. Cas. 797.

Partnership—Money decree against individual partner—Partnership property, if liable—Suit by other partners on attachment of partnership property—Amendment of plaintiff in appeal—See ATTACHMENT—SUBJECTS OF ATTACHMENT, 4 B. 222.

See AWARD, A.W.N. 1881, 29.

Of plaintiff—Inconsistent pleadings—See BANKER AND CUSTOMER, 8 Ind. Cas. 98.

Order holding portion of claim not sustainable and directing amendment—Appeal—Revision—See CIV. PRO. CODE, 1908, ss. 2 (2), 115, 216 P.L.R. 1911.

See CIV. PRO. CODE, 1908, ss. 79, 80, O. XXVII, rr. 1, 6, 4 O.C. 133.

Notice given to public officer before suit—Omission to state same in the plaintiff—See CIV. PRO. CODE, 1908, s. 80, 8 C.W.N. 913.

Plaint—continued.**—3.—Amendment of Plaint**—continued.

See CIV. PRO. CODE, 1908, s. 80, 30 C. 36=7 C.W.N. 249.

Amendment of—Case in which amendment was disallowed in second appeal—See CIV. PRO. CODE, 1908, s. 80, 9 O.C. 275.

In a suit brought under s. 539 of the Civ. Pro. Code—See CIV. PRO. CODE, 1908, ss. 92 and 93, 8 Bom. L.R. 751=30 B. 603, 9 Bom. L.R. 901.

Remand by appellate Court for amendment of plaint—See CIV. PRO. CODE, 1908, s. 99, A.W.N. 1881, 121.

Amendment of—Finality of appellate order confirming order of—Revision—Appeal—See CIV. PRO. CODE, 1908, ss. 106, 104, O. XLIII, r. 1, O. VI, rr. 17 and 18, O. VII, r. 11, 15 P.W.R. 1908.

Amendment of—Application too late—Discretion of Court—See CIV. PRO. CODE, 1908, O. I, rr. 8 (2), 10 (2), (3), (5), 11, A.W.N. (1905), 35.

See CIV. PRO. CODE, 1908, O. I, r. 10 (1), 7 M.L.T. 185=33 M. 115=5 Ind. Cas. 931.

See CIV. PRO. CODE, 1908, O. I, rr. 8 (2), 10 (2), (3), (5), 11 A.W.N. 1881, 140.

Suit by wrong person as plaintiff—Amendment of—See CIV. PRO. CODE, 1908, O. I, r. 10 (1), O. VI, r. 15 (2), (3), 10 C.W.N. 662=33 C. 657.

Amendment of—See CIV. PRO. CODE, 1908, O. II, r. 3, 3 S.L.R. 108=4 Ind. Cas. 600.

See CIV. PRO. CODE, 1908, O. III, r. 4, O. XII, r. 21, 5 C.W.N. 816.

Of plaint—Powers of Court—See CIV. PRO. CODE, 1908, O. VI, r. 17, 10 M.L.T. 116.

Amendment of plaint—See CIV. PRO. CODE, 1908, O. VII, rr. 1, 2, 4, 5, 6, 10 Bom. L.R. 346.

See CIV. PRO. CODE, 1908, O. XIV, rr. 1, 2 and 5, A.W.N. 1887, 247.

See CIV. PRO. CODE, 1908, O. XLI, rr. 23, 25, s. 107 (2), O. XXII, r. 11, 17 M. 187.

See CIV. PRO. CODE, 1908, O. XLIII, r. 1, O. XLI, r. 23, 59 P.R. 1896.

Company—Description of contributory—Balance under—Suit of contributories—Evidence—Amendment of plaint—See COMPANY—GENERAL, 2 E. 116.

See CONTRACT—WAGERING CONTRACTS, 9 B. 358.

Of plaint—Addition or substitution of plaintiffs—See CONTRACT—MISCELLANEOUS, 28 P.L.R. 1905=49 P.R. 1905.

Amendment of—Addition or substitution of plaintiffs—See CONTRACT—MISCELLANEOUS, 28 P.L.R. 1905=49 P.R. 1905.

Plaint—continued.**—3.—Amendment of Plaint**—continued.

Suit for recovery of debt—Amendment of plaint into suit for partnership accounts—Not permissible—See CONTRACT ACT, ss. 182, 239, 240, 163 P.L.R. 1911.

S. 53, Civ. Pro. Code, 1882—Amendment of plaint in second appeal—See CO-SHARERS—SUIT BY CO-SHARERS, 2 Ind. Cas. 77.

Of plaint—Declaratory suit—Consequential relief—See COURT FEES ACT, 1870, sch. I, art. 17, 47 P.L.R. 1911=1 P.R. 1911=22 P.W.R. 1911=9 Ind. Cas. 673.

Of plaint—Conversion of suit for possession into suit for declaration that alienation was without necessity—See CUSTOMS—PUNJAB—ALIENATION, 151 P.L.R. 1910=8 Ind. Cas. 558.

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 26 C. 845=4 C.W.N. 162.

Civ. Pro. Code, 1882, s. 53—Suit for enforcing execution of muchilika—Amendment of plaint by addition of prayer for declaration—See DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS, 12 M. 481.

Declaration of mortgagee's rights in land sold in execution of decree of third party, suit for—Amendment of plaint—Specific Relief Act, 1877, s. 42—See DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 6 O.C. 324.

Suit for mere dignity—*Stanom*—Amendment of plaint—See DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 2 M.W.N. 353.

See EASEMENT, 7 M.L.T. 222.

See EJECTMENT, SUIT FOR, 10 B. 451.

Plaintiff suing on a promissory note in favour of himself and others added as defendants—Plea that he alone not entitled to amount claimed—Plaintiff allowed to amend plaint—See EXECUTION OF DECREE—MISCELLANEOUS, 11 O.C. 225.

Extent to which plaint can be amended—See GUARDIAN—GENERAL, 86 P.W.R. 1910=7 Ind. Cas. 505=213 P.L.R. 1910.

Hindu joint family—Mortgage of family property by father—Suit by mortgagee—Decree against father—Interest and costs—Liability of son—Issue on one aspect of case—Subsequent amendment of plaint, if can be allowed—See HINDU LAW—ALIENATION, 12 B. 431.

Amendment of—Not asked for in the first Court but asked for in the High Court ought not to be allowed—See HINDU LAW—IMPARTIBLE ESTATES, 36 C. 481=13 C.W.N. 838=2 Ind. Cas. 290.

See HINDU LAW—PARTITION, 18 B. 611.

Of plaint—Powers of Court under the new Code—See INDEMNITY, (1912) M.W.N. 37.

S. 53, Civ. Pro. Code, 1882—Case inconsistent with pleadings not allowable—See INJUNCTION—SPECIAL CASES, 5 N.L.R. 67=2 Ind. Cas. 241.

Plaint—continued.—3.—**Amendment of Plaint**—continued.

See ISSUES — ADDITIONAL ISSUES, 5 C. 64 = 4 C.L.R. 353.

See JOINDER OF CAUSES OF ACTION, 6 B. 266.

See JURISDICTION—CAUSES OF JURISDICTION, 17 B. 466.

See JURISDICTION OF REVENUE COURTS, 81 P.R. 1904.

See LIMITATION ACT, 1908, s. 3, 2 A. 832, 6 W. R. 39.

See LIMITATION ACT, 1908, s. 5, 161 P.R. 1888.

Failure to mention receipt as ground of exemption from law of limitation—Plaint whether allowed to be amended in revision—See LIMITATION ACT, 1908, s. 19, 8 M.L.T. 199 = 7 Ind. Cas. 797.

Indian Companies Act, VI of 1882, s. 744—Plaint put in by official liquidator—Amendment of plaint as regards description of plaintiff—Expiry of limitation prior to amendment—See LIMITATION ACT, 1908, s. 22, 18 A. 198, F.B. = A.W.N. 1896, 28.

Of plaint—Test—Discretion—See LIMITATION ACT, 1908, arts. 65, 115, 120, 12 C.L.J. 423 = 8 Ind. Cas. 788.

Amendment of—In second appeal—Conversion of suit of one character into one of a different and inconsistent character—When amendment may not be allowed—See LIMITATION ACT, 1908, arts. 120, 144, 1 C.L.J. 73.

Suit in the name of an alleged minor by next friend—Minority disproved—Amendment of plaint—Suit by next friend when plaintiff not a minor an irregularity—See MINOR—SUITS BY AND AGAINST MINORS, 7 O.C. 234.

See MISJOINDER—OF PARTIES, 8 M. 361.

Of plaint—*De facto* manager “instead of executor”—Whether character of suit is changed—See MOHUNT, 7 Ind. Cas. 161.

Of plaint in second appeal—See MORTGAGE—REDEMPTION, 7 A.L.J. 821 = 7 Ind. Cas. 115 = 32 A. 651.

See MORTGAGE—MISCELLANEOUS, 134 P.L.R. 1901.

Amendment of, in appeal—Practice—See MULTIFARIOUSNESS, 5 M.L.T. 117 = 19 M.L.J. 102.

See NEGOTIABLE INSTRUMENTS—PROMISSORY NOTES, 9 B.L.R. 441 = 18 W.R. 424.

Of plaint according to decision of appellate Court—Appeal from order—Estoppel—See PARTITION—SUITS FOR PARTITION, 10 Ind. Cas. 463.

Setting up case inconsistent with—See PLEADINGS, 8 O.C. 116.

Plaint—continued.—3.—**Amendment of Plaint**—concluded.

In suit for declaration, amendment of, into one for possession—Suit of inconsistent character—See PLEADINGS, 2 N.L.R. 79.

See PLEADINGS, 55 P.R. 1868.

Application for amendment of plaint—Revival of claim abandoned in excess of jurisdiction—See PRACTICE AND PROCEDURE, 1 C.W.N. 32.

Amendment of, after hearing arguments in appeal—Suit brought on one ground—Decree on another ground—See PRACTICE AND PROCEDURE, 11 Bom. L.R. 237 = 34 B. 244.

Of plaint, whether a question of procedure—Change in law of procedure—Effect—See PRACTICE AND PROCEDURE, 13 O. C. 151 = 6 Ind. Cas. 1015.

See PRE-EMPTION—RIGHT TO PRE-EMPT, 7 A. 860 = A.W.N. 1885, 247.

Pre-emptor not suing for entire property, he is entitled to pre-empt—Defendant pointing this out in his plea—Plaintiff persisting in his partial claim—Amendment of plaint—See PRE-EMPTION—RIGHT TO PRE-EMPT, 10 P.R. 1909 = 24 P.L.R. 1909 = 1 Ind. Cas. 397.

See REGISTRATION ACT, 1908, s. 77, 9 M.L.J. 107.

See SALE—SALE FOR ARREARS OF REVENUE AND CESS—MISCELLANEOUS, 5 B. 73.

Omission to seek further relief when such relief is possible—Duty of Court—Amendment of—See SPECIFIC RELIEF ACT, 1877, s. 42, 128 P.R. 1907.

Plaint originally correctly framed—Subsequent amendment owing to unfounded objection defective—Suit dismissed—Restoration by appellate Court—See SPECIFIC RELIEF ACT, 1877, s. 42, 8 C.L.J. 485.

Amendment of—Prayer for injunction—Declaratory suit—Amendment prayed for too late—See SPECIFIC RELIEF ACT, 1877, s. 42, 29 B. 19.

See SPECIFIC RELIEF ACT, 1877, s. 42, 26 A. 215 = A.W.N. 1903, 236, A.W.N. 1900, 172.

Of plaint, under what circumstances, may be allowed—See TRANSFER OF CIVIL CASES, 28 M. 500.

Suit for rent—Damages for breach of agreement to take on lease—Inconsistent claim—Amendment whether allowable—See TRANSFER OF PROPERTY ACT, 1882, s. 107, 11 Ind. Cas. 849.

Suit for rent only—Amendment—Use and occupation—See TRANSFER OF PROPERTY ACT, 1882, s. 107, 11 Ind. Cas. 863.

See VARIANCE BETWEEN PLEADING AND PROOF, 9 B.H.C. 1.

Plaint—continued.**—4.—Construction of Plaint.**

(1)—*Pleadings in Indian Courts, construction of.*—Pleadings in Indian Courts must not be construed with the same strictness as those in English Courts. "Allowance must be made for a very inaccurate mode of setting forth the claims of persons, and the answers or defences to them." A defendant should not be held to have admitted every allegation in the plaint which he has failed to traverse. **NATHA SINGH v. JODHA SINGH, 6 A. 406 = A.W.N. 1884, 140. (21 W.R. 60, R.)**

(2)—*Construction of Indian pleadings.—Issues—Act XVII of 1873—Nawab Nazim of Moorshedabad.*—Pleadings in Indian Courts should not be construed with the same strictness as they are in the English Courts. [R., 6 A. 406 = 4 A.W.N. 140.] Parties are not bound by an opinion of the Court on a matter not in issue, in the same manner as if the Judge had decided an issue formally and properly raised before him. Act XVII of 1873 was not intended to deprive the Nawab Nazim of Moorshedabad of any right of appeal to the High Court which he had before it was passed. **HIS HIGHNESS THE NAWAB NAZIM OF BENGAL v. AMRAO BEGAM, 21 W.R. 59.**

See **RELIEF, 2 B.H.C. 176.**

—5.—Form and Contents of Plaint.

(1)—*Plaint showing good cause of action—Ground for dismissal of suit.*—If a plaint discloses a cause of action, a Judge on appeal ought not to dismiss the suit, on the ground merely of defect in the allegations in the plaint. **KASEENAUTH MOOR v. REEJOON-ISSA, Marsh. 198 = 1 Hay 467.**

(2)—*Plaint not showing when cause of action arose—Limitation.*—The fact of A's plaint not showing when the cause of action arose is ground for rejecting the plaint, but no ground for finding on the trial that the suit is barred upon an issue raised as to limitation. **KALLYNAUTH SHAW v. RAJEEBLOCHUN MOZOOMDAR, 2 Ind. Jur. N. S. 343.**

(3)—*Plaint—Pleading—Cause of action—Limitation.*—A plaintiff must show on the face of his plaint that his cause of action accrued within the period of limitation; and if his case be based on an assignment, he must mention the fact of assignment also in the plaint. **R. P. BROOKE v. T. M. GIBBON, 21 W.R. 47.**

(4)—*S. 50, para. (6), Civ. Pro. Code, 1882 (= O. VII, r. 6, new Code)—Exemption from limitation law.*—A plaintiff cannot take advantage of any ground of exemption from limitation which he has not pleaded in his plaint. **JOGESHWAR ROY v. RAJ NARAIN MITTER, 31 C. 195 = 8 C.W.N. 168.**

(5)—*Allegations of fraud—General allegations—Civ. Pro. Code, ss. 50, 53, 56—Plaint not setting forth good cause of action—Dismissal of suit—Rejection or amendment of plaint.*—

C. VII—84

Plaint—continued.**—5.—Form and Contents of Plaint—contd.**

When fraud is charged against the defendant, it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. With regard to fraud, general allegations however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. [F., 18 B. 144, 19 B. 593, 36 C. 134 = 13 C.W.N. 87; R., 91 P.R. 1893, 8 C.L.J. 135, 1 O.C. 262, 5 C.W.N. 91, 3 L.B.R. 100, F.B., 13 C. W.N. 167, 2 N.L.R. 49.] In disposing of a case upon the defects of the plaint as not setting forth a good cause of action, the Court ought not to dismiss the suit, but it ought, in the terms of s. 53, to reject the plaint, if it did not allow an amendment as authorised by that section. That, according to s. 56 of the Code, would enable the plaintiff to present a fresh plaint in respect of the same cause of action, if he found himself in a position at any future time, to make averments which would give relevancy to his action. **GUNGA NARAIN GUPTA v. TILUCKRAM CHOWDHRY, 15 C. 533 = 15 I A. 119, P.C. [F., 2 L.B.R. 4.]**

(6)—*Paper referred to in plaint.*—A paper referred to in a plaint is not a part of the plaint. **TOULTON v. GWYTHYR, Bourke O. C. 273.**

(7)—*Schedule to plaint—Statement of cause of action.*—The schedule appended to a plaint cannot disclose a cause of action not revealed in the plaint. **MUZHUR HOSSAIN v. DINO-BUNDO SEN, Bourke O. C. 8 = Cor. 94. LUCKEY MONEY DOSSEE v. KHETTER COOMARY DOSSEE, 2 Ind. Jur. N.S. 117.**

(8)—*Act VIII of 1859, s. 26—Error in plaint in date of cause of action—Plaint to be allowed to be amended—Procedure.*—In this case, the suit had been dismissed after the plaint had been admitted and registered and the issues had been fixed, on the sole ground that the plaintiff failed in his plaint to state the date of dispossession of the land in suit. The High Court set aside the proceedings and remanded the case to the first Court for trial on the merits. If the lower Court meant to proceed on the ground that the plaintiff had stated a wrong cause of action, not stating the date of accrual of what they consider as the right cause of action, namely, the dispossession from the land, still, the suit ought not to have been dismissed summarily without trial. The proper course, in cases where there is incompleteness or error in the plaint capable of remedy, is to allow the plaint to be amended. But it is quite irregular, on such ground, to dismiss a suit after the parties have been arrayed before the Court and the trial proceeded with. **RAJAH SHEORAJ SINGH v. NUR KHAN, 7 N. W.P. 354.**

(9)—*Procedure in case of irregularity in form of plaint—Civ. Pro. Code, 1859, s. 26, cl. 5—Amendment of plaint.*—If a plaint be drawn not in accordance with the provisions of cl. 5

Plaint—continued.**—5.—Form and Contents of Plaint—contd.**

s. 26, Act VIII of 1859, the plaintiff ought to be allowed to amend the plaint without the suit being at once dismissed. **BISSUNDEN NARAIN SHAHEE v. GUNGERKISEN SHAHEE**, 2 **Hay** 351.

(10)—*Contents of plaint—Civ. Pro. Code, 1859, ss. 26, 27.*—Under s. 26, Act VIII of 1859, the plaint is intended to be a statement of facts, and not merely a prayer for relief. The words "cause of action" in that section, as distinguished from the "relief sought for" and the "subject of the claim" mean the grounds entitling the plaintiff to the remedy he seeks. **HURCHURN DOSS v. HAZAREEMULL**, 1 **Ind. Jar.** O.S. 12.

(11)—*Defective plaint—Suit not liable to dismissal—Trial of real issues on merits.*—The words of the plaint in this case, taken strictly, charged the defendants with having put the plaintiff's title in jeopardy merely by reason of having procured a decree in the Collector's Court, and the lower appellate Court found that the decree of the Collector in no way damaged the plaintiffs' rights. Under the circumstances of the case it was held that the Judge ought not to have dismissed the suit without entering upon the merits of the real issue between the parties, namely, whether or not the plaintiffs had the title set up by them, which issue was tried in the first Court upon the evidence adduced by both parties. Also, as appeared on the face of the judgment of the lower appellate Court, even if the decree of the Collector did not do anything to affect the plaintiffs' title, still the conduct of the defendants in the course of the suit put an obstacle in the way of the plaintiffs who were consequently fully justified in bringing the present suit. **GOLAM ALI CHOWDHRY v. FUTTICK CHUNDER BUNDOPADHYA**, 10 **W.R.** 460. [*D*, 12 **W.R.** 24.]

(12)—*Pleadings—Plaint intentionally obscure.*—If a plaint is intentionally indistinct and obscure, the Court is justified in refusing to give the plaintiff a decree upon it. **MAHOMED HOSSEIN v. PATUN**, 20 **W.R.** 147.

(13)—*Plaint, return of—Act X of 1859, s. 42—Technical defects—Amendment.*—A suit under Act X of 1859 should not be dismissed after the plaint has been admitted and the parties have appeared, on such a technical ground as that the plaint does not specify the quantity of land in the defendant's possession, for the plaint may be returned under s. 42 or allowed to be amended. **SYED REZA ALI v. PURNAN AND CHUCKERBUTTY**, 6 **B.L.R. App.** 84 = 14 **W.R.** 474. [*R.*, 16 **W.R.** 810, *F.B.*]

(14)—*Plaint—Cause of action.*—When a plaint discloses different causes of action against different parties, it is bad in law, and the suit is not maintainable. **RANI SARAT SUNDARI DEBI v. SURJA KANT ACHARJI CHOWDHRY**, 2 **B.L.R. App.** 53 C = 11 **W.R.** 397.

Plaint—continued.**—5.—Form and Contents of Plaint—contd.**

(15)—*No cause of action disclosed in plaint—Plaintiff not entitled to decree in the suit.*—Objection was taken on the score of misjoinder or rather on the ground that the plaint disclosed no cause of action so far as regards one of the plaintiffs. The High Court was of opinion that it ought to be allowed to prevail, that a decree could not, under the circumstances, be passed in favour of that plaintiff and that the suit therefore was, on that ground, liable to dismissal. **SREEKANT ROY CHOWDHRY v. KITABOODDEEN SIRDAR**, 10 **W.R.** 49.

(16)—*Plaint—Erasure—Dismissal.*—A suit should not be dismissed solely on the ground of there being an erasure in the plaint. **BABOO HURRYHUR MOOKERJEE v. THE GOVERNMENT**, 1 **W.R.** 87.

(17)—*Ambiguous plaint—Claim under several rights.*—A plaint that is ambiguous is bad in form. Where a party claims under two several rights, he should state the fact distinctly that the adversary may have due notice, and the Court be enabled to raise the proper issue. **LALLA PURIAG DUTT v. SHAIKH BUNDEH HOSSEIN**, 15 **W.R.** 225.

(18)—*Suit—Plaint not sufficiently distinct—Dismissal of suit in appeal.*—A suit should not be dismissed at the stage of the proceedings in regular appeal for want of sufficient distinctness in the plaint, but such defect may be cured by examining the plaintiff or his pleader on that point. **JUGMOHUN TEWAREE v. BULDEO NAICK**, 3 **Agra** 162.

(19)—*Mortgage of very early date—Mortgage-deed not forthcoming—Mis-statement of date of mortgage in suit for redemption—Effect of.*—Where a mortgage was effected many years ago and the mortgage-deed was not forthcoming, and the parties to it were dead, a suit for redemption should not be dismissed on the ground that the plaintiff in his plaint had mis-stated the date of the mortgage-deed. **LALLA DAIBEE PERSHAD v. BEHAREE LALL**, 3 **Agra** 33.

(20)—*Construction of plaint.*—A plaint should not to be construed literally, but according to the meaning of the plaintiff. **MRS. SOPHIA INGLIS v. RAM SINGH RAJAH**, **W.R. F.B.** 159.

(21)—*Malicious prosecution—Pleadings—Malice—Reasonable cause—Rejection of plaint—Amendment—Practice—Cause of action—Reference to facts not in plaint—Power of Court—Damages Measure of—Amount to be fixed in plaint.*—Plaintiff brought a suit for malicious prosecution against the first defendant who had prosecuted him unsuccessfully, and against the second defendant, the Subordinate Judge at Broach, who had granted sanction to prosecute the plaintiff. The plaintiff did not himself aver, anywhere in the plaint, that the charge was made against him by the first defendant maliciously and without reasonable or probable

Plaint—continued.**—5.—Form and Contents of Plaint—contd.**

cause, or that the sanction for the prosecution was given by the second defendant without reasonable or probable cause. *Held*, that it was proper to reject the plaint. No amendment of a plaint can be allowed when there has been long delay and when there are no sufficient grounds for it. In order to determine merely whether or not the plaintiff made out such a *prima facie* cause of action as rendered his plaint admissible on the file, the Judge ought not to refer to documents and facts neither mentioned in, nor annexed to, the plaint, nor ascertained by interrogation of the plaintiff by the Judge. In every suit for damages for malicious prosecution, the plaintiff should name the amount of damages which he ought to recover as compensation for the injury of which he complained. **GIRDHARLAL DAYALDAS v. JAGANNATH GIRDHARBHAI**, 10 B.H.C. 182.

(22)—*Suit for damages—Pleadings—Slander—Offensive language.*—In this country, plaints must state the relief sought for, the subject of the claim, the cause of action and when it accrued. In suits for damages for injury done, the nature of the injury ought to be set out. But the strict rules of English law do not apply to plaints in this country. Where a pleader was told by the defendant that his father had taken a bribe when he was acting as a village punchayat, and the pleader thereupon resented the remark and warned the defendant that, if he repeated the insult he would be obliged to take legal steps against him, and the defendant thereupon used grossly offensive language against the plaintiff, *held*, that the plaintiff was entitled to damages. **MOHESH CHUNDER MOOKERJEE v. RAMDHUN PAL**, 13 W.R. 248.

(23)—*Pleadings—Suit for contribution.*—In a suit for contribution, the plaint must distinctly set forth the amounts due by each of the parties sued. If the plaint is defective in respect of these particulars, it must be rejected. **BHOLANATH CHATTERJEE v. INDUR CHAND DOORGAR**, 14 W.R. 373.

(24)—*Partnership suit—Frame of suit—Sch. IV, form 113.*—The plaint in a partnership suit must be framed on the lines of form 113 of the Civ. Pro. Code and the accounts taken as prayed therein. **RAM CHUNDER SHAHA v. MANICK CHUNDER BANIKYA**, 7 C. 428=9 C. L.R. 157. [R., 3 A.W.N. 220.]

(25)—*Suit for amount found due on taking unsettled accounts—Valuation for jurisdictional purposes—Court Fees Act (VII of 1870), s. 7.*—Under s. 50 of the Civ. Pro. Code, 1882, if a plaintiff seeks the recovery of money, the plaint must state the precise amount, so far as the case admits, while, in a suit for the amount which will be found due on taking unsettled accounts, the plaint need only state approximately the amount sued for. As in the former instance, the precise amount, so in the latter the approximate amount stated in the plaint, must

Plaint—continued.**—5.—Form and Contents of Plaint—contd.**

be taken to be the amount or value of the subject matter of the suit for purposes of jurisdiction. **KHUSHALCHAND MULCHAND v. NAG-INDAS MOTICHAND**, 12 B 675. [R., 18 B. 40, 18 B. 100; D., 20 B. 265.]

(26)—*Plaint, form of—Frame of suit—Trespass.*—Where the owner of a tank wishes to bring a suit against a person for fishing in the tank without his permission, the plaint should be framed for the recovery of damages for trespass, and should not be based on an alleged dispossession by reason of the defendants fishing in the tank. **LUCKIMONI DASI v. KORUNA KANT MOITRO**, 3 C L.R. 509.

(27)—*Civil Procedure Code, s. 50—Inconsistent cause of action.*—Where the gist of the plaintiff's charge against the defendant is that he has never executed a sale-deed in the defendant's favour, and that the document set up by him is a forgery; it is not competent to the plaintiff to combine with this charge, as an alternative, the wholly inconsistent charge that, if he *did* execute the document, no consideration was received by him, or that fraud was practised on him. **LYAPPA v. RAMALAKSHANNA**, 13 M. 549. [Diss., 18 A. 125; R., 8 Bom. L.R. 921, 1 O.C. 175.]

(28)—*Inconsistent reliefs prayed for in plaint, no ground for dismissal of suit.*—A Court has no power to throw out a suit merely on the ground that, in its opinion, the plaint sets up two inconsistent causes in the alternative. The fact of the plaintiff's having come in with inconsistent allegations might militate against his succeeding in the suit. But a Court should not on this ground alone dismiss the suit, there being nothing in the Civ. Pro. Code, empowering the Court to reject such a plaint. **JINO v. MANON**, 18 A. 125=A.W.N. 1896, 1. (13 M. 549, Diss.; 15 I.A. 86, R.) [Appr., 34 C. 51=11 C.W.N. 20=4 C.L.J. 437=1 M.L.T. 364; R., 1 O.C. 174.]

(29)—*Goods supplied to the member of a non-proprietary club—Suit in the name of the Secretary alone.*—An action to recover the price of goods supplied to a member of a non-proprietary club or on his responsibility, cannot be brought in the name of the Secretary, as the goods belonged to the club, and not to the Secretary. **MICHAEL v. BRIGGS**, 14 M. 362.

(30)—*Club—Rights and liabilities of Secretary.*—The Secretary of a social club cannot be sued personally, unless he accepts a personal liability for the goods delivered to the former Secretary for the use of the club; nor can the club be sued through its Secretary. **THE N. W.P. CLUB v. SADULLAH**, 20 A. 497. [F., 21 A. 346.]

(31)—*Plaint, form of—Suit by Company—Misdescription of plaintiff—Civ. Pro. Code, 1882, s. 435—Indian Companies Act, 1892, s. 41.*—A suit, wherein the plaintiff was described in the plaint as the manager of a limited Company, but the claim was on behalf of the

Plaint—continued.**—5.—Form and Contents of Plaint—contd.**

Company, and there were several allusions in the body of the plaint to the "plaintiff-Company," was, in the absence of proof of the registration of the Company under s. 41 of the Indian Companies Act, and in the absence of any suggestion that the Company was authorized to sue or to be sued in the name of an officer or trustee, held to be badly framed and liable to dismissal. *S. CAMBELL v. J. A. JACKSON*, 12 C. 41. [D., 30 C. 103; R., 103 P.L.R. 1902.]

(32)—*Indian Companies Act* (VI of 1882), s. 144—*Suit by Bank in liquidation, Bank the proper plaintiff in—Amendment of plaint—Civ. Pro. Code, s. 53.*—This suit, brought on behalf of a Bank in liquidation, was instituted, as set forth in the plaint, by the "Official Liquidator, Himalaya Bank, Limited, in liquidation, plaintiff," and the plaint was subscribed and verified in the same manner. Held that the Official Liquidator had no *locus standi* to institute the suit which should properly have been brought by the Bank itself, and that the suit was liable to be dismissed on the ground that the form of the suit was wrong. Where an Official Liquidator sues in the name and on behalf of a Company, it is not the Liquidator himself but the Company represented by him, that is really the plaintiff, and where such a suit had once been wrongly instituted in his name instead of that of the Company, the error cannot be cured by an amendment of the plaint under s. 53, Civ. Pro. Code, since such a course would result in the substitution of a person, who had never figured as plaintiff in the suit, in place of the person by whom it had actually been brought. *GULAM MUHAMMAD v. THE HIMALAYA BANK, LIMITED*, 17 A. 292 = A.W.N. 1895, 81. [Overruled, 18 A. 193, F.B.; R., 3 O.C. 347.]

(33)—*Civ. Pro. Code* (1882), s. 435 (= O. XXIX, r. 1, new Code)—*Corporation—Suit by unincorporated society, form of.*—The corporation contemplated by the Civ. Pro. Code is a corporation as known in English Law, i. e., a corporation created with the express consent of the Sovereign or of such antiquity that the consent of the Sovereign may be presumed. In a suit by an unregistered company, the names of the members of the company must be disclosed. If this is not done, and if the Society is neither a corporation, nor a company authorized to sue or be sued in the name of an officer or of a trustee, so as to make the provisions of s. 435, Civ. Pro. Code, applicable, the plaint is a bad one and the suit is liable to be dismissed. *PANCHAITI AKHARA, & C. v. GAURI KUAR*, 20 A. 167 = A.W.N. 1898, 7. (8 W.R. 43, 16 A. 420, 6 A. 284, R.)

(34)—*Unregistered Company, suit against—Form of suit—Addition of parties after expiry of limitation against them.*—In the case of unregistered Companies, the proper course would be to sue the individual members thereof, in the same way as the individual members of any other firm, not being incorporated or registered, would have to be sued. A mere

Plaint—continued.**—5.—Form and Contents of Plaint—contd.**

statement in the plaint that the plaintiff did not know of what persons the Company in question is composed, does not entitle him to sue the Company. (20 A. 497, F.; 8 W.R.C.R. 45, Cons.). Where a suit was brought against an unregistered Company, and the plaintiff applied at the time of hearing for an amendment of the plaint by adding the names of such of the persons as he could ascertain, and the suit was barred by limitation at that time as against such persons, the amendment was refused. *GANESHA SINGH v. MUNDI FOREST COMPANY*, 21 A. 346 = A.W.N. 1899, 123.

(35)—*Unregistered Company, person not knowing names of members of, competent to sue Company by its name.*—The plaintiff in an action against a Company not incorporated or registered, who is not aware of the individual members of whom the Company is composed, can use the Company by the name under which they carried on business and contracted with him. In such a case, he will have to state in his plaint his inability to give any better description. *KOYLASH CHUNDER ROY v. MR. EDWARD ELLIS*, 8 W.R. 45. [Not F., 21 A. 346 = 19 A.W.N. 123; R., 20 A. 167 = 18 A.W.N. 7.]

(36)—*Summons, service of—Suit against firm.*—In a suit against a partnership firm, the names of the members of the firm should be mentioned in the plaint, and the summons should be served personally on them or any of them if they or he resided within the jurisdiction. *YEKNATH BABAJI v. GULABCHAND KAHANJI*, 1 B.H.C. 85.

(37)—*Frame of suit—Suit against corporate body—Suit against agent.*—A suit against a corporate body, not brought in its corporate capacity, but through an agent, is bad in form. *NUBEEN CHUNDER PAUL v. CECIL STEPHENSON*, 15 W.R. 534.

(38)—*Act VIII of 1859, ss. 26, 63—Corporations.*—A corporation must sue and be sued in its corporate name. S. 26, Act VIII of 1859, points out how a corporation is to be described in the plaint and s. 63 points out how process is to be served on a corporation. *RAMDAS SEN v. THE COLLECTOR OF MOORSHEDEBAD*, 2 B.L.R.S.N. 6 (a) = 10 W.R. 366.

(39)—*Suit by minor—Improper form of plaint—Effect.*—A suit brought by a widow for herself and as guardian for her minor daughter, and not as for herself and her minor daughter by herself as next friend, was held not badly framed, the objection not being fatal, as no one was misled or injured by the improper form of the plaint. *ALIM BUKSH FAKIR v. JHALO BIBI*, 12 C. 48. [R., 14 C. 754.]

(40)—*Act IV (B.C.) of 1870, s. 59—Suit by manager—Form of plaint—Amendment—Minors—Court of Wards.*—A suit brought by minors through the manager of their property as next friend must strictly follow the form prescribed by Act IV of 1870 (B.C.). Where the plaintiff,

Plaint—continued.**—5.—Form and Contents of Plaint—contd.**

describing himself as the manager of the estate of certain minors under the Court of Wards, sues to set aside deeds constituting a mortgage-transaction upon the minors' property on the ground that the widow who made them had no power to create such an encumbrance, the plaint being on its face one in which the manager himself is the plaintiff, the Court cannot alter this plaint so as to turn the suit into a redemption suit on the part of the minors, and to give them a remedy which has not been asked for even alternatively by the terms of the plaint. **JOYRAM LALL MAHTOON v. STEWART, 20 W.R. 453.**

(41)—*Suit to recover property as adopted sons of widow—Immediate cause of action.*—Plaintiff sued to recover a share in certain property, of which they had been dispossessed by the defendants alleging that they were the adopted sons of a Hindu widow after whose death they had been in possession of the same. *Held* that all that the plaintiffs had to prove was that the widow held possession of the property in her own right and that, from the time of her death to the date of dispossession, they had held possession of the property as her adopted sons; and that there was no necessity for them to explain how the property came to the widow, as they were only bound to state their immediate cause of action. **CHUTTURDHAREE LALL v. MUSSAMUT PARBUTY KOWAR, 12 W.R. 120.**

(42)—*Act XX of 1864, s. 19—Administrator—Misconduct—Waste of minor's estate—Plaint, contents of.*—Every plaint, under s. 19 of Act XX of 1864, should specify either some one or more acts of misconduct on the part of the administrator in his office or should state some reasonable ground for supposing that he is about to waste the estate of the minor. **DAMODAR DAS MANICKLAL v. UTAMARAM MANICKLAL, 10 B.H.C. 414.**

(43)—*Putnee right—Suit for declaration that putnee is invalid—Pleadings.*—In a suit for a declaration that an alleged putnee tenure is invalid, the plaintiff must make the allegation unambiguously in the plaint. **SHARADA PERSHAD MULLICK v. ROY DHUNPUT SINGH BAHADUR, 19 W.R. 219.**

(44)—*Act X of 1877, ss. 50, 51 and 52—Description of parties—Verification of pleading.*—According to s. 50 of the Code of 1877, the description of the plaintiff as residing at Chitpore road in Calcutta is not sufficient; nor is it sufficient to describe the defendant as formerly of Calcutta without alleging that the plaintiff has been unable to ascertain his place of residence more definitely. When the plaint itself does not state anything as being alleged upon information and belief, while it is quite clear that matters are stated in the plaint which are not and cannot be of personal knowledge, then the verification is bad under s. 52. **BIBEE SOLOMAN v. ABDUL AZIZ, 4 C.L.R. 366. [R., 29 A. 418=4 A.L.J. 392=1907 A.W.N. 112; D., 25 A. 48.]**

Plaint—continued.**—5.—Form and Contents of Plaint—contd.**

(45)—*Civ. Pro. Code, s. 26, intent of—The omission of Honourable, Maharaja, etc., no mis-naming.*—The plain intent of s. 26, Civ. Pro. Code, is to secure the definite statement of the subject and object-matters of the litigation, and the words "so far as they can be ascertained" were not intended to compel a plaintiff to insert every name and title to which the defendant may conceive himself entitled. The omission of the titles "Honourable," "Maharaja", in a plaint does not constitute such a mis-naming as to justify the dismissal of the plaint. **ZAMINDAR OF BOBBILY v. ZAMINDAR OF VIZIANAGRAM, 3 M.H.C. 31. [Overruled, 12 B.L.R. 443, P.C.]**

(46)—*Description of Property—Indistinctness of boundaries—Civ. Pro. Code, 1859, s. 26.*—The indistinctness of boundaries is, under Act VIII of 1859, not a cause of non-suit. **JANOKEE CHOWDHURANEE v. DWARKANAATH CHOWDHRY, 1 Hay 555.**

(47)—*Boundaries not mentioned in plaint.*—Where the object of a suit is to prevent the infringement of plaintiff's rights over certain lands, the boundaries of the lands should be given in the plaint. **AJOODHIYA LALL v. GUMANI LALL, 2 C.L.R. 134. [D., 26 C. 845=4 C.W.N. 162.]**

(48)—*Omission to give boundaries in plaint—Decree—Execution.*—The mere omission to give the boundaries or other specifications in the schedule annexed to the plaint will not exclude from the operation of the decree matters which are by name strictly claimed in the plaint and referred to as such in the decree, and which do not need any further specification. **SHIB NARAIN BANERJEE v. RAM NARAIN LUSHKUR, 20 W.R. 142.**

(49)—*Defective plaint—Boundaries not specified—Amendment of plaint.*—Where a plaintiff does not specify the boundary of one of the several plots of land claimed, he should be required to amend his plaint. **JONAB ALI MOLLAH v. GOLAM ASSAD CHOWDHRY, 21 W.R. 187.**

(50)—*Rent—Suit for enhancement—Misrepresentation of area and boundaries—Dismissal of suit.*—If, in a suit for enhancement of rent, the plaintiff altogether misrepresents the area and boundaries of the holding, excluding land in the tenants' possession and specifying land not in their occupation, it vitiates the plaint and renders the whole suit liable to dismissal. **TARINEE CHURN SANNYAL v. MOHIMA CHUNDER SHAH, 22 W.R. 426.**

(51)—*Civil Court—Jurisdiction—Act XI of 1859, ss. 11, 54—Sale of share in aymah estate—Suit by purchaser to recover share purchased by him—Civ. Pro. Code, 1859, s. 25—Description of property—Identification—Boundaries.*—Plaintiff had purchased at a Government sale for arrears of revenue the share of a person in an aymah estate. Previous to the sale, the other

Plaint—continued.**— 5.—Form and Contents of Plaint—contd.**

sharers had applied under s. 11 of Act XI of 1859 and made a separate account of their shares with the Collector. In a suit by the purchaser to recover possession of the lands in the occupation of the sharer whose rights and interests he had purchased, the other sharers contended that the plaintiff was in possession of the lands purchased by him. *Held* that, as the other sharers had already become separated from the defaulter, the suit was not one for partition and consequently the Civil Court had jurisdiction to entertain the suit. Under s. 25, Act VIII of 1859, all that was necessary for the plaintiff to do was to describe the property in such a manner as might suffice for its identification. It was not absolutely necessary that the boundaries should be set forth, provided the land could otherwise be identified. **MEER AFTABOODDEEN v. SHUM-SOODDEEN MULLICK, 18 W.R. 461.**

(52)—*Suit for rent—Misdescription of tenure—Claim how affected.*—Where, in a suit for rent, the plaintiff described his *jote* as “*dur-mourosi*,” and the *jumma-wassil-bakee* papers showed him to be a “*mourosi ijaradar*” or “*dur-mourosi taluqdar*,” *held* that the misdescription, if any, was not sufficient to throw out plaintiff’s claim. **BHOOBUM MOYE DOSSEE v. RUFFICK MUNDUL, 17 W.R. 17.**

(53) *Civ. Pro. Code, 1882, s. 51 (= O. VI, rr. 14, 15), 578 (= s. 99, new Code)—Plaint not signed by plaintiff or authorized agent—Plaint not void—Waiver—Amendment.*—A plaint not signed by the plaintiff or his authorised agent according to the provisions of s. 51, Civ. Pro. Code, is not necessarily void, and such a defect can be waived by the defendant if the suit had been filed with the knowledge of the plaintiff, or can be cured by amendment at any stage of the suit, and under s. 578, Civ. Pro. Code, it is not a ground for interference in second appeal. The plaint in the case purported to be signed on behalf of the plaintiffs, by an advocate who himself filed the plaint, and also by another gentleman who purported to sign as “agent” for the plaintiffs, who were a firm of foreign merchants, residing out of, but trading within, British India. There was nothing to show that this gentleman was a recognised agent of the plaintiffs within the meaning of s. 37, Civ. Pro. Code (1882), nor was there any power-of-attorney in his favour. The defendants raised for the first time at the hearing of the second appeal an objection that the plaint was void *ab initio* on account of this defect. *Held* that the same advocate having conducted the case throughout, it must be presumed, in the absence of any finding or evidence to the contrary, that the suit was instituted and conducted throughout with the knowledge and authority of the plaintiffs; that as there was no suggestion as to this defect in the defendant’s written statement, in the issues, the judgment of the Court below, and the defendant’s memos. of appeal in the lower

Plaint—continued.**—5.—Form and Contents of Plaint—contd.**

Court as well as in the High Court, the defendant should be considered to have waived the defect; and that the defect fell within s. 578, Civ. Pro. Code, which prohibits the interference of the High Court with the decrees below on the ground of any error, defect, or irregularity which affects neither the merits of the case nor the jurisdiction of the Court; and that, if it were necessary (which was not the case here) the High Court was competent even at that stage to direct an amendment of the plaint. **BASDEO v. JOHN SMIDT, 22 A. 55, F. B. = A. W. N. 1899, 172.** (18 A. 396, 17 C. 580, P. C., R.; A. W. N. 1891, 152, A. W. N. 1894, 95, A. W. N. 1899, 55, 16 A. 240, D.) [F., 5 C. W. N. 91, 5 O. C. 355, 28 A. 244 = A. W. N. 1905, 263, 4 L. B. R. 284; R., 25 A. 635 = A. W. N. 1903, 189.]

(54)—*Suit for possession—Limitation—Proof of date of dispossession—Act VIII of 1859, ss. 26, 337—Appeal by one of several defendants Reversal of decree in favour of all.*—A person suing to recover possession of lands is bound, under the provisions of s. 26, Act VIII of 1859, to give the date of dispossession as accurately as he can, especially in a case where one of the issues is whether the plaintiff has been in occupation of the lands within 12 years of suit. Where, in passing a decree against several defendants, the Court of first instance does not proceed on a ground common to all the defendants, the appellate Court is not, on the appeal of one of the defendants, justified in law in giving virtually a decree in favour of the other defendants also. **BOYDONATH SURMAH v. OJAN BIBEE, 11 W.R. 238.** [R., 30 M. 470, F. B. = 17 M. L. J. 119 = 2 M. L. T. 104; D., 16 M. 293, 30 C. 429]

(55)—*Suit for confirmation of possession—Plaintiff not in possession—Ous of proof—Pleadings—Form of plaint—Distinctness—Decision upon issues.*—In most suits for confirmation of possession and for declaration of title, the rule is that the plaintiff is bound to prove that, at the time he preferred his suit, he was in possession, and he is bound also to prove the distinct title which he sets up. But it is not such an inflexible rule that it cannot be departed from. For instance, when a plaintiff can prove that he was in possession for twenty years previous to the suit, until within two or three months of the institution of the suit, his claim should not be thrown out and he should not be required to bring a fresh suit, merely adding the words that he was dispossessed, and changing the prayer for confirmation of possession into one for recovery of possession. [Reversed, 16 W.R. 27.] Matters which are in dispute should be ascertained, not only from the plaint and answer, but also at the first hearing. The plaintiff should be exact in the form in which his plaint is drawn up, but if there be any indistinctness in the form of the plaint, the decisions come to upon the issues

Plaint—continued.**—5.—Form and Contents of Plaint—concl'd.**

between the parties should not be set aside. **MOULVIE ABDOLLAH v. SHAHA MUJEE SOODDEEN Alias PEEROO MEEAH**, 15 W. R. 236. [Reversed, 16 W.R. 27; D., 4 C. 46.]

(56)—*Civ. Pro. Code — Forms of action — Statement of facts in plaint.*—The Code of Civil Procedure does not deal with forms of action, it requires a statement of facts in the plaint and that the plaint should disclose a cause of action. If a cause of action is disclosed, that cause of action is to be heard and determined subject to the defence of the defendant. **MUHAMMAD SHARIF v. SHAM-SHER KHAN**, 11 P.R. 1891.

Necessity for insertion in plaint nature of relief claimed.—See C.P. ACT XVI OF 1889, s. 83, 13 C.P.L.R. 140.

See APPEAL—ORDERS, 3 W.R. Act X Rul., 17.

See PRINCIPAL AND SURETY—SURETY, RIGHTS AND LIABILITIES OF, 7 M.H.C. 364.

—6.—Rejection of Plaint.

(1)—*Civ. Pro. Code*, 1882, s. 54 (=O. VII, r. 11 and O. VI, r. 18), 56 (=O. VII, r. 13)—*Rejection of plaint—Res judicata.*—Where a plaint in a previous suit for pre-emption had, after the issues had been framed, been rejected on the ground that in the plaint, the plaintiff had not shown any cause of action (i. e., that having alleged the sale to be fraudulent, illegal and void as against him, he could not claim pre-emption), and a subsequent suit was brought for the same, it was held that there was no bar of *res judicata*, as the order rejecting the plaint was one within the meaning of s. 56; that, under s. 54, a plaint could be rejected at any stage of the suit; and that when a plaint is so rejected although it be after registration thereof, it does not amount to a dismissal of the suit. **KISHORE SINGH v. SABDAL SINGH**, 12 A. 553 = A.W.N. 1889, 185. (2 M. 318, 8 C. 192, 7 A. 72, 2 M.H.C. 61, 11 W.R. 177, 13 W.R. 358, R.) [F., 18 M. 338, 1 C.W.N. 670; Appr., 27 C. 376; Cons., 15 A. 65; R., U.B.R. 1892-1896, Vol. II, 253, 1 N.L.R. 103, 34 C. 20 = 11 C.W.N. 38 = 1 M.L. T. 355 = 4 C.L.J. 421, F.B.]

(2)—*Plaint, rejection of—Civ. Pro. Code*, 1859, s. 32—*Fresh suit, if maintainable.*—If a plaint is rejected under s. 32, Act VIII of 1859, the plaintiff can bring a suit on the same subject-matter, provided he is not barred by lapse of time. **KADUMBINEE DOSSIA v. UN-NOPOORNA DAYE**, 14 W.R. 289.

(3)—*Civ. Pro. Code (Act VIII of 1859)*, ss. 32, 36—*Dismissal of suit under s. 32—Fresh suit, on same cause of action—Whether legal.*—The fact that provision is expressly made in s. 36 of the Civ. Pro. Code, to the effect that when plaints are rejected under ss. 29 to 31, the plaintiffs are not precluded from bringing

Plaint—continued.**—6.—Rejection of Plaint—continued.**

fresh plaints on the same cause of action suggests the inference that, when a plaint is rejected under s. 32, a fresh plaint cannot be entertained on the same cause of action, as an appeal lies from that order of rejection. **NAGAR MAL v. BHAGWANDAS**, 81 P.R. 1878.

(4)—*Schedule to plaint—Irregular plaint—Filing fresh plaint—Costs.*—A plaint which in the first count did not sufficiently disclose the subject of claim, without reading the schedule annexed as part of the plaint, or when the action accrued, and in the second count did not show any right to sue in the plaintiff, was rejected by the Court as irregular, but with liberty to the plaintiff to bring a fresh suit. *Semble.*—The Court will not make the payment of costs in respect of the former plaint a condition precedent to filing a fresh plaint, where there is no suggestion of *mala fides*. **LUCKHEY MOONEY DOSSEE v. KHETTER COOMARY DOSSEE**, 2 Ind. Jur. N.S. 117.

(5)—*Court Fees Act (VII of 1870)*, s. 12—*Finality of decision of first Court as to under-valuation of plaint—Plaint not to be rejected without opportunity to plaintiff to affix proper stamp.*—The decision of a Court of first instance as to the under-valuation of a plaint is not open to interference by the superior Court. But however as the combined result of s. 54 of the Civ. Pro. Code (XIV of 1882), and s. 12 of the Court Fees Act, 1870, the first Court is not justified in rejecting a plaint merely on account of the under-valuation, without giving the plaintiff an opportunity of affixing the proper stamp required. **BAI ANOPE v. MULCHAND GIRDHAR**, 9 B. 355. [R., 10 B. 610, F.B.]

(6)—*Plaint, insufficiently stamped—Deficiency not made good within time allowed by Court—Plaint admitted subject to defendant's objections—Subsequent rejection of plaint—Civ. Pro. Code*, s. 54—*Act VII of 1870 (Court Fees Act)*, s. 28.—The plaintiff filed his plaint on the last day of limitation on an insufficient stamp, and, being required by the Court to make good the deficiency within a certain time did not do so until two days after the expiration of that period. The Court however accepted the plaint and issued notice to the defendant, but made an order to the effect that it would be open to the defendant to object to the admissibility of the plaint. The defendant did object, and the plaint was in consequence rejected. Held that even if the Court had power to extend the period of limitation the order admitting the plaint subject to the defendant's objections showed no intention of extending the time for payment of the residue of the Court fee; neither could it be taken as an order under s. 28 of the Court Fees Act. The plaint was properly rejected. Held also that the plaintiff not having made any application to be allowed to amend his plaint could not be permitted to prosecute his suit in respect of so much of his claim as was covered by the amount originally paid as

Plaint—continued.**—6.—Rejection of Plaint**—continued.

Court fee. **DHARAM NARAIN LAL v. JAGMOHAN PANDE**, A.W.N. 1891, 166. [R., 15 A. 65.]

(7)—*Court Fees Act* (VII of 1870), s. 12, cls. 1, 2 — *Rejection of plaint for insufficiency of stamp—Appeal*.—The rejection of a plaint by a Subordinate Judge on the ground of insufficiency of valuation and stamp for the purposes of the Court Fees Act, being not "to the detriment of the revenue is not appealable". **MANOHAR GANESH v. BAWA RAMACHARANDAS**, 2 B. 219. (2 B. 145, F.) [F., 9 B. 355; Cons., 10 B. 610, F.B.; R., 12 B. 675, 19 B. 198, 23 B. 486; D., 12 C.L.R. 148.]

(8)—*Act VIII of 1859*, ss. 31, 350—*Improper valuation of claim—Rejection of plaint—Jurisdiction*.—Where it appears to the Court that the plaintiff's claim is improperly valued, the Court shall, under s. 31 of Act VIII of 1859, reject the plaint. The section is not confined to cases in which the defect is patent on the face of the plaint, but the Court may exercise jurisdiction under the section at any time before recording judgment. A Munsiff in whose Court a suit was instituted, found, after issues were fixed, and evidence recorded to some extent, that the suit was undervalued and that the proper valuation would take it beyond the jurisdiction of his Court. He returned the plaint, and the plaintiff, after filing additional stamps, filed the same plaint in the Court of the Sudder Ameen who tried the case and decreed the plaintiff's claim. On appeal, the Judge dismissed the suit on the ground that the Munsiff acted illegally in returning the plaint and the act of the Principal Sudder Ameen in trying the case was also illegal. *Held* that the Munsiff had jurisdiction to reject the plaint under s. 31, Act VIII of 1859, and that his order was substantially, though not technically, an order under that section, and the Principal Sudder Ameen had jurisdiction to try the case. *Held* also that having regard to the terms of s. 350, Act VIII of 1859, the Judge in appeal was wrong in reversing the decision of the Principal Sudder Ameen. **RAM GUTTY v. GOONOMONEE DEBIA**, 11 W. R. 177. [R., 8 C. 126, 12 A. 553.]

(9) *Civ. Pro. Code*, s. 54 (b)—*Rejection of plaint on account of insufficiency of Court fee—Procedure necessary before rejection*.—A Court has no power, subject to limitation, to reject a plaint for insufficiency of Court fees without first complying with the procedure enjoined by s. 54 (b) of the Code of Civil Procedure, that is, before plaint can be rejected, the plaintiff must have been required by the Court to make good the deficiency within a specified period, and he must have failed to obey the Court's order. **RAJA RAM v. PARTAB BHASKAR**, A.W.N. 1898, 100.

(10)—*Under-valuation of relief claimed in plaint—Rejection of plaint by appellate Court*—*Civ. Pro. Code*, 1882, ss. 54 (a), 578.—The

Plaint—continued.**—6.—Rejection of Plaint**—continued.

rule of s. 54 of the Civ. Pro. Code, 1882, is binding on Courts of appeal, as well as on Courts of original jurisdiction, and s. 578 has no application, because an objection that a relief has been "undervalued" under s. 54 (a) affects the jurisdiction of the Court which is prohibited to entertain the plaint under this condition. **RAM PIARI v. BALGOBIND DAS**, A.W.N. 1885, 294.

(11)—*Rejection of plaint—Civ. Pro. Code*, 1882, s. 54 — *Stamp*.—The power of rejection of a plaint, under s. 54, does not arise merely because the plaint is written upon paper insufficiently stamped; but there must be the additional circumstance of a failure on the part of the plaintiff to supply the requisite stamp paper within the period fixed. **DHONDIRAM v. TABA**, 5 Bom. L.R. 198 = 27 B. 330. [R., 19 M.L.J. 340, F.B., 32 M. 305, F.B.]

(12)—*Ss. 54 and 117—Civ. Pro. Code*, 1882—*Suit for partition—Plaintiffs found upon preliminary examination of parties to be out of possession—Court-fee insufficient—Rejection of plaint—Procedure*.—The plaintiffs brought a suit for partition of what they alleged to be the family property of which they were in possession jointly with the defendants, and paid a Court-fee of Rs. 10 upon their plaint. The Court, after examining one of the plaintiffs and one of the defendants under s. 117 but without framing any issues, found that the plaintiffs were not in possession, and consequently ordered them to pay an *ad valorem* fee on the reliefs sought. The plaintiffs failing to pay the additional Court-fee within the time allowed, their plaint was rejected. *Held*, that this procedure was totally erroneous, and the suit was remanded under s. 562. **NAKCHED SINGH v. JHAGRU SINGH**, A.W.N. 1905, 170.

(13)—*Plaint omitting to specify place where cause of action arose—Acceptance of plaint—Decision by arbitrators—Defendant not competent to afterwards object to Court's jurisdiction—Rejection—Proper time*.—The defendant to whom the award of the arbitrators appointed in this case happened to be unfavourable, urged, subsequently to the award for the first time, a defect in the plaint, contending that the Court had no jurisdiction because he resided outside its limits and the balance in account on which the plaintiff sued was also struck outside such limits. Without deciding where the cause of action had arisen, the Court rejected the plaint under s. 53 of the Civ. Pro. Code. This order, the Chief Court held, was not sustainable because s. 53 authorises a Court to reject a plaint "at or before the first hearing" and not after the case had been fully investigated upon its merits. At the stage which the present case had reached, the proper course as the defendant's objection was directed against the jurisdiction of the Court, was to proceed as if the Court had done what it should have done at or before the first hearing, namely, had returned the plaint for amendment by inserting

Plaint—continued.**—6.—Rejection of Plaint**—continued.

a statement of the place at which the cause of action arose, and as if such statement had been inserted by the plaintiff. *MEGHRAJ v. KARIM BAKSH*, 126 P.R. 1881.

(14)—*Plaint when may be rejected*—S. 54, cl. (c), Civ. Pro. Code, 1882 (=O. VII, r. 11, present Code).—Where the plaintiff sued to establish a *mul-rायति* right which by a Government order was not granted and also sought for the position of a *mustagir* and to set aside the executive orders of the Commissioner and the Deputy Commissioner, and questioned the validity of those orders, asserting that his rights in the village are permanent and that he cannot be divested of them by any order made by any executive authority; *held*, that the suit ought to have been tried and that plaint should not have been rejected on the ground of the suit being barred by any positive rules of law. *NAWAB SINGH v. CHARAN RANA*, 6 C.W.N. 411.

(15)—*Description of property in plaint, sufficiency of*—*Summary rejection of plaint*.—There is sufficient description of the land in question when the plaint states what the *zemindari* is, the name of the *juma* and in what *mouzah* it is situated, and within that jurisdiction, and what it was owned by the defendants. *Prima facie*, this description is sufficient for identification, and such a plaint should not be rejected in a summary way for inadequate description of the property. *DURGA CHURN LAW v. KALA CHAND BISWAS*, 7 C.W.N. 615.

(16)—Civ. Pro. Code, 1882, ss. 50 (b), 54 (d)—*Return of plaint for giving description of parties*—*Non-compliance with said order*—*Power of Court to reject plaint*.—Where a plaint was returned by the Court for mentioning the ages of the defendants and the father's name of one of the defendants, it was competent to the Court to reject the plaint for non-compliance with the said order. *SOMAYAJLU v. SURAYYA*, 7 M.L.J. 81.

(17)—*Misjoinder of causes of action*—*Undervaluation*—*High Court, of opinion that there was no misjoinder*—*Order*—Act VIII of 1859, s. 31.—Where the Civil Judge rejected the plaint upon two grounds, because it included different causes of action and because the suit had been undervalued, and the High Court were of opinion that there was no improper joinder of causes of action, the order of the Civil Judge was reversed and he was directed to proceed strictly in accordance with s. 31, Civ. Pro. Code. *KRISTNA AIYANGAR v. PERUMAL NADAN*, 2 M.H.C. 436.

(18)—Civ. Pro. Code, 1882, ss. 53, 54—*Plaint not to be rejected by reason of insufficient verification*—*Procedure*.—*Held*, that a plaint should not be rejected on a mere question of defect of verification. Where the verification is found to be defective the Judge is bound to

Plaint—continued.**—6.—Rejection of Plaint**—continued.

return the plaint for amendment and has no power to reject it until default had been made in amending it within the time allowed by his order. *TULSI RAM v. MUNSHI RAM*, 57 P.R. 1904. (21 B. 570, D.)

(19)—*Rejection of plaint*—*Non-production of documents with plaint*—*Reason for non-production*—*Revision*—Act VIII of 1859—Reg. I of 1827—Act XXIII of 1861.—A plaint cannot be rejected for non-production at its presentation of the document sued upon or of any other document intended to be relied on by the plaintiff in support of his action. The effect of such non-production is that he cannot afterwards produce it in evidence at the hearing, without the sanction of the Court. But when a sufficient cause is given for non-production of the document in the first instance, the Court is bound to give its sanction to its being received in evidence, if there be no other reason, than its previous non-production, for its inadmissibility. The High Court has jurisdiction to set aside the decisions of the Courts below rejecting plaint under the circumstances stated above. *Ex parte RAYA CHAND AMI CHAND*, 2 B.H.C. 369.

(20)—Civ. Pro. Code, 1908, O. VII, r. 11—*Rejection of plaint at any stage*—*Time for amending plaint*—*Waiver*.—O. VII, r. 11, of the Civ. Pro. Code, does not lay down that the plaint is to be rejected before it is registered. It may be rejected at any stage of the suit. The provision that a time should be fixed for amending the plaint being for the benefit of the party, he can waive his right. *SRI KISHAN DAS v. PIR BAKHSH*, 126 P.R. 1888.

(21)—Civ. Pro. Code, Act XIV of 1882, s. 54—*Rejection of plaint already registered*.—The Court has jurisdiction to reject a plaint after it has been registered and written statement filed. S. 54 of the Civ. Pro. Code is capable of being applied at any stage of the suit. *VENKATESA TAWKER v. RAMASAMI CHETTIAR*, 18 M. 338. [R., 1 N.L.R. 103, 34 C. 20, F.B. = 4 C.L.J. 421 = 11 C.W.N. 38 = 1 M.L.T. 355.]

(22)—S. 54—Civ. Pro. Code, 1882—*Rejection of plaint under, after it has been registered*—*Legality thereof*—*Interference of Court of Judicial Commissioner in revision where order to be revised is appealable*.—When a suit came on for hearing, the plaint was returned for amendment under s. 53 (b) (ii) of the Code and for making good a deficiency in stamp-duty. These directions were not complied with. When the suit came on for a second hearing, the Court rejected the plaint under s. 54 (b) and (d) of the Code. Plaintiff, then, applied for re-admission of the suit and the application was dismissed. Thereupon, he moved the Court of the Judicial Commissioner in revision. *Held*, that a plaint may be rejected under s. 54 even after it has been registered. *Held*, also, that

Plaint—continued.**—6.—Rejection of Plaint—continued.**

the Court would not interfere on its revisional side, since the plaintiff failed to appeal against the order rejecting the plaint and against the order dismissing the application for re-admission of the suit. **TRIMBAK PATIL v. MADHAO RAO, 1 N.L.R. 103.**

(23)—*Civ. Pro. Code, 1882, s. 54, cl. (b)—Plaint, admission, registration, and rejection of.*—It is competent to a Court to reject a plaint under s. 54, cl. (b), of the Civ. Pro. Code after it has been admitted and duly registered. A plaint was presented on the 23rd June, 1902, insufficiently stamped. The plaintiffs were directed by the Court to pay the deficit Court-fees on or before the 5th July; the Court fees were supplied on the 9th July. No prayer was made for extension of time, nor was an order made in that behalf; but the plaint was directed to be admitted and registered. At the final hearing, the plaint was rejected upon objection taken by the defendant that the deficit Court fees had not been paid within the time allowed. *Held*, that the plaint ought not to have been rejected, but the Court ought to have proceeded with the suit, as if it had been instituted on the date the deficit Court fees were actually paid dismissing such portion of the claim, if any, as might in this view, be barred by limitation. **PUDMANAND SINGH v. ANANT LAL MISSER, 4 C.L.J. 421, F.B. = 11 C.W.N. 38 = 1 M.L.T. 355 = 34 C. 20, F.B. [R., 34 C. 305 = 5 C.L.J. 270.]**

(24)—*Cause of action—Civ. Pro. Code, 1859, s. 32—Rejection of plaint.*—Under s. 32 of Civ. Pro. Code, 1859, it was not necessary that the cause of action alleged in a plaint was likely to succeed. It was enough if it appeared that the subject matter alleged raised a fair question of claim or right for trial and determination between the parties. Where that was the case, a plaintiff was entitled to institute his suit and to have it regularly proceeded with and fully heard, and a decree pronounced upon the matter in question. In the present case, the cause of action alleged by the widow was the breach of the agreement, and this depended upon the meaning and effect to be given in the construction of the agreement to the language used, as regards the intention of the parties. Consequently, the Court was wrong in having rejected the plaint. **LAKSHMI AMMAL v. TIKARAM TOVAJI, 1 M.H.C. 240.**

(25)—*Civ. Pro. Code, Act VIII of 1859, s. 32—Suit to establish right to property—No specific acts of ownership alleged in plaint within period of limitation—General statements contained in plaint sufficient to entitle plaintiff to let in evidence at hearing—Propriety of summary rejection of plaint as barred by lapse of time.*—Plaintiffs sued to establish their right as proprietors and hereditary mukhyasthans to the devasthan of a temple. The suit was instituted more than twelve years after they were ordered by the Collector to establish their

Plaint—continued.**—6.—Rejection of Plaint—continued.**

right in consequence of certain disputes regarding it. The Civil Judge summarily rejected the plaint under s. 32, Civ. Pro. Code, Act VIII of 1859, on the ground that apparently the suit was barred by lapse of time. *Held* that the power to reject a plaint is one that requires to be very carefully exercised. Although no specific acts of ownership as proprietors were alleged in the plaint, yet, the general statements which it contained were sufficient to entitle the plaintiffs to let in evidence at the hearing. The Court was, therefore, not justified in rejecting the plaint on the ground that, on the face of the plaint, the suit was barred by lapse of time. **UDAYA VARMA v. NAYAR CHAMBITHU, 1 M.H.C. 322.**

(26)—*Civ. Pro. Code, Act VIII of 1859, s. 32—Rejection of plaint registered on ground of limitation.*—A plaint, though registered, could be rejected, on the ground of limitation under s. 32 of Act VIII of 1859. **CHETTI GAUNDAN v. SUNDARAM PILLAI, 2 M.H.C. 51. [F., 18 M. 338; Appr., 12 A. 553.]**

(27)—*Malicious prosecution—Pleadings—Malice—Reasonable cause—Rejection of plaint—Amendment—Reference to facts not in plaint—Measure of damages—Amount to be fixed in plaint.*—Plaintiff brought a suit for malicious prosecution against the first defendant who had prosecuted him unsuccessfully, and against the second defendant, the Subordinate Judge at Broach who had granted sanction to prosecute the plaintiff. The plaintiff did not himself aver, anywhere in the plaint, that the charge was made against him by the first defendant maliciously and without reasonable or probable cause, or that the sanction for the prosecution was given by the second defendant without reasonable or probable cause. *Held* that it was proper to reject the plaint. No amendment of a plaint can be allowed when there has been long delay and when there are no sufficient grounds for it. In order to determine merely whether or not the plaintiff made out such a *prima facie* cause of action as rendered his plaint admissible on the file, the Judge ought not to refer to documents and facts neither mentioned in, nor annexed to, the plaint, nor ascertained by interrogation of the plaintiff by the Judge. In every suit for damages for malicious prosecution, the plaintiff should name the amount of damages which he sought to recover as compensation for the injury of which he complained. **GIRDHAR LAL DAYALDAS v. JAGANNATA GIRDHACHARI, 10 B.H.C. 182.**

(28 & 29)—*Civ. Pro. Code, ss. 54 (d), 588 (6), 622—Return of plaint—Appeal—Rejection of plaint—Powers of High Court.*—On the defendant's objection as to misjoinder of parties and causes of action, the Court returned the plaint for amendment within a fixed time. The plaintiff did not obey this order but appealed there-

Plaint—continued.**—6.—Rejection of Plaint**—continued.

from under cl. (6) of s. 588, Civ. Pro. Code. Pending this appeal, the Court of first instance recorded a judgment rejecting the plaint under s. 54 (d) of the Code and directing the plaintiff to pay the costs. Subsequently, the appeal was heard and the order returning the plaint for amendment was upheld. Then the plaintiff applied to the High Court for revision. *Held* that the case was not one in which the discretionary powers of the High Court under s. 622 should be exercised. **MASITAN v. SAHIBZADI, A.W.N. 1883, 35.**

(30)—S. 54, Civ. Pro. Code, 1882—*Rejection of plaint.—Costs of appeal when the appellant did not present his case in the proper light to the Court of first instance.*—If a plaint be presented upon insufficient stamp and the deficit Court-fee be not put in within the time allowed by the Court, the Court ought to reject the plaint. But if, on the date on which the deficit Court-fee is ultimately put in, the suit of the plaintiff be not barred by limitation the plaint may be regarded as if it was presented for the first time on that date, and the suit ought to be proceeded with (27 C. 376, R.) As the plaintiff (appellant) did not present the matter to the Munsiff in the proper light, it was ordered that he should pay the costs of the respondent in the High Court, although the appeal was decided in his favour. **HARA KUMAR PAL CHOWDHURY v. SHAIKH SAFATULLAH, 9 C.W.N. 844=2 C.L.J. 70. [R., 5 C.L.J. 270=34 C. 305]**

See CIV. PRO. CODE, 1908, O. I, rr. 8, 10 (2), 11, O. VI, rr. 17, 18, O. VII, r. 11, A.W.N. 1882, 67.

Appeal against order rejecting or admitting—See CIV. PRO. CODE, 1908, O. XLI, r. 23, s. 104, O. XLIII, r. 1, 6 C.L.J. 214.

See COURT-FEES, A.W.N. 1889, 124, 7 B.L.R. 664, Note=13 W.R. 415.

See GUARDIAN—APPOINTMENT OF GUARDIANS, 4 B. 642, Note 1.

Suit against several defendants claiming under different titles—Misjoinder—Civ. Pro. Code, 1882, ss. 31, 53—See JOINDER OF PARTIES, 14 C. 435.

See PRE-EMPTION — PURCHASE-MONEY, 52 P.R. 1891.

See RES JUDICATA—ADJUDICATIONS, 51 P.R. 1878.

All defendants not residing within jurisdiction—See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—PRACTICE AND PROCEDURE, 6 B.L.R. 719, Note=14 W.R. 156.

Valuation of suit—Court's power in respect of—See VALUATION OF SUITS, 13 B. 517.

Plaint—continued.**—6.—Rejection of Plaint**—concluded.

See VALUATION OF SUITS, 1 N.W.P. 16.

—7.—Return of Plaint.

(1)—Civ. Pro. Code, Act VIII of 1859, s. 9—*Return of plaint for amendment—Time to be specified for re-presentation—Time for amendment of plaint not specified—Re-presentation within reasonable time but after lapse of period of limitation—Saving of limitation*—A Court returning a plaint for amendment should grant a specified time for re-presentation thereof. [F., 1 A. 260.] Where a plaint presented within the period of limitation was returned by the Court for amendment without specifying a time for such amendment, and the plaint was re-presented within a reasonable time but some days after the expiry of the period of limitation and accepted by the Court, the date of commencing the action was that of the original presentation of the plaint and the suit, in consequence, was not barred by limitation. **ISMAIL SAHIB v. ARUMUGA CHETTI, 1 M.H.C. 427. [F., 23 W.R. 447, 1 A. 260.]**

(2)—U.P. Act, XII of 1881, ss. 93, 95—Civ. Pro. Code, 1882, ss. 54, 57 (=O. VII, rr. 11, 10, new Code).—Where a plaint in a Civil Court alleges facts which, if true, would show that the dispute or matter involved in the suit was one to which s. 93 or s. 95 of Act XII of 1881 applied, the plaint should be rejected under cl. (c) of s. 54, Civ. Pro. Code or possibly in some cases returned under s. 57, Civ. Pro. Code. **TARAPAT OJHA v. RAM RATAN KUAR, 15 A. 387=13 A.W.N. 1893, 164, F.B. [Affirmed, 18 A. 270; R., 10 O.C. 23.]**

(3)—*Want of jurisdiction—Return of plaint*—S. 57, Civ. Pro. Code.—Where several causes of action, over none of which the Court has jurisdiction, are included in a plaint, the Court ought to return the plaint, with a proper endorsement as required in s. 57, Civ. Pro. Code, and not to dismiss the suit. **JIVRAJU v. PURUSHOTAM, 7 M. 171.**

(4)—Civ. Pro. Code, s. 57—*Suit filed in an inferior Court.*—Where a suit is filed in an inferior Court, by understating the value of the subject-matter, the proper course to be adopted is to return the plaint to be presented to the superior Court, and not to dismiss the suit. **KANDU v. KONDA, 8 M. 62. (7 B. 487, R.)**

(5)—Act XL of 1858 and Civ. Pro. Code, s. 440, *suit in violation of—Return of plaint.*—Where a suit is brought in violation of s. 440 of the Civ. Pro. Code or of Act XL of 1858; the plaint should be returned, in order that the error may be rectified. **RUSSICK DAS BAIRAGY v. PREONATH MISREE, 10 C. 102=12 C.L.R. 405.**

(6)—Civ. Pro. Code, 1908, O. VII, r. 10=Civ. Pro. Code, 1882, s. 57—*Return of plaint*

Plaint—continued.**—7.—Return of Plaint—continued.**

for presentation to proper Court—Same and not new plaint to be re-presented.—Where a plaint is returned for presentation to the proper Court the plaint re-presented must be the plaint returned for presentation and not a new plaint. *RATNA BAI v. PANDOBA*, 12 C.P. L.R. 15. (8 B. 313, R.)

(7)—*Act VIII of 1859, ss. 26-29—Plaint prolix or argumentative, to be rejected by Court or returned for amendment.*—The plaint in this case had been drawn in contravention of the directions of the Civ. Pro. Code, and was most unnecessarily prolix, argumentative and full of matter wholly irrelevant. The first paragraph of the plaint was to the following effect:—"Suit for setting aside a fraudulent and fabricated deed of sale and for causing the defendant to be tried for forgery." The whole plaint was mere argument such as could be inadmissible even in a written statement in which usually more latitude is allowed than in a plaint. The High Court held that the plaint ought to have been rejected or to have been returned that it might be amended by striking out the reference to criminal proceedings and other unnecessary matters. *BISHEN SAHAYE SINGH v. BEER KISHORE SINGH*, 8 W.R. 295.

(8)—*Suit found at the hearing to be undervalued, liability of, dismissal—Civ. Pro. Code, ss. 30, 31 and 32, benefit of the provisions of, claimable only when presenting plaint.*—If the plaintiff in a suit chooses to neglect the rules as to valuation of suits, he does so at his own risk. If there is any doubt as to what is the proper value to be put upon a claim, the opinion of the Court can always be taken and ought always to be taken, upon the point at the time that the plaint is presented. And it is at the time of the presentation of the plaint—and not afterwards when the case comes on for hearing upon the return of the summons and after the appearance of the defendant—that the plaintiff in a suit, which has been brought in a Court in which, with reference to its proper valuation, it should not have been brought, can claim the benefit of those sections of the Civ. Pro. Code, which bear upon the question of valuation. So, where, at the time of the hearing, the suit appears to have been undervalued and the Court could not have entertained the suit if it had been properly valued in the first instance, it is the duty of the Court to dismiss the suit. *SHAIKH MUZHUR ALI v. MUSSAMUT BASOO*, 8 W.R. 46.

(9)—*Plaint drawn up in other language than that of Court, not to be admitted on file—Procedure—Rejection or return for amendment and presentation in Court language.*—The plaint filed in this case was drawn up in Persian. That language was not the language either of the Court or of the District, and the High Court observed with dissatisfaction that if the official presiding in the first Court had

Plaint—continued.**—7.—Return of Plaint—continued.**

known his duty, he would at once have rejected or returned the plaint for amendment and presentation in the ordinary language of intercourse and business in the district. *MIRZA AMEER KOLEE KHAN v. RUSSICK LALL SINGH*, 8 W.R. 495.

(10)—*Act VI of 1862 (B.C.), s. 20—Suit instituted in wrong Court—Return of plaint.*—Where a suit was instituted before the Collector, whereas under s. 20, Act VI of 1862 (B.C.) it should have been instituted before a subdivision Court, the plaint should be returned to the plaintiff to be filed in the proper subdivision Court, but the suit should not be dismissed. *RANEE SHURUT SOONDUREE DEBIA v. KHEMUN KUREE DEBIA*, 5 W.R. Act X, Rul. 87. [F., 12 W.R. 310.]

(11)—*Suit instituted at Sudder station by order of Collector—Return of plaint for presentation to sub-division Deputy Collector.*—This suit had been instituted at the Sudder station instead of at the Sub-division Deputy Collector's office in pursuance of an order by the Collector, and the High Court held that the case was one in which the plaint might have been returned to the party to file it in the Sub-division Deputy Collector's office. *KALEE CHURN CHOWDHRY v. RAM GOBIND MOZOMDAR*, 6 W.R. Act X, Rul. 104.

(12)—*Plaint—Return of, with leave to bring fresh suit.*—The defendant applied to take the plaint off the file, on the grounds, first of indefiniteness in that it did not show when the cause of action arose and whether the suit was not barred, secondly, that the plaintiff, who was resident out of the British Territories in India had not deposited security in accordance with the provisions of s. 34, Civ. Pro. Code. No application had been made by the defendant that the plaintiff should be ordered to furnish security nor had the defendant filed his written statement. *Held*, that the plaint should be taken off the file with leave to bring a fresh suit. *SONAMALL v. SUNDARAM ROTTI*, 7 B.L.R. App. 23.

(13)—*Plaint—Returnable—Decree—Jurisdiction—Small Cause Court.*—Though the mere fact of a plaint having been registered did not make it unreturnable to the plaintiff on the discovery by the Court that it had no jurisdiction, yet a plaint could not be returned after a decree had been passed thereon. *JHANDU v. GURMUKH SINGH*, 39 P.R. 1872. (88 P.R. 1869, R.)

(14)—*Return of plaint after trial on the merits—Power of Appellate Court.*—An appellate Court is competent to pass an order directing the return of a plaint to the plaintiff, notwithstanding a trial upon the merits in the Court of first instance, if it be found that the first Court ought to have returned the plaint under s. 57 (a). Act X of 1877, on the ground—

Plaint—continued.—7.—**Return of Plaint**—continued.

that the suit was exclusively cognizable by a Small Cause Court. *SHADI v. MUSSAMMAT AISHAN AND SHAHABUDDIN*, 55 P.R. 1878. [Cons., 90 P.R. 1884; R., 118 P.R. 1881, 8 P.R. 1885.]

(15)—**Appeal**—*Return of plaint by Appellate Court*.—Where an order has directed a plaint to be returned for presentation to the proper Court, an appeal from such an order is an appeal from an order and should be stamped with Rs. 2. It not being an appeal from a decree, full stamp duty need not be paid. *FAZLUR RAHIM v. ABU AHMED*, 30 C. 453 = 7 C.W.N. 402. (26 C. 275, F.)

(16)—Ss. 16, 17, 19 and 57, *Civ. Pro. Code*, 1882—*Return of plaint—Appeal*.—Where a plaint has been returned to the plaintiff to be presented to the proper Court, it is not open to him to appeal from the order of return, after he has taken back the plaint and refiled it in the Court directed. *BENI MADHUB DAS v. JOTENDRA MOHAN TAGORE*, 5 C.L.J. 580 = 11 C.W.N. 765. [F., 11 O.C. 98; R., 6 C.L.J. 547.]

(17)—*Act XI of 1865, s. 28—Chief Court, power of*.—Where it is obvious that a Small Cause Court has exceeded its jurisdiction in hearing a suit and dismissing it contingent on a reference to the Chief Court, the latter Court can under s. 28, Act XI of 1865, (when the case has been referred to it at the request of the plaintiff) set aside such order and direct that the plaint be returned to him in order to its being presented to a Court having jurisdiction to entertain it. *SHANKAR DAS v. GHASITA*, 73 P.R. 1876. [F., 90 P.R. 1884.]

(18)—*Suit being premature—Return of plaint*.—In one case the Chief Court returned the plaint on the ground that the suit was prematurely brought. *GUNGA RAM v. RAM KISHEN*, 17 P.R. 1875.

(19)—*Civ. Pro. Code*, 1882, s. 440—*Act XL of 1858, s. 3—Construction—Suit by minor—Plaint—Return*.—Where a suit is brought in violation of s. 440 of the *Civ. Pro. Code*, 1882, and of the provisions of Act XL of 1858, the original Court ought to return the plaint in order that the error might be rectified. *RASICK DAS BARRAGI v. JAGUDAMBA DABEE*, 13 C.L.R. 405.

(20)—*Erroneous valuation of suit—Want of jurisdiction—Procedure*.—If it is found that a suit or appeal is erroneously valued, the plaint should be returned for presentation to the proper Court. It ought not to be dismissed for want of jurisdiction. *MISRI v. MUHAMMAD KHAN*, 63 P.R. 1887.

(21)—*Want of jurisdiction—Return of plaint—Procedure—Appeal*.—Where a Court has not jurisdiction, the plaint should be returned for presentation to the proper Court, and an appeal from such an order is not an appeal contem-

Plaint—continued.—7.—**Return of Plaint**—continued.

plated by s. 348, *Civ. Pro. Code*, 1859. *KAMEEKHAPERSAD MOOKERJEE v. MR. R. LARMOUR*, W.R., F.B., 86.

(22)—*Jurisdiction—Suit by agent against principal—Return of plaint—Dismissal*.—Plaintiffs, who are agents at F for principals resident elsewhere cannot sue their principals in the Court of F. In such a case, the Court should, instead of dismissing the suit, return the plaint to the plaintiffs in order to its being presented to the proper Court, especially where the objection to jurisdiction has been raised and allowed at a very early stage of the suit. *KOOSHAL CHUND v. T.G.A. PALMER*, 1 Agra 280.

(23)—*Procedure—Jurisdiction—Evasion—Cause of action—Relief—Improper joinder of parties—Return of plaint*.—Plaintiff in order to institute a suit in the Judge's Courts, made the Mamlatdar a nominal defendant. He alleged no cause of action against him nor did he seek any relief against him. Held, that the plaint should be rejected by the Judge, unless the plaintiff consented to amend it by striking out the name of the Mamlatdar. When the plaint is so amended, it must be returned to be presented to the proper Court. *SHRIDHAR HARI v. CHIMA*, 10 B.H.C. 17.

(24)—*Issues raised as to jurisdiction—Finding against jurisdiction—Return of plaint—Act XII of 1861, s. 3*.—Where a Court registers a plaint and allows the parties to join issue on the question of jurisdiction, and afterwards finds that it has no jurisdiction, the proper course is, under s. 3, Act XXIII of 1861, to return the plaint for presentation to the proper Court having jurisdiction, but not to dismiss the suit. *KARTICK NATH PANDAY v. ROY NUNDEPUT MAHATAB BAHADOOR*, 23 W.R. 263. [R., 10 C.L.R. 146 = 8 C. 126.]

(25)—*Presentation of plaint to wrong Court—Procedure*.—Where a plaint is presented to a wrong Court having no jurisdiction to entertain it, it must be returned for presentation to the right Court. *MAHARAJAH DHERAJ MAHTAB CHUND BAHADOOR v. DAMOODER SINGH*, W.R. 1864, 65.

(26)—*Want of jurisdiction—Return of plaint*.—It appears to have been the intention of the Legislature that whenever there is a want of jurisdiction the plaint should be returned. *KHANDU MORESHWAR v. SHIVJI GORKOJI*, 5 B.H.C. A.C. 212. [F., 23 B. 679 = 1 Bom. L.R. 176.]

(27)—*Practice—Jurisdiction, test of—Return of plaint for presentation to proper Court, cannot be ordered after hearing*.—The test of jurisdiction is the shape in which the suit is originally instituted, and not what the plaintiff is found entitled to in the course of the hearing. Where, therefore, plaint praying for a declaration that a certain tax was illegal and also for

Plaint—continued.—7.—Return of *Plaint*—continued.

damages for illegal entry into the plaintiff's house was presented to the Court of the First Class Subordinate Judge, and the Judge, in the course of the hearing, finding that the plaintiff was not entitled to the declaration but only to damages, returned the *plaint* for presentation to the Small Cause Court, *held* that the Subordinate Judge had jurisdiction in the case, and that he was not justified in returning the *plaint* at that stage of the proceedings. **MOTABHAI v. THE SURAT CITY MUNICIPALITY, 20 B. 675.**

(28)—*Jurisdiction—Court—Return of plaint to be presented in proper Court—Civ. Pro. Code, 1882, s. 57.*—The plaintiff filed a suit in the Sirsi Court. The defendant objected that the Court had no jurisdiction to entertain the suit. In the first Court, the objection failed. On appeal it succeeded; the order of the District Judge being: "I dismiss the suit subject to the condition that if plaintiffs so desire the *plaint* may be returned to them for presentation in the proper Court." On second appeal, *held*, that the District Judge in proceeding to dismiss the suit was wrong: inasmuch as there was no jurisdiction to institute the suit in the Sirsi Court the proper order was, as indicated by s. 57 of the Civil Procedure Code, to direct that the *plaint* should be returned to be presented to the proper Court. **PUTTAPPA v. VIRABHADRAPPA, 7 Bom. L.R. 993.**

(29)—*Suit for land—Jurisdiction—Plaint to be returned in absence of jurisdiction—Act VIII of 1859, s. 14.*—Suit for land brought within the district of R. Plaintiff alleged that the land in dispute belonged to district R. Defendant stated that the land was in district G. Finding that the land was in district R, the first Court decided that the plaintiff was entitled to it. The first appellate Judge found the land to be an accretion to an estate in district G, and at once reversed the decree of the first Court. The High Court remanded the case to the Judge in order that he might first distinctly try whether the land was, according to s. 14 of Act VIII of 1859, included within the local jurisdiction of the Courts in district R. If the land was included within the local jurisdiction of the Courts in District G, neither the Judge nor the Munsiff could have any jurisdiction to try the case and, under such circumstances, the Judge should merely have returned the *plaint* to be presented in the proper Court. **RANEE SURNO MOYEE v. DOORGA MONEE DOSSEE, 10 W. R. 335.**

(30)—*Suit in a wrong Court—Plaint, returning of—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 11—S. 57, Civ. Pro. Code, 1882.*—Where the Court in which a *plaint* has been presented has no jurisdiction to try the suit, the proper procedure to be followed will be to return the *plaint*. A suit was brought in the Subordinate Court of Haveli, under the Dekkhan Agriculturists' Relief Act, for the re-

Plaint—continued.—7.—Return of *Plaint*—continued.

covery of a sum of money, against agriculturists, some of whom resided within the jurisdiction of that Court and others within the jurisdiction of the Saswad Court. Defendants residing within the jurisdiction of the Saswad Court were proved to be non-agriculturists under the Act, upon which the Haveli Court rejected the suit and refused to return the *plaint* for presentation to the Saswad Court on the ground that the case did not fall within the provisions of s. 57 of the Code of Civil Procedure: *Held*, (ordering the return of the *plaint*), that s. 57 of the Civil Procedure Code applied, because (a) no option as to the selection of the Court was allowed by law; and (b) none of the defendants were dwelling within the local limits of the Haveli Court. **LADHAJI v. HARI, 1 Bom. L.R. 176 = 23 B. 679.**

(31)—*Jurisdiction—Civil Courts Act—Court Fees Act.*—Whenever a mortgage (not admitted by the plaintiff) is proved and its amount fixed, he may propose, if the defendant do not object, to redeem that mortgage. The amount of the subject-matter may become increased in value, and then further duty should be payable. If the value of the subject-matter appears at the conclusion of the trial or before that to exceed the pecuniary limit of the jurisdiction of the Court, the Court should return the *plaint* to be presented in the proper Court. **CHANDU v. KOMBI, 9 M. 208. [R., 14 M. 169.]**

(32)—*Ss. 53, 54, 57, Civ. Pro. Code, 1882—Properties exceeding pecuniary jurisdiction—Plaint returned for presentation to proper Court—Re-presentation to the same Court after amending, by striking off some items, and properly valuing the rest—Jurisdiction.*—Where the Munsiff returned the *plaint* for presentation to the proper Court, on the ground that the subject-matter of suit was undervalued, and that, if properly valued, it would exceed the pecuniary jurisdiction of the Court, and the plaintiff amended the *plaint* by correcting the valuation, and striking off some of the properties, so as to bring the rest within the jurisdiction of the Munsiff, and re-presented the *plaint* with a petition that he relinquished his claim to the properties struck out. *Held*, in a petition for revising the order of the Munsiff, admitting the *plaint* on re-presentation, that the action of the Munsiff fell within the letter of s. 57, Civ. Pro. Code, read with s. 54. Since under s. 53, cl. (c) the Court may on itself amend the *plaint* at any time before judgment, it cannot be said that the Court has no power to allow or accept the amendment, when it is made by the plaintiff and sanctioned by the Court. **KARUM BAYIRA PONNUPUNDAN v. AUTHIMOOLA PONNUPUNDAN, 6 M.L.T. 261 = 33 M. 262 = 3 Ind. Cas. 338.**

(33)—*Presentation of plaint—Jurisdiction.*—A *plaint* valued at Rs. 1,000 being registered by mistake in a Judge's Court, would be rightly dismissed for want of jurisdiction: but the

Plaint—continued.**—7.—Return of Plaint**—continued.

defect of jurisdiction should be noticed at time of presentation and the plaint should be returned for presentation to the proper Court. **MAHARAJAH DHEERAJ MAHTAB CHUNDER BAHADUR v. DAMOODUR SINGH, W.R., 1864, 162.**

(34)—*Suit beyond pecuniary jurisdiction of Court—Procedure.*—Where a plaint is filed in a Civil Court and it is found subsequently that the value of the suit exceeds the pecuniary jurisdiction of that Court, the party, when that fact is discovered whether in the first Court or in the appeal before the lower appellate Court, or in the High Court, should not lose the benefit of the stamp-duty that he had already paid, but should have the plaint returned to him in order that he may present it with the additional stamp in the proper Court. **MUSSAMUT EDOO v. SHAIKH HEFAZUT HOSSEIN, 13 W.R. 358=5 B.L.R. App. 15.** [R., 8 C. 126=10 C.L.R. 146, 9 B. 266, 8 B. 313, F.B., 12 A. 553=A.W.N. 1889, 185, 7 C.L.J. 152.]

(35)—*Jurisdiction — Defendant's change of residence after filing of plaint—Plaint, return of, after registration.*—If, by reason of the residence of the defendant beyond the local limits of the jurisdiction of the Court of Small Causes, the jurisdiction of the District Court attached upon him at the time of the institution of the suit, such jurisdiction cannot be deemed to be altered by his change of residence after that time. A plaint becomes unreturnable to the plaintiff merely because of its having been registered. **RAM GOPAL v. ASA RAM, 88 P.R. 1869.** [R., 39 P.R. 1872.]

(36)—*Returning plaint after trial—Power of.*—If the Court finds that it had no power to entertain a suit for want of jurisdiction, it ought not to dismiss the suit but should return it even though after trial, for presentation to the proper Court. **MUSSAMMAT PERMESHRI v. GOBIND RAM, 90 P.R. 1884.** (73 P. R. 1876, 55 P.R. 1876, *Cited & Appr.*) [Cited, 91 P.R. 1884, 63 P.R. 1887.]

(37)—*Civ. Pro. Code (Act XIV of 1882), ss. 53, 57—Return of plaint after commencement of trial, legality of—No additional Court fees leviable.*—It is the practice of the Court to act under the provisions of the Civ. Pro. Code and return, or direct the return of the plaint in cases where, in the course of the trial, it comes out that the suit has been entertained by a Court without jurisdiction. No additional Court-fees are payable in such a case. When the decision is that the Court has no jurisdiction, it is a decision that the plaint ought not really to have been admitted, and it should therefore be returned under s. 57 of the Civ. Pro. Code, and, where, on the institution of such a suit, the necessary Court-fees have been paid in a Court not competent to afford the relief sought, it is but just that the plaintiff should be allowed to ask without paying a

Plaint—continued.**—7.—Return of Plaint**—continued.

second fee for an adjudication from another Court which can really give such relief. **PRA-BHAKARBHAT v. VISHWAMBHAR PANDIT, 8 B. 313, F.B.** [R., 8 M. 62, 10 M. 211, 12 C.P. L.R. 15; D., 8 B. 380, 11 M. 482.]

(38)—*Practice — Lower Court entertaining suit without jurisdiction—Procedure of appellate Court.*—An appellate Court deciding that a suit was entertained by the lower Court without jurisdiction, should return the plaint to the plaintiff, so that it may be presented to the proper Court. **BAI MAHKOR v. BULAKHI CHAKU, 1 B. 538.** [R., 8 C. 126, 7 C.L.J. 152.]

(39)—*Return of plaint—Act X of 1877, Civ. Pro. Code, s. 57 (c).*—Though s. 57 of the Civ. Pro. Code, 1877, contemplates a return of the plaint, should an error as to jurisdiction be patent, when it is first presented, there is nothing in the language of the section which forbids the return of the plaint at a later stage in the case, when the Court finds it has no jurisdiction. **ABDUL SAMAD v. RAJINDRO KISHOR SINGH, 2 A. 357.** [R., 8 B. 313, F.B.]

(40)—*Return of plaint—Necessity for re-stamping.*—A plaint returned by a Civil Court to the plaintiff after cancellation of the stamp for presentation to the proper Court, can be received by the latter Court without being again stamped. **MUSSAMMAT AMIN JAN v. IBRAHIM, 91 P.R. 1884.** (7 B. 487, *Not F.*; 90 P.R. 1884, *Cited.*)

(41)—*Plaint or appeal, not returnable for presentation in proper Court after admission in wrong Court and cancellation of Court-fees stamps*—Provision is made for the return of a plaint to a plaintiff, if it has been presented to the wrong Court, in ch. V of the Civ. Pro. Code. That chapter prescribes the procedure to be followed for the institution of suits, and before summons is issued to the defendant. There is nothing in the Code permitting the return of a plaint or memorandum of appeal to the plaintiff or appellant, as the case may be, after a case has been heard on its merits, and the Court is about to pronounce an adverse decision. Even if the returning of a plaint is allowable, after the Court-fees thereon have been cancelled, such a plaint could not again be legally presented in the proper Court without new stamps being affixed to it. The Executive Government alone has power to remit the Court-fees, and no Court or Judge has legal authority to admit a plaint which bears only cancelled stamps, or to direct a subordinate Court to accept such a document. **JAGJIVAN JAVHERDAS SETH v. MAGDUM ALI, 7 B. 487.** [Overruled, 8 B. 313; *Not F.*, 8 M. 62, 91 P. R. 1884; R., 8 B. 380, U.B.R. 1905, 2nd Qr., Civ. Pro. Code, 25.]

(42)—*Civ. Pro. Code, 1877, s. 57—Suit under-valued—Defence put in—Plaint, return of—Dismissal of suit.*—Where the suit has been under-valued and has been filed in a Court, which

Plaint—continued.**—7.—Return of Plaint**—continued.

according to the real valuation, is not competent to try the case, the Court must not dismiss the suit but must return the plaint under s. 57, Civ. Pro. Code, 1877, even though the defendant has filed his written statement. **KHOGENDRO NARAIN CHOWDHRY v. GOURI KANT NATH, 11 C.L.R. 300.**

(43)—*Plaint presented within time—No signature of plaintiff in plaint—Return of plaint and re-presentation within time fixed—Limitation.*—A plaint was first presented to the Court without the plaintiff's signature and was returned for amendment. It was amended and re-presented again within the time fixed by the officer of the Court, and it appeared that the suit was within the time prescribed by the law of Limitation, at the time of the first presentation, but was barred at the time of the second presentation. *Held* that the suit was not barred by limitation. **THYAGARAJA AIYAR v. SANKARA AIYAR, 6 M.L.J. 213.**

(44)—S. 53, cl. (b), Civ. Pro. Code, 1882—*Plaint not duly signed and verified—Amendment, on determination of issue, return for, if allowed.*—Where, in a case, upon an issue as to whether the plaint was duly signed and verified, the Court finds that the suit is not properly signed and verified, it cannot act under cl. (b) of s. 53 and order the return of the plaint for amendment. The proper order in such a case is to direct the removal of the plaint from the file of registered suits; such an order will, however, not debar the plaintiff from bringing a fresh suit, subject to the law of limitation. **BARODA PROSAD BOSE v. GIRIJANATH ROY CHOWDHURY, 2 C.L.J. 11.**

(45)—*Plaint seeking various reliefs—Return of plaint for presentation to proper Court with reference to one relief—Rejection of plaint—Cause of action—Premature suit.*—Where a plaint in a suit seeks various reliefs, with reference to some of which no cause of action is disclosed, or the suit is premature, it should be rejected, and not returned to the plaintiff to be presented to the proper Court, simply because one of the reliefs claimed may disclose a cause of action cognizable by another Court. A plaint must be accepted or rejected in its entirety. **NAGAR MAL v. MACPHERSON, 3 A. 766 = A.W.N. 1881, 66.**

See U. P. ACT XXII OF 1886, ss. 5, 108, cl. (4), 5 O.C. 118.

Return of plaint by appellate Court for presentation to proper Court—Appeal from order—Second appeal to High Court—*See* APPEAL—ORDERS, 3 A. 456.

See APPELLATE COURT—POWERS OF APPELLATE COURT, 6 C.P.L.R. 105, 55 P.R. 1878.

See CIV. PRO. CODE, 1908, ss. 92, 93, 5 O.C. 110.

See CIV. PRO. CODE, 1908, s. 106. O. XLIII, r. 1, 59 P.R. 1899.

Plaint—continued.**—7.—Return of Plaint**—continued.

Order of appellate Court under s. 57, returning plaint—Whether appeal lies—*See* CIV. PRO. CODE, 1908, s. 107, (2), O. XXII, r. 11, s. 104, O. XLIII, r. 1, s. 106, 25 A. 174, F.B. = A.W.N. 1902, 222.

See CIV. PRO. CODE, 1908, s. 115, A.W.N. 1883, 37.

See CIV. PRO. CODE, 1908, O. II, r. 2, A.W.N. 1890, 243.

See CIV. PRO. CODE, 1908, O. VII, r. 10, O. XLI, r. 23, O. XLIII, r. 1, A.W.N. 1882, 45.

Partnership—Dissolution—Application for winding up—Return of plaint—Jurisdiction—*See* CIV. PRO. CODE, 1908, O. XX, r. 15, A.W.N. 1883, 205.

See CIV. PRO. CODE, 1908, O. XXIII, r. 1, 5 O.C. 367.

Appeal from order rejecting plaint on ground of deficiency of Court-fee—*See* COURT FEES ACT, 1870, 5 O.C. 319.

Suit for injunction—Plaintiff's valuation of relief contested by defendant—Valuation increased by Court and plaint returned for want of jurisdiction—Legality of order—*See* COURT FEES ACT, 1870, s. 7, cl. 4 (d), 24 M. 34.

Filed intentionally in wrong Court—Return of—Duty of Court—*See* COURT FEES ACT, 1870, s. 7, sub-s. V, cl. (b), 3 A.L.J. 511 = A.W.N. 1906, 195.

Order by Appellate Court directing that the plaint be returned to be presented to proper Court if decree—*See* DECREE—GENERAL, P.L.R. 1900, p. 137.

To be returned for presentation to proper Court where appellate Court decides that original Court has no jurisdiction to entertain suit—*See* JURISDICTION—GENERAL, 7 C.L.J. 152.

See JURISDICTION—CAUSES OF JURISDICTION, A.W.N. 1891, 165.

See JURISDICTION—SUITS FOR LAND, 1 Ind. Jur. N.S. 40.

Ordered to be returned to the plaintiff for presenting to a Court of competent jurisdiction on discovery of the incompetency of the Court to hear the suit—*See* JURISDICTION OF CIVIL COURTS, 16 P.W.R. 1907.

See JURISDICTION OF CIVIL COURTS, 5 O.C. 332.

When a Court returns a—as being beyond its jurisdiction, it cannot be said that the suit has been legally instituted. A suit can be said to be *instituted* only when the plaint is presented to the proper officer of a Court having jurisdiction to try it—*See* LIMITATION ACT, 1908, ss. 3 and 14, 9 O.C. 1.

Return of—Abandonment of part of claim and institution of suit again in same Court—Bar of claim meantime—Saving of limitation—*See* LIMITATION ACT, 1908, s. 14, 5 M.L.J. 58.

Plaint—continued.**—7.—Return of Plaint—concluded.**

Return of, before registration, whether proper—Order returning defective plaint for amendment, when made—See MORTGAGE—GENERAL, 32 P.W.R. 1908.

Plaint in suit in *forma pauperis*, return of, for presentation to proper Court—Returning Court not competent to order payment of Court-fees by plaintiff—See PAUPER SUITS, 6 B. 590.

Return of plaint by Small Cause Court for presentation to Court of original jurisdiction—Effect of order in conferring jurisdiction on latter Court—See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 23, 10 M.L.J. 313.

Question of title—Return of—Declaration of title—Appeal—See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 23, 6 C.W.N. 687.

See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 23, 20 A. 480 = A.W.N. 1898, 129, 35 P.L.R. 1902 = 43 P.R. 1902.

See RES JUDICATA—MISCELLANEOUS, 16 P.L.R. 1903, F.B. = 92 P.R. 1902.

See REVIEW—MISCELLANEOUS, 6 B.L.R. App. 141.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 20 B. 283.

See SPECIAL OR SECOND APPEAL—MISCELLANEOUS, A.W.N. 1883, 165.

For presentation to proper Court—Refusal by other Court to entertain plaint—Jurisdiction—High Court's power of revision—See SUPERINTENDENCE OF HIGH COURT, 20 B. 50.

—8.—Verification and Signature.

(1)—*Duty of Court on presentation of plaint.*—A Court ought never to allow a person other than the plaintiff to verify the plaint, save strictly under the exception which the law permits,—namely, where the plaintiff, by reason of absence or other good cause, is unable to subscribe it (see Act VIII of 1859, s. 28). Whenever the plaint is not presented by the plaintiff in person, the Court should satisfy itself that the verification is actually signed by the plaintiff. NURSING DEB v. RAM MOHUN MOOKERJEE, Marsh 176. RAM MOHUN MOOKERJEE v. NURSING DEB, W.R.F.B. 55 = 1 Ind. Jur. O.S. 63 = 1 Hay 379.

(2)—*Necessity for plaint being signed by plaintiff.*—The plaint in every suit must be signed by the plaintiff unless there is sufficient cause for his failure to do so. RAJA GOKUL DASS v. MULLU, 16 C.P.L.R. 103. (7 W.R. 168, 4 B. 468, R.)

(3)—*Plaint and written statement, how subscribed and verified—Witnesses—Examination of.*—Where plaintiff showed no *bona fide* intention to examine certain parties to the suit as witnesses, and did not complain of the lower Court's refusal to add them to the list, he cannot be allowed to put in their evidence after

Plaint—continued.**—8.—Verification and Signature—contd.**

the arguments on appeal are concluded, and the decision is about to be given. It is a duty strictly incumbent on all Courts, without regard to rank or station, to see that plaints and written statements are subscribed and verified by the parties in person, except when unable to do so by reason of absence or other good cause. In these cases they may be allowed to be subscribed and verified by persons competent to do it. KUNOO SINGH ROY v. ESHAN CHUNDER ROY, 6 W.R. 213.

(4)—*Civ. Pro. Code, s. 51—Plaint, necessity of plaintiff's signature to.*—Except in the case provided by the last clause of s. 51 of the Civ. Pro. Code, it is imperatively necessary that the plaintiff himself should sign his plaint. Where the plaintiff is not shown to be, by reason of absence or any other good cause, unable to sign the plaint himself, a power of attorney authorising a pleader in general terms to sign plaints for him will not render a plaint signed by such pleader in accordance with such power of attorney a valid plaint according to law. MAHABIR PRASAD v. SHAH WAHID ALAM, A.W.N. 1891, 152. [D., 22 A. 55; R., 21 A. 450.]

(5)—*Verification of, by some only of the plaintiffs—Effect—Civ. Pro. Code, 1882, s. 51 (O. VI, rr. 14 and 15).*—In a suit, where only two of four plaintiffs had signed and verified the plaint, it was held that, as there was no rule prohibiting a person named as a co-plaintiff from being treated as a plaintiff unless he signed and verified the plaint, the two plaintiffs who signed and verified were not suing on behalf of the plaintiffs who did not sign and verify, but that the latter were plaintiffs from the very first; that, though the plaint should be signed by all the plaintiffs according to s. 51, Civ. Pro. Code, 1882, and should be returned by the Court for amendment, the verification by some of the plaintiffs, who were conversant with the facts of the case was sufficient; and that, though the Court should see that a plaint on being received is properly signed and verified, an objection as to the informal character of signing and verification which did not go to the root of the suit, could not be taken at a late stage of the suit, after one or two judgments had been passed in the suit without any objection having been raised as to the informality. CHANDI MAL v. DEVA SINGH, 48 P.R. 1896. (17 C. 580, A.W.N. 1886, 102, R.)

(6)—*Act VIII of 1859, s. 28—Permission to verify plaint through person other than plaintiff, grantable by Court on good cause shown.*—Under the provisions of s. 28 of Act VIII of 1859, before granting an application made to the Court to permit the subscription and verification of a plaint to be made on behalf of the plaintiff by another person, it is the duty of the Court to determine whether the allegations made by the applicant are true, and, if so, whether they constitute a good cause within

Plaint—continued.**—8.—Verification and Signature—contd.**

the meaning of s. 28, sufficient to enable the Court to grant the application. **MAHARAJAH MOHESSUR BUKSH SINGH BAHADOOR v. SHEO NARAIN SINGH**, 6 W.R. Mis. 59.

(7)—*Civ. Pro. Code*, s. 51—*Plaint to be signed by plaintiff—Cases when signature is dispensed with*—"Good cause" significance of the words.—S. 51 of the *Civ. Pro. Code* contains a rule and an exception to that rule. The rule is that plaintiff and his pleader, if any, shall sign the plaint. Where there is a pleader to sign, no exception is made. But for plaintiff's personal signature an exception is provided for specified reasons. When resort is had to the exception, such reasons must be asserted in every case. It is a misinterpretation of the proviso to say that "absence" is a good cause of not signing. It is only absence of such a kind as makes signature impossible that would make this part of the proviso applicable. But the words "other good cause" are of a wider significance, and, in effect, leave the matter to the discretion of the Court; for each case must be treated by itself. So, unless by reason of absence or for other good cause, the plaintiff is unable to sign, the language of s. 51 is imperative that he shall sign. **CHANDRA MAL v. GANPAT RAO**, 4 N.L.R. 117. (16 C.P.L.R. 103, F.)

(8)—*Verification by person other than plaintiff—Notice*.—When a plaint is subscribed and verified by a person other than the plaintiff, notice should be given to the defendant. Nothing more formal need be done by way of notice to support an application for the admission of the plaint, if the person verifying is qualified in other respects according to the provisions of the Code of Civil Procedure. **PUDDOMOKEY DOSSEE v. SHAMA CHURN CHUCKERBUTTY**, 1 Ind. Jur. N.S. 226.

(9)—*Verification by unauthorised person—Removal from file—Pracice*—When a plaint has been verified by a person who has not shown to the Court that he is a person competent to verify it, the Court will order the plaint to be removed from the file. **OVEREND, GURNEY & CO. v. STEELE**, 1 Ind. Jur. N.S. 39.

(10)—*Civ. Pro. Code (Act X of 1877, as amended by Act XII of 1879)*, ss. 51, 52—*Verification of plaint by person holding general power-of-attorney*.—A plaint signed by a person holding a general power-of-attorney to sue on behalf of the plaintiff, is properly signed within the meaning of the proviso in s. 51 of the *Civ. Pro. Code*, 1877, as amended by Act XII of 1879. Although there is nothing in the Code requiring that the verification of a plaint should be made in the presence of the Court or its officers, yet, having regard to the fact that, where a person other than the plaintiff happens to verify a plaint, it should be proved to the satisfaction of the Court that that person is acquainted with the facts of the case, it is desirable that the verification by such

Plaint—continued.**—8.—Verification and Signature—contd.**

person should be made in the presence of the Court, unless the Court be satisfied that there is sufficient ground for dispensing with his attendance. **H. KASTOLINO v. RUSTOMJI DEDABHAI**, 4 B. 468. [R., 54 P.L.R. 1902 = 41 P.R. 1902, 16 C.P.L.R. 103; D., 2 L.B. R. 41.]

(11)—*Civ. Pro. Code*, 1859, ss. 17, 27—*Suit by agent under letter of attorney as plaintiff—Death of party before judgment—Abatement—Legal representative—Verification*.—A party residing within the jurisdiction of the Court appointed a person under letter of attorney to act as agent for filing and verifying a plaint; held that such a person was not an authorized agent within the meaning of s. 15 of Act VIII of 1859, and was not competent to sign and verify the plaint on behalf of the principal. As the agent had elected to put himself in the position of the plaintiff, the appeal did not abate on the death of the principal before pronouncing of judgment of the lower appellate Court and its decision on the merits was right, since it was not necessary to make the legal representative of the deceased person a party to the suit. **THORNHILL v. TAYLOR**, 1 Agra 215.

(12)—*Civ. Pro. Code (Act X of 1877)*, ss. 36, 51—*Plaint, subscription of—Authorized agent*.—S. 36, read with s. 51 of the *Civ. Pro. Code*, Act X of 1877, shows that a plaint which may be presented by an authorized agent, may, in like manner, be subscribed by him, and that such subscription would be a compliance with s. 51. **ROY DHUNPUT SINGH BAHADUR v. JHOOMUK KHAWAS**, 3 C.L.R. 579. [R., 54 P.L.R. 1902 = 41 P.R. 1902; D., 2 L.B.R. 42.]

(13)—*Plaint—Subscription of plaint, by authorized agent—Civ. Pro. Code (Act X of 1877)*, s. 51.—Under s. 51, *Civ. Pro. Code*, Act X of 1877, the Court may in its discretion admit a plaint which has been subscribed by an authorized agent of the plaintiff. **MAHARANEE SURNAMOYE v. POOLIN BEHARY MUNDUL**, 3 C.L.R. 15.

(14)—*Plaint, verification of, by agent—Subsequent objection after previous sanction—Dismissal for default*.—It is not competent to a Small Cause Court Judge to raise any objection to the verification of a plaint by an agent, when such verification has been expressly sanctioned by him at the commencement of the suit, and it is still less competent to him to dismiss the case for default when it has been argued by three pleaders of his Court on behalf of the petitioner. *In the matter of* **RAJAH SUTTO CHURN GHOSAL BAHADOOR v. SUROOP CHUNDER DOSS**, 12 W.R. 465.

(15)—*False verification—Verification by mocktear—Civ. Pro. Code*, 1859, s. 24.—The verification of a plaint signed with the name of the plaintiff by her mocktear, and which does not aver what is false, but attempts to do what the law estops her from doing, is

Plaint—continued.**—8—Verification and Signature—contd.**

not a false verification within the meaning of s. 24, Act VIII of 1859. *ROSHUN JOHAN v. ENAYET HOSSEIN*. **W.R. F.B. 41 = Marsh 127 = 1 Ind. Jur. O.S. 44.**

(16)—*Practice—Suit by firm—Signature and verification by one partner.*—It has been the practice of the Court in a suit brought by a firm, to allow a member of the firm, without special leave to verify the plaint on his own behalf and also on behalf of his co-partners. *Quære.*—Whether such a practice is right or ought to be allowed to continue? *RAMACHUNDER v. CHOONEELALL*, **12 B.L.R. 35.**

(17)—*Suit by partners—Plaint—Signature—Verification.*—One only of several partners can verify a plaint. Partners of a firm may sign with the firm's name. On the plaintiffs describing themselves as lately carrying on business under the name of C and Co., held that there was no irregularity in the plaint being signed by C and Co., and verified by A.B., one of the partners. *ROBERT LACHLAN v. SHAIK ABDULLA*, **5 B.L.R. App. 89.**

(18)—*Plaint—Suit on behalf of firm—Suit in the name of firm—Plaint signed and verified by one of the partners—Misdescription—Amendment of plaint—Power of Appellate Court to amend plaint—Civ. Pro. Code (Act XIV of 1882), s. 578—Irregularity.*—In this case the plaintiff was described in the plaint "*dukhan Amar Singh Wazir Singh*" and it was signed by Amar Singh Mudai. Objection was taken to the form of the plaint and its verification but disallowed and the Court passed a decree in favour of the plaintiff. The lower Appellate Court remanded the suit under s. 562 of the Civ. Pro. Code, for re-trial after proper orders to be passed for amendment of the plaint. The Chief Court set aside the order of remand and directed the lower Appellate Court to rehear the appeal as the original Court had not disposed of the suit on a preliminary point. The Lower Appellate Court dismissed the appeal on the ground that the order of the Chief Court precluded a re-trial, and s. 578 of the Civ. Pro. Code did not cure the defects in the plaint. *Held*, that the suit could not be brought in the name of the shop, and the original Court should have ordered the word *dukhan* to have been expunged on pain of rejection of the plaint. *Held*, further that one of the partners can sign, and verify the plaint on behalf of other partners also and the lower Appellate Court should have directed the amendment as to the description of the plaintiff. The Chief Court allowed the amendment of the plaint and again remanded the case to the Lower Appellate Court for determination of the appeal. *AMAR SINGH v. MAGHAR SINGH*, **103 P.L.R. 1902.**

(19)—*Ss. 51 and 435, Civ. Pro. Code, 1882—Subscription and verification of plaint by acting Manager—Acting Manager, "principal officer of the Corporation."*—An acting Manager of a Bank is a "principal officer of the Corporation,"

Plaint—continued.**—8.—Verification and Signature—contd.**

and he is entitled to subscribe and verify the plaint for the Bank within the meaning of s. 435, Civ. Pro. Code. Where a permanent Manager, of a certain Bank, authorised to sue for debts due to the Bank and to substitute any person for himself, besides doing other acts of management, executed a power of attorney as Manager, whereby another person was appointed as acting Manager, and where such acting Manager while he was conducting the chief business of the Bank, instituted a suit for recovering certain debts, notwithstanding the fact that the power of attorney did not contain express authority empowering him to sue for debts, *held*, that s. 51 of the Code regulating proceedings taken by or on behalf of ordinary plaintiffs did not apply, but that the case must be decided with reference to s. 435 only. *DELHI AND LONDON BANK v. OLDHAM*, **21 C. 60, P.C. = 20 I A. 139 = 6 Sar. 331.**

(20)—*Verification of plaint by lunatic—His right to sue.*—There is no ruling of law which renders a lunatic incapable of suing in a Court of Law, to obtain redress for injury, and he could verify a plaint where he is capable of understanding it. *BRINDAPUN CHUNDER KUR CHOWDHRY v. KALI DASS SIRCAR*, **W.R. 1864, 268.**

(21)—*Plaint alleging frauds within plaintiff's knowledge—Necessity of subscription and verification by plaintiff himself.*—Where a plaint happens to contain several allegations of fraud on the part of the defendants, many of which must obviously be true or false within the knowledge of the plaintiff himself, but has, however, been signed and verified only as by the pen of his general attorney, there is nothing unreasonable in the defendant's requiring the plaintiff to himself subscribe and verify the plaint, it being right and proper under the circumstances that he should be required to do so. *THE RAJAH OF TOMKUHI v. BRAIDWOOD*, **9 A. 505 = A.W.N. 1887, 137.**

(22)—*Verification of plaint—Fraud—Personal knowledge—Plaintiff's verification necessary.*—Where the plaintiff sets up gross fraud in a case depending chiefly upon his personal knowledge, he should verify the plaint. *PROTAP CHUNDER BANERJEE v. KRISTO KISHORE SHAHA*, **8 C. 885.**

(23)—*Plaint—Verification by servant—Fraud.* A plaint containing certain allegations of fraud and setting out circumstances tending to affect any possible question of limitation, such circumstances being peculiarly within the knowledge of the plaintiff, ought to be verified by the plaintiff herself and ought not to be allowed to be verified by a servant of the plaintiff. *JARDINE SKINNER & CO. v. MOHARANEE SHURNO MOYEE*, **24 W.R. 215.**

(24)—*Plaint, Verification of—Personal knowledge and information and belief—Civ. Pro. Code, 1877, s. 51 = (s. 52 of the Code of 1882).* In all cases, whether a plaint is verified by the

Plaint—continued.**—8.—Verification and Signature—contd.**

Plaintiff or some other person, the party verifying should state shortly what paragraphs he verifies of his own knowledge and what paragraphs he believes to be true from the information of others. *In the matter of UPENDRO LALL BOSE*, 6 C. 675 = 7 C.L.R. 413. [F., 15 A. 59]

(25)—*Benami mortgage—Disclosure of beneficial owner—Foreclosure—Non-verification of plaint.*—A suit for possession after notice of foreclosure having been decreed in favour of the parties who appeared as mortgagees in the mortgage-bond, though it was contested that the ostensible plaintiffs were not really interested, an action was brought to recover the mesne profits of the land decreed in the above suit. While the case was under trial, L, whose guardian had brought the action, filed a petition, stating that he had nothing to do with the property, and that the real owner was C, who was in possession. A petition to the same purport was filed by C, and the Court directed that his name should be entered as a joint-plaintiff in the suit. *Held* also, that the suit could not be dismissed and justice denied on the technical ground that C had failed to verify the plaint as required by law. *BIRJ MOOHANLAL MITRA v. BISHNU CHANDRA CHATTERJEE*, 1 B.L.R. A.C. 100 = 10 W.R. 145.

(26)—*Plaintiff when may be excused from verifying plaint—Absence or other good cause.*—It is for the Court in each case where a verification is not made by the plaintiff to consider whether, by reason of absence or for other good cause the plaintiff is unable to subscribe and verify, and whether, if so, the person who has verified it is a person competent to make the verification. It is impossible to set down categorically by way of general directions, what shall be or shall not be considered good cause. That is for the consideration of the Court in each case, and it is only necessary to see that in no case is the plaintiff excused from verifying his plaint, except where, by reason of absence or other good cause, it is made out to the satisfaction of the Court that he is unable to do it. *In re RAJAH LEELANUND SINGH*, 7 W.R. 168. [R., 16 C.P.L.R. 103.]

(27)—*Verification of plaint—Inability to verify.*—In general, plaints should be verified by plaintiff; s. 28 of Act VIII of 1859 should be applied exceptionally and for the good and sufficient cause contemplated therein. Such causes should be judicially considered whenever pleaded. *MAHARAJAH MUHESSR BUKSH SINGH BAHADUR, PETITIONER*, 5 W.R. Mis. 33.

(28)—*Civ. Pro. Code. 1882, s. 52 (= O. VI, r. 15, new Code)—Verification, particulars of.*—A verification in a plaint was made as follows:—"To the limit of my knowledge the purport of this is true." *Held* that such verification was not in accordance with the provisions of s. 52, Civ. Pro. Code. (6 C. 675, R.)

Plaint—continued.**—8.—Verification and Signature—contd.**

The verification under s. 52 must be, if all the facts are within the knowledge of the deponent, a distinct verification that they are to his knowledge true. If he has knowledge as to some, and only information and belief as to others, the verification should show as to which he speaks from his knowledge and as to which he speaks from his information and belief. *GIRDHARI v. KANHAIYA LAL*, 15 A. 59 = A.W.N. 1892, 235. [R., A.W.N. 1896, 75, 18 A. 396, 10 C.L.J. 91]

(29)—*Civ. Pro. Code (1882), s. 53 (= O. VI, r. 17, new Code)—Defective verification of plaint—Amendment of plaint.*—In a plaint consisting of three leaves, the signatures and verifications were contained in the last leaf. The first leaf, the stamped paper containing the name of the Court and the names, description and place of abode of the parties was apparently not verified by the plaintiffs, because that stamped paper showed that it was purchased after the date of the verification. *Held* that the verification was defective, and that the Court should not, under such circumstances, dismiss the suit, but should allow the plaintiffs an opportunity of amending the plaint by making a proper verification. *FATEH CHAND v. MANSAB RAI*, 20 A. 442 = A.W.N. 1898, 110.

(30)—*Plaint not properly signed and verified—Procedure of Court.*—A plaint was drawn up on two sheets of plain paper, and it was signed and verified at the foot by the plaintiffs as required by s. 51, Civ. Pro. Code. They then sent the plaint to their pleader for being filed in the Court. The pleader, instead of attaching to the plaint the stamp paper requisite for the Court-fees payable on the plaint, as he should have done, took out the first sheet and transcribed the contents of it on the stamp paper. *Held* that the plaint was defective and that the Court should not dismiss the suit, on that account, but should have returned the plaint to the plaintiffs for amending it by signing and verifying it as it stood. *Held* further that it was the duty of the Court to return the plaint before settlement of issues, and that even if the issues had been settled, the plaintiffs should not be deprived of the opportunity to cure the defect in the plaint by amending it. *GANGA SAHAI v. MUHAMMAD ALI JAN KHAN*, 20 A. 444, Note.

(31)—*Verification of plaint defective—Suit not to be dismissed—Plaint should be amended—Verification that all matters in plaint are true to his knowledge—Effect of want of personal knowledge as to some.*—The plaint was written out on four sheets of plain paper and the end was signed and verified by the plaintiff, but the pleader filing the plaint, instead of attaching to it the stamps required for the claim took out the first two sheets and caused their contents to be copied on the stamp papers. *Held* that the verification was defective, and that the Court should not dismiss the suit on that account, but should return the plaint to

Plaint—continued.**—8.—Verification and Signature**—*contd.*

the plaintiff in order that it might be properly verified. A verification cannot be considered to be defective in form, on the ground that although the plaintiff verified the whole of the statements contained in the plaint as true to his knowledge, he had, in fact, as to some matters, no personal knowledge. For the purpose of ascertaining whether a verification is a good one in form, the fact whether it is true is wholly immaterial. **MUNSHI FAKIR CHAND v. MAHESH DAS**, 20 A. 445, Note.

(32)—*Civ. Pro. Code*, ss. 52, 53, 578—**Plaint not properly verified, amendment of—Procedure of appellate Court—Defect in verification, whether justifies dismissal of suit.**—Under s. 53 of the *Civ. Pro. Code*, the Court of first instance, unless acting under the orders of the appellate Court, could not return a plaint to be amended after the settlement of issues: but if the plaint required amendment and the fact was only discovered after the issues had been settled, the Court could, under s. 53, cl. (c), amend the plaint or cause it to be amended at any time before judgment. The result of defective verification of the plaint is not necessarily to be the dismissal of the suit. Where, however, a material defect in such verification is not discovered until the suit gets into the superior Court on appeal, the appellate Court can either order the amendment to be made in that Court, or may order the first Court to do what it ought to have done at the proper stage. If the defect in the verification is merely of a formal nature, and not one affecting the merits of the suit, so that it comes under s. 578 of the Code, the appellate Court need not take any notice of it and is not bound to take any steps to rectify it. **RAJIT RAM v. KATESAR NATH**, 18 A. 396 = **A.W.N.** 1896, 102. [*F.*, 5 C.W.N. 91; *R.*, 22 A. 55, 23 A. 167.]

(33)—**Return of plaint in suit as not properly verified—Presentation beyond expiry of limitation.**—The plaint, in this case, having been returned as not duly verified, and not having been presented or registered until more than six months after the expiration of the period of limitation, was clearly out of time. **ABOO BEEBEE v. THE COLLECTOR OF JESSORE**, 4 **W.R.** 81.

(34)—**Irregular verification — Dismissal on ground of improper verification after admission of plaint.**—The Judge on appeal dismissed a suit on the ground that the plaint was verified by an agent, when it might and ought to have been verified by the plaintiff himself. *Held* that, the plaint having been admitted, the suit ought not to be dismissed for this defect, but the Judge might properly have required the verification of the plaintiff to be supplied. **GOKUL CHUNDER v. BUREEK BEGUM**, **Marsh** 344 = 2 **Hay** 325.

(35)—**Plaint—Signature and verification by agent—Irregularity—Whether material—Cure by s. 99, Civ. Pro. Code, 1908—Date of original**

Plaint—continued.**—8.—Verification and Signature**—*contd.*

presentation — Subsequent amendment—Starting point — Limitation.—A plaint was both signed and verified by an agent of the plaintiff. It was pleaded that the plaintiff's signature was not essential because the plaintiff, though resident within jurisdiction, had no personal acquaintance with the facts. The Munsiff held that the plaint was not bad in law, and decided the suit correctly on merits. *Held*, that the signature by the agent amounted to an irregularity, that the defect was cured by s. 99, *Civ. Pro. Code*, 1908 and that there was no ground for interference in appeal. A plaint is not void or inadmissible until the defect in signature is removed. The date of amendment of a plaint is immaterial for purposes of limitation, unless the time expressly allowed by Court has been exceeded, and it is the date of the original presentation of plaint that determines the date of suit for purposes of limitation. **DURGAGIR v. KOLLU**, 7 **N.L.R.** 33. (16 **C.P.L.R.** 103, 4 **N.L.R.** 117, 28 **C.** 324, 22 **A.** 55, 10 **C.W.N.** 841, *R.*)

(36)—*Civ. Pro. Code*, s. 52—**Plaint—Amendment of plaint—Verification of plaint.**—*Held* that a plaint verified in the following form:—“I, Musammatt Ganno Bibi, plaintiff, affirm that the contents of the plaint are true to the extent of my knowledge and belief”—was not properly verified according to law. *Held* also that the plaint could not be returned for amendment of the verification after issues had been settled. **BALGOBIND DAS v. GANNO BIBI**, **A.W.N.** 1896, 75. (15 **A.** 59, *R.*)

(37)—*Civ. Pro. Code*, s. 53—**Plaintiff—Amendment—Plaint not signed by plaintiff or by any one authorised by him in that behalf.**—*Held*, where a document which purported to be a plaint was found not to have been signed by the plaintiff or by any one duly authorised by him in that behalf, that it was not competent to a Court before which such document came in appeal, to allow the so-called plaintiff to sign or affix his mark to the said document, and thereby to convert it into a valid plaint. The document was *ab initio* invalid, and the only order possible in respect of it was an order of rejection. **MARGHUB AHMAD v. NIHAL AHMAD**, **A.W.N.** 1899, 55. (**A.W.N.** 1894, 95, *F.*) [*R.*, 109 **P.R.** 1907; *Diss.*, 22 **A.** 55; *D.*, 25 **A.** 635.]

(38)—**Trial by Deputy Collector—Non-verification of plaint—Examination of parties and their agents—Defective procedure.**—In this case, the High Court was of opinion that there was not only an error in the facts on which the judgment of the appellate Court was based, but there had been, from first to last, defective procedure in the following respects:—(1) The plaint was not verified and the mere fact that one of the plaintiffs had given a deposition could not cure the defect of non-verification of the plaint of all the plaintiffs. (2) The provision of the law that, on the date fixed for the hearing, the

Plaint—continued.**—8.—Verification and Signature—concl'd.**

Collector should examine the plaintiff or defendant or the agent of each and each may cross-examine the other, had not been observed by the Collector, and no opportunity of cross-examination had in fact been given to the parties. The decision of the lower appellate Court was accordingly reversed and the case remanded to that Court to be returned to the Deputy Collector with directions to adhere strictly to the procedure laid down in Act X of 1859. **SREENATH DUTT CHOWDHRY v. GOKOOL CHUNDER SEIN, 6 W.R. Act X, Rul. 6.**

(39)—*False verification by agent—Plaintiff not punishable.*—Plaintiff is not punishable for false verification by agent. **TARAPERSAD ROY CHOWDHRY v. GOPAL DOSS DUTT, W.R. F.B. 23.**

(40)—*Plaint—False verification—Dismissal of suit—Decision on merits.*—A plaintiff was verified by one N, who, in verifying it, declared himself to be the tehsildar of the plaintiff, and to know that the particulars given in the plaint were true. When the case came on for hearing, the Munsiff found that the verification by N was false; and he then apparently was about to dismiss the suit on account of this false verification, when the plaintiff presented an application for leave to withdraw the suit, with permission to bring a fresh suit. The Munsif rejected this application, and dismissed the suit with costs, on the ground that the verification of the plaint was false. *Held* that the defendant having filed his written statement, and the case having actually come on for trial, it was the duty of the Munsif to have disposed of the case upon the merits, dealing in such a manner as he might have thought fit with N, who, no doubt, had laid himself open to criminal proceedings, if he made a false verification for the plaintiff. **SHAMA SOONDUREE DEBIA v. ROHIMOODEEN SIRDAR, 24 W.R. 71. [Rel. on, 15 Ind. Cas. 583.]**

This circular directs that all verifications in plaints, &c., shall contain a true specification of the date and place at which they are signed. **Civ. Cir. No. 5 dated 22nd February 1870, 13 W. R. Civ. Cir. 9.**

See CIV. PRO. CODE, 1908. s. 83, O. XXIX, r. 1, 30 C. 103.

Verification and signing of—Plaint on behalf of Government signed and verified by Collector and signed and presented by a Pleader who was not a Government Pleader—*See* CIV. PRO. CODE, 1908, s. 99, 10 C.W.N. 841=8 C.L.J. 34.

Suit brought by an independent prince—Recognised agent—Signing and verification of plaint—*See* CIV. PRO. CODE, 1908. O. VI, rr. 14, 15 (1), s. 85, 41 P.R. 1902=54 P. L. R. 1902.

Verification of plaint in suit by Corporation—*See* CIV. PRO. CODE, 1908, O. XXIX, r. 1, 5 C. W. N. 91, 9 C.W.N. 608.

Plaint—continued.**—9.—Miscellaneous.**

(1)—*Cause of action—Benamedar.*—The plaintiff alleged that the three first defendants, with a brother since deceased, purchased a *putnee mehal* therein described; that the same was thereafter sold for arrears of rent, and purchased by the said three defendants with their own funds; but that the Collector, in compliance with their petition, entered the name of their mother, the fourth defendant, as the purchaser. The plaintiff then alleged a subsequent sale by the three first defendants to the plaintiff; that they, the said defendants, caused a *kobala* to be executed by the fourth defendant, and that they, being the real owners, became witnesses to the deed, and received the whole of the consideration-money; and prayed, by reason of ouster and disturbance alleged, for damages against all the defendants for breach of the following covenant contained in the *kobala*:—"If any one making any objection to the sale by me of the said *mehal* give you trouble in any way, then I will put matters straight. If I fail to do so, I will return the consideration-money. If I do not return it you will realize it by means of a suit." The Civil Judge in whose Court the plaint was filed held that no cause of action was shewn; and the High Court, on appeal, remanded the case to try whether there had been the ouster and disturbance alleged, and whether, under the circumstances, they constituted a breach of the contract. The High Court, however, dismissed the suit against the three first defendants, holding that the mother only was bound by the contract:—*Held*, by their Lordships, that the plaint disclosed a cause of action against all the defendants, and that the case must be remanded accordingly. One issue raised by the plaint was whether the *kobala* was really entered into by the mother as the agent and on behalf of the three first defendants, and by their authority. **RISHESWARI DEBYA v. GOVIND PERSAD TEWARI, 3 I.A. 194=26 W.R. 32=3 Sar. 626.**

(2)—*Failure to prove case set up in plaint—Admission by defendant—Decree for plaintiff as to such portion.*—Where a plaintiff states in his plaint that the lands in dispute are his self-acquisition and fails to prove his averment, it is no ground for dismissing his suit altogether, if he is entitled in part to the relief sued for on the facts admitted by the defendant himself. **NARASANNA v. GURAPPA, 9 M. 424.**

(3)—*Order for filing new plaint—Decree—Construction.*—Where plaintiffs were ordered to file a new plaint within 3 months, the period was construed to be within 3 months of the final decree. **TARINEE CHURN DEY v. BUNG-SHEE BUDDUN BEY, 17 W.R. 183.**

(4)—*Decree—Uncertainty—Relief—Supplemental plaints.*—The first Court allowed a supplemental plaint to be filed, and passed no order on it, and, in drawing up judgment, wholly omitted to notice it, and gave a decree for an area, not according to the boundaries

Plaint—continued.**—9.—Miscellaneous—continued.**

correctly laid down in the supplemental plaint, but simply for "the lands under litigation." To prevent the petitioner's decree from being infructuous, or, if possible, to protect him from unnecessarily incurring further expenses in applying for a review of judgment, it was indicated to the Court executing the decree that, where the lands have been identified in the plaint by boundaries, and also by trustworthy measurement papers, if possession cannot be given according to the former, it may be according to the latter. **GRAY v. LOYAL, 1 W.R. Mis 19.**

(5)—*Plaint not stamped—Credit asked for excess paid elsewhere.*—Where the plaint is not stamped but the plaintiff claims that the necessary stamp for the same relief has been furnished in excess in another suit, the credit claimed cannot be allowed. **ASSAN v. PATHUMMA, 22 M. 494.**

(6)—*Stamps—Plaint—Necessity to write on stamp paper.*—It is not at all necessary that the substance of the plaint should, as much as possible, be engrossed on the stamp papers. If the rule against the use of a larger number of stamps than is absolutely necessary is complied with, it is not material whether the plaint be taken to commence or end on plain paper. *In the matter of THE LAND MORTGAGE BANK, 18 W.R. 326.*

(7)—*Undervaluation of suit—Civ. Pro. Code, 1859, ss. 30, 31, 32—Dismissal of suit.*—If at the hearing of a suit it proves to be undervalued, and if the Court would not have jurisdiction to entertain it if properly valued the suit ought to be dismissed. **MUZHUR ALI v. BASOO, 8 W.R. 47.** **KOYLASHNAUTH ROY v. BODUN MONEE DABEA, 2 Hay 386.** It is only at the time of presentation of the plaint that the plaintiff in a suit which has been brought in a Court, in which, with reference to its proper valuation, it should not have been brought, can claim the benefit of ss. 30, 31 and 32 of the Code of Civil Procedure, 1859. **MUZHUR ALI v. BASOO, 8 W.R. 47.** *But see contra JADU v. HIFAZAT HOSSEIN, 5 B.L.R. App. 15.* **S.C. EDOO v. HEFAZUT HOSEIN, 13 W.R. 358.**

(8)—*S. 23, Provincial Small Cause Courts Act (1887)—Finality of order.*—An order under s. 23 returning a plaint to be presented to the regular Courts, is final, and confers jurisdiction on the latter. **MAHAMAYA DASIA v. NITYA HARI DAS BAIRAGI, 23 C 425.** [*F.*, 10 M.L.J. 313, 29 M. 329; *R.*, 35 P.L.R. 1902.]

(9)—*Bond, suit for amount due under—Lien—Application under Act XX of 1866, s. 53.*—A plaint in a suit instituted in a Munsiff's Court to recover the amount due under a bond and for a declaration of the plaintiff's lien on the property pledged thereunder, cannot be converted into an application under s. 53 of Act XX of 1866. *In the matter of GOUR CHUNDER MITTER v. GOLUCK CHUNDER ROY, 19 W. R. 156.*

Plaint—continued.**—9.—Miscellaneous—continued.**

(10)—*Inconsistent allegations—Suit framed either under cl. (2) or cl. (5) of s. 108, U.P. Act, XXII of 1886.*—Plaintiff sued to recover Rs. 1,098 alleged to be due from defendants as agents employed by her to collect rent or as arrears of rent payable by them as *thekadars* of the village. The suit was entitled as one either under cl. (5) or cl. (2) of s. 108, Act XXII of 1886. The Court in which the suit was filed was competent to entertain it either as a suit under cl. (5) or as a suit under cl. (2) it was found that the defendants were liable under cl. (2) as *thekadars*. *Held*, that the suit was not liable to dismissal on the ground that the plaint contained inconsistent allegations. **JAFRI BEGAM v. TALEYAR KHAN, 1 O.C. 88.**

(11)—*Verification of statement in suit for rent—Act X of 1859, s. 37.*—The plaintiff brought a suit for rent claimed to be due for three years; he failed to prove his claim, and the suit was dismissed for want of evidence. He afterwards sued to recover rent for one of the same years, and recovered the amount. The Judge on appeal reversed the decree, and made an order remitting the case to the Deputy Collector to enquire under Act X of 1859, s. 37, whether the plaintiff had committed perjury in the first suit, the plaint in which was verified by his agent. The 37th section of the Act requires that the statement of claim shall be verified by the plaintiff or his agent, and enacts that, if the statement shall contain any averment which the person making the verification shall know or believe to be false, or shall not know or believe to be true, such person shall be subject to punishment according to the law for the time being in force for the punishment of giving or fabricating false evidence. *Held* that there was no foundation for the order, the averment having been made by the agent, and not by the plaintiff; and besides, there was no evidence that it was untrue, there having been no finding in the first suit that the rent was not due. **TARAPERSAD ROY CHOWDHRY v. GOPAL DASS DUTT, Marsh 72=W.R. F.B. 24=1 Ind. Jur. O.S. 79=1 Hay 235.**

See **MAD. ACT VIII OF 1865, ss. 15, 18, 51, 22 M. 179.**

Presentation of plaint—Plaint sent by post—See MAD. ACT VIII OF 1865, s. 51, 8 M. 411.

May be treated as an application under s. 244, Civ. Pro. Code—See CIV. PRO. CODE, 1908, s. 47, 6 A.L.J. 641=3 Ind. Cas. 495.

Discrepancies between the terms of a document and their description in—Dismissal of suit—Revision—See CIV. PRO. CODE, 1908, s. 115, 9 Ind. Cas. 32=9 M.L.T. 268=21 M. L.J. 451.

Plaintiff shebait of idol—Plaintiff's name in heading of plaint—Suit in representative character—Maintainability—See CIV. PRO. CODE, 1908, s. 115, O. XXXI, r. 1, 9 Ind. Cas. 132.

See **CIV. PRO. CODE, 1908, O. VII, r. 11, O. VI, r. 18, 27 C. 376.**

Plaint—concluded.—9.—**Miscellaneous**—concluded.

Details of—When may be read into the decree.—*See* CIV. PRO. CODE, 1908, O. XX, r. 9, 74 P.R. 1905=182 P.L.R. 1905.

When a—can be treated as an application for execution—*See* CIV. PRO. CODE, 1908, O. XXI, r. 16, s. 47, 28 M. 64.

Admission of, through mistake or inadvertence—Court-fee—*See* COURT FEES ACT, 1870, s. 7, V (b) and (d) and s. 28, A.W.N. 1907, 110=4 A.L.J. 363=29 A. 382.

Insufficiently stamped at presentation—Payment of additional Court-fee after period of limitation for suit—Dismissal of suit—*See* COURT-FEES ACT, 1870, s. 28, 2 A.L.J. 55=A.W.N. 1905, 12=27 A. 411.

General prayer in—for getting such relief as the Court may think fit to grant—Suit for possession and declaration—Suit for declaration of half only of a property—Relief granting declaration for whole—*See* CUSTOMS—PUNJAB—ALIENATION, 26 P.W.R. 1907.

Civ. Pro. Code, 1908, s. 53—Suit for enforcing execution of Muchilika—Amendment of by addition of prayer for declaration—*See* DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS, 12 M. 481.

See DECREE—MISCELLANEOUS, 5 W.R. Act X, r. 59.

See HOLIDAY, 43 P.R. 1870.

Objections to frame of, when entertainable—Limitation—*See* LIMITATION ACT, 1908, arts. 91, 92, 93, 120, 82 P.L.R. 1909=88 P.W.R. 1909=4 Ind. Cas. 923.

Payment of deficient stamp-duty under orders of Court—Proper—from date of presentation—*See* LIMITATION ACT, 1908, art. 132, 15 M.L.J. 219=28 M. 493.

See NEGOTIABLE INSTRUMENTS, SUMMARY PROCEDURE ON, 3 B.L.R. O. C. 146.

Treated as an application under s. 244, Civ. Pro. Code, 1882—*See* TRANSFER OF PROPERTY ACT, 1882, s. 99, 8 O.C. 327.

Plaintiff.

See JOINDER OF PARTIES.

See PARTIES TO SUITS.

(1)—*Appeal by one plaintiff against another—Decision of rights of plaintiff inter se—Legality.*—An appellate Court must not allow one plaintiff to appeal against the other. Nor can it decide the rights of different plaintiffs *inter se* in such appeal. VITHO v. BHIMO, 15 B. 145. [R., 16 B. 119.]

Suit by person having no right to sue—Person having right whether can be joined as—*See* CIV. PRO. CODE, 1908, O. I, rr. 1, 10, 11 Ind. Cas. 223.

See CIV. PRO. CODE, 1908, O. IX, rr. 8 and 9, 117 P.R. 1891.

Plaintiff—concluded.

Second appeal, statement of plaintiffs in paper book of, not part of decree—Claim to be construed as in plaint—*See* DECREE—DECREE, CONSTRUCTION OF, 11 B. 177.

Addition of, after commencement of suit—*Bona fide* mistake, institution of suit through—Code of Civil Procedure, s. 27—*See* PARTIES TO SUITS—ADDING PARTIES TO SUITS, 7 O. C. 193.

Practice—Appeal against co-plaintiff—*See* PRACTICE AND PROCEDURE, 5 B. 264.

Alleging one state of facts—Denial of defendant—Plaintiff's right to carry on suit—*See* PRACTICE AND PROCEDURE, 14 C. 791.

Plantain Trees.

Suit *re*—Tahsildar not competent to try suit—*See* JURISDICTION—QUESTION OF JURISDICTION, 11 C.P.L.R. 89.

Planter.

See ST. 11 AND 12 VIC., C. 21, s. 60, 21 C. 1018.

Play.

Contract to play for a term and not to perform anywhere else—If enforceable by injunction—*See* CONTRACT ACT, 1872, s. 27, 16 C. W.N. 534.

Plea.

See PLEADINGS.

See PRACTICE AND PROCEDURE.

(1)—*Plea in abatement of jurisdiction—Practice.*—A plea in abatement to the jurisdiction of the Court must point out another Court before which the matter is cognizable. A plea in bar, if well founded, is sufficient, without pointing out the Court in which the suit ought to have been brought. SPOONER v. JUDDOW, 4 M.I.A. 353.

(2)—*Civ. Pro. Code, 1908, s. 11—Res judicata—"Ought"—Under-proprietary rights in Oudh, meaning of—Oudh Rent Act (XXII of 1886), s. 3, cl. 6—Proprietary rights, claim as to, does not affect under-proprietary rights—Pleas in defence which ought to be raised—Inconsistent pleas when barred.*—A sued B, for the recovery of the estate of a deceased Talukdar C, and obtained a decree for possession of the estate. In execution of his decree, A obtained possession of the said property. B objected that the under-proprietary rights in the property were held by A and B, under previous Settlement Court decrees and that these rights were not affected by the decree for the proprietary rights obtained by A. On this ground, B claimed restitution of the property. In the decree obtained by A against B no reservation was made in respect of the under-proprietary rights in favour of B; no question was in issue as to under-proprietary rights in the suit: *Held*, (1) that the decree related to the proprietary rights of C's estate, and did not affect the

Plea—continued.

under-proprietary rights held by A and B jointly and independently of C; (2) that the under-proprietary rights were no part of the property of C; (3) that, as A and B litigated as rival claimants to the estate of C, under a title different from the one claimed as under-proprietors, s. 11 of the Civ. Pro. Code could have no application. (11 M.I.A. 50=10 W.R. 1, P.C., *Expl.*) A party may join two or more alternative claims for relief based on inconsistent allegations, but is not bound to join them in a claim unless such joinder is possible without confusion or embarrassment and without impleading others as additional parties. The word "ought" in *Expl. IV*, s. 11, Civ. Pro. Code, should be interpreted with reference to the array of parties to the previous litigation and the nature of the estate or claim then claimed or set up. (12 O.C. 347=4 Ind. Cas. 763, *F.*) Under-proprietary rights are independent and distinct from proprietary rights. They do not form a part and parcel of *talukdari* rights. An under-proprietor has as complete an ownership over his land as that possessed by a superior proprietor, subject only to the payment, in certain cases, of rent or *malikana* to the superior proprietor. An under-proprietor can deal with his property as freely as a superior proprietor can deal with his, and an under-proprietor's interests are heritable and transferable. The main distinction between a proprietor and an under-proprietor is that the former is not only the owner or part-owner of the *mahal*, but is also entitled to engage directly with Government for land revenue, while the latter, though owner of the land within the *mahal*, is not entitled to engage directly with Government, but pays his assessment to the proprietor of the *mahal*. *SURAJ BIKRAM SINGH v. CHANDRABHAN SINGH*, 17 Ind. Cas. 334.

Of equitable acquiescence—See *LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST*, A.W.N. 1905, 90=27 A. 556.

Right of lien over property in suit, as a plea in defence—See *LIEN*, 4 C. 322=3 C.L.R. 375.

Of limitation taken for the first time in second appeal—See *LIMITATION ACT*, 1908, ss. 6, 8, 28 M. 57=14 M.L.J. 209.

Not raised in lower Courts or in grounds of appeal, but first raised in course of argument in Chief Court, tenability of—See *PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-ARZ*, 1 Ind. Cas. 478=43 P.W.R. 1909.

Of *Res judicata*—Jurisdiction of Court passing former judgment, enquiring into—See *RES JUDICATA, ESTOPPEL BY JUDGMENT*, 2 L.B.R. 24.

Of failure of consideration by stranger to a transaction—See *RIGHT OF SUIT—MISCELLANEOUS*, 9 C.W.N. 477, P.C.=8 O.C. 155=27 A. 271.

That decree is not binding—Question of "Bona fides"—See *SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE*, 5 M. 201.

Plea—concluded.

Taken for the first time in second appeal, entertainment of—See *SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL*, 15 M.L.J. 28=28 M. 122.

Of purchase for value without notice must be raised specifically in written statement or issues—See *SUCCESSION ACT*, 1865, s. 221, 5 Bom. L.R. 784.

Pleader.

See *LEGAL PRACTITIONERS—PLEADER*.

Pleader's Clerk.

See *LEGAL PRACTITIONER—PLEADER*.

Position of—towards his master's clients—See *EVIDENCE ACT*, 1872, s. 111, 9 C.P.L.R. 35.

Pleader's Fees.

See *LEGAL PRACTITIONERS—PLEADER*.

Promissory note for—Omission to file in Court, effect of—See *ACT XVIII OF 1879*, ss. 28, 29, 14 M. 63.

In land acquisition cases—See *ACT I OF 1894*, s. 23, 9 Ind. Cas. 228=9 P.W.R. 1911.

Certificate by pleader not according to rules—See *COSTS—TAXATION OF COSTS*, 15 A. 169=A.W.N. 1893, 78.

Not to be allowed when rules not complied with—See *RIGHT OF OCCUPANCY—GENERAL*, 17 P.W.R. 1911=9 Ind. Cas. 744.

Pleadership Examination.

(1)—*Pleadership examination—Board of Examiners—Standard of marks required for pass certificate raised without notice to candidates—Application by unsuccessful candidates for revision of list of successful candidates.*—Where the Board of Examiners raised the standard of marks required for a pass certificate at the annual examination for Plederships of the Upper Subordinate Grade, without giving any notice to the candidates, an application by the unsuccessful candidates, for a revision of the list of successful candidates and the admission of those who had qualified themselves for a pass certificate according to the old standard, was rejected, on the ground that the High Court, having delegated its power to the Board of Examiners, could not interfere with the exercise, by the Board, of its discretion properly, legally, and for the benefit of the public. *In the petition of DWARKA PRASAD*, 9 A. 611, F.B.=A.W.N. 1887, 148.

Notification that candidate has passed—Cancelment of notification on ground of error—Appeal to Privy Council—See *APPEAL TO PRIVY COUNCIL—CASES WHERE APPEAL LIES OR NOT*, 6 A. 163, F.B.=A.W.N. 1884, 15.

Duty of Board of Examiners for—On application by a candidate—See *BOARD OF EXAMINERS*, 28 C. 479.

Pleadship Rules.

This is a circular which modifies the Pleadship Rules as regards natives of Assam, 15 W. R. H. C. Rules, p. 1.

Pleaders, Lower Provinces.

See BEN. ACT XVIII OF 1852.

Pleaders, Mukhtars and Revenue Agents.

See ACT XX OF 1865.

Pleadings.

See APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL.

See CIV. PRO. CODE, 1908, Orders VI—VIII.

See FRAUD—PLEADINGS AS TO FRAUD.

See PLAINT.

See PRACTICE AND PROCEDURE.

See VARIANCE BETWEEN PLEADING AND PROOF.

See WRITTEN STATEMENT.

(1)—*Pleadings—Object of pleadings.*—The sole object of any system of pleading is that each side may be fully alive to the questions that are about to be argued, in order that each may have an opportunity of bringing forward such evidence as may be appropriate to the issues. SAYAD MUHAMMAD v. FATTEH MUHAMMAD, 22 C. 324, P.C. = 22 I.A. 4 = 6 Sar. 515. [R., 3 Bom. L.R. 535, 28 B. 153 = 5 Bom. L.R. 892.]

(2)—*Forms of pleadings—Cause of action to be disclosed in plaint.*—The Code of Civil Procedure does not deal with the forms of action. A plain statement of facts in the plaint, disclosing a cause of action, is all that is required by the Code. It is illegal to hold that a suit for the price of goods sold to a purchaser, without regard to a contract regarding the same matter, would not lie, on the ground that the suit ought to have been brought on the basis of contract and that the plaintiff should sue for a statement of account on the contract. MUHAMMAD SHARIF v. SHAMSHER KHAN, 11 P.R. 1891. [Rel. on, 111 P.R. 1900; R., 91 P.R. 1901 = 113 P.L.R. 1901.]

(3)—*Case where an error in framing suit was held not fatal.*—Where several persons, who had purchased different shares of an estate, sued the manager to account for his management, and it was pleaded that the suit should be dismissed, the High Court, in regular appeal, although the suit had not been rightly framed, refused to dismiss it, as the plaintiffs were in joint possession; and the fact of their suing together did the defendant no injustice, and as expense had been incurred, and if the plaint were now dismissed, the plaintiffs would probably be barred by limitation. THOMAS KALLONAS v. GUNGA GOBIND ROY CHOWDHRY, 25 W.R. 121.

(4)—*English rules of pleading, not in force in India.*—Indian Courts are not governed by the

Pleadings—continued.

technical rules of pleading which obtain in Courts administering English law. FITAMBUR PYNE v. TOOLSEE DOSSEE, 7 W.R. 39.

(4-a)—*Principles of pleading in English Chancery Court—Applicability to India.*—The same principles in regard to pleadings are applicable here as in the English Court of Chancery. JEEGE BUNDHOO TEWAREE v. KURUM SINGH, 22 W.R. 341.

(5)—*Pleadings—Material allegations in plaint not traversed—Admission by defendant.*—Where a defendant does not traverse any of the material allegations in the plaint, he must be taken to have admitted them. YEKNATH BABAJI v. GULABCHAND KAHANJI, 1 B.H. C. 85.

(6)—*Allegation of title by plaintiff—Non-traverse by defendant, effect of.*—Where plaintiffs sue alleging that they are the Sudder putneedars, and there is no traverse by the defendants of this allegation, then, under the ordinary rules of pleading, the possession of the plaintiffs requires no further proof. CHUNDEE CHURN v. MOBARUCK ALI, 12 W.R. 469.

(7)—*Averments not traversed to be taken as admitted, not applicable to Indian Courts.*—The strict rule that averments not traversed must be taken to be admitted, is not applicable to, in Indian Courts. DEO NUNDAN PERSHAD v. MEGHU MEHTON, 11 C.W.N. 225 = 5 C.L. J. 181 = 34 C. 57. (9 M.I.A. 287, F.)

(8)—*Written statements, pleas of defendant recorded in—Evidence for the defence must be confined to—Civ. Pro. Code, s. 114.*—In a case for pre-emption, a finding that the sale was a fictitious transaction was arrived at by the first Court and upheld on appeal. On second appeal, it was urged, on behalf of the plaintiffs, that the defendants, in their pleadings, never alleged that the sale was a fictitious transaction and there was also no issue framed on this head and that, therefore, the Courts below had acted illegally in raising this point on behalf of the defendants and basing their decree on it. Held, the case for the defence must be confined to the pleas put forward by the defendant. In the absence of a clear statement in the defendants' pleadings, in the first Court, of the contention that the sale was a fictitious one and of issues framed thereon, evidence in support of such contention should not have been allowed to go on the record. The finding of the lower Courts based on such defence cannot, therefore, be upheld. RAM RAKHA MAL v. DEVI DAS, 89 P.R. 1905.

(9)—*Pleading—Point pleaded in plaint and denied in the written statement—No issue taken—No objection taken in the grounds of appeal to the lower appellate Court—Abandonment.*—Case where a lease was held not to be one in perpetuity, but one for a specific period. Where notice was pleaded in the plaint and the sufficiency of notice was denied in the written statement, but no issue was raised and no question as to sufficiency of notice was raised in the

Pleadings—continued.

lower appellate Court. *Held*, that the contention as to sufficiency of notice must be taken as abandoned. **PONNUSAMI PILLAI v. PASUPATHI MUDALIAR, 7 M.L.T. 106=5 Ind. Cas. 813.**

(10)—*Case set up in—Decisions not supported by—Legality.*—The determination in a cause should be founded upon a case either to be found in the pleadings or involved in, or consistent with, the case thereby made, and a decision not so founded ought to be set aside. **P. T. CHRISTENSEN v. K. SUTHI, 5 L.B.R. 76=3 Ind. Cas. 719.** (11 M.I.A. 7, 14 O.C. 801, F.)

(11)—*Pleadings and proof—Specific relief prayed for not proved—Decree on general prayer.*—Although the plaintiff had failed to prove the case on which he claimed a special relief, the Court in this case *held* that he had established a case in which, upon the plaint and the general prayer for relief, he was entitled to a decree. **GOBIND CHUNDER MOOKERJEE v. DOORGAPERSAD, 14 B.L.R. 337=22 W.R. 248.**

(12)—*Decision in judgment, to be founded on case set forth in pleadings—Original grounds of relief, not to be departed from.*—The decision of the High Court in the present case was founded upon an assumed state of facts which was contrary to the case stated in the plaint by the plaintiff and devoid of allegation, or of any evidence in support of it. Their Lordships pointed out the absolute necessity that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. They directed that the rule should be observed that the statement of facts and grounds of relief originally related and pleaded by the plaintiff, shall not be departed from, and did not concur in the conclusion of law drawn by the Court below, even taking into consideration, if they could do so, a statement of facts which that Court assumed. **ISHAN CHUNDER SINGH v. SAMACHURN BHUTTO, 6 W.R. P.C. 57=11 M.I.A. 7=2 Ind. Jur. N. S. 7.** [F., 22 W.R. 216, 8 C. 871, 14 C. 801=14 I.A. 168; *Appl.*, 1 B. 209; *Expl.*, 2 C. 1; *Rel. on.*, 8 Ind. Cas. 713; R., 11 W.R., P.C., 19, 14 W.R. 141, 14 W.R. 386, 15 W.R. 433, 16 W.R. 123, 17 W.R. 432, 18 W.R. 274, 19 W.R. 333, 20 W.R. 272, 21 W.R. 208, 23 W.R. 158, 20 C. 1, P.C.=19 I.A. 221, 22 C. 752, 18 A. 403, 14 C.P.L.R. 42, 27 B. 162=4 Bom. L.R. 980, 31 C. 262=31 I.A. 10=8 C.W.N. 146=14 M.L.J. 8=6 Bom. L.R. 1, 5 C.L.J. 527, 5 N.L.R. 67; D., 13 M. 32.]

(13)—*Decision to proceed on pleadings—Case not raised in pleadings—Power of Court to determine—Suit for ejectment—Declaratory decree on the basis of reversionary right.*—The determination in a cause must be founded upon a case to be found in the pleadings or involved in, or consistent with, the case thereby made. In a suit for immediate possession, the Court must dismiss it if right to immediate possession is

Pleadings—continued.

not made out, and it ought not to award a declaratory right that the plaintiff as reversioner is entitled to possession after the defendant's death. **ALI GAUHARKHAN v. MUHAMMAD HOSSAIN, 159 P.R. 1888.**

(14)—*Practice—Pleadings—Decree at variance with case as stated by the parties.*—Where, in a suit for possession of immoveable property, each party claimed that he was entitled to the sole and exclusive possession. *Held* that it was not competent to the Court to decree partition of the property in suit whether the pleadings were or were not amended. **GAJADHAR v. GAYA DIN, A.W.N. 1893, 103.**

(15)—*Suits to be decided with reference to pleadings.*—Suits must be decided with reference to the pleadings of the parties, and unless the Court is specially asked to determine a particular question, as between the parties, it is not only not bound to do so, but it would not be justified in so doing. **RASH DHARY GOPE v. KHAKON SINGH, 24 C. 433.**

(16)—*Form of suit, Court not competent to change—Decree of Court not to be based on facts not found in pleadings or alleged by either party.*—It may be the practice of the Courts to place a liberal construction upon the pleadings of the parties, but there must be some limits placed upon such liberality. As was ruled by the Privy Council in 11 M.I.A. 7, it is an absolute necessity that the determination in a cause should be founded upon a case either found in the pleadings or involved in or consistent with the case thereby made. The present case falling within the above rule, the Commissioner's decision observing that "the plaintiff's claim was not properly laid" was held to be unsustainable. It was not competent to the Commissioner in hearing a second appeal to change the form of the suit and to pass an order based on a view of the facts not pleaded or alleged by either party. **FOTA v. JOWAHIRA, 36 P.R. 1879.**

(17)—*Claim for too much—Party entitled to recover as much as he is entitled to.*—A plaintiff ought not, by reason of his having claimed too much, to be precluded from recovering a proportionate amount, to which he is entitled, if the pleadings are sufficient to cover such a claim. The question as to whether a partial decree ought to be made in such a case is not one of indulgence to be granted or refused at the Court's discretion. **MALIC AHMAD WALI KHAN v. MUSSAMMAT SHAMSI JAHAN BEGAM, 10 C.W.N. 626=3 A.L.J. 360=3 C.L.J. 481=1 M.L.T. 143=8 Bom. L.R. 397=16 M.L.J. 269=28 A. 482, P.C.=33 I.A. 81=8 Sar. 918.**

(18)—*Pleadings—Construction.*—*Held*, that pleadings in the mofussil ought not, as a general rule, to be strictly construed. **CHINKU WD. JETHO v. UTAMCHAND WD. KHAN CHAND, 2 S.L.R. 59.**

(19)—*Pleadings in Indian Courts, construction of.*—Pleadings in Indian Courts must not

Pleadings—continued.

be construed with the same strictness as those in English Courts. "Allowance must be made for a very inaccurate mode of setting forth the claims of persons, and the answers or defences to them." A defendant should not be held to have admitted every allegation in the plaint which he has failed to traverse. *NATHA SINGH v. JODHA SINGH*, 6 A. 406 = A.W.N. 1884, 140. (21 W.R. 60, R.)

(20)—*Admission by pleading.*—Where parties allow a suit to be conducted in the lower Court as if a certain fact was admitted, they cannot afterwards, on special appeal, question it, and resile from the tacit admission. *MOHIMA CHUNDER ROY CHOWDHRY v. RAM KISHORE ACHARJEE CHOWDHRY*, 15 B.L.R. 142 = 23 W.R. 174.

(21)—*Admission of fact—Implication.*—It has been repeatedly held by the English Common Law Courts, and much more so in India where the pleadings are less technical, that an admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact. *AMIRTOLAL BOSE v. RAJONEEKANT MITTER*, 15 B.L.R. 10, P.C. = 23 W.R. 214 = 2 I.A. 113 = 3 Sar. 430. [R., 6 A. 395, 16 C. 364, 12 C.W.N. 409.]

(22)—*Pleadings — Statements of parties for purposes of particular judicial proceeding—Effect on subsequent proceeding between parties in respect of same matter.*—In the Indian system of pleadings the allegations of parties to a suit cannot be excluded as allegations in bills in equity and pleadings at common law. Mere statements for the purpose of a particular judicial proceeding can only be conclusive evidence in another proceeding as to such material facts embodied therein as must have been found affirmatively to warrant the judgment of the Court upon the issues joined. They are then conclusive between the same parties, not because they are the statements of these parties, but because, for all purposes of present and prospective litigation, they must be taken as truth. *SIVA RAM NANAJI v. JEVANA RAU*, 2 M.H.C. 31.

(23)—*Pleadings—Pleas of the defendants—Inconsistent — No rule of law to prevent.*—There is no rule of law which prevents a defendant from raising inconsistent pleas, at any rate where the facts to which the pleas relate are not within his personal knowledge. *SRI JANAGANTI CHINA VENKATARAJAM GARU v. KAPPOJEE LINGANNA*, M.W.N. 1912, 413 = 15 Ind. Cas. 382.

(24)—*Setting up inconsistent pleas—Allegations in plaint inconsistent with case afterwards set up.*—Plaintiff sued for recovery of the value of two Government pro-notes. She stated in the plaint that the notes were made over to her by the defendant's ancestor in consideration of her refraining from putting forward certain objections to the grant of a succession certificate to him (the transferor). It being found that

Pleadings—continued.

there was no evidence to substantiate the allegation, she put forward the plea that the transfer was in consideration of natural love and affection. *Held*, the latter plea was inconsistent with the plea put forward in the plaint and that the same was not allowable; for, if the consideration set up in the plaint were true, the plea that the transfer was on account of natural love and affection would necessarily be false and *vice versa*. Though a certain amount of latitude is permissible in construing pleadings in this country, a plaintiff cannot be allowed to abandon a case set up in the plaint and substitute an absolutely new and inconsistent case. *PITAMBAR PARSHAD v. MUS-SAMMAT PARBATI*, 8 O.C. 116.

(25)—*Pleadings—Plaint containing inconsistent allegations.*—*Held*, that, where the plaint contained a patent inconsistency, the plaintiff's case should have been thrown out in accordance with the legal maxim *allegans contraria non auditur*. *HARI CHAND v. THE MUNICIPAL COMMITTEE OF JALALPUR JATTAN*, P.L.R. 1900, p. 196 = 14 P.R. 1900.

(26)—*Practice—Pleading—Inconsistent pleadings—Pleas of denial of execution and want of consideration — Allowable—Embarrassment to opposite party—Remedy.*—Where the defendant in a suit pleaded want of consideration for a promissory note in addition to her denial of execution, and where no embarrassment was caused to the plaintiff by such inconsistent pleas. *Held* that the pleas, though inconsistent, may be allowed to be raised (18 A. 125, F.; 15 C. 684 = 15 I.A. 81, *Expl.*; 13 M. 549, *Not F.*). A party who has to answer before a fallible tribunal may plead inconsistent allegations of fact. Any embarrassments which may be caused to the opposite party by such pleading may be met under the Civ. Pro. Code in the same way as they may be met under the Judicature Act and its rules and orders, namely, by the Court striking out or requiring anything which is really embarrassing to be amended. *VENKATACHALAM CHETTY v. KYAUK LON*, 5 L.B.R. 251 = 9 Ind. Cas. 469.

(27)—*Inconsistent issues—Non-execution of pro-note and coercion — Suit on a promissory note.*—In his written statement, the defendant denied the execution of, and the consideration for, the note; and issues were raised on these contentions. Plaintiff proved the execution and the passing of consideration. Judgment was given in his favour. On appeal, defendant contended that the note was executed under coercion on the plaintiff's own showing that, as such, the contract was voidable. *Held*, the contention as to the coercion was inconsistent with the contention as to the non-execution of the note, and was, therefore, inadmissible. The determination in a cause should be founded on a case either to be found in the pleadings, or involved in or consistent with the case thereby made. In this case, the contention as to coercion was inconsistent with the case set up in the written statement. The

Pleadings—continued.

contention of the defendant that, on the plaintiff's own evidence, he was not entitled to a decree, will not prevail, because the contract was not illegal or void, but only voidable, which latter contention was not raised by the defendant in his statement. *MA HNIN GET v. S. V. A. SATAPPA CHETTY*, 14 *Bur. L.R.* 65. (15 C. 684, 11 M.I.A. 7, 14 C. 801, R.)

(28)—*Pleadings—Inconsistent averments in plaint—Suit to set aside sale-deed—Averment of forgery and fraudulent inducement to execute document—Maintainability of suit.*—Where, in a suit to set aside a sale-deed, plaintiff, a young woman, alleged that the document was a forgery and that it was brought about by fraud, and on the Court's asking her to elect which plea she would stand by, she stated that she denied execution: *Held*, that the suit was maintainable and was not liable to be dismissed for inconsistent averments in the plaint. *In re AMAVASAI GOUNDEN*, 8 *Ind. Cas.* 845 = 9 *M.L.T.* 210. (13 M. 549, *Not. Appr.*)

(29)—*Two inconsistent rights—Claim in alternative—Easement and proprietary right—Pleadings—Decree.*—Two inconsistent rights cannot be claimed jointly in the same land, though they may be claimed in the alternative. (34 C. 51, F.B., 4 C.L.J. 487, 11 C.W.N. 20, 1 M.L.T. 364, *Rel. on.*) Therefore, a decree cannot be given declaring both the plaintiff's right to a *mala* as also his right to the flow of water, through it. *BHULU v. ASSAM BIBI*, 8 *Ind. Cas.* 886.

(30)—*Practice—Agreement—Specific performance—Failure of consideration—Unsuccessful attempt to rescind agreement—Inconsistency of pleas.*—It cannot be laid down as an abstract proposition that there is any necessary inconsistency in a party who has unsuccessfully tried to rescind an agreement, afterwards claiming performance of it. But where the principal object of a person (claiming as adopted son), entering into a compromise, is to obtain from the second party a clear admission of his title to the property in dispute and immunity in the future from attacks upon his title from that quarter, and the language of the compromise necessarily imports an agreement by the second party to abstain from questioning the validity of the adoption for the future, if the subsequent conduct of the latter be at variance with, and amount to a subversion of the relation intended to be established by the compromise, there is a failure of consideration for the agreement, and no decree for specific performance can be made at the instance of the second party. *SRISH CHANDRA ROY v. BANOMALI ROY*, 31 C. 584, P.C. = 31 I.A. 107 = 8 C.W.N. 594 = 6 *Bom. L.R.* 501 = 14 *M.L.J.* 185 = 2 *A.L.J.* 31 = 8 *Sar.* 677.

(31)—*Inconsistent pleadings—Custom—Pre-emption—Town—Village.*—A litigant cannot be allowed to play fast and loose with the Courts. When a claim for pre-emption is based on the allegation that the area on which land in dispute is situate is a town, he cannot be allowed

Pleadings—continued.

to contend afterwards that the area is not a town but a village. *NAWAB KHAN v. YATAM*, 15 *P.L.R.* 1911 = 2 *P.W.R.* 1911 = 9 *Ind. Cas.* 36.

(32)—*Inconsistent pleas—Matter not within the personal knowledge of defendants.*—The defendants, as donees from the wife of the testator, first pleaded in their written statement that there was no adoption, and later, on appeal, raised the contention that there was an adoption, but that the adoption and the will formed one transaction, so that the adopted son could not question the will. The defendants were held not to be precluded from raising the above pleas. The case in L.R. 15 I.A. 81 was distinguished on the ground that there the matters in both the inconsistent pleas were within the knowledge of the plaintiff who sought to raise them. In this case the matters were not within the personal knowledge of the defendants. Moreover, the plaintiff can under certain circumstances reserve a claim; but a defendant will have to put forward all his claims, since he cannot afterwards raise the omitted pleas in any other action at the suit of the same party. *NARAYANASAMI v. RAMASAMI*, 14 M. 172 = 1 *M.L.J.* 38. [*F.*, 8 *Bom. L.R.* 921; *R.*, 16 M. 121, 1 O.C. 174].

(33)—*New and inconsistent plea cannot be set up in appeal.*—Plaintiff sued for pre-emption of certain shops basing his claim on the ground that his house adjoined those shops at the back. The pleadings for the defence, admitting that a custom of pre-emption exists in the locality, urged, that the custom does not allow the plaintiff's claiming the pre-emption by virtue of his ownership of the house at the back of the shops. In the Court of first instance, the case was fought out from beginning to end on the said line of defence, but on appeal, the defendants sought to raise new points urging that the custom of pre-emption does not exist in the locality and that it does not apply to shop property. *Held*, defendants should not be allowed in appeal to raise the said points as they involve a new and inconsistent plea and if they are entertained the pleadings will have to be recorded afresh, the issues reframed and necessarily, the case tried *de novo*. Where a case has been fought out from start to finish on a certain line of defence, it is not competent for the defendant to ask for a retrial on appeal on the ground that he finds that he was mistaken in taking up that defence since, if this is allowed, there can be no finality in judicial proceedings. *SHARIF HUSSAIN v. MUHAMMAD YUSUF*, 88 *P.R.* 1905 = 179 *P.L.R.* 1905. [*R.*, 81 *P.R.* 1906, 116 *P.R.* 1908; *Overruled*, 49 *P.R.* 1908 = 63 *P.L.R.* 1908 = 1 *P.W.R.* 1908.]

(34)—*Pleadings—Inconsistent defences—When may be pleaded—Bond not executed—Bond executed under—Circumstances so as not to bind executant—Sub-mortgagee—Whether competent to sue for sale of mortgagee rights of his mortgagor—Benamidar—Right of suit—Benamidar mortgagee—Pardanashin lady—Document executed by such lady—Court to be satisfied on*

Pleadings—continued.

what points—Rule not applicable to literate lady of considerable intellectual capacity—Execution sale—Purchase by stranger—Subsequent modification of decree—Whether sale affected or not.—It is open to a defendant to raise by his written statements as many distinct and separate, and, therefore, inconsistent defences as he may think proper, subject only to the qualification that, if the defence is embarrassing, the Court may, under O. VI, r. 16, direct one of two inconsistent defences to be struck out and the pleading amended. The defendant pleaded that the bond in suit was a forgery and never executed by her, and, in the alternative that, if it was executed, it was done under circumstances which did not make it binding upon her. When the evidence came to be adduced, the defendant was allowed to go into both these matters: *Held*, that it was too late for the plaintiff in appeal to raise any objection on the ground that the defences put forward were inconsistent. A sub-mortgagee is competent to maintain a suit for sale of the mortgagee right of his mortgagor. Whatever divergence of judicial opinion there may be upon the question of the right of a benamidar to maintain an action in ejectment, there is none as to his right to maintain a suit to enforce a mortgage security which stands in his name, or has been assigned in his favour. The Court, when called upon to deal with a deed alleged to have been executed by a *pardanashin* lady, must, before it gives effect to it, satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorized by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter. But this doctrine applies to the case of execution of a document by a *pardanashin* lady properly so called. If a lady is not *pardanashin*, or, though *pardanashin*, is literate and of considerable intellectual capacity, the Court will not be inclined to interfere with a deed which has been *prima facie* properly executed by her, or to interfere with transactions to which her consent has been deliberately given. When a property passes into the hands of a stranger by a sale in execution of a decree, then, even if the decree be modified, the sale will not be affected. **ALI-KJAN BIBI v. RAMBARAN SHAH, 7 Ind. Cas. 167=12 C.L.J. 357.**

(35)—*Defendant, stranger to transactions upon which pleas founded—Whether it is open to him to raise distinct, separate, inconsistent pleas—Principle applicable to plaintiffs—S. 1, Negotiable Instruments Act—Provisions of the Act, how far applicable—Hundies in oriental language—S. 74—Presentment of hundies for payment within reasonable time—Effect of failure—Discharge—“Reasonable time” what is.*—It is open to a defendant, who is a stranger to the transactions in respect of which he makes allegations upon which his defence is founded, to raise and set up as many distinct and separate defences as he might think proper, even though they

Pleadings—continued.

are obviously inconsistent. This principle which has been applied to the case of a plaintiff is applicable to a defendant also. What s. 1 of the Negotiable Instruments Act does is, to save the operation of any local usage relating to instruments written in an oriental language. So in the absence of any allegation or proof as to the existence of any such usages, the provisions of the Act are applicable to *hundies* written in an oriental language. Under s. 74, the holder of a hundi is bound to present it for a payment within a reasonable time, and if it is not so done, and the drawer and the previous indorsees are prejudiced by the delay in presentment, they would be discharged and be absolved from their liability to the party guilty of such delay. In determining what is a reasonable time for presentation, the nature of the bill, the usage of trade with respect to similar bills and the facts of the particular case are to be taken into consideration. **JOHAR MAL v. NAINSUKE, 6 N.L.R. 33=5 Ind. Cas. 745.**

(36)—*Changing frame of suit—Claim as heir impugning adoption—Plaintiff not to be allowed to continue suit as heir of adopted son.*—N died leaving K his widow to whom he gave a power to adopt several sons in succession. K adopted L, who, after taking possession of the property, died leaving a widow and daughter. His widow who had been authorized by him to adopt, adopted one P, but subsequently the widow, daughter and the adopted son all died within thirty years of L's adoption. K, who had been alive all this time then adopted M who also died soon after, leaving a widow S. After the death of K, the present plaintiff sued S, claiming the property as heir of N, denying the genuineness of the power of adoption given by N to his widow K. The original Court dismissed the suit holding that, as plaintiff did not claim as heir of L whose adoption he contended as invalid, but claim as heir of N, he could not claim to succeed as the nearest collateral heir after the death of K. *Held*, on the admission of the genuineness of the power in the High Court by the plaintiff, that it was necessary for him to make out his title as heir of L, that to allow him to proceed with the suit as if he had sued as heir of L, would have been to change the frame of the suit and allow the plaintiff to make an entirely new case, and that, therefore the, original Court was right in dismissing the suit on plaintiff's failure to prove the case upon which he came into Court. **ISHAN CHUNDER CHOWDHRY v. SHARODA GOOPTEAH, 12 W.R. 487.**

(37)—*Alternative defence—Tenancy and limitation.*—It is open to a party-defendant to plead tenancy and limitation in the alternative. (21 W.R. 70, *Rel. on*; 16 C. 506, *Expl.*) In a suit to recover possession of certain land on the ground that the plaintiffs were tenants under certain maliks, where the defendants also claimed to be tenants under the same maliks and further contended that the suit was barred by limitation, and the defendants alleged tenancy

Pleadings—continued.

was not proved, *held* that the Court had no right to give a decree for the plaintiffs without going into the question of limitation, which also must be decided. **KEAMUDDI v. HARA MOHAN MONDUL, 7 C.W.N. 294.**

(38)—*Pleadings—Plaintiff representing himself in different capacities in plaint and in supplementary petition—Suit not liable to dismissal when status of plaintiff not material.*—It was urged in this special appeal that the lower appellate Court had erred in holding that the plaintiff-appellant's suit should be dismissed because he had first represented himself in his plaint as a zemindar, and afterwards in a supplementary petition as a *shikmee* talookdar, and these two representations constituted such a changing of the character of the suit as to be held illegal. The High Court however held that the matter in dispute was merely whether the land in question was inside or not inside the *putnee* lease. The question whether it was the *putnee* of the zemindar or of the *shikmee* talookdar was quite immaterial. The only question was whether the land in suit was land of the *putnee* lease or of the separate talook of the defendant; and the decision of such question could not be affected by the status or character of the giver of the *putnee*. **WOOMESH CHUNDER GOOPTO v. RAJ NARAIN ROY, 6 W.R. 168.**

(39)—*Fraud — Pleadings — Plaintiff's case resting solely on fraud — Fraud negatived—Case on mistake, whether allowable—Alternative claim.*—Where the pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out, from the allegations of the plaint, facts which might, if not put forward as proofs of fraud, have warranted the plaintiff in asking for relief. If relief is asked alternatively, either on the ground of fraud, or failing that ground, then on some other equity, a plaintiff may fail on the first but succeed on the latter alternative. **RAJENDRA KUMAR BOSE v. GANGARAM KOYAL, 6 Ind. Cas. 472 = 12 C. L.J. 70 = 37 C. 856.**

(40)—*Pleadings — Fraud — Competence of Court to grant a decree where fraud proved is not identical with that alleged in the plaint.*—Although in a suit based upon fraud it is, ordinarily speaking, incumbent upon the plaintiff to substantiate completely by his evidence the precise fraud alleged in the plaint, it is nevertheless competent to the Court to grant the plaintiff a decree upon the basis of a fraud disclosed by the facts given in evidence, even if such facts do not constitute a fraud to the full extent alleged in the plaint, provided that the case so disclosed by the evidence is not inconsistent with the case set up in the plaint. **GANGA RAM v. DWARKA PRASAD, A.W.N. 1894, 6.**

(41)—*Mortgagees—Joint owners—Fraud and collusion—Case made in lower Courts—Plaintiff changing case—Special appeal.*—Each of two

Pleadings—continued.

joint proprietors A and B separately mortgaged the whole of the joint property (a house) to different persons. B's mortgagee who was prior in time, obtained a decree on his bond, sold and purchased the house. In a subsequent suit for confirmation of right and possession by A's mortgagee, he charged that the other bond and decree were fraudulent and collusive and that B had no interest in the property. All these allegations were found to be false by the lower appellate Court. *Held* in special appeal, that the plaintiff could not recede from the case he had made in the lower Courts and claim to be entitled to a decree for A's interest in the house. **DURSUN SAHOO v. PRAYAG RAM, 2 C.L.R. 538.**

(42)—*Pleadings—Plaint and written statement both defective—Proper course—Fraud must be pleaded specially—Transfer of Property Act (IV of 1882), s. 53 — Fraudulent Transfer — Intent to defeat or delay creditors — Mala fide sale.*—When both a plaint and a written statement are defective, the proper course is to either return the plaint for amendment and require a fresh written statement in reply to the amended plaint, or to examine the parties in Court with a view to framing proper issues. A party who relies upon fraud must both plead and prove it. He is bound to give particulars of the alleged fraud and can succeed upon proof of the fraud as alleged and not of any other kind of fraud. Where, however, the question as to the *bona-fide* nature of a sale was not raised in the pleadings: *Held*, the lower appellate Court did not exceed its powers in framing issues on this question which, though not raised in the pleadings, had governed the case from the first. Where a judgment-debtor, soon after a money-decree had been passed against her, sold her land for an inadequate price to an employee of her advocate's father who lent the money for the purchase, it is clear that her intention in selling the land for a sum considerably less than its value was to delay or defeat the claim of her judgment-creditor. According to the provisions of s. 53 of the Transfer of Property Act, the sale was voidable at the option of the creditor so defeated. **MG. LU GALE v. VENKATACHELLAM CHETTY, 10 Ind. Cas. 922. [25 B. 202, 34 C. 999, 6 C.L.J. 410, 11 C.W.N. 889, Rel. on.]**

(43)—*Practice—Pleading—Collusion—Plaintiff decree-holder, collusively appearing as judgment-debtor, in prior suit—Non-maintainability of plea of collusion in later suit—S. 44, Evidence Act.*—It is not open to a party to collusive proceedings to plead, in a subsequent suit or proceeding, his own deception of the Court which dealt with that case, or to shew that, when he seemed to be a judgment-debtor, he was really a plaintiff decree-holder. Notwithstanding s. 44, Evidence Act, a party cannot plead his own collusion, to avoid a decree to which he himself was a party. **TUKARAM v. SONAJI, 6 N.L.R. 177 = 8 Ind. Cas. 1179. (5 L.B.R. 321, 26 C. 891, 11 B. 708, 20 M. 333, 31 M. 485, F.; 35 C. 551, P.C., D.)**

Pleadings—continued.

(44)—*Practice—Pleadings—Parties to be kept to their pleadings—Court making a new case for a party—Oppressive or unconscionable bargains—Court's duty to investigate—Second appeal—High Court—Specific ground on which appeal is fought in lower Court—Waiver by the parties of the other grounds—Presumption.*—

As a general rule, parties ought to be kept to their pleadings, and the Court should not raise a new point for them in appeal. There are exceptions to this rule. One of them relates to agreements entered into between persons who stand to each other in the relation of mortgagor and mortgagee, or trustee and *cestui que trust*. A Court, as a Court of Equity, is bound to examine into the nature of such agreements, where, on the face of them, or having regard to the surrounding circumstances, the Court finds *prima facie* grounds to suspect that the transaction is oppressive or unconscionable. When a question is fairly raised either at the original trial or in appeal, and it is met thereby one of the parties on a specific ground, though other grounds were open, and the specific ground fails, that party should not be allowed, as a general rule, to rely upon any of the other grounds in second appeal, if the allowing of that ground necessitates a remand for the taking of fresh evidence and thereby prolongs the litigation. In such a case the Court will presume, in the absence of clear indications from the record to the contrary, that the other grounds were waived by the party. **JAGANNATH RANGO DANDEKAR v. BHASKAR GOPAL BHAT, 12 Bom. L.R. 795.**

(45)—*Divorce Act, 1869, s. 14—Cruelty—Pleading.*—Cruelty must be specifically pleaded, and if it is not, the Court will not allow the issue to be raised or evidence given of it. **KELLY v. KELLY AND SAUNDERS, 3 B.L.R. App. 6.**

(46)—*Duty of party impeaching settled account.*—A party who seeks to open a settled account must point out specific errors by his bill; otherwise he will not be permitted to prove them at the hearing. **MOULVI NIZAMUDDIN SOWDAGAR v. SETH KASTURCHAND, 15 C.P. L.R. 61.**

(47)—*Suit to recover possession—Existence of a right of pre-emption no answer to such a suit.*—Plaintiffs, as owners of part of the equity of redemption, which they had purchased from two of the representatives of the mortgagor, sued for redemption of a usufructuary mortgage. The defence of one of the defendants, mortgagee, was to the effect that he was one of the co-sharers in the village and as such, entitled to pre-empt the sale made in favour of the plaintiff, if that sale was a valid sale and that he was ready to exercise the rights. He urged that, under the circumstances, the plaintiff's suit was not maintainable. *Held*, the plea was not entertainable, it not being competent for a co-sharer in possession to plead the existence of a right of pre-emption in defence to a suit to recover possession. **IDARA T KHAN v. ILAHI BAKSH, 27 A. 78. (1 A. 892, 26 A. 61, R.)**

Pleadings—continued.

(48)—*Amendment of plaint—Prayer for relief on footing of defendant's story.*—When the parties to a suit have come to trial to determine which of two stories is true, the Court cannot allow the plaintiff to amend the plaint, by abandoning his own story and adopting that of the defendant and asking relief on that footing, the question whether on that footing the plaintiff is entitled to relief being one to which the defendant's attention has not been called, and as to which he has had no opportunity of answering. **SHIBKRISTO SIRCAR v. ABDOL HAKEEM, 5 C. 602=5 C.L.R. 455. [R., 10 B. 451.]**

(49)—*Amendment of pleadings without notice—No ground for setting aside decree.*—The mere fact that an amendment in the pleadings, which the Court had jurisdiction to make, and which in fairness it would have made if notice had been given to the other side, was made *ex parte*, does not weaken the binding effect of the decree, and at any rate it cannot have the effect of nullifying the decree subsequently made in the suit. **SADHO MISSER v. GOLAB SINGH, 3 C.W.N. 375.**

(50)—*Plaint praying for declaration, amendment of, by adding prayer for possession—Whether amounts to changing character of suit—Amendment allowing barred relief to be claimed, whether legal.*—Plaintiff asked for a declaratory decree and for an injunction restraining the defendant, his landlord, from interfering with his possession of certain fields. Defendant pleaded, *inter alia*, that the plaintiff was not in possession of the fields claimed, and that the suit as framed was, therefore, untenable. Plaintiff then sought and obtained permission to amend his plaint by adding a prayer for possession and eventually obtained a decree in the Court of the Additional Sub-Judge which was upheld in appeal by the District Judge. On second appeal it was pressed that the amendment of the plaint should not have been allowed because at the time when the amendment was made the new relief asked for was barred by time, and it was *held* that the amendment of a suit for a mere declaration into one for possession does not change the suit into one of an inconsistent character. (5 Bom. L.R. 329, *F.*; 16 M. 319, 18 M. 33, 1 N.L.R. 117, *R.*) The relief for declaration is, in most cases, for recovery of possession claimed as ancillary to the latter and there can be no inconsistency between the two. But no amendment of a plaint can be allowed under s. 53 of the Civ. Pro. Code, where the effect of such amendment would be to deprive the defendant of the defence of limitation. **SHRIRAM SADASHEO BALKRISHNA JOSHI v. GANPATI KUMBI, 2 N.L.R. 79.**

(51)—*Pleadings and proofs, variance between, when material.*—Proofs must correspond with the allegations in the pleadings, but it is sufficient if the substance of the declaration is proved; no variance is material when the allegation and

Pleadings—continued.

proof substantially correspond. **BALABHADRA PERSAD SINGH v. NAJIBAN alias BASMATIA**, 4 C.L.J. 370=11 C.W.N. 85. (19 I.A. 221, 3 C.L.J. 481, F.)

(52)—*Pleading and proof—Variance—Practice.*—The plaintiff in a suit for possession alleged that the defendant took a lease at a certain rent from him some years ago, but was not paying rent latterly. The defendant denied the lease and set up title and adverse possession. It was proved that the plaintiff was the owner of the property, that the defendant occupied it as a friend with permission, and that there was no adverse possession. *Held*, that the plaintiff was entitled to a decree for possession though the case set up had not been proved. **ABDUL GHANI v. MUSAMMAT BABNI**, 25 A. 256, F.B.=A.W.N. 1903, 18. (A.W.N. 1884, 285, A.W.N. 1901, 157, D.)

(53)—*Variance between pleadings and proof—Suit for rent—Kabuliyat not proved—Claim for use and occupation—Alternative case—Amendment of plaint or issues—Mistake.*—Where a landlord sues a ryot for arrears of rent alleged to be due under a *kabuliyat*, and the Court finds that such *kabuliyat* has not been executed by the ryot, but it appears, notwithstanding, that the ryot occupied the land under the zemindar, the landlord's right to have a further trial of the question, whether any rent, and how much, is due on account of the ryot's occupation of such land, depends upon the claim which is stated in the plaint. If that claim is in the alternative and thus the ryot has noticed that the landlord, if he fails to prove the execution of the *kabuliyat*, will claim rent for the occupation of the land, an issue ought to be framed to try whether any rent, and how much, is due on account of the occupation, and the landlord is entitled to have that issue tried. But where a claim for rent on account of the occupation of the land is not made in the plaint, the landlord is not entitled to have that question tried. [F., 9 C. 908=13 C.L.R. 69, 27 C. 239, 10 C.L.J. 538=6 M.L.T. 255=3 Ind. Cas. 346; *Expl. & D.*, 8 C. 926; *D.*, 23 W.R. 465; 6 Ind. Cas. 766=7 M.L.T. 419=20 M.L.J. 555; *R.*, 10 B. 451, 25 C. 324.] It is in the discretion of the Court to amend the plaint or the issues, and to allow it to be tried. Where the omission of an alternative claim in the plaint appears to have been from inadvertence or by mistake, it would be proper to allow amendment. But where there is reason for thinking that the omission was deliberate, it would generally not be proper. **LUKEE KANTO DASS CHOWDHRY v. SUMEERUDDI LUSKER**, 13 B.L.R. 243, F.B.=21 W.R. 208. [*R.*, 10 B. 451, 22 C. 8752, 10 C.L.J. 538=8 M.L.T. 255=3 Ind. Cas. 346.]

(54)—*Pleading and proof, variance between—Alleged inconsistency in pleadings.*—Where, on appeal from a suit brought after the death of a Hindu widow, by the plaintiff (a collateral relation, suing as heir), to have a sale of a portion of her husband's estate effected by her

Pleadings—continued.

set aside on the ground that the sale was invalid except in so far as it affected the rights of the widow herself therein, it was contended on behalf of the defendant, that the plaintiff, having sued as heir, could not be allowed to succeed on the basis of a *solenamah* entered into between himself and the heir by virtue of which he had acquired the rights of the heir, as this would be contrary to the rule laid down in 11 M.I.A. 7,—that the determinations in a cause should be founded on a case, either to be found in the pleadings or involved in or consistent with the case thereby made and that the equities and ground of relief originally alleged and pleaded by the plaintiff should not be departed from—the Judicial Committee fully affirming the rule stated, *held*, that if this objection had been taken in the first Court, the plaint and issues might and ought to have been amended, but, as it was not so taken, and the substance of the case in the plaint was that the sale by the widow was invalid beyond her own interest, under the circumstances of the case, there was no weight in the contention of the appellant. **NURUL HOSSEIN v. SHEOSAHAI LAL**, 20 C. 1, P.C.=19 I.A. 221=6 Sar. 205. [F., 4 C.L.J. 370=11 C.W.N. 85; *R.*, U.B. R. 1897-1901, Vol. II, 231, 91 P.R. 1901=113 P.L.R. 1901, U.B.R. 1906, 3rd Qr., Tort, 9.]

(55)—*Civ. Pro. Code, 1859, s. 123, Construction of—Written statement—Variance between case set up in written statement and that made by him at trial—Practice.*—S. 123, Civ. Pro. Code, 1859, contemplated that a defendant should, in his written statement, set forth the case he intended to make at the trial. The plaintiff must be held to the state of facts and equities alleged and pleaded by him in his plaint, or involved in or consistent therewith, and the same rule applies to the defendant also as regards his written statement. (11 M.I.A. 7, 11 M.I.A. 468, *Appl.*) Accordingly, in a suit in ejectment, the defendant cannot be permitted to set up at the trial a case of adverse possession against the plaintiff, while in his written statement, the contrary was alleged and the defence was based on purchase. **CHOVA KARA v. ISA BIN KHALIFA**, 1 B. 209. [*R.*, 19 B. 323, 1 O.C. 174; *D.*, 8 Bom. L.R. 921.]

(56)—*Failure to prove case as set out—Effect—Plaintiff.*—Failing to prove case in his own way not debarred from making out a good right on facts established by the defence. **NIDRA DASSEE v. ABDOOL WAHED**, 25 W.R. 532.

(57)—*Failure to prove specific alleged title—Title by adverse possession—Distinct and clear declaration of title.*—To enable the plaintiff, who has failed to prove a specific alleged title, to succeed upon the ground of adverse possession for twelve years, it must be distinctly shown that the latter title was also distinctly and clearly raised in the Court of first instance. **KRISHNA CHURN BAISACK v. PROTAB CHUNDER SARMA**, 7 C. 560. (2 C. 418, *R.*)

Pleadings—continued.

(58)—*Adverse possession—Declaration of title—Plaint—Issues.*—A declaration of title may be made on the strength merely of 12 years' adverse possession. (6 M.H.C. 420, *Diss.*; 20 W.R. 104, *F.*) Where such a declaration is sought, the 12 years' adverse possession must be distinctly stated in the plaint, or set out in the issues. *SHIRO KUMARI DEBI v. GOVIND SHAW TANTI*, 2 C. 418. [*F.*, 7 C. 560; *D.*, 14 C. 592.]

(59)—*Failure to prove case set up in plaint—Admission by defendant—Decree for plaintiff as to such portion.*—Where a plaintiff states in his plaint that the lands in dispute are his self-acquisition and fails to prove his averment, it is no ground for dismissing his suit altogether, if he is entitled in part to the relief sued for on the facts admitted by the defendant himself. *NARASANNA v. GURAPPA*, 9 M. 424.

(60)—*Pleadings—New case—Practice.*—Although the plaintiff may have framed his suit in a particular manner, owing to the fact that he has been misled by various representations made by the defendant, yet the plaintiff can only recover according to his allegations and his proofs. He will not be allowed to set up an entirely new case, which is not even set up or hinted at in the plaint. *GOPI LALL v. MUSSAMUTSREE CHUNDRAOLEE BAHOOJEE*, 11 B.L.R. 391, P.C.=19 W.R. 12=I.A. Sup. Vol. 131=3 Sar. 217 [*R.*, 10 C.W.N. 664=33 C. 657.]

(61)—*Suit for possession depending upon a division in family—No averment of the division made in plaint.*—In a suit for possession of a *Zemindary*, the plaintiff's title depended upon the fact of a division having taken place in the family. No averment of such division was made in the plaint, nor did the Courts in India as required by the *Madras Reg. XV of 1816*, s. 10, make it a point to be established, though some evidence was given of the fact. *Held*, on appeal, that there had been a miscarriage, the conditions of the Regulation being imperative, and the decree of the *Sudder Dewanny Adawlut* reversed. But, as the parties had acted under a misapprehension of the regulation, leave was given to institute a fresh suit within three years. *SRIMUT MOOTTOO VIJAYA RAGHANADHA GOWERY VALLABHA PERRIA WOODIA TAVER v. RANY ANGA MOOTTOO NATCHIAR*, 3 M.I.A. 278.

(62)—*Cause of action alleged different from that proved—Suit for 'maintenance of possession'—Suit virtually one to get a rectification of an erroneous decree or a cancellation of an erroneous order in execution—Maintainability of suit.*—Plaintiff, as mortgagee of 13 *bighas* of land, sued to redeem a prior mortgage. The prior mortgagee objected that he was mortgagee not only of part of the 13 *bighas* but also of another 15 *bighas* of land under four other mortgage-deeds and that plaintiff should redeem all the five mortgages. Plaintiff obtained a decree for redemption of all the five mortgages. He paid the money into Court for redemption

Pleadings—continued.

of all the five mortgages and afterwards, applied, in execution, for redemption of the 28 *bighas*. The defendant objected that the decree gave plaintiff possession of only 13 *bighas* and that the decree was wrongfully framed. Plaintiff, without attempting to get the decree rectified, now sued for 'maintenance of possession' of the 15 *bighas* alleging that he had obtained possession of the 15 *bighas* lawfully but that one of the defendants, at the instigation of the other, had interfered with his cultivation of the 15 *bighas* or in the alternative, for possession, if the Court found him to have been dispossessed. It was found by both the lower Courts that plaintiff was never in possession of the 15 *bighas* and consequently, never dispossessed. *Held*, the cause of action alleged by the plaintiff, *viz.*, possession and interference with possession not having been made out and the Courts having found that no such cause of action ever accrued to the plaintiff, the plaintiff was not entitled to maintain the suit, which was liable to dismissal on this ground alone. *Held*, also, that, when the execution Court refused to give him possession on the ground that the decree had been wrongly drawn up, two courses were open to the plaintiff; he might either have appealed against the order in execution refusing to give him possession, if the decree had been properly drawn up, or, if the decree had been wrongly drawn up, he might have applied to the Court that passed the decree and got it rectified. He did neither but brought the present suit, which, in reality, was one to have the redemption-decree rectified and to have the order in execution set aside. Such a suit is not maintainable. *BASAWAN KURMI v. NAKCHHEDI PANDE*, 27 A. 174=A.W.N. 1904, 207=1 A.L.J. 628.

(63)—*Plaintiff must succeed on the strength of his own title, and not on the weakness of that set up by defendant.*—A decree of the *Sudder Court* held that, although the title set up by the plaintiff might be wholly bad, yet that a party, defendant, with whom the plaintiff had, by a deed of *Solenamah*, or compromise, agreed to divide the estate, was entitled and, on that ground, decreed possession. Such decree reversed on appeal, as the effect of the decree would be (1) to defeat the defendant's possessory title without giving him an opportunity of contesting the title of the party by whom he is turned out of possession, and (2) as it was a violation of legal principles which protect possession, and of justice which regulate the joinder of parties and the union of titles to sue in one suit. It is essential that a claimant, seeking to oust a party in possession of an estate, should establish his own right to the estate, and not rely upon the failure of the title impeached. *JOWALA BUKSH v. DHARUM SINGH*, 10 M.I.A. 511.

(64)—*Pleadings—Burden of proof—Plaintiff must succeed or fail on his own allegations.*—The plaintiff, vendor, sued for a part of the consideration of the sale, alleging that the defendant had orally agreed to pay the amount

Pleadings—continued.

in cash and it was fictitiously entered in the sale deed as due to certain creditors of his to be paid by the vendee to prove "necessity." In his oral statement, the plaintiff said that the amount was entered fictitiously to defeat pre-emptors. The claim was allowed by the original Court, but was rejected on appeal. *Held*, that the claim was rightly rejected, for the plaintiff must succeed or fail on his own allegations. **PALA v. BEANT SINGH, 40 P.L.R. 1910 = 8 Ind. Cas. 230.**

(65)—*Claim for proprietary right set up—Rights as hereditary cultivator proved—Suit not to be dismissed.*—Where the plaintiffs, though they set up their right as proprietors in the plaint proved only their right as hereditary cultivators, the suit ought not to have been dismissed on that ground, but the Court could have tried the case and affirmed their right as hereditary cultivators. **SHADEE v. ARJUN, 55 P.R. 1868. [F., 90 P.R. 1882, 105 P.R. 1884.]**

(66)—*Suit on bond—Denial of execution—Admission of part of claim—Previous transaction, between parties—Recovering secundum allegata, application of.*—Although a creditor can, in some cases, fall back on his account stated, his account books and his actual claim for money lent, even when he has failed to prove a bond, still he cannot be allowed to allege one sort of claim and prove another sort of claim. When a claim is based on a bond (alleged to have been executed, after the accounts had been understood by the debtor, in lieu of previous bonds), and on that only, the creditor, when the bond has not been proved, has no right to fall back on the account stated. On the principle of recovering *secundum allegata et probata*, the Court cannot remand the case for decision on the accounts, that being a matter which the creditor in fact never asked for originally, having chosen to rely on the bond exclusively. **GHAILA SINGH v. AHMED KHAN, 32 P.R. 1876.**

(67)—*Relief in suits—Pleadings and issues—Secundum allegata et probata.*—Cases must be tried and determined *secundum allegata et probata*; and it is contrary to this principle to decide a cause upon a point not raised in the pleadings, nor embodied in an issue. **JOYTARA DASSEE v. MAHOMED MOBARUCK, 8 C. 975 = 11 C.L.R. 399. [Appr., 7 B. 146; R., 3 C.L.J. 316; Disc., 14 C. 592.]**

(68)—*Practice—Setting up of defence—Failure of defence of adoption—Defence that plaintiff's deed of title not valid, not open—Pleas.*—The plaintiff, claiming under a deed of gift by the daughter of the owner of the property, sued to recover possession of the property from defendant, who claimed to be an adopted son of the owner. Failing in his defence as to adoption, the defendant set up a case that the plaintiff's deed of gift was invalid. *Held*, that it was not open to the defendant to take up that line of defence. *Ex hypothesi* he was a person who had no title to the property. The plaintiff was a person claiming under a registered

Pleadings—continued.

deed of gift executed in his favour by the person who was admittedly the heir of the last male holder. The plaintiff had, therefore, a *prima facie* title and must succeed, unless the defendant could show some better title in himself. **TRIMBAK KHIKAJI v. SHANKER SHAMRAO, 13 Bom. L.R. 947.**

(69)—*Pleadings—Suit for money—Objection to maintainability of suit—Defendant's consent while giving evidence to plaintiffs recovering the amount, whether validates suit—Issue not framed—Right of Appellate Court to adjudge on questions, not the subject of an issue.*—Where, in a suit for money, an issue is framed as to plaintiff's right to maintain it, the mere consent of the defendant, while being examined as a witness, to plaintiff's recovering the amount, will not be sufficient to entitle the plaintiff to maintain the suit. Where no issue on a matter is raised by the pleadings and the Court of first instance has not dealt with it, it is not competent to the appellate Court to entertain the question in appeal. **MALAIKOLANDU CHETTIAR v. PERIA PILLAY, 10 Ind. Cas. 351 = 2 M.W.N. 1911, 393.**

(70)—*Suit for confirmation of possession—Change in form of suit—Suit for recovery of possession—Bona fides.*—When a plaintiff has a *bona fide* case, which he has proved in substance, but not in form, there are circumstances, under which the Courts assist him. But, where a plaintiff put forward a distinct allegation of possession founded on a deed of sale, which is found by the Court to be false, this is not a case in which the general rule ought to be relaxed and the plaintiff assisted to establish a case which he did not originally put forward. **TERIETPUT SINGH v. GOSSAIN SUDERSAN DAS, 4 C. 46. (15 W.R. 286, 16 W.R. 27, 1 I. A. 192, D., on the ground that they were bona fide cases.)**

(71)—*Benami mortgage—Title—Proof.*—In a mortgage deed, the mortgagee was described as one "M.J.B., otherwise B K, the wife of M," and it recited that the consideration-money was advanced by her. M J B. was not the wife of M, but his concubine. In the absence of satisfactory proof that the money advanced was M. J.B.'s separate property, and upon evidence that the consideration money was really advanced by M. *Held* (affirming the decrees of the Courts in India) that the preponderance of the evidence was in favour of M being the person who advanced the money, and that the transaction was to be considered as *benamee*, or in trust for M, as mortgagee. **BHOWUN DOSS v. SHEIKH MAHOMED HOSSEIN, 13 W.R. P.C. 38 = 13 M.I.A. 346.**

(72 & 73)—*Evidence—Inspection of records in previous suits—Pleadings, declarations in—Act VIII of 1859, s. 138.*—Declarations made in plaints or pleadings in suits instituted prior to the introduction of the Civ. Pro. Code, are inadmissible as evidence of facts stated therein. Though s. 138 of Act VIII of 1859 gives a Civil Court power to inspect the record of papers in

Pleadings—continued.

a previous suit, it can only use such documents in evidence as are legally admissible. *NARAPPA Bin APPA HEGDI v. GAPAYA Bin KAPAYA*, 2 B.H.C. 341.

(74) — *Mesne profits—Proof of greater amount than is claimed.*—A plaintiff is not entitled to more mesne profits than he has claimed in his plaint although by the evidence a larger sum appears to be due. *SOORIAH ROW v. COTAGHERY BOOCHIAH*, 5 W.R. P.C. 127 = 2 M.L.A. 113.

(75) — *Suit to redeem converted into a suit to recover possession on payment of a charge—Compromise in settlement Court not equivalent to a mortgage—Limitation Act, 1877, sch. II, art. 124—Adverse possession—Charge—Transfer of Property Act, s. 100—Recovery of the whole share.*—On the basis of a compromise, a decree was passed, in favour of the ancestors of the plaintiff and his co-sharers, by the Settlement Courts, to the effect that they would be entitled to the possession of their share in the property, if they paid their share of the family debts, and if they failed to do so, the defendants would be entitled to take possession of the whole of their shares. It was also added in the compromise, that, if afterwards the plaintiff and his co-sharers paid the whole of the debt due from them, they would be entitled to recover possession of their shares. The defendants paid the entire amount and took possession of the whole share of the plaintiff and his co-sharers. The plaintiff now sought to redeem his own share, as well as that of his co-sharers, on the payment of the amount due from him and his co-sharers on account of their share. The defendants pleaded that the suit to redeem was not maintainable and was also barred by limitation, as they had been in possession for more than 12 years. They also pleaded that the plaintiff could not recover more than his own share. *Held*, that the above compromise did not create the relationship of mortgagor and mortgagee between the parties to it, and no suit for redemption could lie, but the suit of the plaintiffs should not be dismissed, merely because the plaintiff had stated in his plaint that the above compromise had created such a relationship. The suit was actually for recovery of the property on payment of a certain charge and should have been decreed as such. The actual facts were clear from the pleadings, and the defendants were not in any way prejudiced by such a view of the case. *Held*, further, that the suit being really one for possession of the property on payment of a charge, it was governed by art. 144 of the second schedule of the Limitation Act, and as the defendants had not succeeded in showing that they had been in adverse possession for more than 12 years before the date, on which the present suit was instituted, it was not barred by limitation. *Held*, also, that the plaintiff could recover not only his own share, but also those of his other co-sharers, on payment of the amount due from

Pleadings—continued.

him, as well as from those other co-sharers. *KARIM BAKSH KHAN v. NEHDEI HASAN-KHAN*, 10 O.C. 17.

(76) — *Practice—Second appeal—Change of pleading not allowed.*—Where the plaintiff sued for possession by avoidance of a deed of gift and failed, he cannot, in second appeal, claim as heir of the donee, nor can he claim to set aside a sale by the donee as being unauthorised by the deed of gift. *KANHIA v. MAHIN LAL*, 10 A. 495 = A.W.N. 1888, 181.

(77) — *Plaint, plaintiff how far bound by case set up in his—Declaration of proprietary title and ejectment of tenant, suit by talukdar for—Denial of taluqdari title and assertion of adverse title by defendant—Burden of proof—Indian Evidence Act, ss. 102 and 110—Presumption of ownership—Procedure—Act I of 1869, s. 3.*—In 1886, the plaintiff served the defendants with a notice of ejectment under the provisions of ss. 42 and 43 of Act XIX of 1868, the Rent Act then in force in Oudh, in respect of a village which the plaintiff had acquired under the provisions of s. 3 of Act I of 1869. On the 11th May, 1886, the defendants sued under the same Act contesting the notice, which was finally cancelled on the 6th May, 1887. On the 2nd January, 1888, the plaintiff brought a suit in which he prayed for a declaration of his proprietary right to the village and for ejectment of the defendants from that village, because the latter, being lessees of the village, denied in the suit to contest the notice of ejectment, the tenancy, and set up an under-proprietary title to the village. According to the plaint the tenancy commenced in 1866 with a lease for one year. The defence to the suit was substantially a denial that the relationship of landlord and tenants between the plaintiff and the defendants came into existence in 1866 or at any time, and an assertion that the defendants were entitled to possession of the village as under-proprietors, and that the suit was barred by limitation. It was admitted that the village was a portion of the plaintiff's taluqa and that rent had been paid to him for the village. The question was on whom did the burden of proof lie. *Held*, that the burden of proof lay on the plaintiff. In view of the provisions of s. 102, Indian Evidence Act, the plaintiff would fail if no evidence were given on either side, notwithstanding that the village was a part of his taluqa and that rent had been paid to him. The defendants had admittedly been in possession for more than 12 years; and possession, according to s. 110 of the Indian Evidence Act, was *prima facie* evidence of ownership. The defendants having denied the plaintiff's title and set up adverse possession of the village, the plaintiff was bound to give some evidence that the possession of the defendants had not been adverse for 12 years prior to the institution of the suit, that is to say, some evidence that his title as taluqdar was subsisting when the suit was instituted. The plaintiff's case, as stated

Pleadings—continued.

in the plaint was, that in 1866 he gave the defendants a lease of the village for one year, since when they had held as tenants. In the lower Court, the case was tried on the issue generally whether the defendants were lessees or under-proprietors. In appeal the plaintiff contended that he ought not to be tied down to the statements that the relationship of landlord and tenants between him and the defendants commenced in 1866 and be taken to have failed in his suit if that statement was not proved, but should be allowed to prove the existence of such relationship irrespective of that statement. *Held*, that the substance and the merits of the plaintiff's case, as made in the plaint were that the relationship of landlord and tenant between him and the defendants came into existence in 1866 and that that case ought not to have been departed from. The rule laid down by their Lordships of the Privy Council in *Ishan Chandra Singh v. Shama Charan Bhatt* that "the state of facts, and the equities, and ground of relief originally alleged and pleaded by the plaintiff shall not be departed from" was consistent with and was not to be confounded with another rule laid down by their Lordships in *Hamuman Prasad Panday's* case that "the substance and the merits of the case are to be kept constantly in view" by the Courts in this country. *BHAGWAN BAKHSH v. KAMTA PARSHAD*, 6 O.C. 119. [R., 3 O.C. 145.]

(78)—*Plaintiff setting up a new case not made in the plaint—Possession, suit for.*—The case which the plaintiffs made in the plaint and which was embodied in the issues was that the share in dispute was the property of one D, that on his death his widow M inherited it, and that they (plaintiffs) as the reversionary heirs of D were entitled to it as she was dead. The Subordinate Judge held "that the property never belonged to M," but on the contention of the plaintiffs that the share had been granted to M for maintenance and that they as the representatives of the grantors were entitled to resume it at her death, decreed their claim. *Held*, that the plaintiffs could not be permitted to set up a new case which they did not make in their plaint; and that as they failed to prove the case upon which they came into Court, their suit should have been dismissed. *GAJADHAR BUX SINGH v. MITAN SINGH*, 6 O.C. 247.

(79)—*Case set up in appeal different from that in the plaint.*—Where the plaintiffs in a suit for partition sued for a certain share on a specified title, but the lower Court held that they were entitled only to a lesser share on that title, and the plaintiffs in appeal set up a claim to a larger share based on a finding of the lower Court but inconsistent with the title set up in the plaint, *held* that such a plea could not be set up in appeal. *ILAH KHAN v. SHER ALI KHAN*, 26 A. 331.

(80)—*Suit to recover possession—Fresh plea in appeal, raising of—Practice.*—In a suit by a Mahomedan lady to recover possession of her

Pleadings—continued.

share of the property of her deceased brother in the hands of his widow claiming to have been given by her deceased husband in lieu of her dower debt, *held*, that the plaintiff-appellant cannot raise, in appeal, the question that an account should be taken of the profits of the property so as to ascertain how much of the dower-debt had been satisfied out of the income of the property in the respondent's possession, inasmuch as there was no prayer or claim for an account in the plaint and no issue as to profits was raised at the trial. *HUMERA BIBI v. ZUBEDA BIBI*, A.W.N. 1905, 125=2 A.L.J. 485. (6 M.L.A. 211, 14 M.L.A. 377, F.)

(81)—*Plea raised for the first time in appellate Court*—A plea raised for the first time in the appellate Court cannot be considered by it. *RAYAR SIVARAMA KRISHNIER v. SANKARALINGA KONE*, 8 M.L.T. 247=8 Ind. Cas. 354.

(82)—*Pleadings—Ex-parte decree—Appeal—Supplementing evidence.*—Where, in a suit under Act X of 1859, the Collector gives a decree in favour of the plaintiff on the ground of an *ex-parte* inquiry and report, and the plaintiff in appeal chooses to rely on the Collector's opinion, he cannot, after an adverse decision, supplement his case by other evidence. *WOOMANATH ROY CHOWDHURY v. SREENATH SINGH*, 15 W.R. 260.

(83)—*Special appeal—New title.*—The defendants who in Court below unsuccessfully claimed to retain possession of some land under a Kabala from a Mahomedan widow, who was alleged by them to have been absolutely entitled thereto under her right of dower, could not, in special appeal, set up for the first time that the widow was entitled to a share by inheritance, if not as *denmohur*, no case of that kind having been made in the Courts below, and no enquiry asked for into the state of the family or as to whether any and what share came to the widow. *AMBIKA CHARAN DUTT v. NADIR HOSSEIN*, 2 B.L.R. A.C. 258=11 W.R. 133.

(83-a)—*Appellate Court—New pleas raised for first time.*—A party to a suit cannot succeed on a title which he sets up for the first time in the appellate Court and which he never raised in the Court below. *MAHABEER MISSER v. JUGGER NATH MISSER*, 25 W.R. 11.

(84)—*Contract to transfer—Question not raised in first Court—Pleadings.*—The defendant who had not raised the issue in the first Court that there was a valid contract to transfer could not, on failing to prove the actual transfer set up by him, be allowed to raise it in the appellate Court. *IMMADIPATTAM THIRUGNANA v. PERIYA DORASAMI*, 5 C.W.N. 217=28 I.A. 46=24 M. 377, P.C.=7 Sar. 811. [Expl., 16 M.L.J. 395=1 M.L.T. 153=29 M. 336.]

(85)—*Plaint clumsily drawn—Reading issues to ascertain the case—Difficulty arising from confusion in the plaint—Liability of appellant to pay costs—Appeal—Practice.*—Where the plaint

Pleadings—continued.

was clumsily drawn, it was held in second appeal that the plaint ought to be read with the issues framed in the case to ascertain the plaintiff's case. As much of the difficulty in the appeal arose from the confusion in the plaint, the Appellant, the plaintiff in the lower Court, was directed to pay the costs of the respondent in the appeal, though the High Court reversed the decree of the lower appellate Court and remanded the case for disposal according to law. **GADIDASS SURYANARAYANA ROW v. GADIDASS RAJYA LAKSHMAMMA alias RAJYAM, 8 M.L.T. 202=7 Ind. Cas. 800.**

(86)—*Revision—Material irregularity—Defence not set up in the first Court—Punjab Courts Act XVIII of 1884, as amended, s. 70 (a).—Held*, that the defendant must be limited to the defence set up by him in the first Court. It is a material irregularity on the part of an appellate Court to go outside the merits and consider a technical point not raised in the original pleading. So where a defendant simply pleads in the first Court that he has nothing to do with the contract or its breach, he cannot be allowed to appeal on the ground that he is not legally liable for damages even if he made and broke it. **KARAM BASKH v. ABDUL KARIM, 81 P.W.R. 1912=146 P.L.R. 1912=14 Ind. Cas. 1008.**

(87)—*Order of remand—On a point not arising from the pleadings—Counter allegation by defendant—Necessity of proof.*—Where an order of remand was mistakenly issued on an issue which did not really arise between the parties, but the lower appellate Court on remand came to a finding of facts which correctly disposed of the case, *held* that, although the Judge of the lower appellate Court had not dealt properly with the evidence on the record with reference to the precise issue which was sent down to him, his default in that respect ought not to govern the final result between the plaintiff and the defendant. Where the defendant, instead of merely denying the plaintiff's allegation, raises a counter-allegation in his written statement, he is bound to prove the counter-allegation. **MAHOMED HASHIM v. KALLE CHARAN BANERJEE, 13 W.R. 91.**

(88)—*Withdrawal of first suit for possession of land as owner—Second suit for establishment of easement over land claimed in the first suit.*—There is no legal impediment to a plaintiff, suing for possession of land as owner and withdrawing such suit with liberty to sue again, bringing a second suit, not for recovery of the land itself, as owner, but for establishing an easement over it. "If he (plaintiff) has enjoyed the right, by user, for such a long period as was sufficient to confer on him a right by prescription, the circumstance that, in a previous suit, he had erroneously stated that he was the owner, would not deprive him of the right of easement, which he had already acquired." **CHADAMMI LAL v. SHIB CHARAN, A.W.N. 1905, 18=2 A.L.J. 59. (A.W.N. 1883, 66, D.)**

Pleadings—continued.

(89)—*Counsel—Omission to argue question of law or abandoning a point—Power of Court to go into question.*—Omission of a counsel either to argue a question of law, or his abandoning a question of law is not sufficient to disentitle Court to go into the question. **RAMSARAN SINGH v. KHAKAN SINGH, 11 C.W.N. 340. (27 C. 156, F.)**

(90)—*Civ. Pro. Code, Act VIII of 1859, ss. 29 and 73—Power of Court—Addition and transposition of parties.*—S. 73 of Act VIII of 1859 empowered a Court to add parties to a suit as well as to transpose a party from his position as *pro-forma* defendant, and to array him amongst the plaintiffs after amendment of the plaint under s. 29 of the Act. **PITAMBUR PYNE v. TOOLSEE DOSSEE, 7 W.R. 39.**

(91)—*Plea of merger in special appeal.*—A party cannot be allowed to raise the plea of merger for the first time in special appeal. **MR. H. RUSHTON v. MR. W. L. ATKINSON, 11 W. R. 485.**

(92)—*Appeal—New ground of attack not allowed in appeal—Shamilat land.*—*Held*, that a plaintiff cannot be allowed to alter the nature of attack for the first time in appeal. Therefore plaintiff suing for land as its sole owner cannot be permitted in appeal to base his claim on the ground of its being *shamilat*. **NATHU v. MANJI RAM, 4 P.W.R. 1913=138 P.L.R. 1913.**

(93)—*Pleadings, defective—Finding on evidence which plaintiff had no opportunity to meet—Appellate Court, duty of—Remission of issue.*—If an appellate Court is of opinion that the plaintiff has been prejudiced by the defective pleadings and that there has been a finding upon insufficient evidence and upon evidence which the plaintiff had no reasonable opportunity of meeting, the proper course is to remit an issue on the point. **AHMAD BAKSH v. SAIRA BIBI, 15 Ind. Cas. 3.**

(94)—*Practice—Pleadings—Relief on facts not referred to in pleadings.*—A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings. **MAHOMED ZAHOR ALI KHAN v. TAH-KOORANEE RUTTA KOOR, 9 W.R.P.C. 9=11 M.I.A. 468. [F., 16 C.L.J. 2=3 Ind. Cas. 408; Appr., 1 B. 209; R., 17 W.R. 432.]**

(95)—*Pleadings—Plaintiff alleging a fact—Defendant denying but admitting a certain sum due—Decree and judgment.*—Where the plaintiff sued for dissolution of partnership and for ascertainment of his share, and the defendant said the partnership was dissolved and a certain amount was due to plaintiff, the Courts ought to give a decree for the sum admitted to be due by the defendant. The fact that the plaintiff was persistent in denying the defendant's case and has refused his offer of payment is not a sufficient ground for refusing him the decree for the amount admittedly due. **KARUMUSI BRAHMANNA SASTRULU v. JALDU VENKATA SUBBA ROW, M.W.N. 1913, 432=24 M.L.J. 561.**

Pleadings—continued.

(96)—*Pleadings—Change of case—Issues—Suit to set aside a deed of gift as fraudulent, failing, claim for accounts of a share as from agent.*—Where, on the eve of a contemplated pilgrimage to Mecca, M transferred her property to her nephew E, by a deed of gift, and on the same date the latter executed a deed which provided that a fourth share of the properties thus conveyed should remain in her possession during her lifetime, and on her death should come into E's possession; *Held* that the fact that, in a suit to set aside the deed of gift on the ground of fraud and misrepresentation which failed, a general issue as to whether E was liable to render an account to M was raised with reference to the whole property, would not justify the Court in passing a decree directing E to account for the profits of a 4 annas share, on the footing of his being M's agent in respect of that share. **SAYEDANI MAHMUDA KHATUN CHOWDHURANI v. MAHOMED ELAHABAD KHAN PANI, 17 C.W. N. 427, P.C.**

(97)—*Practice—Pleadings—Issue dealing with questions raised in the pleadings and questions not so raised—Determination of latter question—Legality—Inconsistent defences during suit—Court's duty.*—Where the Court of first instance framed in a suit only one broad issue which not only covered the question raised on the pleadings, viz., whether a gift was a death-bed gift or not, but also another, question namely, whether the gift was made under undue influence, and where the appellate Court determined the question of undue influence which was not specifically raised in the pleadings. *Held*, that there was nothing illegal in the appellate Court taking into consideration the question of undue influence and in coming to a determination upon that question, because such question was not necessarily inconsistent with the other question which was specifically raised by the pleadings. Undoubtedly the case must be decided on the pleadings, not on what transpires in the case. But to non suit a person suing in a small petty Township Court in Upper Burma, merely because there is not sufficient legal advice to draw up the pleadings as fully and carefully as they might be, would obviously involve great hardship on litigants. Of course, the appellate Court must be careful to see that inconsistent defences are not trumped up during the progress of the case. This would merely lead to fraud. **U. THONDAYA BY HIS AGENT NGA PO CHOK v. NGA NI, U.B.R. 1912, 2nd Qr., 141. (5 L.B.R. 76, U.B.R. 11, 1902-03, Bud. Law, Gift. U.B.R. 11, 1907, Execution, Signing, 1 and 14 C. 801, P.C., R.)**

(98)—*Prior agreement of partnership or family arrangement not set up in pleadings—No issue raised on the point—Court cannot make a case of partnership or family arrangement.*—Where a prior agreement of partnership or family arrangement was not set up in the pleadings, and there was no issue on the point, a Court should not go outside the pleadings to make such a case of partnership or arrangement for

Pleadings—continued.

the parties. **ILLA SOMANNA v. MADDALA SETTAMMA, 13 M.L.T. 102.**

See ACT IX OF 1890, s. 77, 24 C. 306.

See BEN. ACT VIII OF 1885, s. 153, 5 C.W. N. 515.

Amendment of pleadings when may be allowed—*See* BEN. ACT I OF 1895, s. 15, 14 C. L.J. 83.

Alternative defences, whether can be set up—Inconsistent defences—Effect—*See* C. P. ACT XVIII OF 1881, ss. 71, 138 (a), 5 N.L.R. 189.

Suit for damages—Suit for Specific return of moveable property—*See* MAD. ACT VIII OF 1865, 27 M. 430.

Plaintiff having no right to sue—Defendants' case weak—Suit must fail—*See* PUN. ACT XVI OF 1887, s. 59 (3), 9 Ind. Cas. 339=54 P.L.R. 1911.

When an appellant before the Privy Council may succeed upon a new case—*See* U.P. ACT I OF 1869, s. 22, 2 C.L.J. 194. P.C.=9 C.W.N. 1009=8 O.C. 317=15 M.L.J. 352=27 A. 634.

Findings sufficient—Remission of issues unnecessary—*See* U.P. ACT II OF 1901, s. 22, 6 Ind. Cas. 499.

Admission in—by co-defendant—Effect—*See* ADMISSION—ADMISSIONS IN PLEADINGS, 7 A. 353=A.W.N. 1885, 54.

Admission in—Of execution of agreement—Evidence to prove admitted document unnecessary—*See* ADMISSION—ADMISSIONS IN PLEADINGS, 5 B. 143.

Scandalous matter should be avoided in—*See* AFFIDAVIT, 10 C.L.J. 414=14 C.W.N. 153=4 Ind. Cas. 380.

Taking before the Privy Council points not taken in the Court of first instance—*See* ALLUVION—FORMATION OF CHURS OR ISLANDS, 3 C.L.J. 560, P.C.=1 M.L.T. 175.

Appeals,—in, must be same as that in original suit—*See* APPEAL—PRACTICE AND PROCEDURE, 15 A. 186=A.W.N. 1893, 69.

See APPELLATE COURT—DUTY OF APPELLATE COURT, 7 A. 1, P.C.=11 I.A. 149=A.W.N. 1884, 246.

Plea of coercion and public policy to avoid sale-deed—Neither raised in pleadings nor in the grounds of appeal—Whether entertainable—*See* APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 6 A.L.J. 636=3 Ind. Cas. 510.

Amendment of pleadings, when may be allowed—Discretion of Court—Power of appellate Court—*See* AWARD, 14 C.L.J. 198.

Making mention only of unsoundness of mind of donor—Whether evidence admissible to

Pleadings—continued.

prove undue influence—See BENAMI TRANSACTION—GENERAL, 10 C.W.N. 570, P.C.=3 A.L.J. 353=3 C.L.J. 484=8 Bom. L.R. 379=16 M.L.J. 166=1 M.L.T. 137=33 C. 773.

See BENAMI TRANSACTION—MISCELLANEOUS, 6 B.L.R. 303, P.C.=15 W.R.P.C. 7.

Questions going to root should be raised in—See CASTE, 11 Bom. L.R. 1267=4 Ind. Cas. 569.

Resumption and transfer by Government of Chowkidari Chakran lands to the Zemindar, subsequent to patni and darpatni leases—Rights of Patnidar and Darpatnidars—Suit for possession and execution of deed of transfer against the Zemindar—Whether badly framed—See CHOWKIDARI CHAKRAN LANDS, 37 C. 57=14 C.W.N. 527=5 Ind. Cas. 205.

Plaintiff and defendant bound to take every possible plea in support of his case—*Res judicata*—See CIV. PRO. CODE, 1908, s. 11, *Expl.* 4, 10 Ind. Cas. 29.

Construction of—See CIV. PRO. CODE, 1908, ss. 47, 65, O. XXI, r. 94, O. XLI, rr. 25, 27, 9 C.L.J. 464=4 Ind. Cas. 168.

Fresh case set up by lower appellate Court—Finding of fact unsupported by evidence—Jurisdiction of High Court to interfere—See CIV. PRO. CODE, 1908, s. 100, 1 A.L.J. 637, P.C.=8 C.W.N. 865=29 B. 1=6 Bom. L.R. 770.

Court overlooking an important plea—Review—See CIV. PRO. CODE, 1908, s. 151, 2 C.P.L.R. 1911=9 Ind. Cas. 545.

Whether the defence of purchase for valuable consideration without notice is available against a claim based on a legal title—See CIV. PRO. CODE, 1908, O.I, r. 10 (1), O. VI, r. 15 (2) (3), 10 C.W.N. 662=33 C. 657.

Amendment of pleading—Defence of limitation—General observations about amendment of plaint—See CIV. PRO. CODE, 1908, O. VI, r. 17, 11 Bom. L.R. 1042=33 B. 644=4 Ind. Cas. 726.

New plea should not be allowed after remand—See CIV. PRO. CODE, 1908, O. XIV, r. 5 10 Ind. Cas. 230.

See CIV. PRO. CODE, 1908, O. XLI, r. 1, 8 C.P.L.R. 81.

Suit upon lost document—Absence of proof of loss—Duty of Court—Burden of proof—See CIV. PRO. CODE, 1908, O. XLIII, r. 1 (r), O. XLVII, r. 7 (a) and (b). s. 115 (c), 49 P.W. R. 1911.

See COMPANY—POWERS AND LIABILITIES OF DIRECTORS, 4 C.W.N. 369.

Inconsistent pleadings—*Allegans Contraria non Auditor*—See CONTRACT—WAGERING CONTRACTS, P.L.R. 1900, 460.

Allegation of fraud by plaintiff of defendant—Necessity to give full particulars—See CONTRACT ACT, 1872, s. 16, 8 O.C. 210.

Pleadings—continued.

Original relief claimed in plaint to rest on facts verified by plaintiffs—See CONTRACT ACT, 1872, ss. 23, 24 and 26, 4 N.L.R. 86.

Bond providing further penalty for failure to pay damages for breach—Plaint not disclosing such failure as a separate cause of action—See CONTRACT ACT, 1872, s. 74, 3 S.L.R. 122=4 Ind. Cas. 607.

Pleading—Denial of statement once made—Duty of Court—Estoppel—See CUSTOMS—PUNJAB—ALIENATION, 27 P.R. 1909=46 P.L.R. 1909=33 P.W.R. 1909=1 Ind. Cas. 888.

Tenant who sets up adverse title if may fall back on tenancy as a defence in ejectment suit—See DEBUTTER PROPERTY, 13 C.W.N. 805=3 Ind. Cas. 93.

And record of suit to be seen in construing decree—See DECREE—DECREE, CONSTRUCTION OF, 11 C.P.L.R. 130.

Terms of ambiguous decree, power of executing Court to refer to—for construing—See DECREE—DECREE, CONSTRUCTION OF, 18 A. 344=A.W.N. 1896, 87.

See DECREE—MISCELLANEOUS, 5 W.R. ACT X Rul. 59.

Alternative claim not put—Inclusion of that claim in common prayer for further relief—See DEED—CANCELLATION OF DEEDS, 1 Ind. Cas. 657.

Statement made in pleadings in an action—See DEFAMATION, 23 C. 867.

Defamatory statements in pleadings—Privileged or not—Parties—See DEFAMATION, 5 C.W.N. 293.

Denial by tenant of his landlord's title in the—Whether gives a cause of action for ejectment—See EJECTMENT, SUIT FOR, 6 N.L. R. 83=6 Ind. Cas. 927.

Court ought not to make out for a party a case not set up by him—See EJECTMENT SUIT FOR, 9 C.W.N. 460=1 C.L.J. 116.

Point not raised in the pleading nor in the appeal not to be considered in second appeal—See EQUITABLE MORTGAGE, 4 L.B.R. 371.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 12 C.L.R. 64, 38 P.R. 1892.

In plaint as to invalidity of a mortgage—Subsequent pleadings, estoppel of—See ESTOPPEL—STATEMENTS AND PLEADINGS, 16 M. L.J. 5.

See ESTOPPEL—STATEMENTS AND PLEADINGS, L.B.R. 1893—1900, 401.

Abstract of pleadings in a decree—Secondary evidence of admission—See EVIDENCE—SECONDARY EVIDENCE, 1 C.W.N. 513.

See EVIDENCE—MISCELLANEOUS, 67 P. R. 1891.

Pleadings—continued.

Inconsistency in—Construction of document—Costs—*See* FAMILY ARRANGEMENT, 15 C.W.N. 497, P.C.=8 A.L.J. 465=13 C.L.J. 519=9 M.L.T. 507=13 Bom. L.R. 404.

Fraud alleged in plaint not proved—Effect—Cause of action irrespective of fraud—Principle to be observed where case is based on fraud—*See* FRAUD—EFFECT OF FRAUD, 9 Ind. Cas. 429.

Fraudulent decree—Special prayer to set aside the decree not made—General prayer for "any other relief"—Maintainability of suit—*See* FRAUDULENT DECREE, 4 Ind. Cas. 356.

See HINDU LAW—ADOPTION, 5 C.W.N. 162, 2 B.L.R. P.C. 101=12 W.R.P.C. 1=12 M.I.A. 350.

Plea that plaint does not disclose a cause of action, whether may be taken in second appeal—*See* HINDU LAW—ALIENATION, 8 A.L.J. 922.

See HINDU LAW—JOINT FAMILY, 6 W.R. 50, P.C.

A plaintiff even though he asks for exclusive provision may yet be awarded possession in common—*See* HINDU LAW—JOINT FAMILY, 8 Bom.L.R. 99.

Variation of—In course of evidence how far allowable—*See* HINDU LAW—JOINT FAMILY, 4 C.L.J. 56.

Frame of plaint impeaching accounts—Objection to plaint when to be taken—*See* HINDU LAW—PARTITION, 13 C.W.N. 309=9 C.L.J. 133=3 Ind. Cas. 241.

Suit on allegation of exclusive title barred—No relief can be given on basis of tenancy-in-common—*See* HINDU LAW—PARTITION, 7 M.L.T. 95=5 Ind. Cas. 764=33 M. 356.

Case inconsistent with, not allowable—*See* INJUNCTION—SPECIAL CASES, 5 N L.R. 67=2 Ind. Cas. 241.

Issues upon matter not covered by—*See* ISSUES—ADDITIONAL ISSUES, 5 C. 64=4 C. L.R. 353.

Frame of issues—Available materials for Court—*See* ISSUES—FRAMING ISSUES, 11 C. 407.

Estoppel by—Amendment of, when allowed—Amendment of suit for rent into suit for damages for use and occupation—*See* LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, 6 M.L.T. 255=3 Ind. Cas. 346=10 C.L.J. 538.

Plea of equitable acquiescence cannot be taken for the first time in second appeal—*See* LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, A.W.N. 1905, 90=27 A. 556.

See LANDLORD AND TENANT—MISCELLANEOUS, 80 P.W.R. 1910=6 Ind. Cas. 1010.

Compromise petition, a pleading filed by parties—Whether enforceable without registration—*See* LEASE—GENERAL, 6 M.L.T. 313=20 M.L.J. 20=33 M. 102=3 Ind. Cas. 701.

Pleadings—continued.

Suit on newspaper libel—Application for amending written statement, at the hearing, refused—*See* LIBEL, 13 C.W.N. 895=6 M.L.T. 73=36 C. 883=3 Ind. Cas. 224.

Dismissal of suit on point not raised—Premature suit—Limitation not commenced—*See* LIMITATION ACT, 1908, art. 113, 11 Ind. Cas. 25.

Allegations vague and loose—Judge to ascertain real controversy—*See* LIMITATION ACT, 1908, art. 149, 13 Bom. L. R. 92=9 Ind. Cas. 765.

Recital of—in judgments—Admissibility of such judgments in evidence—*See* MAINTENANCE GRANT, 3 C.L.J. 521.

Informality of mortgage not impeached at first hearing—Effect—*See* MORTGAGE—GENERAL, 11 Ind. Cas. 850.

See MORTGAGE—MISCELLANEOUS, A.W. N. 1881, 136.

Allegation of fraud in plaint—Case of negligence not to be raised in second appeal—*See* PARTITION—GENERAL, 6 Ind. Cas. 829.

Want of precision in—If material—*See* PARTNERSHIP—MISCELLANEOUS, 15 C.W. N. 882.

Case of acquisition of title by prescription not made in plaint—Plaintiff cannot succeed on such case—*See* POSSESSION—ADVERSE POSSESSION, 3 C.L.J. 316.

See POSSESSION—SUITS FOR POSSESSION, 11 W.R. 27, P.C.

Suit for possession under a sale-deed—Sale declared invalid—Prayer for possession as mortgagee—Inconsistent reliefs—Practice—*See* POSSESSION—SUITS FOR POSSESSION, 4 Ind. Cas. 37=20 M.L.J. 141.

Suit for possession of land—Decree on ground of occupancy right, not claimed in plaint—*See* POSSESSION—SUIT FOR POSSESSION, 5 C. 246=4 C.L.R. 443.

Suit for pre-emption—Allegation that the first demand was made for plaintiff by his general attorney—*Mukhtarnamah* not filed—Duty of Court—*See* PRE-EMPTION—NECESSARY FORMALITIES, A.W.N. 1906, 177=3 A. L.J. 798=28 A. 691.

Rule of—Rule as to amendment of—Test—Amendment letting in new defence not raised in, will not be allowed—Duty of defendant—*See* PRINCIPAL AND AGENT—DUTIES AND LIABILITIES OF PRINCIPAL, 11 Bom. L.R. 926=4 Ind. Cas. 652.

Changing nature of defence in appellate Court—*See* BEN. REG. I OF 1886, ss. 70, 71, 26 C. 194=3 C.W.N. 108.

See RELIEF, 2 C.W.N. 681, P.C.=21 A. 53=25 I.A. 195.

Plaintiff to succeed upon—Prayer for general relief—Relief not prayed for may be granted if not inconsistent with—*See* RELIGIOUS ENDOWMENT, 3 Ind. Cas. 408=11 C.L.J. 2.

Pleadings—continued.

Plaintiff not asking for declaration of his right to nominate *mohunt* of another *mutt*—Plaint not precisely stating relationship between two *mutts*—Whether plaintiff can, in appeal, ask for decree for administration and possession till new *mohunt* is appointed—See RELIGIOUS ENDOWMENT, 8 C.L.J. 499.

Reference to—And judgment in determining question of *res judicata*—See RES JUDICATA—GENERAL, 1 C.L.J. 337.

Necessary allegations absent—Effect—See RIGHT OF SUIT—GENERAL, 6 C.L.R. 58.

See RIGHT OF SUIT—DECREES, 6 B. 7.

Fraud as originally specified in pleadings, party bound to prove—Amendment of pleadings, when permissible—See RIGHT OF SUIT—MISCELLANEOUS, 11 B. 620, P.C. = 14 I.A. 11.

A mere technical defect does not affect the reliefs to which a party is entitled—See SALE—GENERAL, 5 N.L.R. 66 = 2 Ind. Cas. 243.

Construction of—See SANCTION TO PROSECUTE, 3 Ind. Cas. 723 = 6 M.L.T. 346 = 10 Cr. L.J. 364.

Written statement containing a claim of set-off—How to be construed—Court-fee—See SET-OFF, 13 B. 672.

Suit for specific performance—Plea of purchase for consideration without notice—See SPECIFIC PERFORMANCE, 13 C.P.L.R. 172.

Adoption—Suit to set aside—Suit by distant reversioner—See SPECIFIC RELIEF ACT, 1877, s. 42, 11 C.L.R. 198.

Whether plea of title by adverse possession should be allowed though not raised in plaint—Test—See SUCCESSION ACT, 1865, ss. 2, 231, 12 C.L.J. 459 = 8 Ind. Cas. 41.

Statements by plaintiff not admitted by defendant—Plaintiff put upon proof of his title—Effect of neglecting proof—See TRADE MARK, 13 C.W.N. 82 = 4 Ind. Cas. 318.

See TRANSFER OF PROPERTY ACT, 1882, 24 M. 377 = 5 C.W.N. 217 = 28 I. A. 46, P.C.

Case of collusive or fraudulent transfer not set up in the plaint—See TRANSFER OF PROPERTY ACT, 1882, ss. 39, 40, 5 M.L.T. 142.

A fact not alleged in the pleadings not to be considered and a finding thereon not to govern the decision of a suit—See TRANSFER OF PROPERTY ACT, s. 54, 4 L.B.R. 369.

Abandonment of legal objections by—Estoppel—See TRANSFER OF PROPERTY ACT, 1882, ss. 67, 90, 2 C.L.J. 584.

Change in—Defendant limited to the pleadings set forth in written statement—See TRANSFER OF PROPERTY ACT, 1882, s. 123, 4 M.L.T. 327 = 19 M.L.J. 255 = 6 M.L.T. 166 = 3 Ind. Cas. 122.

Pleadings—concluded.

Pleadings—Suit for recovery of money paid under contract of sale—Relief by way of damages not prayed for—Damages not allowable—See VENDOR AND PURCHASER—GENERAL, 21 M.L.J. 359.

See WAIVER, W.R. F.B. 13 = 1 Ind. Jur. O.S. 6, Marsh 40.

Incompetency of defendant to make a new case in appeal—See WILL—REVOCATION, 160 P.W.R. 1909.

Pledge.

See PAWN.

(1)—*Mortgage of moveable property—Delivery of possession—Pledge.*—A mortgage of moveable property, even if unaccompanied by possession, is valid. DAMODAR v. ATMARAM, 8 Bom. L.R. 344.

(2)—*Suit to recover money advanced by sale of property pledged, nature of—Claim of pawnee for similar relief in respect of moveable property.*—When a mortgagee of immoveable property brings a suit to recover the money advanced, by sale of the property pledged, it is a suit to enforce his charge upon the said property; and by analogy, the claim of a pawnee for a similar relief in respect of moveable property is a suit to enforce his charge upon that property. NIM CHAND BABOO v. JAGABUNDHU GHOSE, 22 C. 21.

(3)—*Pledge—Right of pledgee to sell property pledged.*—In the absence of payment of the debt, a pledgee may sell the property pledged, even without the consent of the pledgor. CHELAPATHI v. SURAYYA, 12 M.L.J. 375.

(3-a)—*Contract Act (IX of 1872), s. 178—Goods, pledge of, without possession—Subsequent pledge with possession, validity of—Pawnee, good faith of.*—M who had first pledged his dog-cart and horse to A, retaining their possession, subsequently pledged them to C, for payment of a debt, giving him possession. Held in a suit by the first pawnee, that his claim was not sustainable, and that the second pledge was valid under s. 178 of Act IX of 1872, as it had not been shown that C (that second pawnee), knew of the previous transaction with A. CHUMMON KHAN v. MODY, 70 P.R. 1874. [F., 34 P.R. 1902 = 23 P.L.R. 1902.]

(4)—*Pledge—Pledgee obtaining money-decree—Subsequent purchaser—Execution.*—When a person to whom property is pledged for a debt obtains a simple money-decree against his debtor, he cannot execute that decree against the property pledged, to the prejudice of a subsequent *bona fide* purchaser. He is simply in the position of an ordinary judgment-creditor in respect to his decree, and can only seize the rights and interests of his debtor. GUPINATH SINGH v. SHEO SAHAY SINGH, B.L.R. Sup. Vol. 72 = 1 W.R. 315. [Appr., 2 W.R. 130, 5 W.R. 115, 6 W.R. 312, 7 W.R. 30, 8 W.R. 29, 10 W.R. 88, 3 B.L.R. Appl. 140, 11 W.R. 149, 12 W.R. 522, 23 W.R. 187, 10 C. 299; R., 6 W.R. 318, 7 W.R. 309, 327, 11 W.R. 332; Disc., 5 C.L.R. 243; D., 3 W.R. 110.]

Pledge—continued.

(5)—*Pledgee selling to himself—Effect—Unauthorized conversion—No damage to pledgor—Pledgor whether entitled to recover property without payment.*—Where a pledgee, having power to sell for default, takes over, as if upon a sale to himself, the property pledged without the authority of the pledgor, but crediting its value in account with him, this act, though an unauthorized conversion, does not put an end to the contract of pledge, so as to entitle the pledgor to have the property back without payment. *NECKRAM DOBAY v. THE BANK OF BENGAL*, 19 C. 322=19 I.A. 60, P.C.=6 Sar. 164.

(6)—*Pledge in British India—Debt due in futuro—Sale of property by a French Court—Right of pledgee in sale proceeds—Cause of action.*—Where property is pledged in British India to secure the payment of a debt due in futuro, and before the due date, it is sold at the instance of another creditor by a French Court, the pledgee has no right in the sale proceeds and, therefore, no cause of action accrues to him for denial of his title in them as against the other creditor. *CHITHAMBARA v. MUTHAYA*, 5 M. 330.

(7)—*Bank—Share-holder—Shares, pledge of, to third party—Bank's certificate recognising pledge—Subsequent loan by Bank to shareholder—Bank and first pledgee, rival claims of.*—When a debt has been contracted by a shareholder of a Bank with a third party, and the Bank has registered the pledge of the shares to such person as security for the loan, it cannot afterwards, with notice of such prior debt and prior pledge, lend money to that share holder and assert a preferential lien to that of the first pledge. *THE DELHI AND LONDON BANK v. CHUNNA MALL*, 25 P.R. 1874.

See ATTACHMENT — MISCELLANEOUS, 2 B.L.R.A.C. 230=11 W.R. 149.

See BAILMENT, 5 B.L.R. App. 31=14 W.R. 303.

See COMPANY — MISCELLANEOUS, 1 Ind. Jur. N.S. 278.

Of bills of lading to a third party without notice of seller's claim for the price of goods—See CONTRACT ACT, 1872, ss. 77, 78, 33 C. 547.

Of bills of lading without notice of seller's claim for price of goods—See CONTRACT ACT, 1872, ss. 77, 83, 95, 178, 34 C. 173.

Of a jewel hired, not protected—See CONTRACT ACT, 1872, s. 178, 27 M. 424.

By pawnor, not owner but having a right to possession, Validity of—Right of owner to redeem articles pawned—Suit to declare—See CONTRACT ACT, 1872, s. 178, A.W.N. 1908, 57=30 A. 165.

Unauthorized—Of goods by servant—Suit in trover—See CONTRACT ACT, 1872, s. 178, 4 C. 497=3 C.L.R. 398.

See CONTRACT ACT, 1872, s. 178, 2 Bom. L. R. 403=24 B. 458.

Pledge—concluded.

Discharge of debt with proceeds of debtor's jewel on debtor's authority—Pledge—Subsequent redemption—Revival of debt—See DEBT, 3 M. L.T. 293.

Suit to recover balance of money on sale of article pledged, limitation for—See LIMITATION ACT, 1908, art. 57, 7 Bom. L.R. 739=30 B. 218.

Suit to recover money lent on pledge of moveable property—Prayer for sale of property and for personal remedy—Limitation—See LIMITATION ACT, 1908, arts. 57 and 120, 17 A. 284=A.W.N. 1895, 46.

Right of pledgee to sue for sale—Right of private sale—See LIMITATION ACT, 1908, arts. 57, 120, 27 M. 528, F.B.

See LIMITATION ACT, 1908, arts. 132, 147, 20 B. 408, F.B.

See MORTGAGE—FORM OF MORTGAGES, 3 N.W.P. 71.

Authority under power—Of attorney "to dispose" of property, whether includes power to—See POWER OF ATTORNEY, 14 B. 590.

Of Government securities by agent for unauthorized loan—Suit for recovery of securities by principal from transferee—See POWER OF ATTORNEY, 8 C. 934.

By agent without authority—See PRINCIPAL AND AGENT—AUTHORITY OF AGENTS, 1 Ind. Jur. O.S. 17=1 W.R.P.C. 43=9 M.I.A. 140.

Powers of pledgee—See PRINCIPAL AND AGENT—DUTIES AND LIABILITIES OF PRINCIPAL, 11 Bom. L.R. 926=4 Ind. Cas. 652.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 2 M.H.C. 474.

See STAMP ACT, 1879, arts. 29, 44, sch. I, 21 C. 141.

Plene Administravit.

Plea of—by creditor in possession of assets of his debtor in suit by other creditors to recover their debt—See HINDU LAW—DEBTS, 28 M. 351.

Plunder.

Liability of Railway Company for goods plundered from train—See ACT XVIII OF 1854, 3 B. 109.

Of property—Credibility of witnesses—See DAMAGES—MEASURE AND ASSESSMENT, 3 B.L.R.P.C. 44=12 W.R.P.C. 38.

Notes lost or plundered in Mutiny—See LIMITATION ACT, 1908, s. 18, 1 Agra 213.

Po-Brahman.

Gift by widow for religious purposes—See HINDU LAW—WIDOW, 20 M. 269.

Poddar of the Bank of Bengal.

(1)—*Poddar of the Bank of Bengal, not a public servant.*—A poddar of the Bank of Bengal is not a public servant, under cl. 9, s. 21 of the Penal Code. *In re MODUN MOHUN*, 4 C. 376.

Poems.

Copyright in selection of poems—See COPYRIGHT, 17 C. 951.

Poggalika Gift.

Monastery and monastery land—*Poggalika* gift of such property to *pongyi*—Donee's rights—See SPECIFIC RELIEF ACT, 1877, s. 42, 14 Bur. L.R. 277.

Police.

See ACT V OF 1861.

See BEN. ACT II OF 1866.

See BEN. ACT VIII OF 1878.

See BOM. ACT VII OF 1867.

See BOM. ACT VIII OF 1867.

See BOM. ACT IV OF 1890.

See MAD. ACT XXIV OF 1859.

(1)—*Prosecution by Police constable—Official and private capacity—Malice—Damage.*—A Police constable who was in effect the prosecutor and not only acting in his official capacity, acted dishonestly and not *bona fide*, being actuated by an indirect motive in preferring the charge, *Held*, he was liable for damages for malicious prosecution. MINAKSHISUNDRUM PILLAI v. AYYATHORAI, 18 M. 136.

This circular prescribes new rules for the police when employed in escorting remittances made by Monsiffs. Civ. Cir. No. 8 dated 6th April 1871, 15 W.R. Civ. Cir. 13.

Police officer's power of search under s. 165, Crim. Pro. Code—Same as a Judicial Officer has under s. 96—See ACT XVIII OF 1850, 59 P.W.R. 1908.

Report to police—Slander—See LIBEL, 24 A. 368=A.W.N. 1902, 96.

False report to police—Suit for recovery, of compensation on account of mental distress and defamation—See LIMITATION ACT, 1908, arts. 23, 24, 25, 36, 24 A. 368=A.W.N. 1902, 96.

See MALICIOUS PROSECUTION, 9 B. 717, 26 M. 362=12 M.L.J. 389.

Suit by Head Constable of Police against Inspector of Police for pay received by the latter—Police Act XXIV of 1859—Estoppel—Estoppel by conduct—See RIGHT OF SUIT—MISCELLANEOUS, 5 M.H.C. 466.

Rural police rate, suit by proprietor against under—Proprietors for recovery of rate—See RURAL POLICE RATE, 7 O.C. 35.

Police Commissioner.

The Police Commissioner has no absolute discretion to refuse to grant licenses for eating houses within the town of Bombay—See ACT XLVIII OF 1860, s. 11, 4 Bom. L.R. 1=26 B. 396.

Suit against the Police Commissioner for compelling him to grant a transfer of the license of an eating house—See SPECIFIC RELIEF ACT, 1877, s. 45, 3 Bom. L.R. 653.

Police Officer.

(1)—*Police Officer incompetent to make judicial enquiry about possession.*—A police officer has not authority to make a judicial enquiry about possession, and his opinion, most probably founded entirely on hearsay, was not to be treated as evidence. CHANDRABATI KOERI, v. HARRINGTON, 18 C. 349, P.C.=18 I.A. 27=5 Sar. 481.

This circular directs that when police-officers are summoned by Civil Courts to give evidence, the summons be sent for service through their superiors Civ. Cir. No. 23 dated 5th August 1870, 14 W.R. Civ. Cir. 9.

Suit against—for damages—Wrongful confinement—Malicious act—Notice if necessary—See CIV. PRO. CODE, 1908, s. 80, 26 A. 220=A.W.N. 1903, 241.

See DEFAMATION, 28 C. 794=5 C.W.N. 804.

Entry into a building to arrest suspected persons—See TRESPASS, 13 C.W.N. 485=4 Ind. Cas. 520.

Police-officer, Joint Bombay Act.

See BOM. ACT XV OF 1855.

Police Patel.

Police Patel—Transfer of case pending before a—See BOM. ACT VIII OF 1867, ss. 6 and 14, 10 Bom. L.R. 630.

Police, Presidency-Towns Amending Act.

See ACT XLVIII OF 1860.

Police Superannuation Funds.

See ACT X OF 1869.

Policy.

Life assurance policy, whether available for partition—See HINDU LAW—PARTITION, 13 M.L.J. 75.

Construction of—See INSURANCE, 2 Ind. Jur. N. S. 308.

Policy of Insurance.

Policies of Insurance (Marine and Fire) Assignment—See ACT V OF 1866.

(1)—*Policy of life insurance—Declaration as to age, untrue—Its effect in rendering policy void—Return of premium.*—In a suit to recover money on a policy of life insurance, it appeared that the policy recited that the assured had signed a statement in writing declaring that his age on his next birth-day would not exceed fifty-eight years, and setting forth the past and present state of his health and other circumstances touching his habits and life, and that the assured had agreed that this declaration and personal statement made to the medical referee of the defendants should be the basis of the contract between the assured and the defendants; the policy also contained a condition that in case any statement or allegation

Policy of Insurance—concluded.

contained in the declaration were untrue, or if the assurance had been made through any misrepresentation, concealment or untrue averment, the policy should be void; and the assured, in the proposal for assurance, in his personal statement, and in the declaration annexed to his personal statement, had solemnly declared that his age on his next birthday would not exceed fifty-eight years, but the evidence showed that he was from three to four years older than he had declared himself to be. *Held*:—(a) that the policy had been obtained by fraudulent misrepresentation as to age, and so defendants were not liable on the policy; (b) that plaintiff was not entitled under s. 65 of the Contract Act to a refund of the premia paid on the policy during the life-time of the assured; (c) that the omission of the assured to disclose, in the personal statement above alluded to, in answer to a question as to how many brothers and sisters had died and of what diseases, the fact that two of his sisters had died, did not render the policy void; (d) that the declaration as to age in the personal statement, being ambiguous, must be considered as a warranty that the age of the assured was fifty-eight to the best of his knowledge and belief, that the statement was untrue in fact, and untrue to his knowledge and belief, and the suit should be dismissed since the statement formed part of the basis of the contract—*Per Sir Arnold White, C.J.* (e) The policy must be construed as a warranty of the assured's age in truth and fact, and not simply as a warranty of his belief as to age, and the effect of incorporating into the policy the prospectus of the company was to throw upon the assured the *onus* of the proving correctness of his age as early as he might find it convenient during his life time, or in default thereof his legal representative proving the same on the settlement of the claim under the policy, and it was quite unnecessary to prove that the prospectus had been read by the assured, or that it was specially brought to his notice by the company apart from the reference made to it in the policy itself. **ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE COMPANY LIMITED v. NARASIMHA CHARI, 25 M. 183 = 11 M.L.J. 379. (20 B. 99, R.)**

See STAMP ACT, 1879, s. 3, cl. 15, 19 B. 130, F.B.

See STAMP ACT, 1879, ss. 2 (15), 25 (c) 19 C. 499.

Polliem.

See UNSETTLED POLIAM.

(1)—*Poliyem, mode of succession in—Holder if liable for debts of predecessor.*—The mode of succession in a Poliyem is not such as to render the holder responsible for the debts for his predecessor. There is not a continuance of the previous estate in each successive holder but a fresh estate created by the gift. However, with regard to the private property left by a deceased Poligar, the liability to the extent of

Polliem—concluded.

the assets taken will attach upon the takers, if there was an obligation upon the owner of the property so taken to pay the debt. **K. SUBBA CHETTI v. M. IMMADI RANI, 3 M.H.C. 303. [R., 5 M.H.C. 303, 6 M.H.C. 208, 29 M. 453 = 16 M.L.J. 339 = 1 M.L.T. 272.]**

(2)—*Polliem—Females—Descent.*—Females are not precluded by any rule of descent, custom, or usage of the Cumbala Tottier caste from succeeding to a Polliam. **THE COLLECTOR OF MADURA v. VEERACAMOO UMMAL, 9 M.I.A. 446.**

(3)—*Palayam—Impartibility—Co-widows—Neighbouring palayams, usage of.*—In considering the question whether a *palayapat* is partible or impartible, the usage of many of the palayams in the neighbourhood belonging to the same caste is a circumstance to be taken into consideration. Exclusive enjoyment by one member of the family at a time, even among male co-parceners, being an incident of impartibility, the general presumption is that the same is the case among co-widows between whom no partition is allowed except by way of equal beneficial enjoyment. **VIRA CHINNAMMAL v. AKKULU AMMAL, 1 M.L.J. 326.**

Palayam, history of—Nelson's Manual, admissibility in evidence of—*See* EVIDENCE ACT, 1872, s. 57, 1 M.L.J. 326.

Debts incurred by previous holder of—Son's liability—Assets—*See* HINDU LAW—DEBTS, 5 M.H.C. 303.

See HINDU LAW—IMPARTIBLE ESTATES, 1 I.A. 268.

History of—And their incidents examined—*See* HINDU LAW—IMPARTIBLE ESTATE, 2 C.L.J. 231, P.C.=10 C.W.N. 95=15 M.L.J. 312=2 A.L.J. 845=7 Bom. L.R. 907=1 M.L.J. 12=32 I.A. 261=28 M. 508.

Ancient palayams—Permanent, settlement, effect of—*See* PERMANENT SETTLEMENT, 10 M. 1.

Poligar.

Right of—Of unsettled Polliem to compel acceptance of puttahs by tenants—*See* MAD. ACT VIII OF 1865, s. 1, 5 M.H.C. 208.

See IMPARTIBLE ESTATE, 3 M. 145.

See UNSETTLED POLLIAM, 6 M.H.C. 208.

Political Act.

Political act appeal to the Privy Council from a—*See* PRIVY COUNCIL, PRACTICE OF—SPECIAL LEAVE TO APPEAL AND TO DEFEND APPEAL, 6 Bom. L.R. 763.

Political Agent.

(1)—*Executive acts of Political Agent.*—*Letters patent, cl. 13—Suit or proceeding before political agent in executive capacity.*—The liability of a British Political Agent in foreign territory in India for an act done by him in his political capacity and as Agent for the

Political Agent—concluded.

British Government is akin to that of His Excellency the Governor of Bombay for an act done by him in his political capacity as an act of State; no suit against him for such act would lie. [*R*, 7 B.L.R. 449.] A suit or proceeding before a British Political Agent in foreign territory in his executive or political capacity only would not authorise the application by the High Court of cl. 13 of the Letters Patent. *INHABITANTS OF MAHALINGPORE v. ANDERSON*, 7 B.L.R. 452, Note.

See ACT XXIII OF 1871, s. 4, 17 B. 224.

Government Political Agent in Native state of minor Chief, whether could sue for property in British territory—Political Agent not certificated guardian under Minors Act XX of 1864—Civ. Pro. Code, 1882, s. 37, cl. (a)—Recognised agent—See Bom. ACT XX OF 1864, 11 B. 53.

Agreement to transfer from British to Political Agent's jurisdiction—Not cession of British Territory—Proof—See *CESSION OF BRITISH TERRITORY*, 1 B. 367, P.C. = 3 I.A. 102 = 1 A. C. 322.

Decree passed by — Court against Sirdar—Execution against heirs of Sirdar who was dead—Civil Court—Jurisdiction—See CIV. PRO. CODE, 1908, ss. 36, 37, 17 B. 162.

See PARTIES TO SUIT—GENERAL, 2 A. 690.

The jurisdiction exercised by the Courts of the — And the Assistant Political Agents in Kathiawar is Political and not judicial—See *SOVEREIGN POWERS*, 10 C.W.N. 361 = 8 Bom. L.R. 129, P.C. = 3 A.L.J. 250 = 33 C. 219 = 3 C.L.J. 395 = 16 M.L.J. 115 = 1 M.L.T. 115.

Grant of certificate by—See *SUCCESSION CERTIFICATE ACT*, 1889, ss. 17, 20, 19 B. 145.

Political Pension.

See PENSIONS.

Oudh loans 1838 and 1842, payments due under—Political pension—Liability to attachment for debt, exemption from—S. 266 (g) Civ. Pro. Code, 1882—No distinction observed between state property vested in the sovereign of Oudh See *ATTACHMENT—SUBJECTS OF ATTACHMENT*—18 C. 216, P.C. = 17 I.A. 181.

See *ATTACHMENT—SUBJECTS OF ATTACHMENT*, 26 M. 69, 1 O.C. 170.

Political Prisoner.

(1)—*Political prisoner—Exemption from jurisdiction of British Courts—Whether allowed by Civ. Pro. Code.*—There is nothing in the Civ. Pro. Code, to exempt a Cabul political prisoner (in the receipt of an allowance from the Indian Government) a defendant in a suit, from the jurisdiction of the Civil Courts of British India, when sued at the place where the cause of action arose. *KARM BAKHSH v. SIRDAR SALEH MUHAMMAD KHAN*, 115 P.R. 1880.

Political Tenure.

Resumption of estate by Government—Mixed estate of Saranjam and Inam—See *SERVICE TENURE*, 17 B. 431, P.C. = 20 I.A. 50.

Poll.

Company—Meeting of share-holders—Time and place for taking a poll—Object of taking such poll—Powers of Chairman—See *COMPANY—MEETINGS AND VOTING*, 15 B. 164.

Polliaput.

Impartible—Held by one member of family—Mode of descent—See *IMPARTIBLE ESTATE*, 8 M.H.C. 157.

Pollution.

(1)—*Adoption by Sudra—Religious ceremony—Pollution.*—An adoption by a sudra under pollution is valid as, in his case, no religious ceremonies are essential. *THANGATHANNI v. RAMU*, 5 M. 358.

Polygamy.

See *BUDDHIST LAW—DIVORCE*, L.B.R. 1872—1892, 103.

Ponnas.

Ponna burial ground—Observances of—Sanctity of burial ground—Consecration—Removal of dead bodies—See *FRAUD—GENERAL*, 10 Ind. Cas. 780.

Poramboke.

(1)—*Poramboke nattam—Ryotwari land classified as Poramboke nattam at request of owner—Right of Government to grant it to bona fide applicants—Extinguishment of title of original owner.*—Where, at the request of the owner, a ryotwari land is classified as a *gramanattam* and the assessment therefor remitted by the Government, the right of such owner to the land becomes extinguished and the Government becomes entitled to grant it to *bona fide* applicants for house-sites. The fact that such owner uses part of the land for certain purposes or continues to be in occupation without payment of assessment for less than the statutory period does not affect the character of the arrangement made or revive the right which has been given up. *MAHAMMAD MEERA MOHIDEN v. THE SECRETARY OF STATE FOR INDIA*, 13 M.L.J. 269. [*Expl.*, 33 M. 173 = 20 M. L. J. 71 = 6 M. L. T. 306 = 5 Ind. Cas. 121.]

Entry as—Effect—See *POSSESSION—ADVERSE POSSESSION*, 5 Ind. Cas. 118 = 7 M.L. T. 139 = 20 M.L.J. 74.

Ekabhogam Mirasdar—Adverse possession—Ownership of Government poramboke—See *POSSESSION—ADVERSE POSSESSION*, 3 M.L. J. 231.

Right of a zemindar over—Reg. XXV of 1802—See *ROAD*, 5 M.L.T. 225.

Port Improvement, Calcutta.

See *BEN. ACT V OF 1870*.

Portions, Double.

Portions, double, rule of—See WILL—CONSTRUCTION, 7 Bom. L.R. 299.

Port of Calcutta.

(1)—*Limits of port—Act XXII of 1855—Suit for damages for breach of contract.*—P & Co., agents for the ship F A, contracted by a shipping order with G for freight, with option to G to cancel the contract if the F A should not arrive at the port of Calcutta by the 15th of January. On that day she anchored at Atcheepore and remained there till the morning of the 16th. G refused to fulfil the contract, and P and Co. sued him thereupon. *Held* that there is no custom governing the construction of the words "the port of Calcutta" in shipping orders, and that an arrival at Atcheepore is not an arrival at the port of Calcutta. **POTTER v. GENTLE, Bourke, O.C. 41.**

Port Rules, 1856.

See SHIPPING LAW, Bourke, Act, 1, 15.

Ports.

See ACT X OF 1889.

Ports and Ports-dues.

See ACT XXII OF 1855.

Port Trust.

Bye-laws of—Rule 59—See SALE OF GOODS, 17 B. 62.

Port Trust Act, Bombay.

See BOM. ACT I OF 1873.

See BOM. ACT VI OF 1879.

Port Trusts Act, Karachi.

See BOM. ACT VI OF 1886.

Portuguese.

(1) - *Portuguese law applicable to.*—The Portuguese are generally governed by the principles of English Law inasmuch as their own laws have not been specially reserved to them by the Charter. **ANTAO v. ARDESHIR, 1 Bom. L.R. 303.**

See ENGLISH LAW, 5 B.H.C. O.C. 172.

Possession.

1.—GENERAL.

2.—ADVERSE POSSESSION.

3.—EVIDENCE OF POSSESSION AND TITLE.

4.—NATURE OF POSSESSION.

5.—PROOF OF POSSESSION.

6.—SUITS FOR POSSESSION.

7.—MISCELLANEOUS.

See BURDEN OF PROOF—LIMITATION AND ADVERSE POSSESSION.

See BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE.

See LIMITATION ACT, 1908, arts. 142, 144.

Possession—continued.

See MORTGAGE — POSSESSION UNDER MORTGAGE.

See RIGHT OF SUIT—POSSESSION, SUIT FOR.

See SPECIFIC RELIEF ACT, 1877, s. 9.

See VENDOR AND PURCHASER.

—1.—General.

(1)—*Possession, value of, in relation to title.*—As a general principle of law, the fact of obtaining possession affects the title, and has, in all systems of law, European and Oriental, been always treated as a most important element in the acquisition of title. **SELAM SHEIKH v. BAIRDONATH GHATAK, 3 B.L.R. A.C. 312=12 W.R. 217.** [*F.*, 14 W.R. 250, 9 B.H.C. 147; *R.*, 2 B. 299=P.J. 1880, 57, 12 W.R. 456; *D.*, 21 W.R. 421, 5 C. 336=4 C.L. R. 257, 7 C. 753=10 C.L.R. 129.]

(2)—*Possession—Finding by Mamlatdar as to possession—Subsequent contrary finding by Civil Court—Mamlatdar's order not conclusive—Suit by party affected by Mamlatdar's order—Limitation—Prima facie evidence of title—Burden of proof.*—This was a suit to recover certain lands. Neither the plaintiff nor the defendants could prove any title to the lands other than that of possession. Previous to this in 1881, the plaintiff had brought a possessory suit against the 1st defendant in a Mamlatdar's Court, which was dismissed in 1885, the Mamlatdar holding that the plaintiff had not been in possession. While the proceedings were pending in the Mamlatdar's Court, plaintiff filed a suit in the Civil Court in which it was found that she was in possession since 1880, and damages were also awarded to her against the first defendant (who was held to be her farm servant) for crops which had been taken away by him. In 1887, the 2nd defendant as mortgagee from the 1st defendant obtained a decree against plaintiff in the Mamlatdar's Court awarding him possession of the land, and in execution of that decree, the plaintiff was dispossessed in 1887. Hence in 1890, the plaintiff filed the present suit to recover possession. The defendant contended that the plaintiff had no title to the land, and that the suit was barred by limitation as she had not brought a suit to establish her right within three years of the Mamlatdar's decision in 1885. *Held* that the Mamlatdar's order of 1885 had no conclusive effect, and was rendered ineffectual by the decree of the Civil Court; and that as plaintiff continued in possession notwithstanding that order down to 1887, the present suit was not time-barred, and neither her remedy nor her right was extinguished. [*R.*, 3 Bom. L.R. 246.] Possession is *prima facie* evidence of title, and is primarily exclusive, and it is for him who impugns this exclusive title, to show that the possession originated in a way not to effect his own right. **KRISHNACHARYA v. LINGAWA, 20 B. 270.** [*R.*, 78 P.R. 1902=137 P.L.R. 1902.]

Possession—continued.**—1.—General—continued.**

(3)—*Possession for a long time sufficient for a decree—Disturbance of plaintiff's long continued possession by defendants, effect of—Title to hold possession not sufficiently established, effect of.*—*Held*, that, where the plaintiffs and their ancestors had been in possession of lands for a long time and the defendants had disturbed them in their possession, the plaintiffs were entitled to a decree for possession, although they had not been able to sufficiently establish their possession as mortgagees according to their allegation. **HUB LAL v. JAGESHAR, 11 Ind. Cas. 94.**

(4)—*Suit for possession of land, by the Secretary of State against co-sharer in a village.*—Where plaintiff, Secretary of State, claimed possession of a piece of land, which was originally part of village B but had subsequently become part of village J, of which the defendant was a co-sharer, it was *held*, that the defendant, having been in possession of land for about 36 years, should not be ejected unless the title of the plaintiff was proved beyond reasonable doubt. **THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. THACUR MOHAR SINGH, 9 O.C. 301.**

(5)—*Possession without title.*—A person in possession without title has an interest in the property good as against all the world except the true owner which interest is capable of being dealt with, until the true owner interferes, just in the same way as if it were unimpeached, and it therefore passes by conveyance, devise or by an execution sale, such interest so possessed confers an unimpeachable title which becomes complete as soon as the true owner's claim is barred by limitation, practical effect of which is to extinguish his title in favour of the party in possession. **BRINDABUN CHUNDER ROY v. TARACHAND BINDOPADHYA, 11 B.L.R. 237=20 W.R. 114.** [R., 1 B. 286, 3 C. 224, 9 B. 198, 22 A. 204, 24 A. 157, 6 C.L.J. 521.]

(6)—*Possession without title—Nature of interest of person in possession of immoveable property.*—A person who is in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which, unless and until the true owner interferes, is capable of being disposed of by deed or Will or by execution sale, just as in the same way as it could be dealt with if the title were unimpeachable. **GOBIND PRASAD v. MOHAN LAL, 24 A. 157.** (12 A. 51, 20 W.R. 114, R.) [F., 27 A. 169=1 A.L.J. 625=A.W.N. 1904, 222, A.W.N. 1906, 184=3 A.L.J. 424; R., 137 P. L.R. 1902=78 P.R. 1902, 29 A. 52=3 A.L.J. 775=A.W.N. 1906, 264.]

(7)—*Long possession—Effect.*—A person claiming by virtue of long possession cannot claim a larger right than he would have had if the title under which he claimed had been a valid one. For instance, a person holding under a mortgage executed by one who had only a

Possession—continued.**—1.—General—continued.**

qualified power to deal with the property, but not valid against others interested in the property, may, by dint of long possession, acquire the right to be redeemed by those persons. His possession may be adverse and, therefore, put beyond question his title under the mortgage; but it cannot give him an interest larger than he had ever claimed or was supposed to have. **VENKATASWAMY v. RAMANNA, 6 M.L.J. 188.** [Not F., 3 P.R. 1904.]

(8)—*Long possession at uniform rent—Presumption as to permanency of tenure.*—Where possession at a uniform rent for a long period is established, the Court can infer that the tenure has been of a permanent nature. **RAM RANJAN v. RAM NARAIN, 5 M.L.J. 7, P.C.=22 C. 533=22 I.A. 60=6 Sar. 530.**

(9)—*Suit for possession—Defence of limitation—Plaintiff to prove subsisting title—Submerged land—Constructive possession of true owners—Vis major.*—When the defendant to a suit for possession of land pleads adverse possession, it lies in the first instance upon the plaintiff to prove that he was in possession at some time within 12 years of the suit. (14 A. 193, R.) Where a party is dispossessed by *vis major*, e.g., floods, the constructive possession of the land, so long as the land remains submerged, is in the true owner. **MUNSHI MAZHAR HASAN v. BEHARI SINGH, 3 A.L.J. 567=A.W.N. 1906, 234=28 A. 760.** (29 C. 518, R.)

(10)—*Crim. Pro. Code, 1882, ss. 145, 146—Test of possession for the purpose of making an order under s. 145.*—Where certain villages were managed for the joint benefit of three persons, one of them being the *lambardar* of all the villages, but were not in the actual possession of such three persons or of any one of them: *held* that for the purposes of s. 145 of the Crim. Pro. Code, one of the three who was *lambardar*, must be deemed to be in possession. **RAMDAI v. PARBATI, A.W.N. 1890, 178.**

(11)—*Lands under attachment by Magistrate—S. 146, Crim. Pro. Code.*—Lands under attachment by a Magistrate under s. 146, Crim. Pro. Code, are presumed to continue in possession of the person, who is afterwards found to have title thereto, where a person, who is, afterwards, found to have title to a property, receives from the Magistrate the rents and profits thereof for the period during which it was held under attachment by the latter, under s. 146, Crim. Pro. Code, he is held to be in constructive possession thereof, until withdrawal of such attachment. Limitation does not run against him during such period. **JAGABANDHU BHATTACHARJEE v. HARIMOHAN ROY, 1 C.W.N. 569.**

(12)—*Possession—When possessory title can hold good—Interruption in possession.*—Where both plaintiff and defendant had no title in them, but claimed the land by virtue of their possession, the plaintiff, though in prior possession having ceased to be in possession for some years before the defendants occupied the land,

Possession—continued.**—1.—General—continued.**

cannot claim the benefit of his possessory title. **VENKATACHALA AIYANGAR v. CHINNA GOUNDAN**, 2 M. W. N. 1911, 460 = 12 Ind. Cas. 583. (29 C. 518, R.)

(13)—*Suit by Zemindar for fixing of boundary and declaration of ownership—Acts of possession established by Zemindar, when sufficient to entitle him to decree—Acts of mere easement, independent of possession, effect of.*—Plaintiff, a Zemindar sued to set aside a survey award and to obtain a declaration of his right to certain hills, villages and hamlets, "as part and parcel of Pergunnah Shoosung," in the Zillah of Mymsensing. The dispute was, whether the Government were right in saying that Pergunnah Shoosung extended northward, only to the foot of the locality in question—the plaintiff contending that the Government was wrong and that the pergunnah ran into the Garrow hills. The case for the Government thus was in effect that the lands did not belong to the plaintiff's pergunnah. The Judge of the lower Court decided that the Raja's ancestors obtained a permanent settlement of pergunnah Shoosung from being in possession of it; that the settlement was completed with specification of areas or boundaries, and that the position of the plaintiff was similar to the kind of possession described in the preamble of Reg. X of 1822. It was against this decision that, the defendant, the Government, preferred this special appeal. The grounds of appeal chiefly relied on were that the plaintiff failed to prove that the lands in suit were part of the Zemindaree settled with his ancestor at the time of the decennial settlement; that the evidence showed no such possession on the part of the plaintiff and those through whom he claimed as will support such a suit as this; that some of the documents put in were not proved; and that much of the documentary evidence relied on was not evidence at all as against the defendant. One of the two Judges before whom the appeal came on for hearing decided that the decree of the lower Court ought to be reversed and that the plaintiff's suit ought to be dismissed. But the other Judge, Seton-Karr, J., differed from him as to the result of the evidence and as to the points that it proved in favour of the Raja, the plaintiff. He was of opinion that the judgment of the lower Court should be substantially upheld and that the appellant, the Government, was not entitled to have that decision set aside in its favour. Hunting elephants, cutting wood, levying cesses and exacting services in the Garrow Hills for a period of more than 60 years were held to be acts evidencing possession by the zemindar and not mere acts of easement. The whole of the evidence, documentary and oral, proved sufficiently that the Raja of Shoosung for generations, and possibly from time immemorial, had exercised in the tract of country from which he was cut off by the line drawn by Government in 1859, a right partly feudal, and subject to fluctuations and impediments, and that evidence, looking to the nature of the

Possession—continued.**—1.—General—continued.**

suit, was both credible and sufficient to establish his claim. Further, the Raja could not have produced any evidence differing much in kind from what he had produced though possibly he might have given more detailed evidence of the same kind, or have filed collection-papers. He was therefore entitled to a decree affirming the decision of the Judge and allowing him to go on collecting dues in the tract in question as hitherto. He had shown a prescriptive right to collect in, and receive tribute from, the tract in question, and the Government, in opposition to the case which he has set up, had shown literally nothing to debar him from the future exercise of those rights. **THE GOVERNMENT v. RAJAH RAJ KISHEN SINGH SURMONA BAHADOOR**, 8 W. R. 343. (On appeal, 9 W. R. 426.)

(14)—*Of the trespasser, Heritability of.*—Held that possessory right even that of a trespasser is heritable. **WAJIB KHAN v. DARGAHI KHAN**, 9 O. C. 161. (2 O. C. 3, 12 A. 51, P. C., 3 C. 224, R.) [R., 9 O. C. 230; 11 O. C. 337.]

(15)—*Possession of female member, not that of a qualified owner—Onus of proof.*—*Prima facie*, the possession of a female member of a family not entitled to take as an heir is not the possession of a qualified owner, and it lies on the party who affirms it to show that, when she took possession, she did so claiming only a limited estate. **BAPANAYYA v. PEDDICHALAMAIYA**, 9 M. L. J. 33. (22 C. 447, P. C., F.)

(16)—*Joint possession — Tenant — Encroachment — Trespasser — Co-owner.*—The defendants were tenants under the plaintiffs, but they encroached upon the disputed land and took wrongful possession as trespassers, notwithstanding the protests of the plaintiffs. Subsequently, one of the defendants, became a co-sharer of the plaintiffs by purchasing a very small share. The plaintiffs sued for joint possession and the defendants contended that the plaintiffs might sue for partition but could not get joint possession. *Held*, that, if the defendant had taken possession of the land peacefully after he had become a co-sharer, the case would have fallen within the principle of the case in 18 C. 10 = 17 I. A. 110, but that in the present case the plaintiffs were entitled to joint possession. **SAMAREDDY v. SHYAMA CHARAN SEN**, 11 Ind. Cas. 637 = 16 C. W. N. 251.

(17)—*Joint owners — Separate leases by different co-sharers of lands in their exclusive possession—Right of one lessee to have joint possession with another—Right to partition—Equity.*—The owners of an *ejmali mehal* severally leased out lands in the exclusive possession of each to different lessees. One of the lessees, having obtained his lease on the *bona fide* belief that the land covered by it belonged in its entirety to his lessor, reclaimed and improved it and was then sued by the other for joint possession. *Held*—that it would be inequitable to give the plaintiff the

Possession—continued.

—1.—General—continued.

relief he asked for and his proper remedy was to bring a suit for partition. **SYED ALI v. NAJAB ALI**, 11 C.W.N. 143.

(18)—*Suit for proprietary possession where tenant sets up under-proprietary rights against proprietor—Declaratory suit.*—In 1893, the plaintiff attempted to eject the defendants from certain land, by means of a notice of ejectment. The defendants objected to the notice on the ground that they were under-proprieters, not tenants of the lands and the notice was cancelled on May 9th, 1893. In March 1905, the plaintiff brought a suit for proprietary possession of the said land. *Held*, that the suit for proprietary possession was not maintainable. The proper course for a proprietor, against whom a person alleged to be a tenant sets up a claim to under-proprietary right, is to sue for a declaration. **RAJA MUMTAZ ALI KHAN v. SARJU SINGH**, 9 O.C. 292, (2 O.C. 79, 4 O.C. 314, 25 A. 1, P.C., 3 O.C. 105, R.)

(19)—*Delivery of possession, necessity for, under Hindu Law.*—Under the Hindu Law, delivery of possession is not essential to complete the title of a purchaser for value. **NARAIN CHUNDER CHUCKERBUTTY v. DATARAM ROY**, 8 C. 597, F.B.=10 C.L.R. 241. [R., 6 M. 404, U.B.R. 1897–1901, Vol. II, 573, 21 P.L.R. 1901.]

(20)—*Necessity of transfer of possession to complete alienation—Custom of Bengal and of Bombay differs.*—The custom of Bengal and of Bombay differs as to the necessity of possession to constitute a complete mortgage or gift, and a sale of land in the Bombay Presidency stands on the same footing, through established usage, as the other two contracts with which the ancient authorities link it. [N.B.—The Hindu Law upon the necessity of transfer of possession for the creation of a valid title is elaborately discussed by West, J.] **LALUBHAI SURCHAND v. BAI AMRIT**, 2 B. 299 = P.J. 1880, 57, [R., 6 B. 645.]

(21)—*Refusal to amend decree for possession—High Court's powers of revision—Civ. Pro. Code, ss. 206, 622.*—The refusal of a Subordinate Judge to amend his predecessor's decree for possession of land from which by mistake an order for mesne profits had been omitted and which is at variance with the judgment, amounts to its acting illegally and with material irregularity in the exercise of its jurisdiction, within the meaning of s. 622 of the Civ. Pro. Code, and its order would be subject to revision by the High Court under that section. **BALMAKUND v. SHEO JATAN LAL**, 6 A. 125 = A.W.N. 1882, 60. [F., 11 O. C. 208.]

(22)—*Civ. Pro. Code, ss. 335, 622—Resistance to execution of decree—Revision.*—An order under s. 335 directing that possession be delivered to the execution purchaser is subject to revisional interference by the High

Possession—continued.

—1.—General—continued.

Court under s. 622 of the Civ. Pro. Code, **SHEORAJ SINGH v. BANWARI DAS**, 6 A. 172 = A.W.N. 1884, 16. (7 B. 341, F.B., F.)

(23)—*Declaratory suit—Proprietary right—Enquiry into possession.*—The plaintiffs sued for a declaratory decree for the proprietary right to the land, alleging that they had always had possession, and that the entry in the settlement records of the names of both parties as owning the land in equal shares was erroneous. —The lower Courts founded their judgments solely on the settlement records and refused to go into the question of possession. *Held* that the procedure was defective. The question of possession should have been enquired into, as the plaintiffs alleged possession and sued for a declaration of right without consequential relief; and as the question of possession was vital in adjudicating on the issue of right, there was no reason for refusing to enquire into that question. Moreover, the very object of the suit being to modify the settlement records, there was no meaning in basing the judgment on such records. **MEHR DAD v. CHOWA**, 48 P. R. 1873.

(24)—*Claim for exclusive possession—Right to joint possession proved—Relief should not be given where property was in possession of lessees.*—In a suit for exclusive possession, it would be open to the Court to give a decree for joint possession; but to this, the plaintiff is not entitled as a matter of right. Where the land claimed is in possession of lessees, it would not be proper to pass such a decree. *In re PURUVALA PERUMALA CHETTY*, M.W.N. 1912, 1116.

(25)—*Local investigation—Party's knowledge that investigation was careless—Going to trial thereupon—Request for opportunity to give fresh evidence—Evidence—Onus—Dried up bheels, jungle lands—Reformed lands—Proof of plaintiff's title—Onus, shifting of, to defendant—Wasteland—Adverse possession.*—A litigant, who is a party to a local investigation and knows that such investigation has been carelessly and badly carried out, and, notwithstanding this, is content to go to trial upon it, cannot reasonably ask at the last moment for an opportunity to give fresh evidence, because it is found that the evidence on which he willingly relied is worthless. Generally, the onus is on the plaintiff to prove that he has been in possession of a disputed area within 12 years before the institution of the suit. In cases of dried up bheels, re-formations of diluviated lands not brought under the plough and land covered with jungle, the plaintiffs must prove his title (9 C. 744, 12 C.L.R. 257, *Rel. on*) If he succeeds in doing so and proves that the land probably remained unfit for occupation until a period within 12 years of suit the onus is shifted on to the defendant to prove that the plaintiff has not been in possession within that period. Where a tract of land with a defined boundary has been claimed throughout a person as owner

Possession—continued.—1.—**General**—continued.

and acts of ownership have been done on various portions of it, such acts may be accepted as evidence of the possession of the whole tract. (9 M. 285, *Rel.on.*) In the case of waste lands, what is necessary for a person claiming by adverse possession to show is that he has all along claimed the lands as his own and treated them as such, and it is not necessary on his part to prove that he has been exercising acts of possession over every inch of the land adversely to the opposite party. **SHIDDHESWARI DASIA v. SHASHI BUSHAN CHOWDHURY**, 16 Ind. Cas. 39.

(26)—*Possessory title—Suit for recovery of land—Right of suit against person having no title.*—A person, who has merely a possessory title to land, is entitled to decree for possession against a person who has no title. **NEELAGARA LINGAMMA v. KINNAHAL HAMPIAH**, 17 Ind. Cas. 167.

(27)—*Act X of 1859, ss. 6, 7—Right of occupancy—Leases for fixed terms.*—There is nothing in the mere fact of a tenant having been in possession for over 12 years under a series of *pottas* each for a fixed term only, which gives him a right of occupancy under Act X of 1859. **DAMANULLA SIRKAR v. MAMUDI NASHIO**, 3 B.L.R. A.C. 178=11 W.R. 556.

(27)—*Settlement—Long possession.*—Long possession itself does not give a title to settlement if the parties asking for the settlement do not comply with the requirements of law. **GOLAK CHANDRA CHOWDHRY v. ALI MOLLAH**, 8 B.L.R. 528, Note.

Wrongful—of a deceased person's estate, procedure under Act XIX of 1841 on complaint regarding—*See* ACT XIX OF 1841, ss. 1, 3, 4, 138 P.R. 1906=116 P.L.R. 1908.

Suit by the Dharmakartha of a temple to recover—Of temple property—*See* ACT XX OF 1863, s. 12, 17 M. 143.

Right of person to sub-soil of road—Land when not used as public road, owner's right to claim—Of—*See* BEN, ACT III OF 1864, s. 10, 20 C. 732.

See BEN, ACT VIII OF 1869, s. 27, B.L.R. Sup. Vol. 628=2 Ind. Jur. N. S. 112=7 W. R. 186.

Action of ejectment not under s. 9, Specific Relief Act—Whether plaintiff entitled to decree for on account of previous possession—*See* BEN, ACT VIII OF 1885, s. 35, sub-secs. (1) and (2), 13 C.L.J. 649.

Suit for rent on ground of—Maintainability—*See* BEN, ACT VIII OF 1885, s. 149, 8 C.W. N. 248.

Character of adverse possession—Doctrine of constructive possession—Evidence of—Presumption that possession goes with title—*See* BEN, ACT XV OF 1891, s. 4, 6 Ind. Cas. 392.

See BOM, ACT III OF 1876, s. 4, cl. 2, 18 B. 46.

Possession—continued.—1.—**General**—continued.

See C.P. ACT XVII OF 1889, s. 42, 7 C.P.L. R. 101.

See ALLUVION—FORMATION OF CHURS OR ISLANDS, 9 C.W.N. 111.

See APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 3 B.L.R. App. 28.

See BAILMENT, 5 B.L.R. 31=14 W. R. 303.

No claim for declaration of title or for—Maintainability of suit—Suit for removal of boundary marks—*See* BOUNDARY, A.W.N. 1884, 4.

Orchard land—Possession of planter of trees—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 2 Agra 361.

Agreement for sale—Vendee put in possession subsequently ejected by vendors—Sale not completed—Suit by vendee for possession and injunction—Similar suit by vendors—Subsequent suit by vendee for specific performance—Omission to set up grounds of defence—*Res judicata*—*See* CIV. PRO. CODE, 1908, s. 11, O. II, r. 2, 24 M. 491=6 C.W.N. 17, P.C.

Right to joint possession—Nature of right—Decree for joint possession—*Res judicata*—*See* CIV. PRO. CODE, 1908, s. 11, O. II, rr. 1, 2, O. XXI, r. 35, 11 Ind. Cas. 87.

Decree for—Partition proceedings while suit pending and before execution result of—Succession suit for declaring that judgment-debtors' interest in parent estate passed by partition proceedings to another estate—*See* CIV. PRO. CODE, 1908, s. 47, 20 C. 260.

Resistance by outsider to delivery of, to decree-holder—Order for delivery of, to decree-holder—Inherent power of Court—*See* CIV. PRO. CODE, 1908, s. 151, O. XXI, rr. 97, 98, 99, 6 Ind. Cas. 120=14 C.W.N. 836.

Relinquishment of a portion of claim—Contract for sale—First suit for possession and damages—Second suit for specific performance and completion—Identity of Cause of action—*See* CIV. PRO. CODE, 1908, O. II, r. 2, 6 C.W. N. 17, P.C.=24 M. 491.

Contract to sell—Decree for specific performance—Failure of suit for possession—Subsequent suit for recovery of amount paid—*See* CIV. PRO. CODE, 1908, O. II, r. 2, 24 M. 27=10 M.L.J. 217.

Prior decree for possession of immoveable property—Subsequent mesne profits not claimed in plaint and not provided for in decree—Subsequent suit for recovery of such mesne profits not barred—*See* CIV. PRO. CODE, 1908, O. II, r. 2, s. 47, 11 M.L.J. 332.

Claim for—Transformation into one for redemption—*See* CIV. PRO. CODE, 1908, O. VI, r. 17, 167 P.W.R. 1911.

See CIV. PRO. CODE, 1908, O. XXI, r. 2, 18 B. 690.

Possession—continued.**—1.—General—continued.**

Suit for recovery of joint possession—Form of decree—*See* CIV. PRO. CODE, 1908, O. XXI, r. 35, 8 A.L.J. 1312.

Application for delivery of—Under decree—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 58, 99, 14 A. 417=A.W.N. 1892, 51.

See CIV. PRO. CODE, 1908, O. XXI, r. 96, 21 A. 269=A.W.N. 1899, 56.

Land in the occupancy of a raiyat—Symbolical possession—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 96, 97, 99, 103, 1 C.W.N. 343.

See CONTRACT ACT, 1872, s. 108, Exception 1, 11 B. 704.

Of goods by person other than owner—Title—*See* CONTRACT ACT, 1872, s. 108, Exception 1, 12 B.L.R. 42=20 W.R. 467.

When may be conversion—*See* CONVERSION, 12 Bom. L.R. 316=5 Ind. Cas. 457.

Suit for possession of property pledged in usufructuary mortgage—*See* CO-SHARERS—SUIT BY CO-SHARERS, 2 Hay 155.

Suit for specific performance of contract of sale and for delivery of—Court fee—*See* COURT FEES ACT, 1870, s. 7, cls. 5, 10, 14 C.L.J. 159.

Suit for—After foreclosure—Valuation—*See* COURT FEES ACT, 1870, s. 7, cl. 9, 1 C.L.R. 473.

Magistrate—Finding as to—*See* CRIM. PRO. CODE, 1872, s. 530, 5 B. 387.

Dispute as to land—Civil Court's decree for possession—Effect—Duty of Magistrate—*See* CRIM. PRO. CODE, 1898, s. 145, 5 C.W.N. 563.

Suit for, of land, proof of, for twenty years by claimant—Onus on the Crown to prove subsisting title—Adverse—Proof of, if necessary—*See* CROWN, 7 M.L.T. 128.

See CUSTOM—PUNJAB—ADOPTION, 96 P. R. 1893.

See DAMAGES—MISCELLANEOUS, 6 M. 426.

Person out of—Right to ask merely for injunction—*See* DECLARATORY DECREE, SUIT FOR—GENERAL, 7 M.L.T. 311=20 M. L.J. 306=5 Ind. Cas. 630=33 M. 452.

Suit for declaration that an adoption was invalid dismissed as time-barred—Whether plaintiff can get a decree for possession—*See* DECLARATORY DECREE, SUIT FOR—GENERAL, 8 A.L.J. 1101.

Suit for declaration of exclusive possession of land—Court competent to grant a decree for joint—and thereupon an order for the demolition of a wall built upon such land by some of joint owners—*See* DECLARATORY DECREE, SUIT FOR—GENERAL, A.W.N. 1900, 196.

Possession—continued.**—1.—General—continued.**

Suit by person in—For declaration of title—Neither party proving title—*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 20 B. 798.

Purchaser in execution of decree for money—Decree for sale on mortgage, suit for declaration in respect of—Specific Relief Act I of 1877, s. 42—*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 18 A. 320=A.W.N. 1896, 86.

Declaration of title—Possession for statutory period, not sufficient ground for declaration—*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 6 M.H.C. 420.

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 20 C. 834, P.C.=20 I.A. 99, 5 A. 345, F.B.

Specific Relief Act, s. 42—Withdrawing claim for—Decree for declaration alone—*See* DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS, 14 M. 267=1 M.L.J. 227.

See DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 12 C. 291.

Possession—Title—Right of person in possession to sue in ejectment—*See* DECREE—GENERAL, 11 Ind. Cas. 537.

Suit for possession of immoveable property—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, 6 A. 30=A.W.N. 1883, 215.

Suit for recovery of possession of land—Decree—*See* DECREE—DECREE FORM OF, 1 B.L.R. O.C. 1.

See DECREE—DECREE FORM OF, 7 C. 414=9 C.L.R. 76.

See DILUVION, 6 C. 725=8 C.L.R. 90.

Partition wall—Ownership—What constitutes dispossession—*See* EASEMENT, 31 M. 528=5 M.L.T. 136=19 M.L.J. 309=4 Ind. Cas. 619.

Suit for—Admission or denial of ownership—Shifting of onus—*See* EJECTMENT, SUIT FOR, 14 C.L.J. 175.

Survey Map—Title—*See* EVIDENCE—MAPS, 9 C.L.R. 305.

See EVIDENCE—MISCELLANEOUS, 24 A. 294=A.W.N. 1902, 45.

See FOREIGN COURT, JUDGMENT OF, 20 M. 112=7 M.L.J. 76.

Registered deed of gift—Delivery of, under registered deed of gift—Transfer of Property Act, s. 123—*See* GIFT, 5 O.C. 89.

Guzara land suit for of—Estate for life—Grant for maintenance in perpetuity, how to be construed—*See* GUZRA LAND, 7 O.C. 90.

Prima facie evidence of title—*See* HINDU LAW—ADOPTION, 5 W.R. 69, P.C.

Possession—continued.

—1.—General—continued.

See HINDU LAW—ALIENATION, 14 B.L.R. 307=23 W.R. 131.

Gift—Hindu Law—Creation of trusts—See HINDU LAW—GIFT, 17 B. 486.

With one of the donees—Declaration by donor, effect of—See HINDU LAW—GIFT, 7 B. 452.

Registration of gift deed not equivalent to—See HINDU LAW—GIFT, 7 B. 131.

Possession of brothers and sisters in native families—Presumption—See HINDU LAW—JOINT FAMILY, 20 A. 182=A.W.N. 1898, 19.

See HINDU LAW—JOINT FAMILY, 1 I.A. 9.

Water course—Right to protect possession against trespasser—See INCORPOREAL RIGHTS, 7 M.L.T. 352=6 Ind. Cas. 266=20 M.L.J. 803.

Right of co-sharers of joint property to joint possession—See JOINT PROPERTY, 33 C. 1201.

Suit for possession—Plaint property situated in different districts—Place in which suit to be instituted—Misjoinder of causes of action—See JURISDICTION—CAUSES OF JURISDICTION, A.W.N. 1885, 125.

See JURISDICTION—JURISDICTION OF FOUDARY COURT, 3 W.R. 45, P.C.=7 M.I. A. 283.

Transfer of holding by occupancy—Tenant—Suit for cancelling transfer—Ejectment—Jurisdiction of Civil and Revenue Courts—See JURISDICTION OF REVENUE COURTS, A.W.N. 1885, 271.

Registration of name under Land Registration Act—Whether equivalent to—See LANDLORD AND TENANT—GENERAL, 10 Ind. Cas. 363.

Suit for ejectment—Plea of permanent right of occupancy—Long—on uniform rent, effect of—See LANDLORD AND TENANT—EJECTMENT, 16 M. 131.

Suit for—See LANDLORD AND TENANT—EJECTMENT, 2 C.L.R. 209.

Mere long, of homestead land insufficient to justify presumption of permanent grant—See LANDLORD AND TENANT—NATURE OF TENANCY, 25 C. 896.

See LANDLORD AND TENANT—NATURE OF TENANCY, 5 C.W.N. 801.

Lease—Lessor refusing to register lease-deed—Suit by lessee to enforce registration and for possession—Maintainability—Admissibility of deed in evidence—See LEASE—GENERAL, A.W.N. 1885, 329.

Possession under erroneous order—Limitation—See LIMITATION—GENERAL, 2 B.L.R.A.C. 173.

Possession—continued.

—1.—General—continued.

Suit for by mortgagor to recover—Limitation—Reg. II of 1802—See LIMITATION—GENERAL, 2 M.H.C. 382.

Decree-holder given formal possession—Actual possession remaining with judgment-debtor—Decree holder's right to bring fresh suit within 12 years—See LIMITATION—GENERAL, 10 Ind. Cas. 319.

See LIMITATION ACT, 1908, s. 28, 1 M.H.C. 85.

Possession, meaning of—See LIMITATION ACT, 1908, s. 28, 6 C.W.N. 601.

Suit by vendee or auction-purchaser for—Limitation—See LIMITATION ACT, 1908, s. 28, art. 144, 70 P.L.R. 1910=8 Ind. Cas. 236.

See LIMITATION ACT, 1908, arts. 2, 6, 7, 8, 9, 22, 24, 25, 40, 48, 49, 132, 144, 118, 120, 3 M.H.C. 111.

Meaning of "physical possession"—See LIMITATION ACT, 1908, art. 10, 8 Ind. Cas. 603.

Suit for pre-emption—Terminus a quo—Date of registration or date of getting—See LIMITATION ACT, 1908, art. 10, A.W.N. 1887, 235.

Actual—Meaning of—See LIMITATION ACT, 1908, art. 10, 65 P.R. 1883.

Nature of—See LIMITATION ACT, 1908, art. 10, 24 A. 17, P.C.=5 C.W.N. 888=28 I.A. 248.

"Physical possession," meaning of—See LIMITATION ACT, 1908, arts. 10 and 120, 20 A. 315, F.B.=A.W.N. 1898, 61.

Suit for money by mortgagee disturbed in possession limitation for—See LIMITATION ACT, 1908, arts. 97, 116, 120, 21 M. 242=8 M.L.J. 81.

Whether possession obtained in execution of a decree subsequently set aside is "Wrongful possession"—See LIMITATION ACT, 1908, arts. 109, 120, 3 C.L.J. 182.

Suit for proprietary—Of immoveable property—See LIMITATION ACT, 1908, arts. 113, 144, A.W.N. 1886, 96.

Suit for possession incidentally requiring setting aside of adoption—See LIMITATION ACT, 1908, art. 118, 17 A. 167=A.W.N. 1895, 36.

Suit for declaration of right to office of Dharmakarta of temple and—Of property attached to it—Prescription—Hereditary right—Right to possession dependent on right to office—See LIMITATION ACT, 1908, arts. 120, 124 and 144, 26 M. 113.

See LIMITATION ACT, 1908, art. 135, 3 Agra 103.

See LIMITATION ACT, 1908, art. 181, 3 B. 433.

Possession—continued.—1.—**General**—continued.

Nature of, sufficient to support gift—Presumption of, in favour of title when arises—See MAHOMEDAN LAW—GIFT, 13 O. C. 347=8 Ind. Cas. 717.

See MAHOMEDAN LAW—GIFT, 5 B. 238.

A *wakif* must divest himself of, in order to constitute a valid *wakf*—See MAHOMEDAN LAW—WAKF, 2 N.L.R. 158.

Lease—Death of lessee during period of lease—Suit for—Against lessee's heirs—Jurisdiction of Mamlatdar—See MAMLATDAR, JURISDICTION OF, 21 B. 738.

Joint possession under decree of Civil Court—Taking of produce by one of the parties, not a dispossession within Mamlatdar's jurisdiction—Suit for account or partition, proper remedy between joint-owners—See MAMLATDAR, JURISDICTION OF, 21 B. 777.

See MESNE PROFITS—MODE OF ASSESSMENT, 5 W.R. 127, P.C.=2 M.I.A. 113.

Mortgage of moveable property—Delivery of—of moveable property to mortgagee—See MORTGAGE—GENERAL, 6 O.C. 230.

See MORTGAGE—REDEMPTION, 4 O.C. 347, 25 M. 537.

See MORTGAGE—MISCELLANEOUS, 23 A. 338=A.W.N. 1901, 95.

Hypothecation without—Subsequent hypothecation with possession—Priority—See MOVEABLE PROPERTY, 2 C.P.L.R. 108.

Of by debtor—Presumption—See NEGOTIABLE INSTRUMENTS—PROMISSORY NOTES—MISCELLANEOUS, 29 C. 334=29 I.A. 43=6 C. W.N. 401.

Evidence of ownership—Presumption arising from—See OWNERSHIP, 14 C. 740=14 I.A. 101 P.C.

Necessary parties to a suit for constructive possession—See PARTIES TO SUITS—GENERAL, 2 C.W.N. 229.

Mortgagees' suits concerning—Mortgage by agent—Suit for possession—See PARTIES TO SUITS—GENERAL, 2 Agra 407.

Police Officer incompetent to make judicial enquiry about possession—See POLICE OFFICER, 18 C. 349, P.C.=18 I.A. 27.

Survey records—Evidentiary value in suit for possession—See POSSESSION—EVIDENCE OF POSSESSION AND TITLE, 7 C.L.R. 269.

See PRACTICE AND PROCEDURE, 21 C. 479.

Registered Conveyance—Unregistered Conveyance with possession—Priority—Notice—See REGISTRATION, 7 C. 753=10 C.L.R. 129.

Prior unregistered document, possession under, notice to subsequent registered mortgagee—See REGISTRATION ACT, 1908, s. 50, 9 B. 427.

Possession—continued.—1.—**General**—concluded.

Suit for—Accretion—See BEN. REG. XI OF 1825, s. 4, 11 C.L.J. 148=5 Ind. Cas. 723.

Uninterrupted possession—Thirty years—Prescriptive title—See BOM. REG. V OF 1827, ch. I, s. 1, cl. (i), 1 B. 286.

Claims to recover—and mesne profits, distant claims—See RELINQUISHMENT OF CLAIMS, 19 C. 615.

Suit for—See RENT, 13 W.R. 18, P.C.=13 M.I.A. 270.

Decree ordering possession and mesne profits—Execution application for both reliefs—Omission to grant one relief whether bar to subsequent application in respect of it—See RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, 24 M. 681=11 M.L. J. 313.

Right of occupancy—Long possession—Burden of proof—Landlord and tenant—See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 11 M. 77.

As intruder—Right of intruder to hold house of absconding raiyat—See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 1 Agra 9.

Formal delivery of, effect of, on judgment-debtor and against his co-sharer—See SALE—SALE IN EXECUTION OF DECREE—GENERAL, 3 A.L.J. 659=A.W.N. 1906, 278.

See SERVICE TENURE, 7 C. 697=9 C.L.R. 233.

Transfer of possession, necessary to constitute a valid settlement under the Mahomedan Law, —See SETTLEMENT—GENERAL, 6 Bom. L.R. 263.

See SPECIFIC RELIEF ACT, s. 42, 14 A. 512=A.W.N. 1892, 80.

Decree for—passed by mamlatdar—Ouster of third person in possession—See SUPERINTENDENCE OF HIGH COURT, 21 B. 775.

Presumption of, from evidence of title—Waste lands—See TITLE, 5 C.L.R. 481.

See TITLE, 10 M.I.A. 47.

Hypothecation of property without possession—Incomplete title—See TRANSFER OF PROPERTY, 1 Agra 286.

Suit against trespasser by person dispossessed—Right to recover on the strength of previous possession—See TRESPASSER, 11 Ind. Cas. 279.

—2.—**Adverse Possession.**

See BURDEN OF PROOF—LIMITATION AND ADVERSE POSSESSION.

See—LIMITATION ACT, 1908, arts. 143, 144.

(1)—Of property recognised by law.—It is of the essence of the title by adverse possession that it must relate to some property which is

Possession—continued.**—2.—Adverse Possession—continued.**

recognized by law. *JETHABHAI v. NATHABHAI*, 6 Bom. L.R. 428=28 B. 399. [D., 10 Bom. L.R. 1128=33 B. 116.]

(2)—*Adverse possession—Elements of.*—Adverse possession means possession by a person holding the land on his own behalf of some person other than the true owner having a right to immediate possession. There ought to be nothing equivocal in a possession which is relied upon as a bar. *BALKRISHNA v. GOVIND*, 4 Bom. L.R. 312=26 B. 617.

(3)—*What constitutes—Permanent case—Government—Payment of rent by Government—Government denying title of lessor.*—To constitute a title of adverse possession, the possession required to be proved must be adequate in continuity, in publicity and in extent, and it is displaced by evidence of partial possession by the party against whom the title by adverse possession is claimed. To prove ownership of an unenclosed piece of land, acts of ownership in one part may be presumed to be acts of ownership over the whole unless there are circumstances rebutting that presumption. B, the owner of the land in dispute, gave it under a permanent lease to J, who assigned the lease to plaintiff on the 7th December, 1888, Government having held the land, through the Custom officials, as tenants had gone on paying rent first to J, and then to plaintiff from 1872 to 1891. After 1891, Government denied his and set up their own title to the land and refused to pay rent. The plaintiff, therefore, filed this suit to recover possession of the land with rent and mesne profits from Government. Government claimed the land as their own and pleaded that the rent was paid till 1891, through mistake by the Custom officials without the consent or knowledge of Government: *Held*, (1) that the admission of Government that they had paid rent for some years to the plaintiff was sufficient in law to raise a *prima facie* presumption of title in his favour and to throw the *onus* of proving that the land belonged to them and that they had paid the rent under a mistake, upon Government; (2) that if the Custom officials had authority to take and hold possessions of land for Customs service on behalf of Government, their authority to bind Government by payment of rent for that land followed as a matter of course and it was not open to Government to claim the benefit of the former and repudiate the latter. *VITHALDAS v. SECRETARY OF STATE*, 4 Bom. L.R. 28=26 B. 410. [R., 6 C.L.J. 735; F., 35 C. 961, 12 C.W.N. 127.]

(4)—*Nature of — How to be established—Constructive possession, doctrine of, not applicable to wrong-doer.*—In order to prove title to land by adverse possession, it is not sufficient to show that some acts of possession have been done, but the possession must be adequate in continuity, in publicity and in extent of area, to establish that it is possession adverse to the competitor and to take the title out of the true

Possession—continued.**—2.—Adverse Possession—continued.**

owner. The adverse possession to be effective must be actual, visible, exclusive, hostile and continuous for the statutory period. The doctrine of constructive possession applies only in favour of a rightful owner, and must not, as a rule, be extended in favour of a wrong-doer, whose possession must be confined to the land of which he is actually in occupation. *BARODA PROSAD ROY CHOWDHRY v. ANNODA MOHAN ROY*, 6 Ind. Cas. 359. (7 C.L.J. 114, 12 C.W.N. 273, 3 M.L.T. 212, 27 C. 843, P.C. 27 I.A. 136, 4 C.W.N. 597, 35 C. 961, 12 C.W.N. 127, 6 C.L.J. 735, R.)

(5) — *Acts constituting adverse possession—Legal origin to the Acts.*—The Acts required by law to constitute a title by adverse possession must be of an unequivocal character, and must be such that no legal origin can be ascribed to them. *YESU v. FUL CHAND*, 4 Bom. L.R. 964.

(6)—*Adverse possession—Conduct.*—A plea of title by adverse possession cannot be made good by a few acts of asserted proprietorship, and in the face of the fact that the party who makes that plea permitted the owner to appear in the *Khwats* as proprietor. *PHUNDO v. BHISHWA DAS*, A.W.N. 1883, 246.

(7) — *Possession first permissive — Adverse possession—Nature of evidence required.*—Where occupation of land is originally permissive, evidence is required to make out that it has been changed into adverse possession. And the possession must be proved to have been adverse for a period of twelve years before suit. *WAHEE-OD-DEEN v. JHUNGORE*, 2 N.W.P. 16.

(8)—*Failure to prove specific alleged title—Title by adverse possession—Distinct and clear declaration of title.*—To enable the plaintiff, who has failed to prove a specific alleged title, to succeed upon the ground of adverse possession for twelve years, it must be distinctly shown that the latter title was also distinctly and clearly raised in the Court of first instance. *KRISHNA CHURN BAISACK v. PROTAB CHUNDER SARMA*, 7 C. 560. (2 C. 418, R.)

(9)—*Adverse possession — Ineffective possession—Assertion of title—To the knowledge of the owner.*—Where the possession is of an ineffective nature, supposing that its character could be improved by an assertion of title, it is necessary for the party so in possession to prove that the owner had knowledge of such assertion. An "openly avowed claim" means a claim which may be said to have come to the knowledge of the true owner. *MALLA VEERANNA v. MALLA CHELAMAYYA*, M.W.N. 1912, 68=13 Ind. Cas. 467.

(10)—*Adverse possession, whether there was or was not, mixed question of law and fact—Civ. Pro. Code (Act V of 1908), s. 100—Continuity of "possession."*—The determination of a lower appellate Court whether not there was adverse

Possession—continued.**—2.—Adverse Possession—continued.**

possession, is one of mixed law and fact, and it is open to the High Court in second appeal to determine whether or not, on the findings as to possession at which the lower appellate Court arrived, it would be correct to hold as a legal conclusion that adverse possession has been established. There must be continuity of possession so as to make the possession adverse. **SHOOKOR MALLIK v. BEHARI LAL**, 11 Ind. Cas. 185.

(11)—*Adverse possession—Vacant land—Encroachment—Nature of user.*—A bit of land which was of no use happened to be of use for various temporary purposes to an adjoining landholder and he accordingly used it for more than 12 years. He built a privy and sheds for cows, goats, etc. He contended that such user amounted to adverse possession. *Held* that user of this sort was insufficient to give a title to the land by adverse possession. In this country, such a user excites no particular attention. It is neither meant to denote, nor understood as denoting—on the one side or the other—a claim to the ownership of the land. Where such and no more is the case, it would be altogether wrong to hold that a claim to title by adverse possession has been made out. **FRAMJI CURSETJI v. GOCULDAS MADHOWJI**, 16 B. 338. [*F.*, 21 M. 53, 11 Bom. L.R. 1087=33 B. 712=4 Ind. Cas. 244; *R.*, 91 P.R. 1901=113 P.L.R. 1901, 32 C. 287, 8 Ind. Cas. 708.]

(12)—*Possession for 12 years—Title.*—As between private owners contesting *inter se* the title to lands, the law has established a limitation of 12 years; after that time it declares not simply that the remedy is barred, but that the title is extinct in favour of the possessor. **RAJA BARADAKANT ROY BAHADUR v. PRANKRISHNA PAROI**, 3 B.L.R. A.C. 343=12 W.R. 192. (7 W.R. 21, *R.*) [*R.*, 1 B. 286, 1 B. 592.]

(13)—*Declaration of title—Plaint—Issues.*—A declaration of title may be made on the strength merely of 12 years' adverse possession. (6 M.H.C. 420, *Diss.*; 20 W.R. 104, *F.*) Where such a declaration is sought, the 12 years' adverse possession must be distinctly stated in the plaint, or set out in the issues. **SHIRO KUMARI DEBI v. GOVIND SHAW TANTI**, 2 C. 418. [*F.*, 7 C. 560; *D.*, 14 C. 592; *R.*, 31 M. 531=4 M.L.T. 344.]

(14)—*Judgment-debtor in possession of property for more than 12 years—Adverse possession.*—When a judgment-debtor remains in possession of property for more than 12 years, he has a title by adverse possession. Such title by adverse possession is capable of being attached. **SUJA HOSSEIN v. MONOHUR DAS**, 24 C. 244.

(15)—*Right to land—Adverse possession for more than 12 years.*—If adverse possession had been enjoyed for nearly thirteen years, non claim does not only bar a suit but gives an

Possession—continued.**—2.—Adverse Possession—continued.**

absolute title. On that title, the party may not only insist by way of defence but he may put it forward as a positive title and claim to have it recorded. **KURIM KHAN v. BAHADUR KHAN**, 48 P.R. 1872.

(16)—*Adverse possession—Hereditary office—Inference—Commissioner, Kumaon Division, power of—Second Appeal.*—The defendant had been receiving the entire profits of a hereditary office for upwards of 12 years and had also been performing all the duties connected with that office: *Held*, that under the circumstances the legitimate inference was that the defendant was in adverse possession. *Held*, also, that the commissioner of Kumaon Division as a Court of second appeal was not competent to go behind the finding of fact of the Court of first appeal. **DHARMA NAND v. KHEMA**, 3 Ind. Cas. 8.

(17)—*Two trespassers—Possession for 12 years—One claiming through the other.*—If the period of possession of a trespasser and his predecessor in title, who was also a trespasser, extends over a period of 12 years, he acquires an absolute title to the property of which he has been thus in possession. **BALU RAM v. BANKE BIHARI LAL**, 3 A.L.J. 424=A.W.N. 1906, 184. (24 A. 157, *R.*) [*F.*, 3 A.L.J. 775=A.W.N. 1906, 364; *R.*, 29 A. 52, 9 O.C. 230.]

(18)—*By successive trespassers—Tacking of various periods of adverse possession—Succession by sale as to possessory interest of one trespasser by another.*—*Held*, that a person, who was in possession of the property as a trespasser, is entitled to tack on to the period of his possession the period of the possession as trespasser of his predecessor in title through whom he claims. **NAGESHAR v. SHEO MANGAL**, 9 O.C. 230. (9 O.C. 161, 20 W.R. 114, *R.*)

(19)—*Adverse possession—Enjoyment—Period more than twelve years—Acquisition of title.*—If a plaintiff has put a buttress and has been in possession and enjoyment thereof for more than twelve years, he must be deemed to have a title, and not merely an easement, to the site covered by the buttress, by adverse possession. **RAVUTU ADINARAYANAMMA v. SAHUKARA SYED MURTUZA SAHEB**, 8 M.L.T. 282=7 Ind. Cas. 571.

(20)—*Forcible possession by wrong-doer—Fraud of lawful owner—Jurisdiction—Power of Civil Court to interfere with vested rights—Prescription—Title created by adverse possession.*—A mere wrong-doer, who has forcibly taken possession of another man's property, is not entitled to withhold that property from its lawful owner upon the ground, of a fraud which has in no way affected his own status or position. Civil Courts have no power to interfere with the vested rights of parties, merely by way of penalty, unless they are authorized to do so by some positive legislative enactment. Adverse possession for a period of more than 12 years

Possession—continued.**—2.—Adverse Possession—continued.**

is by itself sufficient to create a title. **RAM SAHOY SINGH v. KOOLDEEP SINGH, 15 W.R. 80. [R., 1 B. 286.]**

(21)—*Suit to recover land—Hostile possession.*—In a suit by V against N to recover certain lands attached to two villages of which he became proprietor in 1857, where it was found that N had been in possession for upwards of 50 years before date of suit, *held* that N's possession was hostile and that the suit was, therefore, barred by the Statute of Limitations. **CHANDRA CHODANGHI v. TIMMAIYA, 2 M.H. C. 391.**

(22)—*Settlement—Payment of arrears of revenue—Adverse possession.*—Because settlement of the property was made with the defendants in consequence of their having paid up the arrears of revenue, it does not follow that, by reason of that simple fact, their possession was adverse sufficient to reckon limitation. **BHEEMA v. PAHLAD, 2 Agra, 38.**

(23)—*Possession lawful under a lease—Whether adverse—Acceptance of new lease—Effect—Lease declared void—Effect—Implied surrender.*—In the case of surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law making void the surrender in case the new lease should be made void. There can be no adverse possession and a consequent title by prescription, if the possession would be lawful and under a lease. **KERALA VARMA VALIA RAJA v. MAYANKUTTY, 8 M.L.T. 309. (15 M. 166, F.)**

(24)—*Alluvial land—Adverse possession, commencement of—Proof of ownership—Proof of possession.*—Possession of alluvial land can commence directly the land is in existence, and does not date from the time at which it becomes culturable. Any proved act of ownership would be sufficient to show possession. In the present case, however, the Judge had found as a fact that the plaintiff did not show possession at any time within twelve years; in fact, that he had not shown any possession at all, whilst the defendant was and always had been in possession of the disputed *chur*; and with this finding no interference was possible by the High Court in special appeal. **LUCKHEE DEBIA CHOWDHRAIN v. THE COLLECTOR OF MYMENSINGH, 7 W.R. 231. [R., 2 B. 19.]**

(25)—*Decree against owner—Attachment of property in execution—Running of time in favour of trespasser not arrested by attachment—Adverse possession.*—When a trespasser is holding the property adversely to the owner, the attachment of the property by a person who has got a decree against the owner, does not arrest the running of time in favour of the trespasser. **SEETHARAMI REDDI v. VENKU REDDI, 11 M. L.J. 344.**

(26)—*Possession of over twelve years under prior valid unregistered sale, effect of, on rights*

Possession—continued.**—2.—Adverse Possession—continued.**

under subsequent registered hypothecation—Registration Act (III of 1877), s. 50.—Rights created under a registered hypothecation bond might be affected not only by lapse of time as between creditor and debtor, but also by possession of the hypothecated property for the required statutory period, by a third person on a claim inconsistent with the rights of both the creditor and the debtor, as in the case of such possession held by a purchaser under a prior valid unregistered sale of the land; nor does s. 50 of the Registration Act in any way interfere with the operation and effect of the established principles of limitation and prescription governing such cases. **NALLAMUTHU PILLAI v. BETHA NAICKAN, 23 M. 37. [R., 26 M. 72 = 12 M.L.J. 410.]**

(27)—*Burden of proof.*—The *onus* of proving a title by adverse possession for the statutory period lies on him who alleges it. The possession required to be proved must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. **RADHAMONI v. COLLECTOR OF KHULNA, 2 Bom. L.R. 592 = 27 C. 943, P.C. = 27 I.A. 136 = 4 C.W.N. 597 = 7 Sar. 714. [F., 13 C. 397, 3 C.L.J. 316; R., 26 B. 410 = 4 Bom. L.R. 28, 28 B. 94 = 5 Bom. L.R. 708, 10 C.W.N. 343, 6 C.L.J. 735 = 12 C.W.N. 127.]**

(28)—*Evidence—Proof.*—Possession to be adverse must be shown to be continuous, public and adequate to the circumstances of the case. In the case of a joint family consisting of three brothers, where no partition was proved, the mere fact that two of the brothers went to live in a neighbouring village would not make the possession of the third, who continued to live in the same village, necessarily adverse. As between brothers, when no partition is proved, the adverse possession of one must be proved by very satisfactory evidence. **JAGJIVANDAS v. BAI AMBA, 3 Bom. L.R. 47 = 25 B. 362.**

(29)—*Onus of proving adverse possession—Presumption.*—The *onus* of proving adverse possession lies on the party who alleges it. The Courts are loth to convert a possession, which commenced lawfully, into a wrongful and adverse possession. **GANPATRAM v. SHIVPRASAD, 4 Bom. L.R. 355.**

(30)—*Adverse possession—Burden of proving possession within 12 years—Landlord and tenant—Pleadings—Denial of title.*—Plaintiffs sued for possession alleging that the defendants were their tenants. The defendants pleaded that they were not the plaintiffs' tenants and that they had been in adverse possession for more than 12 years prior to the institution of the suit.—*Held*, that in the circumstances the plaintiffs were bound to prove not only title but also their proprietary possession within twelve years prior to the suit. **BRIJLAL SAHU v. RAMESHAR SAHU, 9 Ind. Cas. 812. (A.W.N. 1901, 188, A.W.N. 1882, 40, R.)**

Possession—continued.**—2.—Adverse Possession—continued.**

(31)—*Suit for possession—Defendant admitted and found to be in possession for over twelve years—Burden of proof.*—Where, in a suit for possession, the defendant pleads limitation and adverse possession (and it is admitted and found that he was in possession for more than twelve years) and denies the title of the plaintiff, the burden lies on the plaintiff to show that he has a title to the property in question and that such title subsisted at the date of the suit. *MUSAFIR RAI v. MUSAMMAT LAGAN BARTA KUAR*, 2 A.L.J. 62 = A.W.N. 1905, 14. (A.W.N. 1894, 167, F.)

(32)—*Adverse possession—Allegation that defendant was in possession as agent of plaintiff—Burden of proof.*—When a party sought to obtain possession of certain property, denominated a *Muddud-mash*, against a defendant whose adverse possession had existed from 1761, upon the allegation that the defendant was in such possession as agent of plaintiff, the Judicial Committee held that the proof of such agency lay on the plaintiff; the balance of evidence being in favour of the defendant's right to possession, the circumstance of his having registered himself as owner in 1797, without any opposition or subsequent claim to register on the part of the plaintiff, and having continued in undisturbed possession from that period, was conclusive as against the claim set up by plaintiff. *MEER USUDOOLLAH v. BEEBY IMAMAN*, 5 W.R.P.C. 26 = 1 Suther. 46 = 1 Sar. 89 = 1 M.I.A. 19.

(33)—*Limitation—Adverse possession—Partition suit—Family property sold to stranger—Purchaser in possession—Sale not by registered instrument—Dispossession of family within 12 years prior to suit—Onus of proof—Failure to prove—Perfection of purchaser's title.*—Where immoveable property was sold to the defendant, and such sale was not supported by a registered instrument, and where the plaintiff, in a partition suit, claimed such property to belong to the family and to be liable for partition: *Held*, that it lay on the plaintiff to prove that the family was dispossessed within 12 years prior to the suit, and that, plaintiff having failed to do so, the defendant's title was perfected by limitation. *VUGAMUDI SUBRAMMA REDDI v. VUGAMUDI RAMACHANDRA REDDI*, 9 M.L.T. 476.

(34)—*Adverse possession—Onus probandi—Claim for a share in undivided ancestral property—Mutation in favour of plaintiffs—Abandonment of inheritance.*—The plaintiffs sued for possession of one-third of the lands in dispute as their share in the joint ancestral property inherited by them from their deceased father and brother. The defendants pleaded adverse possession and that the deceased had abandoned their rights in the property in dispute. The abandonment by the deceased father and brother of the plaintiffs pleaded by the defendants was not established. On the death of the father, the lands were mutated in the names of the plaintiffs and their deceased

Possession—continued.**—2.—Adverse Possession—continued.**

brother who died subsequently. It was not till 1891 that mutations adverse to the plaintiffs took place. *Held*, that the onus of proving adverse possession lay on the defendants, and they had failed to prove it for the period prior to 1891. *SAHIB DAD KHAN v. AKBAR KHAN*, 62 P.L.R. 1902. (61 P.R. 1870, 118 P.R. 1889; 116 P.R. 1900, F.)

(35)—*Joint property—Adverse possession by one co-sharer.*—As the possession of one co-sharer is the possession of all in the case of joint property, a co-sharer, setting up adverse possession, is bound to prove that the other co-sharers were excluded more than 12 years ago, or that they abandoned their rights: and the co-sharer out of possession need not make out that the family lived as a joint Hindu family or that he received his share of the joint income. *DAS AND HUKMAN v. MAYA DAS*, 118 P.R. 1889. [R., 30 P.R. 1901, 120 P.R. 1908.]

(36)—*Possession of lambardar.*—Where it is not proved that a *lambardar* is in possession as agent of a co-sharer, his possession cannot be considered as permissive but must be held to be adverse. *SHEODAYAL SINGH v. BHAGIRATH SINGH*, 13 C.P.L.R. 99. (2 C.P.L.R. 171, Cons.; 11 C.P.L.R. 30, 17 A. 423, R.) [Exps. 5 N.L.R. 41.]

(37)—*Shamilat land, Implied transfer of—Shamilat land is joint undivided property and the possession of one co-sharer is not, in the absence of special circumstances, adverse against the other co-sharers.*—In determining the question whether *shamilat* land passed to the vendee on a sale of *malik* rights, one point of importance is the area and value of *shamilat* as compared with *maliki* land. When the *shamilat* land was of no great value and the sale included *jumla haquq dakhili wa khariji*, *mai jumla haquq bisuadari*. *Held*, that a transfer of share in *shamilat* was implied by the sale. *AHMAD v. KARORI MAL*, 4 P.L.R. 1907 = 49 P.W.R. 1907.

(38)—*By a tenant-in-common—Exclusive receipt of profits—Presumption.*—To constitute an adverse possession as between tenants-in-common, there must be an exclusion or an ouster. Exclusive receipt of profits by one tenant-in-common continuously for a long period would be sufficient evidence to presume an actual ouster of the other tenant-in-common. *GANGADHAR v. PARASHARAM*, 7 Bom. L.R. 252 = 29 B. 300. [R., 11 Bom. L.R. 51 = 33 B. 317.]

(39)—*Tenants-in-common—Ouster—Acts of exclusive occupation.*—The question of adverse possession between tenants in-common depends, not on a severance of the tenancy-in-common by partition, but on exclusive occupation by one co-tenant amounting to ouster of the other. Two brothers G and D owned a property jointly. In execution of a decree against D, the property was sold and purchased by V, who, in taking possession of it, was obstructed by G. V sued to remove the obstruction and obtained a partition decree on the 29th November, 1886; and

Possession—continued.**—2.—Adverse Possession—continued.**

subsequently obtained symbolical possession of the property on the 11th December, 1895. Meanwhile, on the 4th October, 1894, G sold the property to defendant and placed him in possession. The assignee of V then sued the defendant on the 4th October, 1906, to recover possession of the property from him. His claim was resisted by a plea of adverse possession. *Held*, negating the contention. (1) that to entitle the defendant to add to the period of his own adverse possession (which was admittedly less than twelve years before the date of suit) the period of G's possession, it must be shown that the latter's possession was also adverse; (2) that G's possession could not become adverse to V so long as the decree for partition was alive and capable of execution as against G. *AMRITA RAVJI RAO v. SHIRDHAR NARAYAN OKE*, 11 Bom. L.R. 51=33 B. 317=1 Ind. Cas. 322.

(40)—*Joint holders — Adverse possession.*—Where a holding was entered at the settlement as the joint property of the parties and it was recorded that they were entitled to equal rights, possession by one of the parties cannot be regarded as adverse as against the other. *NIZAMUDDIN v. GAHIA*, 61 P.R. 1870. [R., 62 P.L.R. 1902.]

(41)—*Suit for profits of sir land appertaining to an undivided mahal—Adverse possession.*—Plaintiff, as a co-sharer in an undivided mahal, sued to recover a share of the profits of some sir land, appertaining to the mahal and in the occupation of the defendant for more than twelve years. It was found that the plaintiff and his predecessors in title had been respectively in receipt of his and their share of the profits of the mahal, with the exception of the sir land in dispute, for more than twelve years before suit; and the defendant had not at any time repudiated the title of the plaintiff or his predecessors to the enjoyment of the sir land or set up any adverse title. *Held*, the mahal being undivided, the defendant's possession of the sir land must be regarded as a possession not only on his own account but also on account of his co-sharers, including plaintiff, and therefore, not hostile; and plaintiff's suit not barred. *RAJ BAHADUR v. BHARAT SINGH*, A.W.N. 1905, 15=27 A. 348=2 A.L.J. 110.

(42)—*Absentees — Adverse possession—Entry of absentees' name in Collector's records.*—The mere entry in the Collector's records of the names of absentees in respect of certain shares cannot alter the nature of possession adversely held by the other co-sharers. *DOORJUN v. CHAINA*, 2 N.W.P. 43. [R., 3 A. 458.]

(43)—*Joint Hindu family—Adverse possession.*—In the case of a joint undivided Hindu family, the possession of one member or more cannot be adverse in regard to a member who was absent for years; the possession of one is possession of the others; adverse possession never commences in such cases unless there

Possession—continued.**—2.—Adverse Possession—continued.**

be peculiar circumstances altering the "status" of the family. *LALLA v. JEYCOPAL*, 49 P.R. 1870.

(44)—*Possession—One co-sharer—Joint property—Whether adverse possession.*—Exclusive possession of a co-owner of property which originally had been joint does not *per se* amount to adverse possession as against his co-sharers. Where one of the two sisters remained in possession of the father's property for twenty-one years and the other did not "participate in possession," *held* that that only did not make her possession adverse. *PARBATI v. RAM PRASAD*, 5 A.L.J. 511=A.W.N. 1908, 239. (1 C.L.R. 364, 3 C.W.N. 774, R.)

(45)—*Ancestral property, possession of—When title against co-sharer.*—The fact that a person is in possession of ancestral property is good evidence of title against a co-sharer, if such possession is shown to be exclusive and inconsistent with the co-sharer's having any right to the property claimed. *TEKAIT HURRO NARAIN SINGH v. BOYKUNT NARAIN SINGH*, 14 W.R. 51.

(46)—*Adverse possession — Abandonment — Absentee co-sharer.*—The father and uncle of the plaintiff were shown as absentee owners in 1851, at which Settlement it was recorded that, if absentees returned, they could re-claim their land. This entry was not repeated at the last Settlement of 1885, but the names of the plaintiff and his uncle continued to be shown up to the date of the suit. The plaintiff claimed to take his own share in the land as well as his uncle's. The persons holding land of the absentees in a sale-deed executed in 1890 agreed with the vendee, that, if the absentees returned and claimed their shares, they would make up the deficiency by giving other land out of their own share. The defendants pleaded that the plaintiff's claim was barred by adverse possession of the defendants and the abandonment by the plaintiff and his predecessors. *Held*, that there was no abandonment on the part of the plaintiff or his predecessors or adverse possession on the part of the defendants. *TABA v. KALA*, 146 P.L.R. 1903. (118 P.R. 1889, 18 P.R. 1888, 84 P.R. 1888, 180 P.R. 1888, 141 P.R. 1883, 104 P.R. 1889, 118 P.R. 1893, 109 P.R. 1892, 121 P.R. 1884 and 30 P.R. 1901, R.)

(47)—*Adverse possession set up by co-sharers — Onus of proof—Abandonment.*—*Held*, that, ordinarily, in the case of property held in common, the possession of a co-sharer is the possession of all. In a case, in which co-sharers set up a title adverse to a co-sharer, it lies upon them to show at what time their possession became adverse or that there was clear and definite abandonment with intention. *HAJI v. GOHNA*, 39 P.L.R. 1906.

(48)—*Adverse possession—Co-sharers—Abandonment—Punjab Courts Act (XVIII of 1884), s. 70 (1) (b)—Revision—Civil cases—Question of fact.*—The defendants in a suit for possession

Possession—continued.**—2.—Adverse Possession—continued.**

of land pleaded abandonment and adverse possession, and the pleas were disallowed by the Original and the Appellate Courts, and the claim was decreed. On revision, *held*, that, the question of abandonment being a question of fact in the case, no revision was competent under s. 70 (1) (b) of the Punjab Courts Act, and as regards the adverse possession, the land being part of a joint holding, the possession of the defendants was *prima facie* possession of all the co-sharers. An overt act on the part of the defendants evidencing an intention to hold adversely to the plaintiffs was not established in the case and the pleas were rightly disallowed. *ATRA v. RAM KISHEN*, 102 P.L.R. 1909=154 P.W.R. 1909.

(49)—*Possession by co-sharer—Adverse possession.*—Possession of a plot of land by a co-sharer would not be adverse against the other sharers not in actual possession, unless the latter asserted or claimed some right in the land and that right was denied by the sharer in possession. *SHURFUNISSA BIBEE CHOWDHRAIN v. KYLASH CHUNDER GUNGOPADHYA*, 25 W.R. 53. [H., 5 L.B.R. 112.]

(50)—*Adverse possession between joint owners.*—Many acts which would be clearly adverse and might amount to dispossession as between a stranger and the true owner of land, would, between joint owners, naturally bear a different construction. *MAHOMED ALI KHAN v. KHAJA ABDUL GUNNY*, 9 C. 744, F.B.=12 C.L.R. 257. [R., 19 C. 253, P.C. 12 C.W.N. 127=6 C.L.J. 735.]

(51)—*Purchase of joint family property without notice—Suit by members of family for possession—Adverse possession—Lease by limited owner—Refund of purchase money.*—A person purchased portions of the property of a joint family, without notice that there were contested rights and in the belief that the vendor was entitled to sell or grant a *muurosee* lease; and the representatives of the family afterwards sued the representatives of the purchaser to recover possession, on the ground that there was no valid ground under the Hindu Law for the making of a *miras* pottah as to a portion of the property in suit made by a widow of one of the three original owners, who were brothers, and that the pottah was not good, beyond her own lifetime; but the purchaser's representatives claimed to hold adversely, both in respect of the widow's lease and in respect of the share of one of three brothers, which their predecessor in title had purchased: *Held*, that, as the widow who had made the lease was not the widow or heir of the brother whose share defendants held, the possession held by her during all this time must be considered as an adverse possession, and the reversioner was now barred by limitation; and that, in respect of the other two portions, not so barred, the plaintiffs could get back possession of it only by repaying the amount of the money laid out on the purchase by the defendants' predecessor

Possession—continued.**—2.—Adverse Possession—continued.**

in title. *RAKHAL CHUNDER ROY CHOWDHRY v. GOPAL KRISHTO SEN*, 23 W.R. 368.

(52)—*Adverse possession—Reversioner—Possession of property by stranger.*—After the death of the last male holder, his mother inherited all the properties and enjoyed the same. After her death, the sister of the last male holder took possession of the properties and enjoyed the same for over 12 years. Subsequent to her death the defendant, a collateral heir of the last male holder, entered into possession of the properties. The plaintiffs who were the co-heirs with the defendant of the last male holder sued for their share of the properties. *Held* that the suit was barred by limitation as the possession of the defendant's predecessor was adverse to the plaintiffs and as the cause of action accrued on the mother's death. Possession of property must always be attributed to a right to the property of the largest possible kind on the part of the person possessing it, until it be shown either that the possessory right really is in another person and that the present enjoyment is by his permission, or that the possession although of right, is so under some limited right to the property. *BIRESSUR BANERJEE v. ONOODA CHURN BANERJEE*, 3 W.R. 12.

(53)—*By a co-parcener.*—Where there has been no exclusion of any of the co-parceners from use and enjoyment of the property for the period of limitation, a co-parcener cannot successfully set up a case of adverse possession of the property on the strength of mere paper assertions not brought home to the knowledge of the other co-parceners. *ANANDRAO v. VASANTRAO*, 9 Bom. L.R. 595=5 C.L.J. 338=11 C.W.N. 478=2 M.L.T. 151=17 M.L.J. 184. [Appl., 10 Bom. L.R. 778.]

(54)—*Awards—Bengal Regulations VII of 1822, IX of 1825, and IX of 1833—Adverse possession.*—Act XIII of 1848 is limited to awards made by Collectors under Bengal Regulations VII of 1822, IX of 1825, and IX of 1833, which gives to the revenue authorities judicial power to determine questions of possession, and the right of appeal from such award is subjected to three years' limitation. The general rule, that the possession of one member of a joint Hindu family is the possession of all other members, does not apply where the party claiming has been clearly excluded from the family. In such a case, the possession is adverse, and under the general law of limitation the time will run from such adverse possession. *JOWALA BUKSH v. DHARUM SINGH*, 10 M.L.A. 511=2 Sar. 189.

(55)—*Hindu law—Succession—Possession of one sharer in absence of another—Adverse possession—Limitation.*—Possession is *prima facie* proof of title; but in a case where two brothers were members of the same family, and admittedly succeeded to equal shares in the estate, the mere fact of one brother being absent on

Possession—continued.**—2.—Adverse Possession—continued.**

service or for any other reason, and the home-staying brother being in possession for himself and as trustee for his absent brother, would not deprive the latter of his rights of inheritance, unless it be clearly shown that the possession of the brother staying at home was adverse to the absent brother. *MUSSAMAT WOOZEERUN v. NOORUL JAN*, 9 W.R. 98. [Appr., 13 W. R. F.B. 74.]

(56) — *Hindu Law—Joint family—Portions of family property in occupation of different members for convenience—Adverse possession—Limitation.*—Where, from motives of convenience, the members of a joint Hindu family reside on different portions of the family property, one of the members taking charge of one shop to carry on trade there, and another taking charge of another with a similar object, any member cannot be allowed to plead adverse possession and limitation after the lapse of 12 years and exclude his brother from participating in the profits of the shop. *SOOKH LALL BHOOWALA v. GOOLZAR BHOOWALA*, 14 W.R. 228. [Dist., 22 W.R. 9; R., 10 B.H.C. 444.]

(57) — *Adverse possession—Limitation.*—The possession of one co-parcener is the possession of all, and is, therefore, not inconsistent with the rights of the other co-parceners. Limitation, while it cures the defect of title on the strength of which possession was maintained, cannot operate to give the holder a title which he never claimed. A person holding in the character of mortgagee may, by dint of possession, render unimpeachable a title which at the outset was defective; but his acquired right is co-extensive with his claim, and he cannot on the strength of it go further and claim to be absolute proprietor. If a man claims an estate for life and that is consistent with his possession, the law will not, upon the mere fact of possession, adjudge him to be in under a higher right of a larger estate. *RAJYALAKSHMI v. SURYANARAYANA*, 3 M.L.J. 100.

(58) — *Adverse possession—Joint family against individual members.*—Where lands, granted to one of the two brothers of a joint Hindu family, were held by the joint family adversely to the individual interest of the grantee and his son, held that the grantee and his son had lost their rights. *VASUDEVA PADHI KHADANGA GARU v. MAGUNI DEVAN BAKSHI MAHAPATRULU GARU*, 24 M. 387 = 6 C.W.N. 545 = 28 I.A. 81 = 3 Bom. L.R. 303, P.C. = 7 Sar. 819. [R., 6 Bom. L.R. 925.]

(59) — *Hindu Law—Adverse possession of a Hindu woman—Nature of adverseness—Presumption.*—Where the possession of a Hindu woman is said to be adverse to the widow of her deceased son, the last male owner, the question to be decided would be what was her *animus possidendi*? Did she assert an absolute title in herself or did she

Possession—continued.**—2.—Adverse Possession—continued.**

claim to hold as the heiress of her son? The latter would be the ordinary presumption in the absence of any evidence to the contrary, and if she held as heiress of her son, on her death the person entitled to succeed would be her son's heir and not the heirs to her *stridhanam* property. *In re PRATTIPATI SESHAYYA*, 11 M.L.T. 261 = M.W.N. 1912, 515 = 15 Ind. Cas. 404.

(60) — *Adverse possession by a Hindu widow—Possession of mother to be reckoned as possession on behalf of her son when son incompetent to manage his affairs—Reversioner not entitled to sue for possession during the lifetime of the mother.*—One, G, the owner of certain property, died in 1869 leaving a widow S, a son R, and daughter-in-law, R's wife; R, and his wife died in 1874. It was found from the evidence that, after the death of G, S took possession of the property inasmuch as R, was a fool and unable to manage his affairs. He was unfit to work and therefore, lived with his mother and did nothing. Held, that, under the circumstances, it should be presumed that S intended to hold the property on behalf of her son, and that she could not be considered to have held adversely to her son. Held, further, that in any case because S, had remained in possession only for five years after the death of G, and had subsequently on the death of her son R, come to possess the property as mother, her possession could not be considered adverse to the reversioner, since the reversioner could not sue for the possession of the property as long as she was alive. *BHAGWANDAS v. ISHAR DAT*, 11 Ind. Cas. 93.

(61) — *Hindu Law—Alienation by widow—Suit by remote reversioner when maintainable.*—A suit to set aside an alienation alleged to have been illegally made by a Hindu widow of property belonging to her deceased husband, should be brought by the next reversioner and not by a remote one. But the latter has been allowed to maintain such a suit, when the nearer reversioner was acting fraudulently and in collusion with the widow and the purchaser from her or where he has disclaimed or renounced all right, or has consented to and authorised the suit. In a suit by a remote reversioner, the nearer reversioners, having been made parties to the suit by order of the Court, represented that they had consented to forego their rights in favour of the plaintiff, such suit may be considered as one brought by a person who, by the express declaration of those having prior right, was entitled to maintain it by reason of their consent and of their relinquishment in the plaintiff's favour of their right of suit. Where the widow's possession was *prima facie* not adverse, such possession must be presumed, unless otherwise shown to have continued a possession of the same character as formerly. *AMMUR SINGH v. MURDUN SINGH*, 2 N.W.P. 31.

(62) — *Act VIII of 1859, s. 2—Res judicata—Reversioner suing in representative character*

Possession—continued.**—2.—Adverse Possession—continued.**

and in his own right.—A Hindu widow who had transferred to her granddaughter by agreement certain land of which she was a life-tenant, subsequently sued to have that agreement set aside. She died while the suit was in the appellate stage, and the next reversioner, one D, was allowed to carry on the appeal on her behalf on his own application to the Court to be made *kaem-mukam* of the widow. The agreement was upheld in its integrity and the possession of the grantee was maintained. D, as next reversioner, afterwards sued to recover possession of that very land. *Held* that D was not bound to disclose his whole claim when he represented the widow, as the causes of action in the two cases were very different; that s. 2 of Act VIII of 1859 was no bar to the subsequent suit as the reversioner was not in a position to introduce any pleas arising out of a new state of facts not existing or before the Court, when the former suit was instituted and decided in the first Court. *DEORANEL KOOWAR v. MUSSAMUT INDURJEET KOOWAR*, 12 W.R. 234. (10 W.R. 426=2 B.L.R. A.C. 102, D.)

(63)—*Civ. Pro. Code, s. 2—Decree for possession of land but not executed—Second suit for possession—Fresh cause of action—Adverse possession.*—Plaintiffs had previously sued for the land, the subject-matter of the present suit then in possession of the defendants and got a decree on the ground that the land was theirs and the possession of the defendants permissive. It appeared that the decree was never executed. One act of positive possession since the decree was set forth by the plaintiffs to the effect that they had removed the wood of one of the trees that fell down. But they failed to establish this allegation and it was held that to let a second suit be brought on identically the same grounds is contrary to s. 2 of the Code, in the absence of a distinct and fresh cause of action. *BUTA v. JOWAHIRA*, 56 P.R. 1875. [R., 93 P.R. 1879.]

(64)—*Possession adverse to plaintiff for over 12 years—Interruption by dispossession of defendant under decree of Civil Court in favour of third person effect of, on time for adverse, possession running in favour of defendant.*—Plaintiffs were out of possession of the land since 1881 and the defendant had been in possession of it adversely to plaintiff, from 1881 up to the time of the present suit in October 1895 with the exception of a period of three years (from April 1892 to April 1895) during which he was ousted from possession in execution of a decree obtained against him by a third person. On the decree, however, being reversed by the High Court defendant was restored to possession in April 1895. *Held* that the plaintiffs' suit was barred by the adverse possession of the defendant. The wrongful possession that had been given by the Court to a third person did not (after such possession had been restored to the defendant) during its continuance, prevent the statute of

Possession—continued.**—2.—Adverse Possession—continued.**

limitation from running against the plaintiffs and in favour of the defendant. The erroneous decree against the defendant and his ouster from possession thereunder could not prejudice the defendant or put him in a worse position than he would have occupied, had the erroneous decree not been passed at all. *DAGDU v. KALU*, 22 B. 733. [R., 28 M. 338.]

(65)—*Possession of mother as guardian of her minor son after death of last male owner, nature of.*—Where the properties of the last male owner vested, on his death, in his son, who was a minor at the time under the custody and guardianship of his mother, her possession of the properties must be taken to have been on behalf of the minor, and not adverse to him. Possession is never to be considered adverse, if it can be referred to any lawful authority. *SREERAMULU NAIDU v. ANDALAMMAL*, 17 M.L.J. 14=30 M. 145.

(66)—*Actual or constructive—When time runs—Joint holding—Absence of one co-sharer—Long silence and inaction—Abandonment—Adverse possession—Arts. 142, 144, Limitation Act (1877).*—Possession may be either actual or constructive. While either kind of possession exists in the proprietor, time does not begin to run against him. Where one co-sharer holds the share of another co-sharer, who had simply ceased to hold actual possession, the holder's possession implies constructive possession by the proprietor. Where the absentee has "abandoned" possession, the co-sharer's possession of the renouncing person's share will not be possession on behalf of the latter. Long silence and inaction may be evidence of abandonment. Where A sued to recover certain shares in a joint holding from B, who was absent and whose ancestors also had been absent from the village for a very long period, and it was alleged that B returned to the village lately and took possession of the shares, the right to which had become extinct and lapsed in favour of A through long dispossession, *held*, the long silence and inaction of B and his ancestors, may be evidence of abandonment, and the possession of B and his ancestors ceased when they left the village and ceased to take share of the profits, and that, the rights of B having become extinct at the end of the twelve years, A had a right to sue for possession. *SHAHZADA SURAYA JAH v. AZIM*, 29 P.R. 1910=17 P.W. R. 1910=5 Ind. Cas. 888=61 P.L.R. 1910.

(67)—*Title by long possession—Possession for 12 years—Unexecuted decree—Limitation.*—A obtained a decree for possession against B, and notwithstanding that decree, B remained in wholly undisturbed possession for 12 years, without acknowledgment of A's title; B was considered as having acquired a good title by his 12 years' possession, A's decree obtained intermediately having become null and void under s. 20. Act XIV of 1859. The principle adopted in this country appears to be that the

Possession—continued.**—2.—Adverse Possession—continued.**

period of possession which is sufficient to bar the remedy is also sufficient to transfer the right. *AMIRUNNISSA BEGUM v. UMAR KHAN*, 8 B. L.R. 540 = 17 W.R. 119. [F., 3 C. 224; R., 1 B. 592, 25 A. 35 = A.W.N. 1902, 175.]

(68)—*One of several reversioners taking possession of whole property—Suit by other reversioners for their shares after twelve years—Limitation.*—In 1871 there was a litigation between two brothers and widows of two brothers predeceased, with the result that the widows were given their husbands' shares to be held for life for their maintenance, and that these shares were to pass to the two surviving brothers upon the death of the widows in equal shares. Upon the death of the widows one of the two brothers got into exclusive possession of the shares allotted to the widows: *Held*, that this title became adverse to the other brother from the death of the widows, and the suit by the other brother beyond twelve years of the widow's death was barred by time. *GANPAT SINGH v. MUS-SAI SINGH*, 6 Ind. Cas. 695.

(69)—*Suit for possession—Limitation—Adverse possession—Limitation Act, art. 144.*—Where, in a suit for possession, the question of limitation is raised, the point to be considered is, not whether the plaintiff has been in possession for twelve years before the institution of the suit, but whether the defendant had been in adverse possession against the plaintiff. It must be shown by the defendant that he has had possession of the property adversely to the plaintiff for twelve years. *MOTAR v. DIPPA*, A.W.N. 1882, 40.

(70)—*Suit to recover property inherited from father—Adverse possession—Life estate—Limitation.*—In a suit brought by A against S to recover certain property which she inherited from her father and which had been taken possession of by S during the lifetime of A's mother, where it was not shown that A's mother was in possession at any time within twelve years before the suit, and the death of A's mother had taken place within twelve years before suit, *held* that, until the death of her mother, A's alleged cause of action did not arise, and that her right not being derived from or through her mother, the period of limitation could not be considered as having been running against her from the commencement of the adverse possession in her mother's lifetime, and that the suit was therefore not barred. *C. ATCHAMMA v. SUBBARAYUDU*, 5 M.H.C. 428. [R., 13 M. 512.]

(71)—*Reg. V of 1827, s. 1—Limitation Acts XIV of 1859 and IX of 1871—Adverse possession—Remedy—Title.*—S. 1 of Reg. V of 1827 required 30 years' adverse possession of another, to extinguish the proprietor's title. Limitation Act XIV of 1859, not affecting the Regulation, barred the remedy of the proprietor without extinguishing his title, in case of adverse possession of another for 12 years. So, if the latter

Possession—continued.**—2.—Adverse Possession—continued.**

happened to lose his possession and the proprietor to regain it, unless he sued within 6 months under s. 15 of the Act, he must fail in any suit to eject the proprietor (10 B.H.C. 290, R.)—Limitation Act IX of 1871 expressly repealing the Regulation (s. 2), not only barred the remedy of the proprietor, but also extinguished his title (s. 29) on adverse possession by another for 12 years. *RAMBHAT AGNIHOTRI v. THE COLLECTOR OF POONA*, 1 B. 592. (1 M. H.C. 85, 89, R.) [R., 14 B. 222, 15 B. 299, 21 A. 204.]

(72)—*Limitation Act before 1871, on adverse possession binding the female heir.*—Under the law of limitation, as it stood before Act IX of 1871, came into operation, an adverse possession, which bound the female heir, bound also the reversioner; and the latter got no fresh cause of action in regard to the estate of the ancestor at the time of the death of the female heir. *MOHIMA CHUNDER ROY CHOWDHURI v. GOURI NATH DEY CHOWDHURI*, 2 C.W.N. 162.

(73)—*Possession taken with permission of minor, under agreement excluding minor's adverse possession—Future rights—Limitation.*—The plaintiff, proprietor of half the well and lands was 15 years of age in 1857 when he was sued by the fathers of the present defendants, the proprietors of the other half of the well, for revenue due on the plaintiff's moiety of the well. The parties entered into a *raznamah* to the effect that the fathers of the defendants abandoned their claim on the plaintiff for the money in consideration of his having given them his share in the well and land. The above agreement was ratified by the Deputy Commissioner on 26th August, 1857. *Held* that as it was of the essence of the agreement that defendants should henceforth be the sole owners of the half of the well that had theretofore belonged to the plaintiff, the possession of the defendants became adverse to the plaintiff on the date of the agreement. This being so the plaintiff had 12 years under cl. 12, s. 1, Act XIV of 1859, within which to bring his suit for the property. As the 12 years had expired before the suit was instituted, it was held that it was barred. *PATHAN v. SHEIKH AHMED*, 34 P.R. 1872.

(74)—*Limitation—Adverse possession ripening into ownership—Nature of—Constructive possession—Wrong doer—Dispossession—Adverse possession of part not adverse possession of the whole—Evidence Act, s. 114.*—(a) The adverse possession, which under the Limitation Act ripens into ownership, must be actual, exclusive, and continuous for more than 12 years. (b) A trespasser is not entitled to have constructive possession presumed in his favour. (c) A trespasser by virtue of an adverse possession of a part cannot be deemed to be in adverse possession of the whole. (d) A plaintiff, who bases his title on adverse possession for more

Possession—continued.**—2.—Adverse Possession—continued.**

than 12 years, must prove an actual, continuous, exclusive and adverse possession for more than 12 years. The law relating to presumptions is not intended to enable a wrong-doer to turn it to his own account, hence a wrong-doer cannot be allowed to call in aid the provisions of s. 114, Evidence Act. *ZAHURAN v. RAHIM*, 8 A.L.J. 247.

(75)—*Possession under erroneous order—Limitation.*—Possession under an erroneous order of a Magistrate does not constitute such *bona fide* possession as will prevent the law of limitation from running. *MOOKTAKASHI v. LUCKEE*, 2 Ind. Jur. O S. 4.

(76) *Immoveable property—Adverse possession—Rights, transfer of—Limitation—Lease—Compromise by lessee—Lessor no party—Validity of compromise—Cause of action—Ijaradar—Dispossession—Zemindar, how affected.*—A new period of limitation cannot begin to run by the mere circumstance of a transfer of rights or supposed rights, after adverse possession of immoveable property for a period of more than 12 years. [*Not F*, 29 A. 593=4 A.L.J. 726=A.W.N. 1907, 185; *F*, 9 C.L.R. 347.] A lessor is not bound, by a compromise by which the lessee relinquished the land and to which the lessor was no party. Such a compromise does not create any cause of action on the part of the lessor or any person holding under him. The zemindar or owner is bound by the dispossession suffered by his *ijaradar*. *BRINDABUN CHUNDER SIRCAR CHOWDHRY v. BHOPAL CHUNDER BISWAS*, 17 W.R. 377.

(77)—*Reg. XI of 1825—Temporary lease—Dispossession—Limitation—Permanent Settlement—Alluvion.*—Limitation would not count against a party during the term that he was out of possession under temporary leases. Where a lessee receives a *malikana* allowance from the Revenue authorities during the period he held these lands on lease, such receipt would have the effect of not barring the right to a Permanent Settlement of any party, who is entitled thereto under the law relating to alluvial lands. Regulation XI of 1825 only recognises one mode of determining the claims of parties to the accreted lands. That mode is to regard the land as the right of that party to whose estate the land is an accretion. *CALLY CHUNDER CHOWDHRY v. MONIKURNIKA CHOWDHRAIN*, W.R. 1834, 149. [*F*, 18 W.R. 198, *Cons*, 22 W.R. 520.]

(78)—*Limitation Act XV of 1877, sch. II, art. 144—Adverse possession, circumstances and acts necessary to constitute.*—Where the defendant who was the brother of the plaintiff happened to be using as a backyard a few square yards of vacant house site land, to which plaintiff had title, it was held there was nothing under the circumstances, sufficient to constitute adverse possession by the defendant as against the plaintiff, especially because the parties were brothers and the land in question

Possession—continued.**—2.—Adverse Possession—continued.**

was situate between their houses. *CHOCKA LINGA NAICKEN v. MUTHUSAMI NAICKEN*, 21 M. 53.

(79)—*Sales in execution of decree pendente lite—Decree against judgment-debtor void against purchaser—Purchasers at sheriff's sales—Execution creditor—Suppression of mortgage—Limitation.*—Where, pending a suit, the property of a defendant is seized and sold in execution of a decree against him, the purchaser has a right to be heard for the protection of his own interest, and will not be bound by the decree against the judgment-debtor. In fact, the Court will treat it as inoperative and void against him. Purchasers at sheriff's sales cannot be bound to take notice of a suit against the execution-debtor in a Court which had no jurisdiction over them, or over or in respect of the lands purchased by them which were the subject-matter of the suit, except by consent of the execution-debtor. The consent of the execution-debtor, on which the jurisdiction of the Supreme Court was founded, cannot enlarge the jurisdiction and powers of the Court, or the operation of its decree as regards third parties. An execution creditor who, in the execution department, by petition suppresses all mention of his own mortgage, and probably thereby induces the defendants to become purchasers, and who, as attorney or representative of the execution debtor gets the benefit of the defendants' purchase-money, has no pretence whatever for claiming any allowance for the time occupied by him in the prosecution of the suit for foreclosure of the mortgages the existence of which he had concealed from the defendants. *SREEMUTY ANUND MOYEE DOSSEE v. DHURUNDRO CHUNDER MOOKERJEE*, 1 W.R. 103. [*Affirmed*, 8 B.L.R. 122, P.C.=14 M. I. A. 101=16 W.R. P.C. 19.]

(80)—*Possession for a brief period under decree—Limitation.*—The plaintiff had been out of possession for a long time, but obtained a brief possession for a few weeks under a decree, which was subsequently set aside or modified so as to give it, no effect against persons, who were, in fact, the persons in possession at the time; held, that such brief possession of the plaintiff would not entitle him to reckon limitation from that time. *DEGUMBERY DOSSEE v. RAJAH ANNUNDNATH ROY*, W.R. 1864, 43. [*R*, 28 M. 338.]

(81)—*Permissive possession, conversion of—Cause of action—Limitation Act XIV of 1859.*—Possession of land by a party which was permissive in its origin, when it is converted into an adverse one by his setting up an absolute title to it and suing the tenant for rent, becomes wrongful and gives a cause of action to the owner of the land. And the Limitation Act (XIV of 1859) never begins to run until there has been a cause of action. *KHURUCKDHARE SINGH v. REWAT LALL SINGH*, 12 W.R. 167. (8 W.R. 385, *D*.) [*F*, 6 C. 311=1 C.L.R. 188].

Possession—continued.**—2.—Adverse Possession—continued.**

(82)—*Limitation Act XV of 1877, arts. 142, 144 — Dispossession — Adverse possession — Animus revertendi.*—Plaintiffs, descendants of certain co-sharers in a joint *khata*, who have been absent for 80 years in 1865 and 107 years in 1891-92, sued in 1906 to recover their shares. Defendants pleaded adverse possession. In 1877, the predecessors in title of the plaintiffs sued the defendants for a declaration that they were co-sharers of the land in dispute, the cause of action alleged being that they, the defendants, hoodwinked the *Patwari* by telling him that defendants were the owners of the land, that plaintiffs had no share and that their names should be kept out of the *girdawaris*. Defendants were in exclusive possession since then. *Held*, that the conduct of the defendants, which led to the suit of 1877, amounted to an overt act of dispossession and denial of title, and so set limitation running, and that the defendants' possession had become adverse, though ordinarily the possession of one sharer is the possession of his co-sharers. (23 P.R. 1890, P.C., 109 P.R. 1892, 30 P.R. 1901, 118 P.R. 1893, 189 P.R. 1889, R.). Where plaintiffs, who were absent for over a century, and who did not take any share in the management of the land or participate in the profits, though they lived very near, their reviving antiquated claims in 1877 is not even *prima facie* proof that all the 100 years, they or their fathers cherished any *animus revertendi*. **NAND SINGH v. NATHA SINGH AND JHANDA SINGH, 86 P.R. 1909 = 134 P.W. R. 1909 = 3 Ind. Cas 611.**

(83)—*Limitation—Possession adverse to real owner—Effect of such possession for more than twelve years as against true owner.*—Plaintiff had been transported for life. In the year after his conviction, his wife executed an usufructuary mortgage in favour of her brother. A few years later, a similar mortgage was executed by her in favour of a third person, the consideration being the promise on the latter's part to pay off the former mortgage and an additional advance then made. Within twelve years of institution of the present suit, the said third person assigned his mortgage to the defendant. Plaintiff's suit was for possession of the property on payment of the additional advance stated above. Plaintiff contended that the usufructuary mortgage made by his wife was made without authority and was not binding on him. *Held*, that, as before the institution of the suit, more than twelve years' possession had been enjoyed under the first instrument executed by the wife, the plaintiff's right to impeach it was lost and the suit was barred by limitation. **MAMMUNHI v. GRI SHAM BHATTA, 7 M.L.J. 11.**

(84)—*Limitation — Service inam — Adverse possession by one branch of grantee's family to the exclusion of another branch—Possession for more than twelve years—Bar of limitation.—Suit for partition*—The suit lands and certain other lands were originally granted as mirasi

Possession—continued.**—2.—Adverse Possession—continued.**

inam attached to the office of kurnam of a village. At the commencement of the last century, the duties of the office of kurnam were discharged by two persons, the descendants of the original grantee. The inam lands were also divided and held in shares by the said persons. After their death, the lands were held and the duties performed by their representatives. The working kurnam of one branch having died, no steps were taken by the Zemindar to appoint a successor to him, but the lands in his possession continued to be enjoyed by his legal representatives as private property without doing any service whatever. After the lapse of several years, the plaintiff, the descendant of the other branch, sued for partition and possession of lands enjoyed by the defendant as his private property. *Held* that, as the Zemindar made no attempt to re-attach the lands to the office of kurnam, the possession of the lands became adverse both to the Zemindar and to the co-kurnam on the death of the last working kurnam of that branch, and the suit, having been brought more than twelve years after the death of the last working kurnam, was barred by limitation. **VENKATARAZU v. NARAYANAMURTHY, 7 M.L.J. 54.**

(85)—*Alienation by qualified owner—Adverse possession — Limitation*—Each of several widows or daughters represents the inheritance, so that the alienation by one renders the possession of the alienee after her death adverse to the others, and if they neglect to sue for twelve years and become barred, the reversioner is also barred. The principle appears to be that the possession is that of a trespasser against all persons representing the inheritance other than the alienor, when the possession is that of a trespasser against a Hindu widow who represents the inheritance; such possession is adverse not only against her but also against the reversion. **RAGAVA v. SAMBASIVA, 1 M.L.J. 392.**

(86)—*Limitation Act, sch. II, art. 144—Limitation—Lease—Possession derived from a lessee not necessarily adverse as against the lessor.*—*Held* that possession acquired during the continuance of a lease will not ordinarily be adverse possession as against the lessor, until at any rate, such time as the lessor becomes entitled to possession. **THAMMAN PANDE v. THE MAHARAJA OF VIZIANAGRAM, A.W.N. 1907, 185 = 4 A.L.J. 726 = 29 A. 593. (27 A. 395, 13 C. 101, 10 W.R. 15, 9 C. 367, 10 C. 577, 23 C. 863, F.; 4 C. 327, R.; 14 W.R. 395, 17 W.R. 377, 9 C.L.R. 347, 26 C. 460, Not F.)**

(87)—*Adverse possession—Suit for possession on basis of purchase in Court auction—Symbolical possession—Limitation.*—Plaintiff purchased the *jenn* right of first defendant in the suit property in a Court auction. In execution thereof he was resisted by third defendant's predecessor-in-title and the Court *held* that he was not entitled to actual possession. He brought the present suit more than twelve

Possession—continued.**—2.—Adverse Possession—continued.**

years thereafter. *Held*, that the suit was barred. *In re RAMA MOOTHAN*, 9 Ind. Cas. 271 = 9 M.L.T. 359.

(88)—*Adverse possession—Limitation Act XIV of 1859; Act IX of 1871; Act XV of 1877.*—When a widow who has inherited certain property from her husband is dispossessed of the property on the ground that the property was transferred to the husband conditionally and that there should be a retransfer to the grantor, the resumption by the grantor would be an act done in enforcement of an adverse title against the widow and the reversioner under Act XIV of 1859. If the reversioner's title were barred by Act XIV of 1859, it could not be revived either by Act IX of 1871 or Act XV of 1877 under which the death of the female on whose death the reversioner becomes an estate vested in possession is the date from which time begins to run against the right of the reversioner to sue. *RAJAH OF BOBBILI v. BHANAYAMMI*, 4 M.L.J. 192.

(89)—*Jungle waste lands, not incapable of possession—Plea of limitation by adverse possession—Plaintiff's cause of action, commencement of.*—On remand by the High Court for trying the point of limitation, the Sudder Ameen found that the land in dispute had been lying waste for 40 or 50 years and had not been in the possession of the plaintiff, and his suit was therefore barred. The High Court was of opinion that the above conclusion was not warranted upon the finding, because though the land may be a jungle it may still have been in the possession of some one. As a fact, however, the jungle in this case was not in the possession of either the plaintiff or the defendant as ascertained and reported by the local Amin. Plaintiff was thus not barred by any adverse possession; and inasmuch as, until there was adverse possession, there was no cause of action, the suit would not be barred unless it was instituted beyond twelve years from the date when adverse possession was taken, and, since it was clear that no acts of ownership were exercised by either party in respect to the land, the subject of this litigation, until a very recent period preceding the institution of this suit, there was no ground for holding that the plaintiff's remedy was lost by his failure to sue within twelve years from the date of his cause of action. *ESHAN CHUNDER RAI v. KALI COOMAR RAI*, 2 W.R. 135.

(90)—*Lease by joint co-sharers—Suit between lessees—Adverse possession—Limitation.*—Where, in a suit between the lessees of two out of four joint co-sharers, the plaintiff and the defendant both assert the exclusive holdings of their respective lessors, *held* that the defendants' possession and enjoyment of the lands in dispute for 12 years prior to suit, if proved, would bar the claim of the plaintiff to hold under one of the joint co-sharers. *JUNGLEE SHIKDAR v. BAMASOONDREE*, 1 W.R. 202.

Possession—continued.**—2.—Adverse Possession—continued.**

(91)—*Beng. Reg. III of 1793, s. 15—Beng. Reg. II of 1805—Question of title—Fraud—Limitation.*—The Bengal Regulations of Limitation (Reg. III of 1793, s. 15 and Reg. II of 1805) *held* conclusive, in a question of title, where adverse possession had been held for more than twelve years and the fraud alleged, as taking the case out of the Regulations, was not proved. *RAJAH DUNDIAL SINGH v. RAJAH ANUND KISHWAR SINGH*, 1 M.I.A. 482 = 1 Sar. 142.

(92)—*Adverse possession—Easement—Limitation Act, 1877, s. 26.—User as a right of way up the ladder, one end of which rests on the property of another and along the platform which overhangs it.*—*Held*, that a user for less than twenty, but for more than twelve, years, as a right of way up a certain ladder, one end of which rests on the land of the defendant and along the platform which overhangs it, was not sufficient to establish a right of easement or title by adverse possession. *SHARAF HUSAIN v. ROM KISHEN DAS*, 68 P.R. 1899 = 5 P.L.R. 1900, Notes of Judgments. (3 B. 174, F.)

(93)—*Limitation Act, art. 144—Suit for possession of immoveable property—Adverse possession—Burden of proof.*—In a suit for possession of his share of certain immoveable property left by the plaintiff's paternal grandfather, the plaintiff being incompetent to inherit under his personal law, as his father predeceased his grandfather, based his claim on a testamentary document, under which his title, together with that of the defendants, came into being more than a quarter of a century before suit, but did not prove any possession, either actual or constructive. *Held*, that the burden of proving that his claim was not time barred being on him, and he having failed to prove joint possession, the suit was barred under art. 144, Limitation Act. *DIN MUHAMMAD v. MEER BAKHSI*, 30 P.R. 1902. (116 P.R. 1900, 97 P.R. 1890, R.)

(94)—*Limitation—Adverse possession—Possession granted for during prohibit service—Cessation of prohibit service—Whether renders possession adverse.*—Where the defendant was let into possession of the suit land on condition of his doing prohibit service, and the defendant pleaded that he ceased to perform prohibit service, from a period to twelve years before the institution of the suit. *Held*, that the mere cessation of service was not sufficient to make defendant's possession adverse. *N. S. NARAYANASAMI AIYER v. VATHIAR RAMA AIYER*, 7 Ind. Cas. 252 = 8 M.L.T. 280. (23 B. 604, R.)

(95)—*Limitation—Adverse possession—Necessity for finding whether defendant's possession was adverse or derivative—Failure to account for origin of possession—Legal presumption—Derivative possession.*—In a suit for possession of property, where defendant sets up the plea of adverse possession, it is not enough for the Court simply to find against defendant and for

Possession—continued.**—2.—Adverse Possession—continued.**

plaintiff. The Court should find how long the defendant was in possession, and, if for over the statutory period, whether the possession was only derivative. Without a definite conclusion on these points, no finding should be recorded on the question of limitation in plaintiff's favour. The mere failure of the defendant to prove the origin of his possession does not give rise to a legal presumption that his possession was only derivative. It is a question in each case on the facts, whether, having failed to prove the origin of his possession, the defendant may be deemed to have come into possession under the plaintiff or under persons who got into possession from the plaintiff. *ERANHIKKAL KUNHIMMACHA v. THOPPIL PUDIA VITIL*, 8 Ind. Cas. 596.

(96)—*Self-acquisition by member of tarwad—Adverse possession—Limitation.*—Though the self-acquired properties of members of a tarwad become merged in the tarwad property, on their death, when a member, who is in possession of such properties, sets up an independent title to them, his possession becomes hostile to the tarwad and limitation begins to run from that time. *KANARA PANIKER v. RYRAPPA PANIKER*, 3 M. 212. [*R.*, 32 M. 351, 19 M.L.J. 350.]

(97)—*Landlord and tenant—Non-payment of rent—Limitation.*—Where proof exists of the relation of landlord and tenant, the tenants in possession must show that this relation was put an end to at such a period anterior to the suit, as would entitle him to rely on his possession for 12 years as adverse to the landlord. [*R.*, 23 B. 602.] The mere non-payment of rent to landlords, for over 12 years, by the tenants does not destroy the rights of the landlords as such. *TIRUCHURNA PERUMAL NADEN v. SANGUVIEN*, 3 M. 118. [*R.*, 23 B. 602, U.B.R. 1892-1896, Vol. 11, 363, 15 C.P.L.R. 9]

(98)—*Landlord and tenant—Suit for possession—Limitation—Adverse possession.*—In a suit for possession of land brought against a tenant who is really a trespasser, the defendant merely by alleging tenancy in his written statement, does not preclude himself from setting up the defence of the law of limitation. *DINOMONEY DABEA v. DOORGAPERSAD MOZOOMDAR*, 12 B.L.R. 274 = 21 W.R. 70. [*F.*, 7 B. 96, 8 C.L.J. 557; *Rel. on*, 7 C.W.N. 294; *Expl.*, 9 M. 244; *R.*, 27 B. 515 = 5 Bom. L.R. 274; *D.*, 31 C. 397.]

(99)—*Landlord and tenant—Limitation—Adverse possession—Estoppel.*—In a suit for ejectment and mesne-profits on the allegation that the term of the temporary leases under which defendants had been in possession had expired, where defendants pleaded that they had held the land in mokarrari for generations and that an ancestor of the plaintiffs had confirmed their mokuriare rights by the grant of a pottah. *Held* that, if defendants could prove

Possession—continued.**—2.—Adverse Possession—continued.**

that they had held for more than 12 years previous to the institution of the suit under a mokurrari tenure to the knowledge of the plaintiffs, the suit would be barred by limitation. The judgment of a Moonsiff's Court (confirmed by the lower appellate Court) in a suit for arrears of rent, as to the validity of the same leases which plaintiff there set up, and of the same mokurrari pottah which defendants then brought into Court, was not conclusive evidence in the present case; for though an inferior Court has jurisdiction to try every matter which is necessary for the adjudication of the point in contest before it, its decision is not final as regards other facts not in contest before it. *TAKAETNI GOWRA KUMARI v. THE BENGAL COAL COMPANY*, 12 B.L.R. 282, Note = 13 W.R. 129. [*Affirmed*, 19 W.R. 252; *R.*, 14 C. 323; *D.*, 7 B. 96.]

(100)—*Landlord and tenant—Limitation—Adverse possession.*—Where a landlord seeks to obtain khas possession, the tenant is at liberty to plead limitation in bar, if he has been in occupation under a title like that of a by-howladar for a period of more than 12 years. *RUTTONMONEE DABEE v. KOMALAKANTH MOOKERJEE*, 12 B.L.R. 283, Note = 12 W.R. 364. [*D.*, 18 W.R. 443.]

(101)—*Suit by landlord against tenant—Limitation.*—The possession of a tenant cannot be adverse to the title of his landlord. So, limitation cannot be applied in a suit by the landlord against the tenant. *SHRISTEEDHUR MOZOOMDAR CHOWDHREE v. KALIKANT*, 1 W.R. 171. [*R.*, 7 W.R. 395.]

(102)—*Claims hostile to each other—Landlord and tenant—Receipt of rent—Creation of relationship—Dispossession.*—Possession of property by one party cannot be adverse to another within the meaning of the Limitation Act, unless the claims of the parties are hostile and adverse to each other. (12 C. 484, *F.*) Acceptance of rent by the landlord creates the relationship of landlord and tenant between the parties, and until that relationship is legally determined, the landlord cannot dispossess the tenant. *CHAITAN SINGH v. SADHARI MONIM*, 5 C.L.J. 62. [*R.*, 36 C. 675 = 9 C.L.J. 523; *D.*, 8 C.L.J. 557.]

(103)—*Landlord and tenant—Possession with tenant holding on without paying rent, not adverse possession.*—In this suit brought for possession of land claimed by the plaintiff, as owner, the District Judge, having found that the plaintiff occupied the property as tenant of the defendants until 1865, was wrong in holding that such possession subsequent to 1865 became adverse and that the defendants should have sued in ejectment before the end of 1877, which they did not do, and that therefore in 1878 plaintiff acquired ownership by possession. Mere non-payment of rent for over twelve years could not constitute adverse possession sufficient to give the plaintiff a title

Possession—continued.**— 2.—Adverse Possession—continued.**

as against the defendants, his landlords. *TATIA v. SADASHIV*, 7 B. 40. [R., 18 B. 256, U. B. R. 1892-1896, Vol. II, 363, 22 B. 893, 7 C.L.J. 202, 7 C.L.J. 615.]

(104)—*Rent suit—Failure of plaintiff—Subsequent suit for confirmation of possession—Possession of tenant—Possession of landlord.*—The failure of the landlord in a rent suit is no bar to the maintenance of a subsequent action for confirmation of possession. The possession of a tenant is, in the eye of law, the possession of his landlord. *GHRISH CHUNDER ROY v. BHUGWAN CHUNDER ROY*, 13 W.R. 191.

(105)—*Omission to obtain registration of title—Reg. XXVI of 1802—Rent Recovery Act VIII of 1865 (Madras)—Omission to collect rent—Adverse possession—Limitation.*—Neither the fact that an inamdar had not obtained registration of title under Reg. XXVI of 1802, under the registered landlord, and therefore could not enforce acceptance of patta, nor the fact that he did not collect rent for more than twelve years, could make the possession of the tenant adverse to the landlord. Registration gives the inamdar a complete title on which to enforce acceptance of patta. *SRINIVASARAGAVA AIYANGAR v. MUTTUSAMI PADEYACHI*, 20 M. 6.

(106)—*Adverse possession—Holding under intermediate tenant—Cause of action*—The possession of a person, A, holding land under plaintiff's tenant is not adverse to plaintiff. Whether there was or was not an intermediate tenant, or whether the rent was paid to the plaintiff himself, the presumption is, until the contrary is shown, that so long as A holds, he continues to hold, as he had before, under the plaintiff. If in setting up a title to any portion of the property, he obtains a decree against the plaintiffs alleged tenant, this gives the plaintiff a cause of action against. *BUNGS-RAJ BHOOKTA GHATWAL v. MOHUNT MEGH LALL POOREE GOSSAIN*, 20 W.R. 398.

(107)—*Suit to recover land under lease—Defendant pleading mahtran, tenure, competent to set up limitation by adverse possession*—In this suit to recover land under a lease, the defendant claimed the land as his mahtran tenure, on which he had planted an orchard and built a house. He likewise pleaded an adverse possession of more than 12 years. Reversing the decision of the first Court, the Principal Sudder Ameen held that the mere taking of possession of deserted land and planting a few trees there did not give any right to plead limitation, and that the plaintiff's title was good, whilst the defendant's was not established. The High Court reversed the above decision of the lower appellate Court on the ground that the defendant, as a hostile claimant alleging a proprietary right, and endeavouring to prove it, would, by a twelve years' occupation, become entitled to set up a plea of limitation. *OOPENDRONATH ROY v. KALEE CHURN ROY*, 8 W.R. 394.

Possession—continued.**— 2.—Adverse Possession—continued.**

(108)—*Right of occupancy—Land liable to assessment—Abandonment—Occupation by landlord—Lease.*—Where the occupants of certain jummai homestead land, declared liable to assessment, abandoned it owing to certain criminal proceedings, and the land becoming vacant, came into the khas possession of the landlord who leased it out to others who held possession paying rent for more than twelve years and were then ousted by the original occupants who claimed the land rent free, held in a suit by the lessees to recover the land, that they were entitled to recover. *MONEEROOD-DEEN MOJOOMDAR v. PARBUTTY CHURN GHOSE*, 15 W.R. 121.

(109)—*Lease for tenant's life—Possession by tenant's heirs after his death—Nature of possession—Suit by landlord to recover possession—Limitation.*—The suit land was leased to X in 1840 for his life. After his death in 1871, his heirs continued to be in possession of the land, but they did not pay any rent to the landlord, or obtain a fresh lease of the land from him. In a suit brought in 1888 by the landlord to eject the defendants, the latter pleaded limitation. Held that the possession of the defendants after the death of the life tenant, the original lessee, was not that of trespassers, though they did not occupy the land as tenants. Their possession was only permissive and not adverse until they expressly set up a title of ownership in the property. This they had not done in this case and so the claim was not barred. *KRISHNAJI RAMACHANDRA v. ANTAJI PANDURANG*, 18 B. 256 [Overruled, 22 B. 893; F., 24 B. 504; R., 20 B. 759, U.B. R. 1892-1896, Vol. II, 363; D., 31 M. 163=18 M.L.J. 26=3 M.L.T. 256.]

(110 & 111)—*Miras lease—Suit for possession against Mirasdar—Limitation.*—Where the defendant (mirasdar) pleads limitation to a suit for possession against him, held that, in computing the time, the period of possession by the lessor should not be added to the time during which the defendant had been holding under his miras lease, the latter period not being in continuation of the former. The holding of the proprietor is quite a different thing from the holding of the lessee. *DHUN MONEE CHOWDHRAIN v. GOLAM KASOM*, 23 W.R. 331.

(112)—*Encroachment—Rent-free landholder.*—A rent-free holder encroaching on adjoining land, and enjoying it rent free and adversely to zamindari right for more than twelve years; Held that he cannot be dispossessed of it, nor assessed with rent for it. *BHAGOUTEE CHARUN v. BABOO SHIVA PERSHAD*, 1 Agra Rev. 38.

(113)—*Order of Magistrate set aside by Civil Court—Possession under, order of no avail against plea of limitation.*—The order of the Magistrate that retained the plaintiff in the present suit in possession, was, with all its

Possession—continued.**—2.—Adverse Possession—continued.**

effects, extinguished by the decision of a subsequent civil suit instituted to set aside that order. That suit was to recover through the Civil Court possession on proof of title and that Court found that, not only had the party who had been victorious before the Magistrate no title, but that the title, as well as the possession of the other side had been clearly proved, both at and before the time of the Magistrate's order, which therefore was no proof in the present case of the plaintiff's possession in 1864. The High Court reversed the judgment of the Principal Sudder Ameen who held that the plaintiff had recovered possession by the Criminal Court and that therefore limitation did not apply and the Principal Sudder Ameen was directed to find whether there was any other evidence on the record whereby the plaintiff could escape from the plea of limitation. **FIRINGEE SAHOO v. SHAM MANJHEE, 8 W.R. 373. [R., 28 M. 338.]**

(114)—*Possession of tenant—Adverse possession—Payment of rent by tenant to stranger—Limitation.*—In December 1853, certain lands were let by the plaintiff to B under a *kabuliat*, by the terms of which the lease expired in December 1863. In March 1875, less than twelve years from the expiration of such lease, the plaintiff brought a suit for possession against B and the talookdars of the estate of which the lands in dispute formed part. The latter alleged that the *lakheraj* title, of the plaintiff was invalid; that although no proceedings, as required by the rent law, had been taken to invalidate the plaintiff's title, they the talookdars, had resumed possession of the land by receiving the rents from B from 1859, and that the suit was barred by reason of their possession since that date. *Held* that the suit was not barred, inasmuch as nothing had occurred to determine the tenancy which existed between the plaintiff and B, and that the possession of the latter was in law the plaintiff's possession. **PARBUTTI DASSEE v. RAM CHAND BHUTTACHARJEE, 3 C.L.R. 576.**

(115)—*By a tenant of his limited interest.*—A partial interest in land may be lost as well as the whole interest. Though adverse possession for twelve years of a limited interest may be a good plea to a suit for ejectment, it is good only to the extent of that interest. The nature and effect of possession must depend upon the nature and extent of the rights asserted by the oral conduct or express declaration of the person relying on it. There can, therefore, be no acquisition by adverse possession of an absolute title when it is found that nothing but a limited interest has been asserted. **YAMUNABAI v. DHONDI, 5 Bom. L.R. 186. [R., 2 C.L.J. 125.]**

(116)—*Landlord and tenant—Adverse decision under Act IV of 1840 against tenant—Zemindar how far bound.*—*Semle*:—Where a Zemindar lets his estate in farm for a term of years, and

Possession—continued.**—2.—Adverse Possession—continued.**

so delegates the whole of his rights, privileges and immunities to another person, who thereupon becomes to that extent his representative, an adverse decision under Act IV of 1840, whether under s. 2 or s. 4 of the Act, to which the former had been a party, would be binding on the Zemindar. **LEKHRAJ ROY v. THE COURT OF WARDS, 14 W.R. 395. [F., 9 C.L.R. 347; R., 4 A.L.J. 726 = A.W.N. 1907, 185 = 29 A. 593.]**

(117)—*Possession by tenant—Character of tenure—Recital in decree.*—Possession by a tenant does not in itself lead to any inference as to the character of the tenure; the fact of his having occupied the land and paid rent for 12 years and even for 20 years being equally consistent with his being a tenant-at-will, a farmer or a *mokurruredar*. *Held*, also, that the defendants would not be bound by the recital in a decree in a suit not between the parties to the present suit. **SHIU DAYAL PURI v. THAKUR MAHABIR PRASAD, 2 B.L.R. App. 8 = 10 W.R. 477. [F., 3 B.L.R.A.C. 312 = 12 W.R. 217; R., 7 B.L.R. 211; D., 11 W.R. 465.]**

(118)—*Possession by tenant, when becomes adverse to landlord—Non-payment of rent, effect of.*—Mere non-payment of rent by tenants for more than twelve years cannot by itself create any adverse title as against the landlord. In the absence of any assertion of a distinct and different claim by the tenants, the presumption will be that they have continued in possession as such, and, even where a person claiming under a permanent lease has been asserting an adverse title, limitation would not run unless he has done so to the knowledge of the landlord. **GANGABAI v. KALAPA DARI MUKRYA, 9 B. 419. [F., 15 B. 704; R., 23 B. 602, 27 B. 43 = 4 Bom. L.R. 721, 5 Bom. L.R. 186, 27 B. 515, 8 O.C. 61; D., 18 B. 433, 22 B. 893.]**

(119)—*Possession of defendant alleged to be in tenant right—Burden of proof—Acknowledgment after limitation period*—When it is not shown that the defendant's possession began as of a tenant and it is not proved that the plaintiff received any rent from the defendant during twelve years prior to the filing of the suit, the plaintiff's suit for possession must be dismissed; for, the defendant's possession must be presumed to be that of an owner and adverse to the plaintiff. Acknowledgment of plaintiff's title by writing, when made after the expiry of the period of limitation, or not signed by the defendant, does not save limitation. **BEHARI v. SADHO MAL, 73 P.L.R. 1906**

(120)—*Landlord and tenant—House in abadi.*—The fact that the tenant built a house in the abadi of a village and occupied it for over twelve years, is not sufficient to establish a title against a zamindar by adverse possession. **JAIKISHAN SINGH v. MOTI CHAND, 3 A.L.J. 627 = A.W.N. 1906, 258. (1 A.L.J. 479, D.)**

(121)—*Decree establishing under-proprietary right of person, entitling him to sub-settlement*

Possession—continued.**—2.—Adverse Possession—continued.**

—*Adverse possession—Act XV of 1877 (Limitation).*—Where a decree of Court establishes the sub-proprietary right of a person, thereby entitling him either to a settlement or sub-settlement, it gives a start to adverse possession as against the whole world including any one claiming to be a taluqdar or superior proprietor of the same estate. The talukdar's suit, therefore, brought more than twelve years from the date of such decree, will be barred. **IMDAD HUSAIN v. AZIZ-UN-NIZZA, 6 M.L.J. 43 P.C. = 23 C. 483 = 23 I.A. 8 = 6 Sar. 669.**

(122)—*Adverse possession against tenant where adverse to landlord—Tenant holding over when dispossessed—Right of landlord to sue trespasser—Limitation.*—When there is a current lease, and the tenant is dispossessed by a third party, time does not commence to run against the landlord until the expiration of the lease. (9 C. 367, 13 C. 101, F.) But, when the lease has expired and the tenant is holding over with the landlord's consent, and the possession of such third party is adequate in continuity, in publicity and in extent so as to show that it is possession adverse to the landlord, the latter is not precluded from determining the tenancy and suing the trespasser in ejectment, and his right to sue will be barred after 12 years of such possession. **KISAH-WAR NATH SAHAI DEV v. KALI SANKAR SAHAI, 10 C.W.N. 343. (4 C.W.N. 597, R.) [F., 2 Ind. Cas. 168]**

(123)—*Landlord and tenant—Adverse possession.*—Where an ijaradar under one zemindar A has also some land under another zemindar B, his possession of A's land cannot afterwards be pleaded as adverse to A, unless it was brought to A's notice that there was a claim of adverse possession, and that the ijaradar was holding adversely to him under some one else. **NOWAB SYUD AZIM ALI KHAN BAHADUR v. SURUSSUTTY DEBIA, 23 W.R. 93.**

(124)—*Ijara to putneedar—Omission to collect rent—Adverse possession.*—A putneedar, as ijaradar under a lakherajdar, cannot, by omitting to collect rent, cause adverse possession to grow up on his part or his successors against the lakherajdar. **DOOP SINGH ROY v. BINO-DE BEHAREE SHAHA, 20 W.R. 315.**

(125)—*Suit for possession by purchaser at mortgage-sale—Adverse possession by patnidar.*—In a suit for khas possession of certain lands by the purchaser thereof in execution of a mortgage-decree, against the patnidar of such lands who subsequently purchased the same at an auction-sale by the sheriff, held that the latter's possession as patnidar only could not be considered as adverse to the former who claimed the superior interest. **KASUMUN-NISSA BIBEE v. NILRATNA BOSE, 8 C. 79 = 9 C.L.R. 173 = 10 C.L.R. 113.**

(126)—*Suit for possession—Mokurreredar—Limitation.*—A suit for confirmation of possession by a declaration of the right of the plaintiff to collect rents for the lands in dispute

Possession—continued.**—2.—Adverse Possession—continued.**

from the defendant, as mokurreredar, is barred, where the defendant has been in possession for 30 years and pleads a right also as owner. **SYUDOONNISSA BEGAM v. MUSSAMUT KUM-UROONISSA, 1 W.R. 80.**

(127)—*Possession—Admission of tenancy—Adverse possession.*—Where there is an admission of tenancy and no finding to the contrary, there can be no adverse possession, even though the plaintiff has not had khas possession for twelve years. **BABOO DOOLEE CHUND v. SHAM BEHAREE SINGH, 24 W.R. 113.**

(128)—*Isumnuvissee papers, evidentiary value of—Suit for assessment of land held in excess by ghatwal—Act X of 1859, ss. 15, 16—Protection from fresh assessment.*—This was a suit to recover possession of several beeghas of cultivated and uncultivated land and tanks. The right to eject was based on the ground that the defendant was in possession of the land of which the plaintiff was putneedar, and that the plaintiff had given the defendant notice to come in and deliver a pottah, and take a kubooleut within 15 days, but that the defendant had refused to do so. It was alleged in the plaint that the lands were held by the defendant without any right, under the pretence that they were a portion of the ghatwalee tenure. The defendant set up a title as ghatwal to the whole mouzah in which the land was situated, saying that, with the exception of a few beeghas which he claimed as ancestral rent-free land, it had been held as hereditary service land from the time of the Permanent Settlement. He also asserted that the plaintiff's suit was barred by limitation. In the evidence produced by the plaintiff, there were three isumnuvissee papers which were returns by police officers to a Magistrate, and there was no satisfactory proof as to the source of the information contained in these papers, and they were therefore rejected on the ground of not constituting proper and sufficient evidence. The contention of the defendant that he had been holding the lands at a uniform rate of rent from the time of the Permanent Settlement was upheld. The case of the defendant that the rent was always being paid in respect of the whole of the lands was supportable by obvious presumptions and the evidence to oppose it was of little or no value. The High Court, therefore, found in favour of the defendant that the whole of the lands had been held at a fixed rent for upwards of 60 years, and was of opinion that as he had thus held the lands at the same rent for more than 20 years, he must be presumed to have held them at that rent from the time of the Permanent Settlement; and, therefore, by the provisions of ss. 3 and 15 of Act X, the rent of the lands could not be enhanced whether the defendant be regarded as a "ryot" within the meaning of ss. 3 and 4, or "the person possessing a permanent transferable interest intermediate between the proprietor of the estate and the ryot" within the meaning of ss. 15 & 16

Possession—continued.**—2.—Adverse Possession—continued.**

of the Act. *MR. JAMES ERSKINE v. THE GOVERNMENT*, 8 W.R. 232. (5 W.R. P.C. 1, F.) [Affirmed on appeal, 16 W.R. 29, P.C.=8 R.L.R. 504; R., 34 C. 753=5 C.L.J. 583=12 C.W.N. 193.]

(129)—*Tenant holding adjoining lands without landlord's knowledge—No adverse possession.*—Where a tenant ploughs up the lands adjoining and around his holding and thus without his landlords's knowledge holds land in excess of that leased to him, he cannot be said to have adverse possession of those lands. *JUGARAJ SINGH v. RATAN*, 1 C.P.L.R. 37. [R., 16 C.P.L.R. 36.]

(130)—*Adverse possession—Tenant's possession of land not let to him without landlord's knowledge—No adverse possession—No acquisition of right in such land.*—When a tenant takes into his holding land which was not been let to him and holds it under color of his tenancy, his possession cannot be said to be adverse, nor would he acquire right of occupancy in land so held without the landlord's knowledge. *BHAU PATIL v. SADOO TELEE*, 1 C.P.L.R. 58.

(131)—*Enjoyment of fruits of trees with permission of owner—No adverse possession—Suit for possession—No plea of limitation.*—Where the fruits of trees are enjoyed with the consent of the Malguzar, there cannot be any adverse possession and consequently a plea of limitation cannot be permitted in a suit by the Malguzar to recover possession of the property. *DURGA PATEL v. ATMARAM POWAR*, 3 C.P.L.R. 160. [R., 4 N.L.R. 104, 7 C.P.L.R. 7.]

(132)—*Cultivation by tenant of one village of land of another village without landlord's knowledge—No adverse possession against landlord of other village.*—If a resident of one village cultivates land situate in another village without the landlord's knowledge, the land is not in the adverse possession of the landlord of the former village. *MADHO RAO NARAYEN v. MOHKAM-CHAND*, 4 C.P.L.R. 51.

(133)—*Land belonging to Patwari holding—When possession becomes adverse to Patwari*—Possession of land belonging to a village patwari holding becomes adverse to a Patwari only from the date of his appointment as Patwari. *SEETARAM BRAHMIN v. RAMBHAOO PATWARI*, 10 C.P.L.R. 78.

(134)—*Act XXIII of 1861, s. 23—Limitation—Adverse possession—Cultivated and uncultivated lands—Landlord and tenant—Ghatwals.*—Suit for reversal of survey award demarcating certain lands as ghatwali and as held under the Government. Held that, in such a suit, adverse possession and limitation can be pleaded by the Government and the ghatwal (*Trevor and Norman JJ., dissenting.*)—Adverse possession may be pleaded to bar a claim as regards uncultivated lands in the same manner and to the same extent as regards cultivated lands. *WATSON v.*

Possession—continued.**—2.—Adverse Possession—continued.**

GOVERNMENT, B.L.R. Sup. Vol. 182=3 W.R. 73. [F., 8 W.R. 343, 11 W.R. 267, 16 W.R. 102, 5 C.L.R. 481, 31 C. 397, 9 C.W.N. 111; D., 11 W.R. 283.]

(135)—*Real owner minor—Completion of title by adverseness—True owner recovering possession by inducing trespasser's tenant to attorn to him—Landlord and tenant—Estoppel—Hindu Law—Inheritance—Sudras—Illegitimate son—Marriage—Custom.*—Title by adverse possession cannot be completed against a minor before the end of three years after the minor comes of age. A true owner of property is not estopped from recovering possession of his property by inducing the trespasser's tenant in possession to attorn to him, nor is such tenant, who had not been let into possession by the trespasser or his predecessor-in-interest, estopped from denying the trespasser's title. The illegitimate son of a Sudra by "an unmarried Sudra woman" is entitled to a share of the family property, if the concubinage was continuous and if the connection was not incestuous or adulterous or in violation of or forbidden by law. But the offspring of a connection forbidden by the customary law of the parties has no right of inheritance to the property of his father. *ANNAYAN v. CHINNAN alias MUNI VENKATA CHETTY*, 5 Ind. Cas. 84=7 M.L.T. 140=20 M.L.J. 355=33 M. 366.

(136)—*Adverse possession against a vatan-dar.*—The adverse possession commenced in the lifetime of one vatandar avails as against the subsequent vatandar and will not be stopped by his minority at the death of such preceding vatandar. *RAMA v. SHAMRAO*, 7 Bom. L.R. 135.

(137)—*Of service lands.*—Where lands are held on service, the fact that no service was performed will not of itself make the holding adverse. *KOMARGOWDA v. BHIMAJI*, 1 Bom. L.R. 61=223 B. 602. [R., 11 C.W.N. 655.]

(138)—*Trust to pay debts of testator—Executor—Adverse possession—Limitation.*—An executor holding an estate in trust to pay the profits in certain defined shares to the heirs of the testator, cannot plead adverse possession against them. *RANEE KHAJOORUNNISSA v. MUSSAMAT ROHEEMONNISSA*, 17 W.R. 190.

(139)—*Adverse possession—Abandonment of land for 40 years without arranging for payment of revenue—Trust—Entry in the record of rights that land should be given back—Effect.*—Where the plaintiffs left their land (without making any arrangement as to payment of the revenue) and the defendants were in possession for 40 years, and the plaintiffs failed to show that they had anything to do either with the land or its profits during the 40 years the defendants were in possession, held, the plaintiff's suit was barred by limitation. (109 P.R. 1892, 118 P.R. 1893, R.) An entry in the *wajib-ul-arz*, that the plaintiffs can take the land back when they return and want it, does not create

Possession—continued.—2.—**Adverse Possession**—continued.

a trust in their favour. **DHAN SINGH v. HAR NARAIN**, 85 P.R. 1909 = 135 P.W.R. 1909 = 3 Ind. Cas. 599. (2 A. 493, 4 A. 187, 141 P.R. 1883, 30 P.R. 1901, F.) [R., 29 P.R. 1910.]

(140)—Ss. 63, 64, Act II of 1882 (Trusts)—*Trust property title to of persons acquiring possession thereof and appropriating the same to their own use.*—No trustee can acquire trust property by possession adverse to the trust. **BHITTO KUNWAR v. KESHO PERSHAD MISSER**, 1 C.W.N. 265, P.C. = 19 A. 277 = 24 I. A. 10 = 7 Sar. 131.

(141)—*Possession of temple property by the shevaks as servants of the idol, whether could be adverse to rights of hereditary manager.*—Plaintiff, the hereditary manager of a temple, sued to eject, from a piece of the temple land, the defendants who were the *shevaks* or ministering priests for the idol of the temple. It was contended for the defendant that though they acquired possession or detention of the land in dispute as servants or representatives of the deity, yet, by reason of long occupation and user, they had acquired a *quasi* proprietary title as against the plaintiff; but it was held that, having come in as servants or representatives of the deity, they could not, by mere wish or volition, change the nature of their possession if possession it amounted to at all. They held such possession, however, for the deity on whose behalf plaintiff also was holding property as hereditary manager of the temple. In the ideal personage of the deity, the rights of both parties concurred, and possession by the one therefore could not really be adverse to the other so as to give rise to a title by prescription. **MULJI BHULABHAI v. MANOHAR GANESH**, 12 B. 322. [R., 27 B. 43.]

(142)—*Manager and trustee on behalf of temple idol—Shevaks or revotaries of temple—Right to management or to custody of temple land, as against manager.*—Question was raised in this case as to the competency of the defendant as trustee and manager of the temple to erect a booth or booths on the portion of the court-yard of the temple mentioned in the plaint. The use of this very portion of the court-yard was in litigation previously, wherein the Courts had concluded that the yard should be left to remain open and unincumbered by any shops, booths or other similar erections. Relying on the above, the lower Court had decided against the right of the defendant to put up such structures, and the High Court confirmed such decision. **GANPATRAV MANOHAR v. ANOPRAM BECHAR**, 12 B. 325, Note = P.J. 1879, 361.

(143)—*By an agent or manager—Overt act.*—In order to entitle a person who originally comes into possession of property in the character of manager or agent to succeed on a title by wrongful detention it is necessary that he must prove, First that he gave notice of his adverse holding to the owner or that he set up his adverse title to his knowledge, Secondly that he dealt with the property after that as his own.

Possession—continued.—2.—**Adverse Possession**—continued.

In other words, the repudiation of the former capacity as manager or agent must be followed by wrongful taking or unlawful detention which means some active assertion of an adverse right. Mere repudiation to the knowledge of the owner will not do unless it is accompanied by some overt act. **RAGHUNATHJI v. VIRJIVANDAS**, 7 Bom. L.R. 836.

(144)—*Invalid grant of property by wife during husband's absence—Grantee's title perfect by twelve years' possession—Property held on another's behalf—Denial of that other's title, effect of—Possession, wrongful and commencing in a 'just cause.'*—The holder of a *mourasi* grant, from a woman, of the property of her absent husband, mistakenly supposed to be dead, though the grant was in excess of the wife's limited powers, was not in the position of a lessee, and could acquire, as against the husband (the true owner of the property) a perfect title thereto by twelve years' possession. One who holds possession on behalf of another, does not, by a mere denial of that other's title, make his possession adverse, so as to give himself the benefit of the Statute of Limitation. The Indian law of limitation and prescription has not made the sound distinction between cases where the possession begins by wrong, and where it commences in a 'just cause,' although under a defective title. It is not the province of Courts to qualify the express and deliberate Enactments of the Legislature. Adverse possession includes possession by a person holding the land, on his own behalf, of some person other than the true owner, the true owner having a right to immediate possession. If, by this adverse possession, the Statute is set running for 12 years, then the title of the true owner is extinguished and the person in possession becomes the owner. **BEJOY CHUNDER BANERJEE v. KALLY PROSONNO MOOKERJEE**, 4 C. 327. [F., 1 A. L. J. 725 = A.W.N. (1905) 4 = 27 A. 395; Appl., 20 A. 482; R., 16 B. 722, 21 B. 793, 23 B. 137, 26 B. 617, 27 B. 43 = 4 Bom. L.R. 721. 4 Bom. L.R. 312, 5 Bom. L.R. 186, 11 C.W.N. 527 = 5 C.L.J. 208 = 34 C. 358, 29 A. 593 = A.W.N. 1907, 185 = 4 A.L.J. 726, 30 A. 119 = A.W.N. 1908, 25 = 5 A.L.J. 85 = 3 M.L.T. 125.]

(145)—*Adverse possession against mortgagee not necessarily adverse against mortgagor.*—Possession, which may be adverse to the mortgagee, is not necessarily adverse to the mortgagor, for the reason that possession adverse to the mortgagors can only arise after the mortgagor has become entitled to immediate possession. Nor can the substitution of the names, by the Revenue authorities, without any statutory authority, affect the title of the owner or constitute adverse possession against him. **MUHAMMAD HUSSAIN v. MULCHAND**, A.W.N. 1905, 4 = 27 A. 395. (18 B. 51, 4 C. 327, R.)

(146)—*Mortgage—Extinguishment of mortgagor's right by adverse possession of a stranger*

Possession—continued.**—2.—Adverse Possession—continued.**

—*Position of mortgagee — Whether title by adverse possession subject to mortgagee's claim to enforce sale.*—The acquisition of title to land by prescription is not affected by the existence of a mortgage at the commencement of the adverse possession. Though there may be cases in which a person claiming to have acquired a title by prescription would acquire it subject to an existing mortgage, yet, where the mortgagor is dispossessed and his title disputed and another person obtains possession of the estate, the possession of the new holder becomes adverse to both the mortgagor and the mortgagee, and the mortgagee's cause of action arises against new holder on the date on which the latter obtains such adverse possession of the mortgaged estate. *RAMASAWMI CHETTI v. PONNA PADAYACHI*, 9 Ind. Cas. 28=9 M.L.T. 264. (33 C. 1015, 10 C.W.N. 904, 8 Ind. Cas. 264, M.W.N. 1900, 633, 8 M.L.T. 377; Diss., 2 M. 226, W.R. 1864, 375, 7 M.I.A. 323, 4 W.R. 37, 2 N.W.P. 223, 5 A. 1, 9 I.A. 99, *Rel. on.*)

(147) — *Mortgage — Adverse possession while period of redemption running.*—An equity of redemption in common with other equitable estates in land is capable of being extinguished by the operation of the statute of limitation. It may, in the case of an usufructuary mortgage, be extinguished by adverse possession on the part of a stranger, while the mortgagee continues in possession and the period of redemption is still running, as, for instance, where the stranger received rent from the mortgagee in possession for more than 12 years as against the owner of the equity of redemption. *LALLA KHANHOO LAL v. MUSAMAT MANKI BIBI*, 6 C.W.N. 601. (12 B.H.C. 180, 2 M. 226, 18 B. 51, 14 B. 176, 7 M. 26, 20 M. 305, 21 M. 153, 16 B. 197, *R.*)

(148) — *Adverse possession — Mortgagor and mortgagee — Right to immediate possession — Time runs from date of — Sale or mortgage of entire interest — Prescriptive title — Time when begins to run.*—Plaintiff sued in 1905 to recover by sale of the mortgaged property the amount due under a simple mortgage executed in 1871 in his favour by the grand-father of Defendants 1 and 2. The property was purchased by a stranger in Court auction held in execution of a money-decree obtained against the mortgagor after the execution of the mortgage, and the purchaser entered into possession of the property in 1873, so that at the time when the present suit was brought, the mortgagor's right to the property became, by adverse possession, extinguished. It was contended that the plaintiff's rights also became extinguished. *Held*, that the plaintiff's mortgage right did not become extinguished. Time does not begin to run against the mortgagee until the right of entry had accrued. Adverse possession begins to run against the true owner when the true owner has the immediate right to possession. (33 C. 1015, 8 M.L.T. 377, *Appr.*; 9 M.L.T. 264, *Not*

Possession—continued.**—2.—Adverse Possession—continued.**

F.; 7 M.I.A. 323, 23 M. 37, *D.*; W.R. 1864, 375, *R.*; 14 M.I.A. 101, 4 C. 327, 12 C. 414, 14 M.I. A. 144, 2 M. 226, 25 A. 35, 2 N.W.P. 223, 5 A. 1, *R.*) The interest in immoveable property which is affected by adverse possession is the interest, and that interest only, which the person who was entitled to immediate possession at the time the adverse possession began, had at the time. A claim to immoveable property will not cause time to run against the true owner unless it is accompanied by possession; the term 'adverse possession' clearly implies that the person against whom adverse possession is exercised is a person who is entitled to demand possession at the moment the adverse possession begins. Where such a person has the entire interest when the adverse possession begins, he cannot, by afterwards transferring the whole interest, as by sale, or by transferring a part of the interest, as by mortgage, prevent the operation of prescription upon the entire interest, unless he also interrupts the possession which is adverse. If, however, while still in possession he transfers a part of his interest, the transferee will not be affected by the subsequent possession of a third party, if under his transfer he is not entitled to possession of the property. *PARTHASARATHY NAIKEN v. LAKSHMANA NAICKEN*, 9 M.L.T. 399=21 M.L.J. 467.

(149) — *Mortgage of rent-free plot — Resumption — Settlement as mortgagee — Redemption — Adverse possession.*—Where the settlement of a resumed rent-free plot belonging to the plaintiffs' ancestors was made with the defendant in the character of mortgagee, the defendant's possession would not be adverse to the plaintiffs, the mortgagors. *RAM DIAL v. SHAH BAZKHAN*, 1 *Agra* 15.

(150) — *Mortgage — Equity of redemption, capable of being subject of adverse possession — Limitation — Res judicata.*—The owner of the property, of which plaintiff sought possession, had mortgaged it before his death, leaving him surviving a daughter K, the mother of the plaintiff, and a daughter-in-law N, the widow of a deceased adopted son. A decree was obtained on the mortgage against N and the mortgaged house in 1856. N thereon sold the house to one R who satisfied the mortgage. The present appellant (defendant) claimed through this R, whose right, title and interest were purchased by him at a Court-sale in execution of a decree. Plaintiff's suit was held to be barred by adverse possession. In 1856, N the daughter-in-law of the original mortgagor was in possession of the equity of redemption adversely to his rightful heirs. The Court of first instance rightly held that R having derived his possession from N, his possession also continued to be adverse to that of the plaintiff from the time of his purchase. There can be adverse possession of the equity of redemption as against the true owner, and persons claiming under an adverse holder of the equity of redemption can protect themselves by such adverse possession.

Possession—continued.**—2.—Adverse Possession—continued.**

Further, in this case, the lower appellate Court had held that the decision in the previous redemption suit to which the original purchaser was a party was *res judicata* as against the defendant who claimed under such purchaser, but the High Court was of opinion that that view was not sustainable because the original purchaser was not a necessary party to that suit and was under no obligation to have made any defence therein. **PUTTAPPA v. TIMMAJI**, 14 B. 176. [F., 6 C.W.N. 601; *Expl.*, 27 B. 43, 13 B. 51, 21 M. 153=8 M.L.J. 92, 5 Bom.L.R. 186; D., 21 B. 793, 25 M. 507.]

(151)—*Suit for possession—Plea of mortgage found to be invalid—Adverse possession.*—In a suit for possession, defendant pleaded a mortgage which was found to be invalid. *Held* that, though it is possible that a bad title can be cured by long possession, it was not so in this case. **KISHEN SINGH v. THOOLA SINGH**, 2 P.R. 1866.

(152)—*Mortgage by trespasser—Mortgagee in possession for over 12 years—Prescriptive title complete.*—A, a trespasser in respect of a certain fixed rate holding, mortgaged it to B in 1884. B remained in possession of the property ever since: *Held*, that the possession of B was equivalent to the possession of his mortgagor, and as he had been in possession for over 12 years, it must be held that A and B, had acquired a title by adverse possession. **BENI MADHO SINGH v. DEBI SARAN DUBE**, 10 Ind. Cas. 545.

(153)—*Mortgage—Adverse possession of mortgaged property—Purchaser at a sale in execution of a mortgage-decree, position of.*—*Per Chamier, J. C.*—*Held*, that the purchaser at a sale in execution of a mortgage-decree does not claim through or under the mortgagee. (22 B. 945, 30 M. 507, 30 A. 379, R.) *Held*, further, that ordinarily such a purchaser acquires the interest of the mortgagor as at the date of the mortgage. If, however, the mortgagee was entitled to possession, but was kept out of possession by a trespasser for more than 12 years, the interest of the trespasser will not be affected by a subsequent purchase at a sale in execution of a decree on the mortgage. *Held*, also, that, in the case of a simple mortgage when the mortgagee is not entitled to possession, 12 years adverse possession against the mortgagor would extinguish the security as regards the property held adversely to the mortgagor. *Per Evans, A.J.C.*—*Held*, that a person, who is in possession of mortgaged property adversely to the mortgagor, can assert his title as against the mortgagee from the date on which the mortgagee was entitled to take action on his mortgage-deed by suing for possession or sale. **PRATAP BAHADUR SINGH v. MAHESHWAR BAKSH SINGH**, 12 O.C. 45 (B.)=2 Ind. Cas. 57. (33 C. 1015, 7 M.I.A. 323, W.R. 1864, 375, 8 A. 86, 29 C. 518, 5 A. 1, 30 M. 426, 16 W.R. P.C. 33, R.)

Possession—continued.**—2.—Adverse Possession—continued.**

(154)—*By a mortgagor—Limitation Act (XV of 1877), sch. II, art. 144—Mortgagor—Mortgagee in possession—Alienation from the mortgagee—Notice to mortgagor*—Where a mortgagee in possession is dispossessed on grounds affecting only his right the dispossession of the mortgagee does not imperil or call in question any right of the mortgagor, and the mortgagor is not concerned or entitled to insist on being immediately restored to possession; and the possession taken is not adverse to him and cannot cause time to run against him. To give the mortgagor a right to insist on immediate possession, there must be an unequivocal ouster preventing the possession of the mortgagor from continuing altogether by leaving no room for doubt that the person taking possession does not profess to represent the mortgagor but to hold in spite of him. Possession must be in some way or other ostensibly adverse before it can cause limitation to run, and when there is no actual deprivation of any right, there must be a manifest and known assertion of a title incompatible with that of the disseizee. The adverse possession of a right may be entirely distinct from the adverse possession of tangible immoveable property; a right to sue in respect of the former arising possibly on open and avowed assertion or manifest adverse exercise of such right; while, the right to sue in respect of the possession can commence only when the possession itself (and not a mere claim to some minor right) becomes adverse to the rights of the person alleging title, which it cannot be as long as that person is not entitled to claim possession. Where there is no ouster or open or notorious act of taking possession, the person relying on his possession to defeat title, must show that it was of such a nature, and involved the exercise of rights so irreconcilable with those claimable by the plaintiff, as to give the plaintiff occasion to dispute that possession (or in other words, that it was such as to give a cause of action or right to sue for possession) throughout the twelve years next preceding the suit. Where a plaintiff has been in possession, and has been dispossessed, he must show possession and dispossession within twelve years, but where there is no allegation of original possession in the plaintiff lost by dispossession or discontinuance of possession, then the party relying on adverse possession to displace a proved or admitted title must show such adverse possession to have commenced and continued from twelve years prior to suit. **TARUBAI v. VENKATRAO**, 4 Bom. L.R. 721=27 B. 43. [R., 5 Bom. L.R. 186.]

(155)—*Limitation Act, 1877, art. 144—Possession of usufructuary mortgage—Suit for possession of immoveable property—Burden of proof.*—The possession of a usufructuary mortgagee is the possession of all the persons who have the right of redemption, i.e., of the persons entitled to the estate. It is only when, after redemption, possession is taken by some of the persons so entitled, that their possession

Possession—continued.**—2.—Adverse Possession—continued.**

becomes adverse as against the others. Where, therefore, some of the persons so entitled sued the others in possession for partition and for the possession of their share, *held* that the suit was not barred if brought within 12 years from the date on which the defendants redeemed and got possession of the property. [R., 9 O.C. 91.] In a suit for the possession of immoveable property, it is for the plaintiff to show, by some *prima facie* evidence, that he has a subsisting title not extinguished by the operation of limitation, before the defendant can be called upon to substantiate his plea of adverse possession. **INAYAK HUSEN v. ALI HUSEN**, 20 A. 182 = A.W.N. 1898, 19. (11 A. 431, 11 A. 193, R.) [R., U.B.R. 1897—1901, Vol. II, 461, 105 P.R. 1901.]

(156)—*Usufructuary mortgage satisfied from usufruct—Mortgagor entitled only to his share—Possession of whole by one co-mortgagor adverse to others.*—When one of several mortgagors redeems a mortgage by payment of the mortgage money and takes possession of the property, he steps into the shoes of the mortgagee as regards the shares of his co-mortgagors, and his possession over those shares can only be regarded as the possession of a mortgagee. Where, however, the mortgage is a usufructuary one and its amount satisfied out of the usufruct, each mortgagor can claim from the mortgagee only his individual share, and acquires no right to take possession of the shares of his co-mortgagors. Consequently, in such a case, when one of the co-mortgagors gets possession of the entire property he holds the shares of the others adversely to them. **GOBARDHAN v. SUJAN**, 16 A. 284 = A.W.N. 1894, 72. (7 A. 376, F.)

(157)—*Deed of conveyance with undertaking to recovery—Lapse of period for re-payment—Person long in possession under deed, entitled to possession against hostile purchaser under fraudulent sale.*—The plaintiff in this case sued for declaration of title to land in his possession, the right to which was menaced by the purchaser at a sale in execution of a decree for debt, obtained by one member of his vendor's family against another. On special appeal, it was objected that the transfer to the plaintiff effected only a mortgage, and not an out-and-out sale. It appeared, however, that the transfer to the plaintiff was absolute, subject only to an undertaking to recover on re-payment within a period which had long elapsed, and it was held that, although the plaintiff's vendor or his representative was entitled to redeem, yet the plaintiff was also certainly entitled to establish his right to possession against a hostile intruder whose claims were based on a fraudulent sale. **MUSSAMUT TOMMUNNISSA v. MUSSAMUT NUJEEME BANOO**, 8 W.R. 340.

(158)—*As a bar to suit.*—The property in suit was mortgaged on the 25th September 1855. In 1884, the plaintiff, then a minor, sued for redemption of the property claiming to be entitled as the adopted son of the

Possession—continued.**—2.—Adverse Possession—continued.**

mortgagor. The defendant then applied to be added as a party to the suit, inasmuch as he disputed the plaintiff's adoption and his right to redeem: but his application was rejected on the 10th August 1882. On the 14th of the same month, the defendant redeemed the mortgage out of Court and went into possession. The plaintiff's suit was subsequently dismissed. The plaintiff attained his majority in 1887. In 1901, he brought this suit to redeem and recover possession of his share in the property, as the adopted son of the mortgagor: *Held*, that the suit was barred by time, since the defendant from 1882 held the property adversely to the plaintiff. **GANESH v. VITHAL**, 6 Bom. L.R. 312.

(159)—*Partition, Suit for—Omission of a mortgaged field from claim—Subsequent suit—Civ. Pro. Code (Act VIII of 1859), s. 7—Limitation—Separation in living and separation by partition.*—In 1861, the plaintiff brought a general partition suit to recover his share of the family property in the possession of the first defendant, and omitted to ask for a field then in the possession of a mortgagee. The field was subsequently redeemed by the first defendant, who again mortgaged it to the second defendant. The plaintiff then brought the present suit to recover his share in the field. The first Court allowed the plaintiff's claim, but the District Judge in appeal threw it out, on the ground that it was barred both by s. 7 of the Civ. Pro. Code and by the law of limitation. The Judge based the latter finding on certain allegations made by the plaintiff in the general partition suit and in another suit brought by him against the first defendant and the then mortgagee of the field, from which allegations the Judge inferred a separation between the plaintiff and the first defendant. *Held*, in special appeal that the claim was not barred by s. 7 of the Civ. Pro. Code (Act VIII of 1859), because the mortgaged field was not available for an actual partition at the time of the former suit. *Held*, also, that the suit was not barred by limitation, because the possession of the first defendant or of his mortgagee, was not adverse to the plaintiff, the alleged separation being only a separation in living and not one by partition. The point for decision in such cases is, whether the former suit was one in which the plaintiff might have recovered precisely what he seeks to recover in the second, and where the former suit is one for an actual division of the property, the plaintiff need not ask for a declaration defining his right in property not then capable of division. **NARAYAN BABAJI DABHOLKAR v. PANDURANG RAMACHANDRA DABHOLKAR**, 12 B.H.C. 148. [F., 23 M. 608; R., 10 M.L.J. 141, 23 B. 597, 24 B. 128, 1 Bom. L.R. 620, 1 L.B.R. 7.]

(160)—*Adverse possession—Denial of jenm right.*—The mere denial, by the mortgagee in

Possession—continued.**—2.—Adverse Possession—continued.**

possession, or by the representative of the mortgagee in possession, of the mortgagor's right to the equity of redemption, is not, of itself, sufficient to convert such possession into adverse possession. *MUSSAD v. THE COLLECTOR OF MALABAR*, 10 M. 189. [R., 21 M. 153=8 M.L.J. 92, 27 B. 43.]

(161)—*Under a mistake-in-common—Possession under a mistake common to all parties—Adverse character of possession.*—On 2nd October 1873, D, the widow of G, mortgaged with possession certain lands for Rs. 900 to defendant 1, husband of her daughter Rau. D died in 1882. Plaintiffs, as heirs of G, then put forth a claim to the property mortgaged. The dispute terminated by the plaintiff's executing a fresh mortgage on the 22nd June 1882, in favour of defendant 1 for Rs. 800, the latter having remitted Rs. 100 in their favour. Rau was aware of this mortgage and acquiesced in it. In 1889, however, Rau sold her equity of redemption to defendant 2, who in his turn paid off defendant 1. Plaintiffs then brought a suit for redemption based on the mortgage dated the 22nd June 1882:—*Held*, that plaintiffs were entitled to redeem the property, since Rau's claim to the equity of redemption had become barred. Though defendant 1's possession in its inception was not by virtue of a right derived from the plaintiffs still his possession was from the 22nd June 1882 under colour of a right derived from the plaintiffs and so adverse to Rau and to her knowledge. The fact that defendant 1 took possession under a mistake common to all as to Rau's rights did not make the possession any the less adverse to Rau. *PURSHOTAM v. SAGAJI*, 5 Bom. L. R. 674=28 B. 87.

(162)—*Adverse possession.*—The mere fact of certain weavers having been accustomed to stretch their weaving apparatus on the land of another does not of itself constitute such possession as can be considered adverse. But when the owners are resisted in taking possession for the statutory period, their right to recover it is barred. *DEVI DITTA v. IDA*, P.L.R. 1900, p. 142.

(163)—*Headship of butchers, Hereditary office of—Right to inherit, Proof of—Adverse possession.*—Claim, to the hereditary office of the headship of the butchers in the town of Ahmednaggur, dismissed, no satisfactory proof being shown of the right to inherit, and adverse possession of the office being had for more than thirty years. *BABUN WULLAD RAJA KATIK v. DAVOOD WULLAD NUNNOO*, 2 M.I.A. 479=1 Suther. 108=1 Sar. 221=6 W. R. P. C. 10.

(164)—*Decree in suit for ejectment against Mahomedan father—Execution and delivery of symbolical possession as against father binding on sons living with father—Continued possession by sons, if adverse—Civ. Pro. Code, 1877, s. 263.*—A, a Mahomedan, was the absolute owner of the house and land in dispute. A sold them to

Possession—continued.**—2.—Adverse Possession—continued.**

G, the plaintiff's vendor. Plaintiff had sued and obtained a decree for possession against A and G, in execution of which he was placed in formal possession on the 6th of April, 1880, by the Court's officer under s. 263 of the Civ. Pro. Code of 1877, in the presence of A who made no objection. The present defendants were the sons of A who were living with him at the time of the execution proceedings and continued to do so even subsequent to his death. This suit to eject them was begun on the 4th April 1892 and the question arose, whether it was barred by limitation. The District Judge *held* that the proceedings by which plaintiff obtained possession from A did not affect the defendants, the sons of A who were then living in the house, as they were not parties to the suit which resulted in the execution proceedings of the 6th April 1880. The High Court disagreed from the District Judge and *held* that the possession which the plaintiff obtained through Court from A operated as well against his sons and other dependents as against himself. The defendants living with their father had no independent juridical possession of the premises. The case would have been different if the sons had been in independent possession of any part of the premises. They would then have been in the position of their parties whom neither the decree nor the formal possession given under it could have affected. *PANDHARINATH v. MAHABUBKHAN*, 21 B. 98.

(165)—*Wakf—Well dedicated to public use looked after and managed founder's family—Proprietary right not lost after cessation of public use—Gift of some property by descendants of founder under an unregistered deed—Evidence Act (I of 1872), ss. 91, 110—Admissibility of parol evidence to prove the factum of gift—Adverse possession—Revision—Material irregularity.*—Where the property is dedicated to the use of the public, but the family of the founder of *wakf* look after it, they do not necessarily lose all rights to it, after its public use has completely ceased. Such property does not become *res nullius* which can be seized upon by any one minded to do so, but reverts to the original proprietor, on the cessation of its use by the public. S. 91, Evidence Act, excludes only the terms of a contract, grant or disposition of property, which have been reduced to writing, being proved by oral evidence, but the fact of the contract can be proved orally. (24 W.R. 425, F.) A defendant whose possession has been due to wrongful seizure, must prove twelve years' adverse possession. Plaintiff's previous possession gives him the right to recover from a trespasser, who has unlawfully evicted him within twelve years. (78 P.R. 1902, F.) Misapprehension of law, misapplication of legal principles, indefiniteness in some of the findings, and failure to consider the effect of prior peaceful possession as owner, amount to "material irregularities," justifying the interference of the Chief Court on revision. Mere tying of cattle and occasional uses of an open

Possession—continued.**—2.—Adverse Possession—continued.**

ground are not acts necessarily adverse to the owner; but if permanent occupation of any portion, to the exclusion of others for 12 years, is proved, a defendant may be entitled to keep so much to himself. *BAWA NARAINGIR v. MIRAN BAKSH*, 4 Ind. Cas. 314=18 P.W.R. 1909.

(166)—*Adverse possession — Co-sharer — Muhammadan Law—Question of fact—Revision.*—In a suit by a Mahomedan co-sharer, for possession of immoveable property, against a third person, who pleaded purchase from another co-sharer: *Held*, (1) that, having regard to the main allegation of the defence, which is, not that plaintiff and their mother never entered into possession, but that plaintiff's mother sold her share to the present petitioner—an allegation which has been held to be not proved, there was good ground for presuming that the petitioner's possession was not adverse. (89 P.R. 1888, 30 P.R. 1901, D.) The question whether an entry by one co-heir is an entry on behalf of all co-heirs or on behalf of the entering co-heir alone is a question of fact. *FARID-UD DIN v. ALI HUSSAIN*, 79 P.W.R. 1910=6 Ind. Cas. 1009. (97 P.R. 1890, 42 P.R. 1889, D.; 89 P.R. 1881, Diss.)

(167)—*Zamindari village — Occupation by Government—Non-payment of rent—Adverse possession.*—The occupation by Government of certain lands in a zamindari village without payment of rent to any one cannot be construed as possession adverse to the zamindar. *DINO NATH MOOKERJEE v. BROJO COOMAR MULLICK*, 25 W.R. 102.

(167-a)—*Landlord—Possession by Government—Non-payment of rent—Limitation.*—In a suit to recover a zamindari from an intermediate holder, the cause of action does not arise until Government who are in possession of lands began paying rent to defendants, and the possession of the Government without payment of rent could not be adverse to the plaintiff. When the Government never intended to remain in possession without payment of rent, the onus is on the defendant to prove his title as intermediate holder. *DINO NATH MOOKERJEE v. BROJO COOMAR MULLICK*, 25 W.R. 102, Note.

(168)—*Wrongful taking possession of land by Government—Ijara from Government taken by true owner—Prescriptive title acquired by Government after twelve years—Lease.*—Where the Government wrongfully took possession of certain land, and the true owner took an *ijara* from Government and held it for over 12 years, the Government was held to have acquired a prescriptive title to the land at the end of the period of the lease. *SECRETARY OF STATE FOR INDIA v. KRISHNAMONI GUPTA*, 29 C. 518, P.C.=29 I.A. 104=6 C.W.N. 617=4 Bom. L.R. 537=8 Sar. 269. [F., 26 M. 410, 97 P.R. 1902=121 P.L.R. 1902, 9 C.W.N. 111; R., 27 B. 43=4 Bom. L.R. 721, 34 C. 753=5 C.L.J. 583=12 C.W.N. 193, 3 C.L.J. 316,

Possession—continued.**—2.—Adverse Possession—continued.**

28 A. 760=A W.N. 1906, 234 = 3 A.L.J. 567, 35 C. 120=8 C.L.J. 245 =12 C.W.N. 16, 7 C.L.J. 414=12 C.W.N. 273=3 M.L.T. 212, 10 C.L.J. 527, 12 O.C. 45, 58.]

(169)—*Enjoyment—Acts of ownership—Title by prescription.*—Where the acts of enjoyment proved are acts of ownership done adversely to the Crown, if the adverse possession extends to more than sixty years, a title by prescription will be acquired. *SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA*, 9 M. 285. [R., 15 M. 315, 6 Bom. L.R. 864; D., 21 M. 169=8 M.L.J. 117.]

(170)—*Suit against Government for recovery of a tank—Acts constituting adverse possession—Enjoyment of fruits and flowers on the banks of the tank—Removal of silt from tank—Entry of tank in Settlement Register as poramboke—Effect of—Burden of proof.*—The mere enjoyment of fruits and flowers on the banks of a tank and of fishery in the tank for even thirty and forty years will not, as against Government, indicate ownership as Government generally allows villagers such enjoyment in small villages, and the non-interference of Government with such enjoyment does not imply a denial of ownership of Government or abandonment by Government of its ownership. (28 M. 257, F.) The clearing of silt from a tank, and the construction of masonry sluices in it by a person, and the possession and enjoyment of the tank adversely to the Government for thirty or forty years, raise a presumption of ownership in favour of that person, and shift on to Government the burden of showing a title, or that it was in possession at some time within sixty years prior to suit. If the Government fails to prove that it was ever in possession of the tank, the person's possession should be presumed to have continued for more than the statutory period and to have established a title by prescription. The mere entry of the tank in the *Paimash* and Settlement Registers as Government *poramboke* is insufficient to prove that the tank is the property of Government. *VENKATARAMA AIYAR v. THE SECRETARY OF STATE FOR INDIA*, 5 Ind. Cas. 118=7 M. L.T. 139=20 M.L.J. 74. (14 C. 740, R.)

(171)—*Land within 30 feet of Lahore City wall—Adverse possession—Right of Government.*—The Sikh Government considered itself entitled to turn out the inhabitants of houses within 30 feet of the Lahore City wall from the site occupied by them. But the British Government which succeeded permitted the occupier to remain in occupation. It was thus clear that the British Government introduced a new law so to speak, namely, that of adverse possession. Thus the occupier of a house who might at one time have been turned out by the Government, became possessed in a manner which can only be taken to be adverse, there being nothing to show that his possession was permissive. With reference to the property in question in this suit, an order had

Possession—continued.**—2.—Adverse Possession—continued.**

been passed in 1855 by the then Deputy Commissioner, which, properly construed, meant the Government had no right to the house as well as the site, and since then, no assertion had ever been made by Government of its rights to control the alienation of the land until the present suit was brought. *Held* that this showed that the occupier of the house occupied the land on the same footing as that upon which he held the house, namely, adversely. **THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. SOWAYA RAM, 56 P.R. 1871.**

(172)—*Adverse possession by Government of permanently-settled estates.*—The fact that the Government continues to receive the full revenue from the proprietor of a permanently-settled estate for the entire estate, does not preclude the Government from claiming title by adverse possession in respect of any portion thereof. **KRISTO MONI GUPTA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 3 C.W.N. 99.**

(173)—*Dishonesty in obtaining possession—Limitation—Government failing to take possession of Chur—Fordable river—Alluvial land—Reg. XI of 1825, s. 4.*—The law of limitation in this country being express, dishonesty in obtaining possession will not prevent the possessor from availing himself of the provisions of that law. But the law cannot relieve him from the charge of dishonesty. If the Government does not take possession of a *chur* or dispose of it for a year or so, and during that time the channel between the island and the adjoining land becomes fordable, the right of Government to dispose of it would cease and it would become an increment to the tenure of the person holding the land most contiguous to it. **KOWAR FOREST NARAIN ROY v. WATSON & CO., 5 W.R. 283. [R., 9 W.R. 259; D., 6 B.L.R. 343 = 14 W.R. 352.]**

(174)—*Ekabhogam mirasidar—Adverse possession—Ownership of Government poramboke.*—The true test, in determining whether an Ekabhogam mirasidar of a certain village has acquired title by adverse possession over Government poramboke land situated in that village, is whether the acts done by him were beyond the customary rights of a mirasidar. **THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. VADAMALAI PILLAI, 3 M.L.J. 231.**

(175)—*Acquisition of title by adverse possession not made in plaint—Question not raised in issues—Proof title by prescription—Constructive possession, Doctrine of—Accretion.*—Where no case of acquisition of title by adverse possession was made in the plaint, nor was the question raised directly or indirectly in any of the issues, the plaintiff ought not to be allowed to succeed upon such a case, which was not made in the plaint (8 C. 975, R.; 14 C. 592, Cited.) To prove title to land by adverse possession, it is not sufficient to show that some

Possession—continued.**—2.—Adverse Possession—continued.**

acts of possession have been done; for the possession required must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor. (27 C. 943, F.) The doctrine of constructive possession applies only in favour of a rightful owner and must not, as a rule, be extended in favour of a wrong-doer, whose possession must be confined to land of which he is actually in possession. (27 C. 221, 24 C. 256, R. & F.; 29 C. 518, R.) Where land, which has been submerged, reforms and is identified as having formed part even by accretion of a particular estate, the owner of that estate is entitled to it. **ANANDA HARI BASAK v. SECRETARY OF STATE FOR INDIA IN COUNCIL, 3 C.L.J. 316. (2 I.A. 28, 14 B.L.R. 268, Appr.) [R., 12 C.W.N. 127 = 35 C. 961 = 6 C.L.J. 735.]**

(176)—*Plea of adverse possession in the alternative of a specific title.*—It is open to a party to allege a specific title and in the alternative, a title by 12 years' adverse possession. **MAY VIN v. MA PU, 4 L.B.R. 238. (4 C. 699, F.) [R., 5 L.B.R. 82.]**

(177)—*Question of fact—Title—Jurisdiction of District Judge in appeal.*—Where the plaintiff in a case claims title on the basis of adverse possession for more than twelve years, it was held that the question whether the possession alleged was of such a kind as to enable the plaintiff to acquire a title was a question of fact, and that the District Judge had jurisdiction to decide that question in appeal on the evidence. **MUTHUSAWMY ASARI v. RAMASAWMY IYENGAR, 3 M.L.T. 299.**

(178)—*Adverse possession—Thirty years' possession—Proof of—Possession within 60 years by Crown—Onus of proof—Street—Dedication as highway—Proof.*—Where a plaintiff has, by 30 years' possession, acquired a right to erect and retain certain pandals, the onus is shifted upon the Crown to show that it had possession within 60 years. Even if the property in the subsoil be in the temple, it is still possible that the streets are public streets, if they have been used by the public for the purpose of passing and re-passing, and that may be sufficient to raise the presumption of dedication of the street to the public for use as a highway. **ALAGASINGA BHATTAR AYYAVARALANGARU v. TALUK BOARD, RAJAMUNDRY, 12 M.L.T. 159 = 16 Ind. Cas. 626.**

(179)—*Adverse possession, title by—Submerged land, possession during time it is out of water—Possession disturbed every year.*—Plaintiffs claimed possession of certain land which was submerged during part of a year and was in possession of defendants during the other part. The defendants pleaded adverse possession. *Held*, that, during the time the land was submerged, the constructive possession was in the rightful owner, and a title by adverse possession could not be acquired by a trespasser. **LOKNATH v. MANORATH RAM, 11 A.L.J. 68. (29 C. 518, Appl.)**

Possession—continued.**—2.—Adverse Possession—continued.**

(180)—*Adverse possession—Possession of one co-heir in the absence of others—Whether adverse.*—A co-heir, in the absence of the other co-heirs, got possession of certain property left by a deceased Mubammadan: *Held*, that the possession of such co-heir was not adverse to the others unless an adverse title was asserted. **CHAND KHAN v. ALI KHAN, 15 Ind. Cas. 292. (14 A. 193, R.)**

(181)—*Adverse possession—Limitation—Enjoyment of land for storing water—Evidence of title—Failure to assert right through Courts—Entry in Government registers, evidentiary value of—Orders of Survey Officers.*—A Survey Officer's orders, if wrong, should be set aside in a suit brought within the time fixed by the Surveys and Boundaries Act. Effective occupation of land by a person for the statutory period and the non-assertion of a claim of right to it by any one else is both strong evidence of title in pursuance of which he first took possession and conclusive of his right to the land by prescription. It is enough for the person claiming the prescriptive right, even if he proves that the only use he made of the land was to store water therein. An entry in the Government survey account and the Government plan is strong evidence of title of the person in whose name the entry is made, only if it is accompanied by substantial acts of enjoyment. **GOPALASWAMY CHETTY v. SECRETARY OF STATE, 16 Ind. Cas. 955.**

(182)—*Adverse possession—Plea of limitation—Onus on plaintiff to prove that his suit is within time—Auction-purchaser—Symbolical possession—Limitation to run from date of symbolical possession.*—When a suit for possession is met by a plea of adverse possession during the limitation period, the question of limitation becomes a question of title and the plaintiff must first, *prima facie*, furnish proof of subsisting title at the date of the commencement of his suit, before the defendant is required to establish his adverse possession. (11 A. 438=A.W.N. 1889, 155, 20 A. 182, 28 A. 760=A.W.N. 1906, 234=3 A.L.J. 567, 2 A.L.J. 62=A.W.N. 1905, 14, *Rel. on.*) Where an auction-purchaser at a Court-sale has obtained symbolical possession, he or his assigns may sue the judgment-debtor for actual possession within 12 years from the date of obtaining such symbolical possession. **MUSSAMAT SUNDAR v. SARESVATI, 17 Ind. Cas. 518. (25 B. 275, 25 B. 358, *Rel.*)**

(183)—*Possession of mortgagee not adverse—Mode of recording evidence—Supply of materials for repair of house, whether constitutes interruption of possession.*—The possession of a mortgagee is not adverse. The evidence of each witness should be recorded separately and the evidence of a number of witnesses should not be mixed up together on the same sheet. The fact that the plaintiff supplied materials for the repair of a house does not constitute an interruption of defendant's possession. **CHIRAGH SHAH v. GHUSEETA, 58 P.R. 1866.**

Possession—continued.**—2.—Adverse Possession—continued.**

(184)—*Default in payment of revenue—Lease or farm of land—Lessee's possession if adverse to the previous holder.*—Plaintiff was a defaulter unable to pay the Government revenue on his share and consequently his puttee was leased out to the defendant for 15 years, *i.e.*, to the close of the settlement. In the order conferring the lease, the Collector recorded, that, after the lapse of 15 years, plaintiff could recover and take possession of the puttee. Defendant also subsequently fell into arrear, and the puttee was leased out to another, but, after a time, was restored to the defendant. In the present suit for possession of land, defendant contended that since he obtained from Government the proprietary possession of the puttee, such possession was adverse to the plaintiff and consequently the suit was barred. *Held* that there was no adverse possession against the plaintiff and that he was entitled to recover. In the absence of any evidence that the plaintiff, the ex-proprietor, during the fifteen years of his ejection, committed any act by which he might have absolutely lost his rights, and in the absence of a competent authority declaring such rights absolutely lost and confiscated to Government, the ex-proprietor, at the close of the prescribed period, has an indisputable right to come to the Government or to a Court and claim his rights and his interests. **SARFA-RAZ ALI v. ASID ALI, 63 P.R. 1875. [R., 41 P.R. 1881.]**

(185)—*Gift by Hindu widow—Suit for possession by daughter—Limitation—Adverse possession of donee.*—In this case, the Courts below were held to be wrong in having decided that the present suit was barred by limitation. The right of the plaintiff to sue did not arise until the death of her mother, a widow holding on a life-tenure. It was not competent to the defendant, who admittedly held by virtue of a gift from the mother, to plead that his possession was adverse during her life-tenure. Further, the donor was merely a tenant for life and was incapable of conveying an interest larger than her own. **MUSSAMAT JAI DEVI v. SHIB DAYAL, 15 P.R. 1879. [R., 125 P.R. 1881.]**

(186)—*Adverse possession—Mortgagee in possession—Adverse possession as regards mortgagee, effect of, upon rights of mortgagor.*—A mortgagor who has transferred possession of the mortgaged land to the mortgagee, has no right to possession thereof until he has redeemed the mortgage. Hence the possession of a third party, though adverse as regards the mortgagee whom he has ousted, does not, when unaccompanied by further acts of aggression upon the mortgagor's rights, give any cause of action to the latter during the continuance of the mortgage, and, therefore, the burden of proving that his possession was adverse as against the mortgagor no less than as against the mortgagee rests upon such third party. (18 B. 51, *F.*) *Held*, upon the facts of the case, that defendants had failed to prove that their possession

Possession—continued.**—2.—Adverse Possession—continued.**

was adverse as against the plaintiff-mortgagor. *KHANU MAL v. KHAN MUHAMMAD*, 6 P.R. 1898.

Of *maliki* and *shamilat* land—Plaintiff suing defendants for recovery of land of which their father and they themselves recorded as proprietors in 1868 and 1892—In 1868 plaintiff's fathers recorded as minors—Defendant entered as in possession on their behalf—No adverse possession by defendant—See *ABANDONMENT OF TENURE*, 97 P.W.R. 1908.

Plaintiff's name not finding a place in the register at the first settlement is not sufficient to prove adverse possession against or abandonment by him—See *ABANDONMENT OF TENURE*, 62 P.R. 1890.

Long absence does not impair rights of a co-sharer unless adverse title is set up—See *ABANDONMENT OF TENURE*, 84 P.R. 1888.

Common holding—Owner leaving his share in possession of co-sharer—Adverse possession, how established—See *ABANDONMENT OF TENURE*, 120 P.R. 1908=172 P.W.R. 1908=18 P.L.R. 1909=4 Ind. Cas. 912.

See *ABSENTEE*, 5 P.R. 1868, Rev., 7 P.R. 1868, Rev., 32 P.R. 1868, 46 P.R. 1872, 15 P.R. 1873, 46 P.R. 1875, 21 P.R. 1876, 54 P.R. 1876, 25 P.R. 1877.

See *BEN. ACT XI OF 1859*, ss. 11, 13, 54, 3 B.L.R. A.C. 446=12 W.R. 440.

Sale of share—Purchaser's right to eject person in adverse possession for over 12 years before sale—See *BEN. ACT XI OF 1859*, ss. 13, 54, 13 C.W.N. 407=1 Ind. Cas. 81.

Limited interest in land may be acquired by—See *BEN. ACT VIII OF 1885*, 2 Ind. Cas. 148=14 C.W.N. 68.

See *BEN. ACT VIII OF 1885*, ss. 101, 102, Ch. X, 22 C. 244.

Character of—See *BEN. ACT XV OF 1891*, s. 4, 6 Ind. Cas. 392.

Appointment by Collector, of one of several co-parceners to officiate as patil—Presumption as to adverse possession—See *BOM. ACT XI OF 1843*, 1 B. 533, Note.

Can be successfully urged to defend possession acquired under an alienation made in contravention of s. 3 of the *Bhagdari Act*, 1862—See *BOM. ACT V OF 1862*, s. 3, 10 Bom. L.R. 1128=33 B. 116.

Plea of, cannot avail against the action taken by the Collector under s. 3 of the *Bhagdaree and Narwadaree Act*—See *BOM. ACT V OF 1862* (*Bhagdaree*), s. 3, 4 Bom. L.R. 797, 6 Bom. L.R. 423=28 B. 399.

See *BOM. ACT V OF 1862*, s. 3, 23 B. 710.

See *BUR. ACT II OF 1876*, s. 7, L.B.R. 1893—1900, 3.

See *C.P. ACT IX OF 1883*, 2 C.P.L.R. 197.

Possession—continued.**—2.—Adverse Possession—continued.**

Title set up against Crown—Exclusive possession within a statutory period—Acts done on particular tracts of land, when evidence of enjoyment of whole—See *MAD. ACT V OF 1882*, s. 25, 9 Ind. Cas. 9.

See *U. P. ACT XVIII OF 1873*, s. 93 (h), A. W.N. 1891, 107.

See *ALLUVION—FORMATION OF CHURS OR ISLANDS*, 6 B.L.R. 261, Note=13 W.R. 366.

See *ALLUVION—LAND INUNDATED AND RE-FORMED*, 3 C. 796, P.C.=1 C.L.R. 259.

Assertion of absolute title by life-tenant—Estoppel—See *BENAMI TRANSACTIONS—GENERAL*, 7 Ind. Cas. 218.

Proof of title by plaintiff—Burden of proving—See *BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE*, 5 A. 345, F.B.

See *BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE*, 30 P.R. 1902.

Mere non-payment of rent for twelve years without any denial of the landlord's right, how far constitutes—See *CIV. PRO. CODE*, 1908, s. 11, 16 M.L.J. 35=29 M. 42.

Suit between tenants in common for partition—Exclusive possession of one tenant whether adverse possession—*Limitation Act*, XV of 1877, sch. II, arts. 142, 144—See *CIV. PRO. CODE*, 1908, O. II, r. 2, 21 M. 153=8 M.L.J. 92.

See *CLAIMS TO PROPERTY ATTACHED*, 18 B. 260.

See *COMMON LAND*, 105 P.R. 1901.

What amounts to, among co-owners—Non-receipt of profits—Effect—See *CO-SHARERS—GENERAL*, 9 Ind. Cas. 425.

Brother and sister—One heir managing property—Other heir minor—Whether—See *CO-SHARERS—GENERAL*, 10 Ind. Cas. 413.

By co-sharer—What amounts to—See *CO-SHARERS—GENERAL*, 73 P.W.R. 1912.

See *CO-SHARERS—GENERAL*, 31 C. 970=9 C.W.N. 32.

Mahomedan co-owners—One of them out of possession for twelve years—Co-owner in possession not recognising his title, effect of—Distinction from Hindu co-ownership—See *CO-SHARERS—ENJOYMENT OF PROPERTY BY CO-SHARERS*, 4 A.L.J. 473=A.W.N. 1907, 195.

Exclusive possession by one co-sharer in excess of his share—Right of other co-sharers to recover possession—See *CO-SHARERS—ENJOYMENT OF PROPERTY BY CO-SHARERS*, 14 C.P.L.R. 76.

See *CO-SHARERS—ENJOYMENT OF PROPERTY BY CO-SHARERS*, 13 C.P.L.R. 99, 5 N.W.P. 122.

Possession—continued.**—2.—Adverse Possession—continued.**

Co-owner in symbolical possession—Exclusive possession by other co-sharers, whether adverse—*See* CO-SHARERS—SUIT BY CO-SHARERS, 4 C.L.J. 254.

By lambardar not adverse—*See* CO-SHARERS—SUIT BY CO-SHARERS, 2 C.P.L.R. 171.

See CO-SHARERS—MISCELLANEOUS, 1 C.L.R. 155.

Of gifted property—*See* CUSTOMS—PUNJAB—ALIENATION, 110 P.L.R. 1909=149 P.W.R. 1909.

Against nearest reversioner not adverse to remoter reversioner—Person having no immediate right to possession—Whether possession can be adverse against him—*See* CUSTOM—PUNJAB—ALIENATION, 9 Ind. Cas. 300, F.B.

Possession by widow of pre-deceased son—Whether adverse—*See* CUSTOMS—PUNJAB, INHERITANCE, 102 P.R. 1907.

Of debutter property—What amounts to—*See* DEBUTTER PROPERTY, 14 C.W.N. 889, P.C., 7 A.L.J. 791=12 Bom. L.R. 632=12 C.L.J. 110=8 M.L.T. 145=20 M.L.J. 624, 7 Ind. Cas. 240, 37 C. 885.

Of debutter land by mortgagee—*See* DEBUTTER PROPERTY, 3 Ind. Cas. 98.

See DEED—CONSTRUCTION OF DEEDS, 16 B. 172.

Plea of, first taken in Court of appeal, whether allowable—*See* ESTOPPEL—ESTOPPEL BY JUDGMENT, 6 C.L.J. 621.

Title by, cannot be acquired by lessee entering into possession under lease, against lessor pending term of lease—Conditions for acquiring such possession—Mere non-payment of rent whether creates adverse possession in lessee's favour—*See* EVIDENCE ACT, 1872, s. 90, 7 C.L.J. 615.

See EVIDENCE ACT, s. 110, 11 A. 438.

See FISHERY, 3 C. 276=1 C.L.R. 592.

See GRANT—CONSTRUCTION, 12 B. 80.

See HEREDITARY OFFICE, 12 B.H.C. 172.

Necessity to prove—As against Government—*See* HILL, 28 M. 69.

Parlakimidi Zemindari under Court of Wards for more than 60 years—Utilization by Collector and other Government officials of Zemindari funds for improving *maliahs*—Acquiescence of Government in such official acts under mistake—Whether possession of *maliahs* by Zemindari amounted to—*See* HILL TRACTS, 9 C.W.N. 553, P.C.=28 M. 130=1 C.L.J. 460.

See HINDU LAW—ADOPTION, 13 B. 160.

See HINDU LAW—CUSTOM, 21 B. 110.

Joint family—Possession of property by widow—Presumption—Adverse possession—*See* HINDU LAW—JOINT FAMILY, A.W.N. 1888, 133.

Possession—continued.**—2.—Adverse Possession—continued.**

One of two brothers in management and possession of entire property—Failure of the other to take possession of his share after requisition to do so—Claim whether barred as by adverse possession—*See* HINDU LAW—JOINT FAMILY, 11 B. 365.

See HINDU LAW—JOINT FAMILY, 1 Agra 162, 49 P.R. 1870.

See HINDU LAW—MAINTENANCE, 29 C. 664, P.C.=29 I.A. 132=6 C.W.N. 657.

Against life-tenant—Possessory title—True owner—*See* HINDU LAW—REVERSIONERS, 8 A.L.J. 849.

See HINDU LAW—REVERSIONERS, 5 M.L.J. 269=22 C. 445, P.C.=22 I.A. 25.

Property acquired by a female by—Stridhan—*See* HINDU LAW—STRIDHANAM, 7 A.L.J. 153=5 Ind. Cas. 207=32 A. 189.

Possession by transferee from widow under a compromise—Whether adverse—*See* HINDU LAW—WIDOW, 7 M.L.T. 340=20 M.L.J. 204.

Hindu Law—Female heir—Adverse possession—Reversioner's suit—Cause of action—Limitation—*See* HINDU LAW—WIDOW, B.L.R. Sup. 1008, F.B.=9 W.R. 505.

See HINDU LAW—WIDOW, A.W.N. 1887, 43, A.W.N. 1899, 95.

See INAM, 9 M.L.J. 141.

Of after-acquired property by undischarged insolvent—*See* INSOLVENCY—PROPERTY ACQUIRED AFTER VESTING ORDER, 8 C. 556=12 C.L.R. 253.

Assertion of limited interest—Whether can lead to acquisition by adverse possession of an absolute title—*See* JURISDICTION OF REVENUE COURTS, 7 C.L.J. 499=12 C.W.N. 636=35 C. 470.

Suit by co-sharer for profits against Lambardar—*See* LAMBARDAR, 2 A.L.J. 107=A.W.N. 1905, 36=27 A. 436.

See LAMBARDAR, A.W.N. 1881, 20.

Physical possession—Abridgment of title—Adverse possession—*See* LANDLORD AND TENANT—GENERAL, 10 Ind. Cas. 363.

Houses as appurtenant to holdings—When possession will become adverse—*See* LANDLORD AND TENANT—EJECTMENT, 3 A.L.J. 619=A.W.N. 1906, 243.

Acquisition of limited interest by—*See* LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 3 Ind. Cas. 431.

See LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, 2 Agra 25.

See LANDLORD AND TENANT—TENANT TO KEEP HOLDING DISTINCT, 9 C.L.R. 347.

Possession—continued.—2.—**Adverse Possession**—*continued*.

Tenant erecting temporary structures — Effect — See LANDLORD AND TENANT — MISCELLANEOUS, 8 Ind. Cas. 708.

Decree for possession against tenant and symbolical delivery thereunder—Continuance of tenant in possession, asserting permanent tenancy rights—Acquisition of permanent tenancy by adverse possession—See LANDLORD AND TENANT—MISCELLANEOUS, 9 C.W.N. 292.

As giving rise to permanent tenure can be pleaded — See LANDLORD AND TENANT — MISCELLANEOUS, 5 Bom. L.R. 274 = 27 B. 515.

See LANDLORD AND TENANT—MISCELLANEOUS, 10 B. 112, 16 C. 806.

See LIMITATION—GENERAL, 2 M.L.J. 210.

Against mortgagor, effect of, on mortgagee — See LIMITATION — GENERAL, 10 C.W.N. 904 = 33 C. 1015.

Acquisition of limited interest by — See LIMITATION—GENERAL, 17 M.L.J. 469 = 3 M.L.T. 187.

See LIMITATION ACT—GENERAL, L.B.R. 1872—1892, 51.

Fishery right—Possession in exercise of common right not adverse—See LIMITATION ACT, 1908, s. 26, 15 C.W.N. 972 = 11 Ind. Cas. 180.

Mortgage—Receipt of rent for over 12 years — See LIMITATION ACT, 1908, s. 28, 7 M. 26.

Right to hold temple office with lands attached, whether can be acquired by—See LIMITATION ACT, 1908, s. 28, 21 M. 278.

See LIMITATION ACT, 1908, s. 28, 18 B. 507.

See LIMITATION ACT, 1908, s. 28, art. 138, A.W.N. 1887, 92.

See LIMITATION ACT, 1908, art. 14, 18 B. 244.

See LIMITATION ACT, 1908, art. 91, 27 C. 156, P.C. = 26 I.A. 216 = 4 C.W.N. 274.

See LIMITATION ACT, 1908, arts. 91, 144, 17 B. 755.

See LIMITATION ACT, 1908, art. 119, 43 P.L.R. 1904 = 3 P.R. 1904.

Tenants-in-common — Sharers under Mahomedan Law—Possession of one tenant-in-common not adverse in the absence of ouster, denial of title or abandonment—See LIMITATION ACT, 1908, arts. 123, 127, 5 N.L.R. 41 = 2 Ind. Cas. 15.

Of profits alone without the office—Rights to beneficial enjoyment of property—Starting point—See LIMITATION ACT, 1908, art. 124, 20 M.L.J. 781 = 8 Ind. Cas. 998.

See LIMITATION ACT, 1908, art. 124, 5 B. 437.

Possession—continued.—2.—**Adverse Possession**—*continued*.

Suit for emoluments of office—Declaratory decree obtained during period of—Effect—See LIMITATION ACT, 1908, art. 124, 8 Ind. Cas. 883 = 9 M.L.T. 171.

See LIMITATION ACT, 1908, arts. 132, 144, 1 B.L.R. S.N. 13 C.

See LIMITATION ACT, 1908, arts. 132, 144, 1 B.L.R. A.C. 114 = 10 W.R. 172.

Independent trespassers—Adverse possession — Limitation — See LIMITATION ACT, 1908, arts. 137, 142, 144, 7 A.L.J. 1184.

See LIMITATION ACT, 1908, art. 139, 25 M. 507 = 12 M.L.J. 119.

See LIMITATION ACT, 1908, arts. 139, 148, 4 B.H.C. A.C. 155.

Against an adoptive mother, how far operative against an adopted son—See LIMITATION ACT, 1908, arts. 140 and 141, 2 Bom. L.R. 411.

See LIMITATION ACT, 1908, art. 141, 18 B. 216.

Against a reversioner, effect of, when complete against a Hindu widow, how far operative against the reversioner who is entitled to the estate—See LIMITATION ACT, 1908, art. 141, 2 Bom. L.R. 106.

See LIMITATION ACT, 1908, arts. 141, 142, 79 P.R. 1898.

By a grandmother against grandson, which is not adverse in its inception, does not become adverse merely by registration of her will—See LIMITATION ACT, art. 141, 3 Bom. L.R. 673.

Possession adverse to the female adverse to the reversioner—See LIMITATION ACT, 1908, arts. 141, 142, 144, 41 P.R. 1903.

Against Hindu reversioner—Suit by more remote reversioners on death of such reversioner—See LIMITATION ACT, 1908, art. 144, 106 P.R. 1906 = 162 P.L.R. 1906.

See LIMITATION ACT, 1908, art. 148, A.W.N. 1886, 152.

Mahomedan widow in possession of property in lieu of dower—Loss of possession by widow — Adverse possession by stranger—See MAHOMEDAN LAW—DOWER, A.W.N. 1908, 256 = 5 A.L.J. 715.

Mahomedan Law—Possessory lien for dower — Adverse possession—See MAHOMEDAN LAW — DOWER, A.W.N. 1893, 103.

See MAHOMEDAN LAW—GIFT, A. W. N. 1884, 296.

See MAHOMEDAN LAW—INHERITANCE, A. W. N. 1884, 171.

Wakf property—Acquisition of title by—See MAHOMEDAN LAW—WAKF, 7 A.L.J. 1095 = 8 Ind. Cas. 578.

Possession—continued.**—2.—Adverse Possession—continued.**

Office of Mutwalli—Adverse possession—See MAHOMEDAN LAW—WAKF, 3 Ind. Cas. 419=11 C.L.J. 304=14 C.W.N. 497=37 C. 263.

Where the enjoyment of a person in possession is not adverse to the owner of the property, the owner's right will not be barred by limitation—See MAHOMEDAN LAW—WAKF, 9 C.W.N. 625=2 A.L.J. 513=2 C.L.J. 179=27 A. 320=15 M.L.J. 261.

See MALABAR LAW—JOINT FAMILY, 14 M. 38.

See MALABAR LAW—MORTGAGE, 10 M. 189.

See MESNE PROFITS—MODE OF ASSESSMENT, 5 W. R. 127, P.C.=2 M.L.A. 113.

Against mortgagor—Suit by mortgagee—Limitation—See MORTGAGE—GENERAL, 9 Ind. Cas. 990.

Assertion of proprietary right by mortgagee, after fruitless foreclosure proceedings—Mutation in Revenue records in his favour—Whether he can start possession adverse to mortgagor—See MORTGAGE—FORECLOSURE, 90 P.L.R. 1908=65 P.R. 1908=113 P.W.R. 1908.

See MORTGAGE—FORECLOSURE, 8 B.L.R. 104, P.C.=16 W.R. P.C. 33=14 M.L.A. 144.

Mortgagee's possession not adverse to true owners—See MORTGAGE—REDEMPTION, 4 A.L.J. 787=A.W.N. 1908, 1=3 M.L.T. 132.

As between mortgagor and mortgagee—What constitutes—See MORTGAGE—REDEMPTION, 15 O.C. 39.

Mortgagor and mortgagee—Possession of mortgagee when adverse—See MORTGAGE—REDEMPTION, 9 C.W.N. 201=7 Bom. L.R. 1=2 A.L.J. 71, P.C.=1 C.L.J. 584=32 C. 296.

See MORTGAGE—REDEMPTION, 161 P.R. 1889, 71 P.R. 1900.

Usufructuary mortgage—Ouster of mortgagees—See MORTGAGE—USUFRUCTUARY, A.W.N. 1908, 25=5 A.L.J. 85=3 M.L.T. 125=30 A. 119.

Mortgage—Sale of equity of redemption—Purchase by mortgagee and possession whether amounts to adverse possession against true owner of equity—See MORTGAGE—MISCELLANEOUS, 21 B. 793.

See OUDH SETTLEMENT, 8 A.L.J. 132, P.C.=9 M.L.T. 200=15 C.W.N. 273=21 M.L.J. 109=13 Bom. L.R. 75=9 Ind. Cas. 391=14 O. C. 95=33 A. 125=13 C.L.J. 63.

Partition—Land allotted to minor—Adult member remaining in possession—Nature of possession—See PARTITION—GENERAL, 9 M. L.T. 387=9 Ind. Cas. 505.

Defendant not himself in possession—Plea of—See PARTITION—GENERAL, 5 Ind. Cas. 325.

Possession—continued.**—2.—Adverse Possession—continued.**

Acts not necessarily amounting to—Rights of person in previous possession as against trespasser—See POSSESSION—ADVERSE POSSESSION, 4 Ind. Cas. 314=18 P.W.R. 1909.

Suit for possession on title by purchase—Title not proved—Title by adverse possession not being inferrible from plaint or issue—Effect—See POSSESSION—SUITS FOR POSSESSION, 4 M.L.T. 344.

Suit for possession—Plaintiffs alleging that defendants were tenants of other than suit lands and that by trespass they got suit land within 12 years before suit—Defendant's possession for more than 12 years proved—Effect—See POSSESSION—SUITS FOR POSSESSION, 8 C. L.J. 557.

Possession in the first instance permissive, and not adverse—Adverse possession subsequently set up—Burden of proof of—See POSSESSION—SUITS FOR POSSESSION, 5 M.L.T. 294=1 Ind. Cas. 806.

Declaration of title based on—Claim based on adverse possession not set up in the plaint—Practice—Pleadings—See PRACTICE AND PROCEDURE, A.W.N. 1908, 277.

See MAD. REG. XXV OF 1802, s. 8, 3 M.H. C. 5.

Right to office of shebait may be extinguished by—See RELIGIOUS ENDOWMENT, 3 Ind. Cas. 408=11 C.L.J. 2.

Right to shebaitship—Acquired by more than 12 years—See RELIGIOUS ENDOWMENT, 19 C. 776.

See RES JUDICATA—PARTIES, 1 C.L.R. 531.

See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 1 B.L.R. S.N. 25 A.

Suit by landlord to resume occupancy right on the death of the widow of tenant—Plea of adverse possession by person claiming through widow—See RIGHT OF OCCUPANCY—MISCELLANEOUS, 60 P. R. 1908=109 P.W.R. 1908.

Tenant's possession when adverse—See SALE—GENERAL, 13 C.L.J. 660.

Rights of successive holders of hereditary and impartible estates, whether may be barred by—See SARANJAM, 12 Bom. L.R. 208=5 Ind. Cas. 965=34 B. 329.

See SETTLEMENT—EFFECT OF SETTLEMENT, 1 Agra 231.

Whether plea of title by, should be allowed though not raised in plaint—Test—See SUCCESSION ACT, 1865, ss. 2, 231, 12 C.L.J. 459=8 Ind. Cas. 41.

Management of temple by rotation among two branches of trustees—Discontinuance of possession by one branch—Adverse enjoyment by other—Extinction—See TEMPLE, 27 M. 192.

Possession—continued.**—2.—Adverse Possession—concluded.**

Suit by mortgagee—Decree under s. 86 of the Transfer of Property Act (IV of 1882)—Decree directing payment within a certain time and in default foreclosure—Default by mortgagor—Possession of mortgagee adverse—Second suit for redemption barred—See TRANSFER OF PROPERTY ACT, 1882, s. 86, 8 O.C. 33.

Of joint Hindu family property—See TRANSFER OF PROPERTY ACT, 1882, s. 6, 9 O.C. 55 B.

See TRANSFER OF PROPERTY ACT, 1882, s. 123, 4 M.L.T. 327=19 M.L.J. 255=6 M.L.T. 166=3 Ind. Cas. 122.

Trust-deed turning out to be invalid—Adverse possession by trustee as against *cestui que trust*—Resulting trust in favour of settlor—Limitation—See TRUST, 13 Bom. L.R. 717.

Decisive factor in determining—See TRUST, M.W.N. 1912 445.

Collection of rents by settlor—Whether adverse to trustees—See TRUST, 10 M.L.T. 44.

Holder of missing person's estate—Possession—See TRUST, 2 Agra 78.

See TRUST, 6 M.L.J. 270, 9 M.L.J. 93.

See TRUSTEE, 3 B.L.R.A.C. 409=12 W. R. 319.

See VENDOR AND PURCHASER—MISCELLANEOUS, 1 Agra 110.

See SPECIFIC RELIEF ACT, 1877, s. 42, A.W.N. 1887, 103.

—3.—Evidence of Possession and Title.

(1)—*Question of fact—Evidence.*—When a witness says that a party is in possession, that, in point of law, is admissible evidence of the fact that such party was in possession. *Per Mitter, J.*—A bare statement of a witness that A.B. was in possession unaccompanied by any information as to his means of knowledge, or as to the materials upon which he came to that conclusion, would be, even if it were admissible in law, evidence of a most unsatisfactory character. If the word 'possession' is understood in the sense of actual occupation—a fact directly cognizable by the senses,—there can be no doubt that the statement would be admissible, but if the word is to be understood in the sense of what is called in legal phraseology constructive possession, the witness must be considered to have been speaking not of a fact directly within his knowledge but of a conclusion based upon facts although the knowledge of those facts might have been actually derived from sensation, the primary source of all our knowledge. *MANIRAM DEB v. DEBI CHARAN DEB*, 4 B.L.R. F.B. 97=13 W.R. F.B. 42. [F., 8 Bom. L.R. 19=1 M.L.T. 63.]

(2)—*Possession—Mixed question of fact and law—Statement by witness as to possession.*—

Possession—continued.**—3.—Evidence of Possession and Title—*ctd.***

A mere statement by a witness to the effect that a party is in possession is no evidence of possession. The question of possession is a mixed question of fact and law, which it is for the Court to determine. The evidence produced on the point must give the various acts of ownership which go to constitute possession, so that the Court might arrive at its own conclusion. *ISHAN CHUNDER BEHARA v. RAM LOCHUN BEHARA*, 9 W.R. 79.

(3)—*Possession—Proof—Occasional visiting and use of house prima facie evidence of possession.*—Where the question was whether the vendor of a house was in possession of it within 12 years before the commencement of the suit, and it was shown that he had, within the twelve years occasionally visited and made use of the house, *held* this was ample evidence of possession, unless it was shown that the party so claiming possession had come to the house in the capacity of a visitor, and not in his own right. *UNUNTO RAM SEAL v. BROJO BULLUB SEAL*, 11 W. R. 136.

(4)—*Evidence not alluding to specific acts of ownership—Possession.*—The High Court, in special appeal, *held* that evidence not alluding to specific acts of ownership, was not enough to prove possession. *JAGABANDHU DAS GAJENDRA MAHAPATRA v. DINABANDHU DAS GAJENDRA MAHAPATRA*, 2 B.L.R. App. 30.

(5)—*Suit for possession—Assertion of title by plaintiff in previous proceedings—No objection raised by defendant—Presumption.*—In a dispute as to who was the owner of certain land, where the evidence in the case showed that, whenever the question of ownership of the suit land was raised in previous proceedings before the Revenue Authorities, the plaintiff successfully asserted that it belonged to him, whereas the defendant, knowing that his title was not acknowledged, never raised any objection, *held* that the mere fact of the plaintiff failing to prove that he had taken any produce of the suit land did not show that the plaintiff was not in possession. *BORDDO NATH MOKOOR v. DUMOYUNTEE DEBIA*, 19 W.R. 245.

(6)—*Mirasdar's title, proof of—Long possession.*—The titles of *mirasdars*, both of those who once had but have lost their *sanads* and of those who never had such documents, may be proved by other evidence, and long possession is a strong element in such proof. A *sanad* is not indispensable to the proof of *mirasi* tenure. *BABAJI AND NANAJI v. NARAYAN*, 3 B. 340. [Appl. 18 B. 433; Cons., 1 Bom. L.R. 373; R., 15 B. 647, 25 C. 896, 5 Bom. L.R. 186.]

(7)—*Survey records—Evidentiary value in suit for possession.*—Where a person sues to recover possession of lands, the *onus* is upon him to show that he has been in possession and that he has a title in them. Certain alluvial lands were originally surveyed as appertaining to no

Possession—continued.**---3.—Evidence of Possession and Title—*ctd.***

permanently settled estate in 1863-1864. The predecessor-in-title of the plaintiff, subsequently in 1864, claimed them as appertaining to his estate. No objections being raised by any one to his claim, the survey authorities admitted it, and corrected their record accordingly. The plaintiff, in 1876, sued for recovery of possession of the land. *Held*, that although, ordinarily, the fact of the land of a certain village being measured by the Revenue Authorities as appurtenant to a certain estate is *prima facie* evidence of possession of that land at the time of the survey by the owner of such estate, and, in the absence of proof to the contrary, the title would follow the possession, yet, no presumption of possession or of title could arise in favour of the plaintiff upon the survey proceedings of 1863. If no possession ever followed it, the plaintiff would not be entitled to a decree. If, on the other hand, he was able to prove possession, it would be for the Court to decide whether the plaintiff could establish a title on it, either by reason of its being an accretion to his original estate, or a reformation of plaintiff's lands. **KUSSESUR ROY v. JOGGODISHURI, 7 C.L.R. 269.**

(8)—*Evidence — Undisturbed possession — Registry in Government books.*—Where the name of a person or his ancestor has always been entered in the Government books, and it is found that he has always paid the Government assessment in respect of certain villages, though that may not be evidence of title, it is very strong evidence of possession. **DEVAJI GAYAGI v. GODABHAI GODBHAI, 2 B.L.R. P. C. 85=11 W.R.P.C. 35=2 Suth. 208. [F., 17 W.R. 346; R., 5 Bom. L.R. 956.]**

(9)—*Evidence of possession—Collector's books.*—The Collector's books are intended only for the purposes of revenue: they are evidence neither of title nor possession. **PANDURANG v. ANANT, 5 Bom. L.R. 956. KHAVAR SULTAN v. RUKHA SULTAN, 6 Bom. L.R. 983.**

(10)—*Chur lands—Suit for possession of—Evidence.*—Where, in a suit for possession of *chur* lands, plaintiff alleging his possession for 10 years and subsequent dispossession by Government, the lower Court decreed the claim, relying on the strength of a map prepared by an Amin in another suit to which the defendant was no party, and rejecting the whole of the evidence which consisted of the depositions of Government officers, who, from year to year went to the land, measured it, surrounded it by pillars and exercised other acts of possession, *held* that the lower Court was wrong in having decreed possession to the plaintiff. It was pointed out to the lower Court that the decrees obtained by either party to which the other was no party, or the proceedings of the Revenue Authorities, should not be considered as binding, but should be treated as evidence to which the Court should give such weight as it thinks proper. The fact that the Government sent its public officers to the spot to have it

Possession—continued.**---3.—Evidence of Possession and Title—*ctd.***

measured and surrounded with pillars is the very best evidence of possession, whether the land was *chur* or cultivable—*Per Jackson, J. (N.B.)*—The case was, accordingly, remanded for re-trial according to the above directions. **THE COLLECTOR OF FURREEDPORE v. KALLEE DOSS HAZRAH, 17 W.R. 195.**

(11)—*Possession, Suit for—Title—Evidence—Government revenue, receipts for—Evidentiary value.*—In a suit for possession, if the plaintiff proves his possession for 30 years prior to the institution of the suit, he proves a title by prescription and is entitled to get from the Court a decree declaring his title to the suit property, notwithstanding any title that the defendant might set up to the contrary, however good that title may be. The possession of receipts for Government revenue is no proof or, at best, a very weak proof, of possession of property. **LALLEE SINGH v. MUSSAMUT ARIT KOOR, 17 W.R. 490.**

(12)—*Evidence—Possession — Disturbance—Receipt of rent.*—Receipt of rent is good evidence of possession, but does not necessarily follow in every case that a party in possession has been disturbed, because he cannot prove that he has collected rent in respect of a particular portion of the property. **PUDAR BINDHOO MAHANTEE v. MOHESH CHUNDER SEN, 20 W.R. 183.**

(13)—*Non-payment of rent at any time, how far proof of exemption protected by limitation—Party claiming rent, burden of proof on—Permissive holdings, Zemindar's rights not affected by.*—Where the holding has been merely permissive, it could not prejudice the right of the zemindar. The fact that no rent has ever been paid may be *prima facie* strong proof of a *de facto* exemption protected by limitation. The plaintiff claiming the land may be able to satisfy the Court that her remedy was not affected by lapse of time and that the land was held for service due and rendered to the zemindar, otherwise by the permission of the zemindar, but the *onus* of proving the above will always be upon the plaintiff. **ALI BUX v. MUSUMAT ROOP KOOR, 2 N.W.P. 106.**

(14)—*Possessory suit—Rent decree—Evidence.*—In a suit for rent filed against a registered tenant and another, a decree against the former is not binding evidence of possession in a subsequent suit for possession between them. **HURRONATH BHUTTACHARJEE v. ROBERT HARNEY, 25 W.R. 23.**

(15)—*Suit to set aside decree—Possession—Title—Court's duty.*—Where a plaintiff sues to set aside a decree and also to recover possession on the strength of his title, the question of title must be tried by the Court. **TARINEE CHURN MUSADDEE v. JABAR ALI, 23 W.R. 21.**

(16)—*Act IV of 1840, decision in case under, no evidence respecting title—Issue regarding right to possession, proof of actual possession not necessary.*—The decision passed, in an Act IV

Possession—continued.**—3.—Evidence of Possession and Title—*ctd.***

of 1840 case, cannot amount to any evidence of title one way or the other. A person subsequently suing to get rid of such a decision and to establish his right must prove his title before he can put his opponent to proof of his. Also, where the question for trial is not possession but a right to possession, it is not necessary for the plaintiff to prove *khas* possession, since he may possibly have a perfectly good title though he might never had any possession. **GUDADHUR KOONDOO v. RAM KOONWAR BOSE, 6 W.R. 155.**

(17)—*Error of law—Judgment omitting to mention evidence—Act IV of 1840—Possession—Presumption as to title.*—Plaintiff sued for possession on the allegation of previous possession and dispossession. Defendant denied that plaintiff ever held the lands in suit at all, or was dispossessed, and pleaded limitation. The lower appellate Court found, "on the whole of the evidence," the allegation of plaintiff as to dispossession, as stated in the plaint, proved. In special appeal, the defendant contended that the lower Courts did not consider the plea of limitation in connection with a record of a case under Act IV of 1840, in which it was found that a certain embankment was in the possession of the defendant. *Held*, that by the expression "on the whole evidence" it should be judicially presumed that any and all evidence adduced by the defendant was fully considered and that there was not any error of law in the lower appellate Court not specifically mentioning and dwelling upon the fact in the Act IV record, that a certain embankment was in the possession of the defendant. Possession though not long would be sufficient to raise a presumption of title. **PURANCHUNDER MOOKERJEE v. PROTAP NARAIN PAUL, 9 W.R. 120.**

(18)—*Decree for rent.*—A decree for rent is no proof of actual possession. **ABDOOL ALI v. ABDUL RUHMAN, 21 W.R. 429.**

(19)—*Registration under the Act—Evidence in suit for possession—Quære.*—Whether, in a suit founded upon possession alone, or in which the relief sought depends solely upon possession, such registration ought not to be treated as *prima facie* evidence of actual possession at the date when the registration was effected? **RAM BUSHAN MAHTO v. JUBLI MAHTO, 8 C. 853.** [*Expl.*, 9 C. 431; *R.*, 23 C. 87, F.B.]

(20)—*Evidence—Recital in decree between other parties—Possession by tenant.*—A recital in a decree in a suit not between the parties to the present suit, or those under whom they claim, cannot be evidence to bind the defendants in the present suit. Possession by a tenant does not in itself lead to any inference as to the character of the tenure; the fact of his having occupied the land and paid rent for 12 years and even for 20 years being equally consistent with his being a tenant-at-will, a farmer or a *mokurruredar*. **SHIU DAYAL**

Possession—continued.**—3.—Evidence of Possession and Title—*ctd.***

PURI v. THAKUR MAHABIR PRASAD, 2 B.L.R. App. 8=10 W.R. 477. [*F.*, 3 B.L.R.A.C. 312=12 W.R. 217; *R.*, 7 B.L.R. 211; *D.*, 11 W.R. 465.]

(21)—*Evidence of title—Presumption.*—Possession is evidence of title, and is primarily exclusive. It is for him who impugns the exclusive title to show that the possession originated in some way which has preserved his own right, otherwise one must attribute a legal origin and the usual incidents to actual, continued and peaceable enjoyment. **BASAPA v. BASAPA, 2 Bom. L.R. 410.**

(22)—*Possession, Effect of, in relation to title—Conveyance, Evidentiary value of.*—Possession is a good title as against everybody who fails to prove one better. Hence, a person not in possession, cannot, without proof of title, turn another even though he may have no title, out of possession. Mere production of a conveyance will be of no avail. **GEORGE CLARKE v. BINDABUN CHUNDER SIRCAR, W.R. F.B. 20 = Marsh. 75=1 Ind. Jur. O.S. 97=1 Hay 137.**

(23)—*Title by possession—Effect.*—Possession is a good title against every one who cannot prove a better title. **SOODUKHINA CHOWDHRAIN v. RAJ MOHUN BOSE, 11 W.R. 350.**

(24)—*Possession—Title—Proof of title.*—If, in a suit for possession on the ground of trespass, the plaintiff fails to prove that the trespass alleged is true and that the defendant's possession commenced in wrong, he can succeed only on proving a distinctly superior title. **ARUMUGAM CHETTY v. PERRIYANNAN SERVAI, 25 W.R. 81, P.C.**

(25)—*Ownership—Value of possession.*—To recover possession a plaintiff must show a better right in himself to possession than is in the defendant. He may, within the period prescribed by the Limitation Act, show that, in a case where he is dispossessed, either by establishing title or by showing a prior legal possession entitling him to be restored to the same. Possession is *prima facie* proof of ownership: it is so because it is the sum of acts of ownership. This applies both to prior and to present possession. Possession has a two-fold value: it is evidence of ownership, and is itself the foundation of a right to possession. **HARI v. DHONDI, 8 Bom. L.R. 96.**

(26)—*Possession a good defence against a mere wrong-doer.*—Possession peaceably held entitles a person to recover without further proof of title as against a mere wrong-doer. **BAI FATAN v. EMAD, 3 Bom. L. R. 246.**

(27)—*Proof of title—Presumption in favour of the man in possession.*—Possession is in itself title in the absence of proof displacing the presumption that arises from possession. The man in possession starts with this presumption in his favour, and the maxim *presumitur retro* applies: and it is, therefore, for the other side to show, not only that the former's possession

Possession—continued.**—3.—Evidence of Possession and Title—*ctd.***

is not evidence of his title, but that the latter has a superior title. **BHAGWAN SING v. THE SECRETARY OF STATE, 10 Bom. L.R. 571.**

(28)—*Prior possession—Proof of title—Specific Relief Act, s. 9.*—Possession in the absence of proof to the contrary is *prima facie* evidence of title. Prior possession is a ground on which as *prima facie* evidence of title, a plaintiff may recover possession in the absence of title set up by the defendant even though his suit does not fall within s. 9 of the Specific Relief Act. But it must be found not only that the plaintiff's prior possession was within 12 years of suit, but also that it was a juridical possession of the property claimed. If the possession is joint, it cannot be held juridical possession of the whole as against the person with whom it is jointly held. All that can be recovered on such joint possession will be joint possession and not exclusive possession; for as against the joint possessor the prior enjoyment would be *prima facie* evidence of title. **RAJARAM v. NANCHAND, 5 Bom. L.R. 225.**

(29)—*Title — Dispossession — Wrong-doer — Suit to recover possession—Specific Relief Act (1 of 1877), s. 9.*—A plaintiff who proves that while in peaceable possession he was dispossessed by the defendant wrongfully is entitled to recover because his previous possession is tantamount to his title as against a wrong-doer. A person in possession has a good title as against every stranger, and one who dispossesses him, having no title in himself is a wrong-doer and cannot defend himself by showing that the title is in some third person. In such cases proof of previous possession is, without more, evidence of the plaintiff's title to recover from the defendants who are proved to be wrong-doers. There is a difference between such a suit and a suit under s. 9 of the Specific Relief Act, 1877. In the former, the Court awards the claim only when it finds that the plaintiff had peaceable possession, before dispossession and that the defendant has no title and is a wrong doer, the plaintiff's previous possession being in law sufficient proof of his title; in the latter, the Court can only go into the question of dispossession within six months before suit and cannot enquire into the defendant's title. **ALI v. PACHUBIBI, 5 Bom. L.R. 264.**

(30)—*Acquisition of possession.*—For the purpose of going into possession of land, it is not necessary to walk over the whole of it; but it is enough where the lands are connected geographically to go on to one piece of the land in the name of the whole. **HANMANTA v. MIR AJMODIN, 6 Bom. L.R. 1104.**

(31)—*Nuzool land—Houses and shops—Non-assertion of proprietary rights by Government—Local agency—Summary proceeding—Legality of—Regular suit.*—Plaintiff had been in possession and enjoyment of two houses and ten shops (which were erected by his ancestor) for

Possession—continued.**—3.—Evidence of Possession and Title—*ctd.***

very many years from time previous to 1841 without any rent being demanded by Government and without any recognition whatsoever of rights either of the Government or of the public in the houses or the land on which they stood, at any time previous to 1865. The Revenue officials fixed certain sums of money as the prices of the houses, on the ground that they belonged to the *nuzool* fund, and issued a notice to the effect that if the price be not paid within a month, the houses would be sold. *Held* that the order can have no legal operation to the prejudice of the plaintiff, and that the Revenue Authorities ought to obtain from the Civil Courts an adjudication of those rights to the property before proceeding summarily. **COLLECTOR OF BAREILLY v. GHASEE RAM, 1 Agra 260.**

(32)—*Suit for redemption—Defendant pleading possession under sale—Long possession—Burden of proof.*—In a suit for redemption of a mortgage, the plaintiff alleged in his plaint that a stale claim of upwards of 30 years, standing was lately purchased by the defendants from one of the sons of the original mortgagors. The defendants denied the mortgage insisting that the transaction was one of sale and that possession was held by them under a sale-deed which had been lost in 1857 during the mutiny, and that in the Collector's papers their names only appeared. *Held* that it was incumbent on the plaintiff who sought to disturb a possession of more than 30 years' duration, to show his title to do this and to prove that this possession was referable to a mortgage title and not to a title by purchase. Uninterrupted possession for a long period of time is sufficient *prima facie* proof of title. It is of the utmost consequence in India that the security which long possession affords should not be weakened. **RAGHOO NATH RAI v. CHUNDOO LALL, 2 Agra 395.**

(33)—*Suit for possession of property—Twelve years' possession—Title.*—In a suit to recover possession of land, anterior possession for 12 years of the land sought to be recovered does not dispense with the necessity which lies on the plaintiff to prove his title to the property. He is not on that fact alone entitled to be re-placed in possession of the property without regard to any right which may be alleged by the defendant. **LAKHI KAMAR v. RAM DUTT CHOWDHRY, 3 B.L.R. App. 44.**

(34)—*Suit for possession—Plea of joint possession—Limitation—Long possession—Title—Evidence.*—In a suit for confirmation of title and possession, the defendants pleaded that they were also jointly in possession with the plaintiffs, but failed to prove this allegation of joint possession. *Held* that the defendants could not then plead limitation. In a suit for confirmation of title and possession of certain property which was admittedly acquired about a century ago and of which the defendant claimed to be in

Possession—continued.**—3.—Evidence of Possession and Title—*ctd.***

joint possession, the plaintiff cannot be reasonably expected to prove the *specific source* from which the acquisition was made. The question of possession is the only material point in the case. Long possession is not only evidence of title, but in a case of this sort, it is a good and valid title by itself. **RUNG LALL MISSER v. RAGHOOBUR SINGH, 9 W.R. 169.** [*D.*, 11 W.R. 550.]

(35)—*Possession—Presumption.*—The only presumption which a Judge, as a *matter of law* is absolutely bound to make in favour of a person in possession, is that he is in lawful possession, for any purpose beyond this, possession is only evidence to be taken conjointly with the other evidence (if any) by which it is sought to establish or impugn the title. **SELAM SHEIKH v. BAIRDONATH GHATAK, 3 B.L.R.A.C. 312=12 W.R. 217.** [*R.*, 9 B.H.C. 121.]

(36)—*Possession and dispossession—Proof of title, onus of—Act X of 1859—Prescription or title by right of occupancy.*—Possession is evidence of title, and if a plaintiff proves that he had possession, and that that possession has been forcibly disturbed by another person against his consent and without the intervention of a Court of law, he will have made out a *prima facie* title which it would be upon that other person to rebut. (9 W.R. 602, *Appl.*) A person who had obtained certain land by purchase from a zemindar subsequently confirmed by a pottah was dispossessed by the defendant claiming under a lease from the same landlord. She sued for recovery of possession, and the Court of first instance decreed her claim. But the lower appellate Court, holding that the pottah was not proved by the plaintiff, refused to go into the question of possession and dismissed the suit. *Held* that, even admitting for the sake of argument that the plaintiff had failed in proving the genuineness of the pottah propounded by her, it would have been still necessary for the lower appellate Court to enquire whether the plaintiff, or the party through whom she claimed, had been in possession of the property in dispute for such a length of time as would have been sufficient to create a title by prescription in her favour, or, at any rate, a title of occupancy under the provisions of Act X of 1859. **AYESHA BEEBEE v. KANHYA MOLLAH, 12 W.R. 146.**

(37)—*Act XIV of 1859, s. 15—Possessory action—Burden of proof.*—A party failing in a possessory action under s. 15, Act XIV of 1859, is bound to prove his title, even though he may have been in possession for three or four years previously. **JHOOMUCK LALL SHAHA v. JAMES BURRELL, 21 W.R. 52.**

(38)—*Act XIV of 1859, s. 15—Scope and object—Dispossession by wrongful act.*—S. 15 of Act XIV of 1859 does not in any way affect the general law on matters to which it relates. It was intended by that section solely to give a special remedy for a particular kind of grievance. Were it not for the advantages given

Possession—continued.**—3.—Evidence of Possession and Title—*ctd.***

by that Act, it might happen that a person in undisturbed possession of landed property might be turned out by a stranger, and might not be able to get it back again without invoking the assistance of a Court of Law; but if he did come into Court for the purpose of seeking to recover possession, the burden would be placed upon him to prove a *prima facie* title before the defendant can be called upon to say anything in defence of his own case. **KALEE CHUNDER SEIN v. ADDOO SHAIKH, 9 W.R. 602.** [*R.*, 19 C. 544, F.B.; *D.*, 11 W.R. 550.]

(39)—*Suit to recover possession of bramat land—Act XIV of 1859, s. 15.*—Where the plaintiffs sued to recover possession of certain *bramat* lands by declaration of their title by purchase to those lands and for reversal of an order passed under s. 15, Act XIV of 1859 (by virtue of which the defendant dispossessed them of the same), *held* that, though the plaintiffs failed to prove their title-deeds, their title was yet sufficiently established by oral evidence of long possession prior to their dispossession by the defendant. **RAMCHANDRA CHOWDHRI v. BRAJANATH SARMA, 3 B.L.R. App. 109.**

(40)—*Zemindar not competent to restrain persons of his officers—Ejectment of officers from houses—Onus of proof of title on zemindar.*—A zemindar has no right to restrain the persons of his officers in case he thinks proper so to do, and the Court should hold him liable to more than merely nominal damages for such restraint in order to impress upon him the injustice of proceeding upon any supposed custom to the contrary. Where an officer of the zemindar has had long possession of, and lived in, a house appropriated to him according to the customs and usages in the East Indies, the Court can justly draw the inference from such possession that that is evidence of title. In the absence of any proof of the existence of a good title to the contrary in the zemindar, the title of his officer inferred from long possession should prevail. **RAJAH PEDDA VENKATAPPA NAIDOO BAHADUR v. AROVALA ROODRAPA NAIDOO, 6 W.R. P.C. 13=2 M.I.A. 504=1 Suther 112=1 Sar. 224.** [*F.*, 9 W.R. 71; *D.*, 8 W.R. 370.]

(41)—*Person in possession, right of, to continue—Duty of opponent to disclose better title.*—In this case, defendant was admittedly in possession and plaintiff who sought to oust him from possession was bound to prove a better title. The title produced by the plaintiff was his decree and if this be impugned by the defendant and proved to be collusive, the defendant, however bad his own title might be, would be entitled to remain in possession until some one disclosed a better title than he. It would be no answer to defendant's allegation of fraud to show that he was himself in no better position, because he, being in possession of the thing sought to be recovered, was, for the time, master of the situation, and could only be

Possession—continued.**—3.—Evidence of Possession and Title—*ctd.***

ejected on the strength of his assailants' title, and not on account of the weakness of his own right. **GOPEE NATH DOSS v. DYANIDHEE SOONDURA MOHAPATTUR, 7 W.R. 485.**

(42)—*Suit for damages for value of fruits, etc., taken by a wrong-doer from a garden, maintainability of—Possession and title, proof of.*—Where a person brought a suit to recover the value of fruits and other crops taken away wrongfully, from the garden in his possession, by the defendants, *held*, that the plaintiff would be entitled to a decree for damages without proof of title, if it was found *first*, that he had been in possession from before and up to the date of the institution of the suit, and *secondly*, that the defendants had failed to make out a better title to the garden than the plaintiff. So, in this case, the plaintiff will be entitled to a decree, unless the defendants make out a better title; title need not be proved by the plaintiff. **LEP SINGH KHASIA v. NIMAR KHASIA, 21 C. 244.**

(43)—*Settlement — Long possession.*—Long possession itself does not give a title to settlement, if the parties asking for the settlement do not comply with the requirements of the law. **GOLAK CHANDRA CHOWDHRY v. ALI MOLLAH, 8 B.L.R. 528, Note = 11 W. R. 378.**

(44)—*Suit to recover possession of immoveable property — Title and possession.*—A plaintiff cannot ordinarily succeed in a suit to recover possession of immoveable property, merely by showing that the title to the property to which the defendant is in possession has accrued to him. Where a plaintiff seeks to recover possession upon a title recently acquired by him, it is not an invariable rule that he should prove the origin of his vendor's title and the documents on which it is founded; it is quite sufficient for him to give proof of long possession on the part of his vendor. Though possession alone could not be conclusive evidence of title, nor does it constitute title, still, long and undisturbed possession of the vendor, when positive evidence of title cannot be had, might in many cases be sufficient to constitute proof of title. **JOYKISHEN MOOKERJEE v. RAJKISHEN MOOKERJEE, 12 W. R. 315.**

(45)—*Pre-emption — Long possession — Sale-deed set aside in first Court—Appeal—Result not known—Mutiny—Destruction of records.*—The plaintiff claimed a right of pre-emption as *sufee shurikh* or partner in an estate purchased in 1853. The defendant alleged that the deed of 1853 was set aside, in a suit founded thereon brought by the plaintiff in 1855. This was admitted by the plaintiff, but he stated that the decree was reversed in appeal. Of this, there was no evidence, but it appeared that an appeal was preferred against that decision. The result of the appeal could not be known, inasmuch as the records of that time were burnt during the mutiny. The first Court gave him a decree on the ground of long possession as proprietor. The lower appellate Court

Possession—continued.**—3.—Evidence of Possession and Title—*ctd.***

reversed the decision on the ground that as the plaintiff's claim for pre-emption must stand or fall with the deed of 1853, and as this had been admittedly set aside by a decision in the Munsiff's Court in 1855, it was upon the plaintiff to show that that decision was reversed on appeal and as he failed to do so, it was unnecessary to enter into the question of his possession. *Held*, that under the circumstances of the case, the plaintiff was entitled to a decree on proof of long possession as proprietor. **TUFANI SINGH v. MUSSAMAT DURGABAN, 4 B. L. R. App. 21.**

(46)—*Suit for rent—Adverse possession—Relationship of landlord and tenant, non-existence of—Limitation.*—Where there has been no occupation by the defendant as tenant to and under the title of the plaintiff as landlord, but an occupation by the defendant adverse and hostile to the title of the plaintiff in the lands in question: *Held*, that under such circumstances the plaintiff's suit for rent was barred by the law of limitation. **KIRPA SHUNKUR v. PAL PANDEY, 1 Agra Rev. 47.**

(47)—*Purchase by a person for himself and as agent of another—Possession with other subsequent to purchase — Finding as title.*—The question in this case was whether the property in suit was purchased by one W for himself or as agent and on behalf of the plaintiff. The lower Courts found that W was the plaintiff's agent, that subsequent to the purchase by W, plaintiff got possession and retained it for several years, and on such evidence of possession, the title was decided to be with the plaintiff. **SYUD MAHOMED SHUMSOOL HOADA v. SYUD MOONEEROOL HUQ, 2 W. R. 41.**

(48)—*Possession—Plaintiff not in possession for 12 years—Evidence—Adverse possession.*—If the plaintiff does not show possession within 12 years of suit, it does not follow that the defendant must have a verdict. Possession may be some evidence of title. But it must be weighed for the party proving that fact together with the other independent evidence adduced by that party, and it must be considered also with reference to how far the evidence adduced by the opposite party may tend to rebut it. The plea of adverse possession for more than 12 years is another point for adjudication in bar. **GOPEENATH MOOKERJEE v. ISSUR CHUNDER BANERJEE, 9 W.R. 365.**

(49)—*Adverse possession — Presumption of independent title.*—Long adverse possession of a defendant, admittedly for 10 or 11 years, in the face of a powerful Zemindar, without any opposition on his part, was in the absence of any evidence on the part of the plaintiff to prove his possession within 12 years, *held* to establish clearly the fact that the adverse possession of the defendant was that of a party with an independent title. **DINOBUNDHOO SUHAYE v. THE COURT OF WARDS, 11 W.R. 347.**

Possession—continued.**—3.—Evidence of Possession and Title—*ctd.***

(50)—*Joint family Property—Presumption in favour of joint possession by members—Exclusive possession by some members, effect of, on presumption—Onus of proof on party setting up joint possession.*—The family property in this case had been in the exclusive possession of the defendant's father. The original presumption in favour of the joint possession of joint family property was supplanted by another and totally different presumption by reason of the said exclusive possession, so that the plaintiff who set up joint possession was bound to make out that a new state of things had subsequently arisen by which he had been re-admitted to possession as a joint owner or had otherwise obtained a practical recognition of his right in that character. The evidence produced by the plaintiff in this case was loose and defective, and it having been met by a stronger body of evidence on the other side, the decree of the lower Court in favour of the plaintiff was reversed. **TATYA v. ANAJI, 11 B. 220, Note (a) = P.J. 1883, 259.** [*F.*, 2 Bom. L.R. 410; *R.*, 11 B. 216.]

(51)—*Exclusive possession of property—Title by prescription—Onus of proof on party impugning exclusive title.*—This was a suit for a portion of joint property alleged to have been left undivided at a general partition of the family. The defendant had exclusive possession of the plaintiff's property. It was held that the onus lay on the plaintiff, who impugned such exclusive title to prove that the possession originated in some way by which his right was preserved. The man who is out of possession must make out some *prima facie* title and some acknowledgment of it such that possession by his adversary is deprived of its ordinary effect through being held on a joint right or on one subordinate to the right set up. No such title and agreement having been made out in this case, plaintiff was held not entitled to the relief sought by him. **VITHOBA v. NARAYAN, 11 B. 221, Note (b) = P.J. 1883, 262.** [*R.*, 11 B. 216.]

(52)—*Enjoyment by one of two joint-owners, prima facie an exclusion of the other—Continuance of joint right, the necessity of positive evidence to make out.*—When of two persons one is in enjoyment of property and the other has no enjoyment or possession, that is, *prima facie* an exclusion of the latter, there may be a contract or other jural relation between the parties which accounts for the sole possession, and makes it preserve instead of destroying the joint right; but, of such a state of things positive evidence is always required since otherwise possession continued even for centuries would afford no security to property. An enjoyment by agreement even after partition, by one for several would, of course, satisfy the test, but then, there must be evidence of the agreement to prevent the inference of exclusive possession. **LACHIRAM v. UMA, 11 B. 221, Note = P.J. 1883, 285.**

Possession—continued.**—3.—Evidence of Possession and Title—*ctd.***

(53)—*Limitation—Adverse possession—Mortgage by owner—Redemption by person not entitled to property—Assertion of right.*—L died in 1848, having in the previous year mortgaged the disputed property. After his death, F and his sister were recorded as proprietors. They were his grandchildren, the children of a son who died in his lifetime. After the record of their names as proprietors, F and his sister redeemed the mortgage in 1854 and afterwards sold the property to the defendant. Until the redemption of the mortgage in 1854, the actual possession was with the mortgagee. The Nankar allowance reserved by the original mortgagor was held by F and his sister. The plaintiff claimed as the son of L by another wife—*Held*, that these undisputed assertions of ownership by F and his sister sufficiently indicated an assertion of exclusive right to the mortgagor's right or equity of redemption adversely to the plaintiff's claim, and that the adverse right thus asserted having lasted for more than twelve years, the plaintiff's right of suit was barred by time. **MUSSUMAT RUTTUN BEBEE v. MAKARUM ALI, 2 Agra 309.**

(54)—*Possession—Permission—Effect on title.*—Long possession would not confer any title on the occupant, if it be proved that the possession was a permissive one. **GUNGA DEEN CHOWDHRY v. HUR SAHAI SINGH, 3 Agra 261.** See, also, **TOOLSEERAM v. NAHUR SINGH, 3 Agra 271.**

(55)—*Occupied and unoccupied lands—Limitation.*—For purposes of limitation, it is important to consider whether the disputed lands are occupied or uninhabited and uncultivated. Where the land has been occupied, the question of possession must properly be dealt with as distinct from that of title; but where no acts of ownership, by any person, could be proved to have been exercised over the land, the right to which is disputed, it would be often necessary to rely upon slight evidence of possession and, sometimes, possession of the adjoining land coupled with evidence of title, such as grants or leases, and under such circumstances the party, who has the title, might be presumed to have also the possession. **MOHIMA CHUNDER DEY SIRCAR v. HURRO LALL SIRCAR, 3 C. 768 = 2 C.L.R. 364.**

(56)—*Conflicting evidence of possession—Presumption of title.*—Where the evidence of possession, in a case where both the parties are trying to make out a title by twelve years' adverse possession, is conflicting and conclusive on neither side, the presumption that possession goes with the title may well be applied. **DHARM SINGH v. HUR PERSHAD SINGH, 12 C. 38.** (20 W.R. 25, *F.*) [*F.*, 8 C.W.N. 876; *Expl.*, 7 C. P.L.R. 12, 27 C. 25.]

(57)—*Evidence of possession conflicting—Title, presumption of—Possession not necessarily the same as actual user—When presumption in favour of continuance of possession though in no sense a conclusive one arises.*—Where the evidence

Possession—continued.**—3.—Evidence of Possession and Title—*ctd.***

of possession is strong on both sides and apparently equally balanced, preference should be given to the evidence on the side of the party with whom the title is found. But the principle does not apply where the evidence of possession is equally unworthy of reliance on either side. [*R.*, 8 C.W.N. 876.] Possession is not necessarily the same thing as actual user. A presumption in favour of continuance of possession arises in a case in which a person has to prove possession of the disputed land within the statutory period of limitation, if there is anything special in the character of the land, *e.g.*, when land is either permanently or temporarily incapable of actual enjoyment in any of the customary modes. Such a presumption is in no sense a conclusive one. *THAKUR SINGH v. BHOGERAJ SINGH*, 27 C. 25. (9 C. 744, *R.*) [*R.*, 8 C.W.N. 876.]

(58)—*Title—Possession for twelve years.*—A brought a suit under Act X of 1859 to recover arrears of rent *re* certain lands. B was made a party under s. 77; but A obtained a decree and ousted B. Thereupon B sued A in the Civil Court for possession and for the declaration of his rights to the lands, alleging that they were his *Likheraj* and *Davatsa* lands. Proof of long possession by B was established. The High Court, on special appeal, held that proof of twelve years' possession by B was sufficient. *BISWANATH v. BRAJA MOHAN CHUCKERBUTTY*, 1 B L.R.S.N.I. (c) = 10 W.R. 61. [*D.*, 2 B.L.R. App. 8]

(59)—*Suit for possession against tortfeasor by one who had possession without title.*—A plaintiff, in a suit for possession brought more than six months after his dispossession, is not entitled to possession merely upon proof of previous possession short of possession for a statutory period of 12 years which can give a title by adverse possession. *SHAMA CHURUN ROY v. ABDUL KABUR*, 3 C.W.N. 158. (20 C. 834, *D.*; 17 C. 256, 9 C. 130, *F.*) [*R.*, 26 C. 579.]

(60)—*Acquisition of land by Railway Company—Right to compensation of party in possession—Onus on party setting up prior claim.*—Where a Railway Company acquires land for public purposes, the person in possession of the land at the time of its acquisition would be *prima facie* entitled to the money paid for it by the Company, unless some one else showed that he had a prior claim. *CHUNDEE CHURN CHATTERJEE v. BIDOO BUDDEN BANERJEE*, 10 W.R. 48.

(61)—*Land Acquisition Act (X of 1870), s. 15—Compensation for owners of houses and sites—Owners of houses entitled to compensation for sites also.*—Assuming that possession of plots of land (on which houses appropriated under Act X of 1870 were situated) had been granted by the Zamindars to the builders to build thereon, and to hold so long as the building subsisted, the Zamindars would be entitled only to a reversionary interest in the land, an interest contingent on the owner of the buildings allowing

Possession—continued.**—3.—Evidence of Possession and Title—*ctd.***

them to fall into ruin. On the other hand, the owner at the time the property was taken for public purposes would be entitled to the bulk of the compensation awarded for the sites as he had possession of the sites on which the buildings stood. When there was no proof that any grant was ever made to the owner of the buildings, and he has held the land on which the buildings, had been built for upwards of twelve years, without paying any rent or acknowledging the title of the zamindars, he was entitled to the whole compensation allowed for the sites to the exclusion of the zamindars, and the mere fact that the sites were situated within the area of a permanently settled mahal was not sufficient to justify the presumption that the Zamindars made a limited grant to the original builders, or in other words, reserved to themselves reversionary rights in the sites. *MAHANT GUR PARSHAD v. UMRAO SINGH*, 7 N.W.P. 218.

(62)—*For a limited period by grandfather—Land—Ancestral property.*—Mere possession for seven or eight years, by a grandfather, of land which it is not clear was his and which he abandons to his daughter, does not make the land ancestral property. *MAUNG SHWE ON v. MAUNG SHWE NU*, L.B.R. 1893-1900, 468.

Recovery of possession—Evidence of peaceable possession till dispossession—Proof of title, onus of—See BURDEN OF PROOF—LIMITATION AND ADVERSE POSSESSION, 7 C. 591 = 9 C.L. R. 164.

Decree of Civil Court *re* possession—Magistrate's duty to maintain possession—See CRIM. PRO. CODE, 1898, s. 145, 29 C. 208 = 6 C.W.N. 38.

Long, by alleged mortgages without recognition of mortgagor's claim—See EVIDENCE ACT, 1872, ss. 102, 110, U.B.R. 1897-1901, Vol. II, 409.

See EVIDENCE ACT, 1872, s. 110, U.B.R. 1897-1901, Vol. II, 416.

See EVIDENCE ACT, 1872, s. 110, U.B.R. 1902-03, Vol. II, Civil, Evidence, 7.

See EVIDENCE ACT, s. 110, L.B.R. 1872-1892, 474.

See FISHERY, W.R. 1864, 243.

See LIMITATION ACT, 1908, art. 127, 11 B. 216.

Decree in possessory suit, if evidence of title—See SPECIFIC RELIEF ACT, 1877, s. 9, 15 C.L. J. 1.

See TITLE, 8 W.R. 386, 10 W.R. 61.

—4.—Nature of Possession.

(1)—*Presumption as to possession.*—When the evidence of possession is conflicting, the presumption is that possession follows title. *BABU KASTURI SINGH v. RAJEUMAR BABU*, 8 C.W.N. 876.

Possession—continued.**—4.—Nature of Possession—continued.**

(2)—*Possession not always actual user—Presumption where actual enjoyment not possible—Nature of presumption.*—Possession does not necessarily mean the same thing as actual user. When land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes, at such a time and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the previous possession continued also, till the contrary is shown. Such a presumption is not conclusive, its bearing depending upon the circumstances of each particular case. *MAHOMED ALI KHAN v. KHAJA ABDUL GUNNY*, 9 C. 744=12 C.L.R. 257, F.B. [Appl., 9 C. 802; R., 24 C. 256, 26 C. 114, 12 C.W.N. 273, 27 C. 25, 105 P.R. 1901, 8 C.W.N. 876, 9 C.W.N. 111, 7 C.L.J. 414, 3 M.L.T. 212.]

(3)—*Title—Nature of possessory title.*—A Hindu died leaving a widow and a son and leaving also some property behind him. The widow's name was entered in respect of half the property left by the husband and the son's name in respect of the other half. Sometime after, the son also dying, the widow's name was entered in respect of the other half also. Afterwards, the widow made a gift of the half that stood in her name to plaintiff, a minor, and executed a registered deed of gift in his favour. But no mutation of names was effected and the widow remained in possession of the property given away for a number of years. Thereafter, she sold the property, which had been given to plaintiff, to the defendant who obtained possession. Plaintiff now sued defendant, to recover possession of the land. *Held*, the possession, which the widow had of the property, was one good against all the world except the true owner, who did not appear in this case at all; thus she had a right to dispose of the property in dispute, of which she had been in possession, in any manner she pleased as if she had an absolute and indefeasible title. (24 A. 157, R.) Having once disposed of the property in favour of the plaintiff, it was no longer in her power to sell the same property to defendants in derogation of the gift to plaintiff. The sale gave no title whatever to possession of the property or to eject the donee, the registration of the deed of gift in whose favour completed his title. *PAHLWAN SINGH v. RAM BHAROSE*, 27 A 169=1 A.L.J. 625=A.W.N. 1904, 222. (25 A 358, R.) [R., 29 A. 52=3 A.L.J. 775=A.W.N. 1906, 264.]

(4)—*Possession—Title—Possession of the rightful owner—Intermediate possession of a wrong-doer—Relinquishment by wrong-doer of his possession.*—Plaintiff sued to have it declared that the land in dispute belonged to him, alleging that defendant took wrongful possession. It was found that plaintiff's title was proved; and that the defendant had made no permanent use of it inconsistent with its being

Possession—continued.**—4.—Nature of Possession—continued.**

the plaintiff's land. *Held* (1) that the plaintiff was entitled to succeed. The proved circumstances of the case invited the application of the presumption that possession goes with the title; (20 W.R. 25, F.) (2) that the use by the defendant of the land was no evidence of adverse possession. Where a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. *GANAPATI AMBADAS v. RAGHUNATH ANANT*, 11 Bom. L.R. 1087=4 Ind. Cas. 244=33 B. 712. (16 B. 388, F.)

(5)—*Possession of part is possession of whole—Presumption in favour of title—Trespasser's possession is confined to land actually occupied.*—*Held*, that, as a general rule, possession of part is in law possession of the whole, if the whole is otherwise vacant. But constructive possession of this kind can only be presumed when there is a claim based upon title. *Held* further, that possession by a trespasser is confined to the land actually occupied by him. *MAHESHWAR BAKSH SINGH v. HON'BLE RAJA PRATAP BAHADUR SINGH*, 12 O.C. 58 B.=2 Ind. Cas. 63. (8 O.C. 177, 29 C. 518, 9 M. 285, 31 C. 397, R.)

(6)—S. 335, Civ. Pro. Code, 1882 (= O. XXI, r. 103, new Code)—*Symbolical possession—Dispossession.*—Symbolical possession does not amount to "dispossession" within the meaning of s. 335, Civ. Pro. Code, 1882. *IBRAHIM MULLICK v. RAM JADU RAKSHIT*, 30 C. 710. [R., 16 C.P.L.R. 107, 27 M. 67, F.B.; Expl. and D., 33 C. 487=3 C.L.J. 293.]

(7)—*Symbolical.*—The delivery in execution, of symbolical possession, as between parties to the suit, amounts to an actual transfer of possession from one party to the other. *HIRACHAND v. BALA*, 1 Bom. L.R. 48.

(8)—*Execution proceedings—Symbolical possession, effect of.*—Symbolical possession given in execution proceedings would operate as an actual transfer of possession as between the parties to the suit; but it has no such effect as against third persons that are not parties to the suit. *RANJIT SINGH v. BUNWARI LAL SAHU*, 10 C. 993. (5 C.L.R. 548, Expl.) [F., 1 Bom. L.R. 48; R., 21 B. 98.]

(9)—*Symbolical possession—Effect as between judgment creditor and judgment debtor including their legal representatives—Suit for possession.*—As between the judgment-creditor or his assigns on one side, and the judgment-debtor or his heirs on the other, symbolical possession under the execution of a decree is as good as actual possession to give the purchaser or his assigns the right to bring his suit for possession within twelve years from that date. *MAHADEV v. PARASHRAM*, 2 Bom. L.R. 1087.

Possession—continued.**—4.—Nature of Possession**—continued.

(10)—*Act VIII of 1859, s. 224, person obtaining symbolical possession under, competent to subsequently sue for actual possession.*—There is nothing in the law to prevent a person who has obtained merely the symbolical possession under s. 224 of Act VIII of 1859 from asking subsequently for actual possession of the land under s. 223, provided the terms of his decree warrant the giving of such possession. **ROBSON AND CO. v. MR. MASEYK, 3 W.R. Mis. 2.**

(11)—*Limitation—Symbolical possession—Delivery—Revenue sale—Suit for actual possession.*—The purchaser at a revenue sale, who is put in symbolical possession by the proclamation of the Collector, is entitled to sue for actual possession of the land within twelve years from the date of such symbolical possession. **MOZUFFER WAHID v. ABDUS SAMAD, 6 C.L.R. 539. (5 C.L.R. 548, F.) [R., 6 C.L.J. 472.]**

(12)—*Suit by purchaser at execution-sale—Limitation—Execution of decree—Symbolical delivery of property to father—Suit by son for actual possession.*—A suit by an auction-purchaser of the right, title and interest of the judgment debtor, for possession of the properties, will not be barred, if it is shown that the judgment-debtor was in possession within twelve years before suit. **[R., 5 C.L.R. 548.]** Where an auction-purchaser takes possession in the manner which the law provides, his proceedings are valid, and a suit by his son, after his death, will not be open to the objection that the purchaser, after his purchase, did not take the necessary steps for delivery of possession of the property in dispute to him by the Court. **KOONJO MOHUN DASS v. NOBO COOMAR SHAHA, 4 C. 216. (19 W.R. 101, P.C. & 24 W.R. 418, R.)**

(13)—*Symbolical possession given under decree—Effect against claimant—Limitation.*—Where only symbolical possession and not real possession is given under a decree, the decree-holder or purchaser would be entitled to count a fresh period of limitation from that date only as against the defendant from whom the possession was then formally taken, but not as against a third party, as, for instance, a person who preferred a claim to property attached under the decree and whose claim was disallowed. **DOYANIDHI PANDA v. KELAI PANDA, 11 C.L.R. 395. (5 C. 584, F.B.=5 C.L.R. 548, D.) [F., 10 C. 993; R., 6 C.L.J. 472.]**

(14)—*Execution of decree—Symbolical possession of property—Limitation.*—Symbolical possession of immoveable property in the occupation of ryots delivered, in execution of a decree, according to s. 224 of the old Civ. Pro. Code (of 1859) was equivalent, as against the defendant, to actual possession though of no avail as against third parties who are strangers to the proceedings. But if the defendant subsequently dispossesses the plaintiff by receiving the rents and profits, the plaintiffs will have

Possession—continued.**—4—Nature of Possession**—continued.

12 years from such dispossession to bring another suit. **JUGGOBHUNDHU MUKERJEE v. RAM CHUNDER BYSACK, 5 C. 584=5 C.L.R. 548, (F.B.) [F., 6 C.L.R. 539, 7 C. 418, 16 C. 530, F.B.; D., 11 C.L.R. 395, 18 C. 520; Appl., 24 C. 715; Expl., 10 C. 993, 19 B. 620, 6 C.L.J. 472; R., 6 B. 650, 11 C. 93, 10 M. 17, 16 B. 722, 18 M. 405, 19 A. 499=A.W.N. 1897, 127, 25 B. 275, 27 M. 262, 9 C.W.N. 292.]**

(15)—*Land gradually re-formed on old sites—Identity of site how far can give title to former owner—Party in possession of land right of, to all increments.*—When land washed away has been re-formed on two old sites, the identity of site cannot give any title, to the former owners of the two old sites to the lands re-formed in such old sites respectively; nor can such identity of site give any title to land gradually re-formed when it is formed by gradual accession partly to one estate and partly to another.—The person in possession of land is *prima facie* entitled to it and to all increments to it. It may be difficult to establish what portion of the re-formed land attached itself as an increment by gradual accretion to lands in the possession of, or belonging to the plaintiff. But the difficulty will not supersede the necessity of plaintiff letting in sufficient evidence to prove his case. In order to entitle himself to possession, plaintiff must show that the accretion or some part of it belonged to him or was an increment to land belonging to him. So, a mere finding that the accretion does not belong to the defendant, would not be sufficient ground for decreeing possession of it to the plaintiff. **MUTHOORANATH MUZOOMDAR v. TARINEE CHURN SINGH, 8 W.R. 164. [R., 2 B. 19.]**

(16)—*Limitation Act (XV of 1877)—Possession of tenant possession of landlord—Adverse possession—Definition vis major—Constructive possession—Abandonment by trespasser, effect of—Owner obtaining lease from trespasser, effect of*—Possession of the tenant is in law the possession of the landlord or superior proprietor, and it can make no difference whether the tenant be one who claims adversely to his landlord or not. In order to sustain a claim to land by limitation under the Indian Act (Act XV of 1877), there must be actual possession of a person claiming as of right by himself or by persons deriving title from him. If the possession comes to an end by *vis major* (e.g., submergence of the land), the constructive possession rests not with the trespassers, but with the true owners. If a person enters upon the land of another and holds possession for a time, and then, without having acquired a title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. Dispossession by *vis major*, has the same effect as voluntary abandonment. **SECRETARY OF STATE FOR INDIA v. KRISHNAMONI GUPTA, 29 C. 518. P.C.=29 I.A. 104=6 C.W.N. 617=4 Bom.**

Possession—continued.**—4.—Nature of Possession—continued.**

L R. 537=8 Sar. 260. (6 C. 725, R.) [F., 26 M. 410, 97 P.R. 1902=121 P.L.R. 1902, 9 C.W.N. 111; R., 27 B. 43=4 Bom. L.R. 721, 31 C. 397, 9 C.W.N. 1061, 18 P.L.R. 1904, 2 C.L.J. 1, 3 C.L.J. 316, 23 A. 760=1906 A. W.N. 234=3 A.L.J. 567, 34 C. 753=5 C.L.J. 583=12 C.W.N. 193; R., 35 C. 120=8 C.L.J. 245=12 C.W.N. 16, 7 C.L.J. 414=12 C.W.N. 273=3 M.L.J. 212, 10 C.L.J. 527, 12 O.C. 45, 58.]

(17)—*Landlord and Tenant—Acts indicative of possession varying according to nature of property—Waste land—Possession by fluctuating body of persons—Occupation by wrong-doer—Dispossession what constitutes.*—Acts indicative of possession must vary according to the nature of the property over which possession is exercised. (3 W.R. 73, R.) In the case of *bil* or waste lands the cutting of grass and grazing of cattle are the ordinary acts by which possession is asserted. But, where the acts are being done by tenants on the waste lands of their landlords, the principle can only apply, if the acts done are such as to amount to an assertion of possession adverse to the landlords, and are not such acts which presumably are done with his permission or consent. Acts done at different times by a fluctuating body of persons do not amount to adverse possession. To constitute adverse possession, the possession must be adequate in continuity, publicity, and extent. (9 C. 698, 27 C. 943, P.C., F.) Possession or part occupation by a wrong-doer of a portion of the land only cannot be held to constitute constructive possession of the whole, so as to enable him to obtain thereby a title by limitation. (24 C. 256, 29 C. 518, P.C., F.) [Rel. on., 34 C. 753=5 C.L.J. 583=12 C.W.N. 193, 12 O.C. 58.] To constitute dispossession, there must, in every case, be positive acts which can be referred only to the intention of obtaining exclusive control, and which are not consistent with the purpose to which the owner intends to devote the land. **WALI AHMED CHOWDHRY v. TOTA MEGH CHOWDHRY, 31 C. 397.** [R., 35 C. 961=6 C.L.J. 735=12 C.W.N. 127.]

(18)—*Proprietorship of land—Cultivation—Claims of real owner.*—The mere fact of a person cultivating barren land for a period of years less than that prescribed by the law of limitation, will not of itself give him a title to the land, unless the land had been granted to him by some officer of Government. When the real owners come back within the statutory period and claim back the land their title must be affirmed, if found to be true. **SHUJEWAL v. KURREM CHEND, 38 P.R. 1867.**

(19)—*Possession of Receiver, Nature of.*—The possession of the Receiver is not adverse to the lease-holder, and could not be pleaded against him in any question of limitation. The possession of the Receiver is for the benefit of the parties in the suit. **KARTIC NATH PANDY v. PEDMANUND SINGH, 11 C. 496.** [Appl., 2 C.L.J. 602.]

Possession—continued.**—4.—Nature of Possession—continued.**

(20)—*Suit for possession—Defendant claiming under conveyance—Decree declaring conveyance to be fraudulent—Limitation.*—In a suit for possession of lands against the defendant who claimed under a deed conveying the property to him by way of endowment, the fact of the existence of a previous decree declaring the deed to be fraudulent must not be construed to have the effect of putting the plaintiff in possession. Whatever the decree may have been, the defendant's possession must not be construed as having ceased in consequence of it unless he were actually dispossessed. The fact that there is a decree against the defendant, does not prevent the statute of limitation from running against the plaintiff. **SHAIKH MUKBOOL ALI v. SHEIKH WAJED HOSSEIN, 25 W.R. 249.**

(21)—*Decree for possession—Execution barred by time—Formal possession—Fresh suit—Limitation.*—The plaintiff got a decree for possession of the land in dispute, declaring that he was to get possession on a *butwarra* being made. From the time of the decree, nothing whatever was done under it down to the time when the issuing of execution on the decree was long barred by time. The plaintiff then appeared before the Collector and applied to have a *butwarra* made. The Collector caused a *butwarra* to be made which was finally confirmed, and the plaintiff obtained merely formal possession. Held, that no fresh cause of action was given to him by the formal possession given under the *butwarra*. **KISHORE SINGH v. GOBIND SINGH, 24 W.R. 33.**

(22)—*Butwarra proceedings, possession under, nature of—Crim. Pro. Code, 1872, s. 530.*—The possession given by an ameen, in *buiwarra* proceedings, is possession as owner, and not as occupier, and hence, could not oust tenants holding lands previous to such delivery of possession. *In re MODUN MOHUN, 4 C. 378.* [R., 20 C. 285.]

(23)—*Execution—Formal possession given by Court—Effect.*—The formal possession given by a Civil Court under an execution operates, in point of law and fact as between the parties, as a complete transfer of possession from the one party to the other; though it would not be so as against third parties. **LOKESUR KOER v. PURGUY ROY, 7 C. 418.** (5 C. 584, F.) [Appl., 24 C. 715; R., 11 C. 93, 10 M. 17, 18 M. 405, 6 B. 650, 25 B. 275.]

(24)—*Formal possession of property in execution of decree—Subsequent regular suit for actual possession—Civ. Pro. Code, ss. 263 & 264.*—A person, who has obtained a decree for immovable property in the occupancy of the judgment-debtor, and who, in execution of that decree, has taken mere formal possession of such property, is entitled to bring a fresh suit to compel the same judgment-debtor to deliver up the actual physical possession of the property. (Earlie

Possession—continued.**—4.—Nature of Possession**—continued.

authorities discussed.) SHAMA CHARAN CHATTERJEE v. MADHUB CHANDER MUKERJI, 11 C. 93. [F., 8 C.W.N. 49; Appr., 24 C. 715; R., 10 M. 53, 3 A.L.J. 504 = A.W.N. 1906, 213 = 28 A. 722; Appl., 5 A.L.J. 35, Note.]

(25)—*Civ. Pro. Code (Act VIII of 1859), s. 264—Possession without certificate.*—Without deciding the question whether an auction-purchaser who, without a certificate of sale, has been put in possession, could be lawfully ejected because he has not such a certificate, it was held that it was not incumbent on the Court under s. 264 of the Code, to put a purchaser into possession until he had his certificate of sale. TUKARAM v. SATVAJI KHANDUJI, 5 B. 206. [R., 6 B. 139, 7 B. 254, 12 B. 589.]

(26)—*Act VIII of 1859, s. 224—Legal possession.*—Under s. 224 of Act VIII of 1859, it is essential that all the requirements of that section should be carried out. Where, therefore, no copy of the *hookoomnamah* was fixed on any place on the land in dispute, the possession given to the decree-holder cannot be called a legal possession under that section. THE COURT OF WARDS v. BURRA LALL OOPENDRA NATH DEO, 15 W.R. 99.

(27)—*Act VIII of 1859, s. 221—Legal receipt for possession—Actual receipt of rents—Priority.*—Where it is found as a fact that the necessary formalities required by s. 224, Act VIII of 1859, were adhered to and completed, and that there is a legal receipt on record for possession, such facts found give such a right under a Civil Court decree as will prevail over one founded on mere actual receipt of rent. KHETTUR-NATH ROY v. DURBESH MOONSHEE, 9 W.R. 358. [Expl., 12 W.R. 62.]

(28)—*Suit for khas possession against trespasser—Decree for possession—Legal possession—Act VIII of 1859, s. 223.*—The plaintiff sued the defendant as trespasser and prayed for khas possession, the defendant set up an adverse title, and a decree was given against her for possession; Held that the possession decreed was such as the plaintiff sued for, that is, legal possession as provided by s. 223 of Act VIII of 1859. RAJ MUNGUL ROY v. SREEMUTTY ANUNDOMOYEE, 11 W.R. 63.

(29)—*Farm made by Government on account of recusancy of settlement, duration and extent of.*—The main question in this appeal was whether the defendant's possession, as Government farmer, should be disturbed because of a final decree having been got for settlement with another person as proprietor for the remaining period of the Government farm. The High Court was of opinion that the claim of proprietary right in cases of recusancy of settlement, cannot interfere with the farm made with another party on account of that recusancy, pending the period, and to the extent of the farm, and held that, until and unless it be decided that the defendant had no right to the farm which she held from Government, she

Possession—continued.**—4.—Nature of Possession**—continued.

could not be dispossessed of the farm till the expiry of the term of her farm from Government. AMEERONNISSA KHATOON v. MOULIE ABDUL ALI, 2 W.R. 136.

(30)—*Civ. Pro. Code, 1859, s. 224—Formal possession given under section—Suit for possession—Limitation Act, 1859, s. 1, cl. 12—Possession under s. 224, Civ. Pro. Code, 1859 and also admitted—Limitation.*—Where formal possession under s. 224, Civ. Pro. Code, 1859, is given to a person within twelve years of institution of a suit for possession, held that such possession was sufficient to save the plaintiff's claim from the operation of limitation. The plaintiff obtained a decree against the defendant for possession of a moiety of certain lands appertaining to a shamilat, and as the lands were held by ryots entitled to occupy them, possession was delivered under s. 224, Civ. Pro. Code. The plaintiff brought another suit against the defendant for possession of the remaining moiety, and while the suit was pending obtained an award under Act IV of 1840, after which the defendant's pleader appeared in Court and admitted that the only question remaining to be decided was that of costs. Held that, after this, limitation could not be pleaded against the plaintiff, and if the defendant continued to oppose the occupation of the property by the plaintiff's lessee, every such act of opposition could give the plaintiff a fresh cause of action. BINDULA SHINI DAS v. J.R. RENNY, 7 B.L.R. App. 20 = 15 W.R. 307. [R., 24 W.R. 418.]

(31)—*Decree for possession—Symbolical possession—Actual possession not taken within twelve years—Limitation.*—If a decree-holder entitled to possession under a decree obtains symbolical possession by the mere ceremony of going to the land and beating drum and posting bamboos, and then allows 12 years to run without taking any steps to get actual possession of the property, he loses his right to the property. PEAREE MOHUN PODDAR v. JUGOBUNDHOO SEN, 24 W.R. 418 [Diss., 4 C.L.R. 55 = 4 C. 870, 11 C. 93; R., 4 C. 216, 25 B. 275 = 2 Bom. L.R. 1021.]

(32)—*Title maturing possession—Transfer—Continuity by transferee—Nature of possession—Mortgagors and mortgagees.*—A person, whose title to property is maturing by adverse possession, could transfer it and the transferee is entitled to the benefit of such term. This rule will hold good only in cases where the interests of transferor and transferee are of an identical and similar nature and will not apply to a case where a mortgagee sets up adverse possession by adding the period of his mortgagor's possession to that of his own. DITEE v. DEVI DIAL, 189 P.R. 1889. [R., 86 P.R. 1909.]

(33)—*Delivery of possession in execution of decree—Subsequent continuance in possession by judgment-debtor—Fresh execution of decree—*

Possession—continued.**—4.—Nature of Possession—continued.**

Fresh suit for possession—Effect of formal possession given to decree-holder—Limitation.—When formal possession of immoveable property has been given according to law in execution of a decree, the subsequent continuance of the judgment-debtor in actual possession of the property cannot entitle the decree-holder to apply for a fresh delivery of possession in execution. He can only institute a fresh suit for possession of the property. Possession once obtained in accordance with the provisions of law even though not actual, would stop the acquirement of hostile right by adverse possession of more than twelve years. *GOPAL DAS v. THAN SINGH*, 4 A. 184 = A.W.N. 1882, 4. [F., 3 A.W.N. 1883, 192; R., 25 B. 275]

(34)—*Distinction between constructive possession by rightful owner and that by wrong-doer—Limitation—Land emerging from a bhil—Presumption as to possession of owner.*—Acts of possession by the rightful owner, over a part of any immoveable property may, in many cases, be evidence of *de facto* possession of the whole. But possession by a wrong-doer, over a part, except where there is close connection and interdependence between the part actually possessed and the whole of which it is claimed to be a part, must be confined to the part of which he is actually in possession. [F., 31 C. 397, 3 C.L.J. 316, 6 C.L.J. 735 = 12 C.W.N. 127, 7 C.L.J. 414 = 12 C.W.N. 273 = 3 M.L.T. 212; R., 34 C. 753 = 5 C.L.J. 583 = 12 C.W.N. 193; D., 6 C.L.J. 472.] Where lands emerge from a *bhil*, the possession of the owner is presumed to continue, until the contrary is shown, when such lands remain *patit* or waste, whether it be culturable or unculturable. *MOHINI MOHAN ROY v. PROMOTHA NATH ROY*, 24 C. 256 = 1 C.W.N. 304. (9 C. 744, 19 C. 660, R.)

(35)—*Decree for possession—Plaintiff put in possession without intervention of Court—Dispossession—Subsequent suit for ejectment—Limitation.*—Where the plaintiff described himself as having acquired, by a decree, a title to the property in suit and alleged that possession had been yielded to him by the party against whom the decree in his favour was passed, and that he had been dispossessed of that property by the defendant in the month preceding the institution of the suit, the lower Courts ought not to have dismissed his suit for possession based on subsequent ejectment as out of time, simply on the ground that the plaintiff is not shown to have been put in possession of the property in suit by the intervention of Court in execution of the decree. In such a case, the question for trial and determination is, whether the plaintiff obtained possession of the property and was thereafter wrongfully and illegally ejected therefrom by the defendant and the cause of action dates from the date of his dispossession and not the date of the decree. *SALIG RAM v. MEHEEN LALL*, 2 Agra 235.

Possession—continued.**—4.—Nature of Possession—continued.**

(36)—*Possession—Limitation.*—Where the lower Court considered possession "by proclamation of sale through the Sudder Ameen's Court" to amount to "possession" in a manner, through the Court, held that such imaginary possession was no possession at all, and could not prevent the operation of the law of limitation. *MOONSHI JOWHER ALI v. RAMCHAND*, 2 B.L.R. App. 29 = 24 W.R. 419, Note. [Cons., 24 W.R. 418.]

(37)—*Limitation Act (XV of 1877), sch. II, art. 49—Time when detainer's possession becomes unlawful.*—The suit, by a successful plaintiff in a suit for specific performance of a contract of sale in respect of moveable and immoveable property, for recovery of the moveable property covered by the contract, will be in time, if brought within three years from the date of the decree for specific performance, since it is from such date that the detention of the moveable property becomes unlawful. *DHONDIBA KRISHNAJI PATEL v. RAMACHANDRA BHAGBAT*, 5 B. 554.

(38)—*Formal possession to decree-holder—Suit for possession—Limitation.*—Formal possession given to a decree-holder in execution of his decree is sufficient to give him a fresh cause of action, and he or his assigns may sue to recover possession at any time within twelve years therefrom. It is immaterial that actual possession was not given and a party relying upon adverse possession could not take advantage of his possession previous to the date of such formal possession. *UMBIKA CHURN GUPTA v. MADHUB GHOSAB*, 4 C. 870 = 4 C.L.R. 55. [R., 11 C. 93, 25 B. 275 = 2 Bom. L.R. 1021.]

(39)—*Act IV of 1840—Award by Criminal Courts—Suit for possession after 12 years—Maintainability of.*—Where the plaintiff, without setting aside an adverse order of the Criminal Courts under Act IV of 1840, within 12 years, brings a suit for possession of a whole pond, the former order being adverse to the claim, held that his suit was not maintainable. *MAHUNT GOPAL NATH v. ABDOL GHANEE*, 1 Agra 120.

(40)—*Purchase of land—Suit for possession—Decree—Non-execution within statutory period—Forcible possession taken by rightful owner without intervention of Court—Effect—S. 9, Specific Relief Act, 1877.*—The defendant had obtained a decree for possession of land purchased by him from the plaintiff's father but took no steps to execute it within the statutory period. On the death of the plaintiff's father the defendant took forcible possession of the land from the plaintiff, (the legal representative of the vendor) without the intervention of the Court, the plaintiff being a minor at the time. The plaintiff, after attaining majority, instituted the present suit to recover possession of the land from the defendant. The lower appellate Court held

Possession—continued.**—4.—Nature of Possession**—continued.

that the defendant was a trespasser by reason of his having taken forcible possession without the Court's intervention, and that the plaintiff, as heir of the vendor against whom the decree was passed, was entitled to the land until evicted in due course of law. The defendant preferred a second appeal to the High Court. The High Court reversed the lower Appellate Court's decree and held that the defendant was entitled to possession. S. 9 of the Specific Relief Act (I of 1877) provides for the summary removal of any one who dispossesses another, whether peaceably or otherwise than by due course of law; but subject to such provision, it cannot be held that, in India, the rightful owner dispossessing another is a trespasser, and that he must not (as under the English Law) rely, for the support of his possession, on the title vested in him. *BANDU v. NABA*, 15 B. 238. [F., 12 Bom. L.R. 957; Appr., 9 C.W.N. 1061.]

(41)—*Limitation Act* (XV of 1877), sch. II, arts. 142 and 144—*Possession—Discontinuance of possession—Waste land—Presumption of possession—Co-owner, possession of—Not adverse to other co-owners—Possession of one parcel.*—In the case of land, which is waste and unfit for use, the presumption of law is that possession is with the rightful owner. (9 C. 744, F.B., F.) The law will never construe a possession tortious, unless from necessity, and it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful. (35 C. 961, F.) Therefore, where the plaintiffs and defendants are co-owners, and *prima facie* the possession of one co-owner is on behalf of all, the mere fact that the plaintiffs are unable to show that they exercised any overt act of ownership over the land in dispute within 12 years before suit, does not justify the inference that there has been a discontinuance of their possession, for they are entitled to rely upon the possession of their co-owners as their possession, till such time as the possession of the co-owners became hostile to them. Where there is nothing to show that all the disputed parcels of the land formed one property, the mere fact that the defendants dispossessed the plaintiffs of the first parcel, would not justify the inference that the acts of possession which they exercised over the parcels ought to be attributed to their character, not of co-owners, but trespassers. *NARAYAN CHANDRA SINGHA v. BASANTA KUMARI DAS*, 1 Ind. Cas. 252.

(42)—*Joint possession—Well-water—Non-exercise of that right—Limitation.*—Where the plaintiff had a right to the use of a well-water in common with others, his preferring not to use the water, or even his omission to pay his share of expenses, did not of itself destroy that right by mere non-exercise of it; but there should be some direct evidence of adverse enjoyment on the part of the defendants. *BALI v. DNYANU*, 2 Bom. L.R. 620.

Possession—continued.**—4.—Nature of Possession**—concluded.

(43)—*Adverse possession—Co-sharers—Redemption of mortgage by one co-sharer—No exclusive title.*—Possession taken by one of the co-sharers who redeemed a mortgage is not in itself inconsistent with the proprietary rights of the other co-sharers; such possession cannot become adverse until some exclusive title is set up. *FAKI ABAS valad FAKI AHMED MULNAJI v. FAKI NURUDIN valad FAKI HOHIDIN MULNAJI*, 16 B. 191 = P.J. 1891, 123. (11 B. 422, 11 B. 425, F.) [R., 20 B. 747, 26 B. 500 = 4 Bom. L.R. 178, 5 Bom. L.R. 355; D., 20 B. 557.]

(44)—*Decree for possession—Joint decree-holders—Possession given to one.*—Possession given to one of several joint holders of a decree must be held to be given on behalf of both. *HARGOBIND DAS v. BARODA PRASAD DAS*, 6 B.L.R. 614 = 15 W.R. 112.

(45)—*Title-deeds, possession of, as between tenants-in-common.*—When deeds relate to two or more portions of an estate or to an estate which is held by tenants-in-common if any one of the interested parties gets possession of the deeds, none of the other parties can get them from him; for no one can show a better title to have them than he has. This rule of law applies only where all the parties have equal rights. *HUNSAJ v. BAI MONGHIBAI*, 7 Bom. L.R. 622.

See BEN. ACT, VII OF 1876, s. 55, 9 C. 431 = 12 C.L.R. 12.

See CIV. PRO. CODE, 1908, s. 47, 8 C.W.N. 49.

See CIV. PRO. CODE, 1908, O. XXI, rr. 46, 58, 59, 60, 61, 27 M. 67, F.B.

Application of doctrine of constructive possession to wrong-doers—Occupation by wrong-doer of portion of land, effect of—See DIGWARI TENURE, 5 C.L.J. 583 = 34 C. 753 = 12 C.W.N. 193.

Transfer of non-transferable holding—Continuance of—In the tenant—Suit for ejectment, maintainability of—See LANDLORD AND TENANT—EJECTMENT, 9 C.W.N. 379.

Possession of plaintiff if must have been physical possession—Possession through tenants—Ouster of tenants—Right of suit—See SPECIFIC RELIEF ACT, 1877, s. 9, 13 C.W.N. 303 = 1 Ind. Cas. 150.

Holder of missing person's estate—Possession—See TRUST, 2 Agra 78.

—5.—Proof of Possession.

See BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE.

(1)—*Possession—Prima facie evidence of title—Burden of proof.*—Possession is *prima facie* evidence of title, and is primarily exclusive, and it is for him, who impugns this exclusive title, to show that the possession originated in a way

Possession—continued.**—5.—Proof of Possession—concluded.**

not to affect his own right. KRISHNA CHARYA v. LINGAWA, 20 B. 270. [R., 78 F.R. 1902 = 137 P.L.R. 1902.]

(2)—*Allegation of forcible ouster—Burden of proving ouster first.*—Where plaintiff alleges forcible ouster in a certain year, he is bound to prove such ouster before defendant need be called upon to prove anything. RAJARAM KALITA v. ROOPA KAGTEE KALITA, 13 W.R. 113.

(3)—*Suit for possession—Utility of presumption arising from title.*—Where there is evidence apparently strong on each side, in estimating the weight due to the evidence on both sides, the presumption which arises from title may in certain circumstances be regarded. But, if there be no credible evidence on plaintiff's side, no question of turning the balance of evidence by the weight of presumption as to title arises. LAXMAN v. MANGAL KHAN, 7 C.P.L. R. 12.

(4)—*Proof of title by plaintiff—Burden of proving adverse possession.*—In a suit for possession based on title, where the plaintiff proves title, the burden of proving adverse possession is upon the defendant. SARSUTI v. KUNJ BEHARI LAL, 5 A. 345, F B.

(5)—*Receipt of rent—Evidentiary value.*—In India, possession or receipt of rent by a person who pays the land revenue immediately to Government is *prima facie* evidence of an estate of inheritance in the case of an ordinary zemindary. The evidence is still stronger, if it be proved that the estate has passed, on one or more occasions, from ancestor to heir. There is no difference in this respect between a polliam and an ordinary zemindary. The only difference between a polliam or zemindary which is permanently settled and one that is not is that, in the former, the Government is precluded for ever from raising the revenue; and in the latter, the Government may or may not have that power. OOLAGAPPA CHETTY v. ARBUTHNOT, 14 B.L.R. 115, P.C. = 1 I.A. 268, 282 = 21 W.R. 358 = 3 Sar. 318.

—6.—Suits for Possession.

(1)—*Valid title against all except rightful owner—Possessory title, heritable and transferable.*—Possession is a valid title against any one except the rightful owner. (20 C. 834, 2 O.C. 3, 9 O.C. 273, R.) Further, such title would descend by inheritance to the heirs and is also transferable. WAZIR-UN-NISA BEGAM v. WAZIR ALI, 11 O. C. 337. (9 O.C. 161, 3 C. 224, R.)

(2)—*Suit for possession against trespasser—Plaintiff's title, proof of.*—Held, that possession is good title against all persons except the rightful owner, and entitles the possessor to maintain an action in ejectment against any person other than such owner, who dispossesses him. GOPAL v. SANT BAKSH, 2 O.C. 3. [R., 9 O.C. 161, 9 O.C. 273, 11 O.C. 337, 12 O.C. 129.]

Possession—continued.**—6.—Suits for possession—continued.**

(3)—*Suit for—Onus of proof—Nature of evidence to be adduced by either party—Title, proof of, effect of—Presumption of possession—Constructive possession—Survey map, value of, as evidence.*—In respect of jungle and hilly land, possession must be presumed to be with the rightful owner. (9 C. 744, 19 C. 660, P.C., *Relied on.*) Plaintiff, in an action for ejectment, must not only prove his title, but also his possession, actual or constructive, within twelve years of suit. (12 M.L.A. 337, 8 M.L.A. 199, 9 C. 744, 16 C. 473, P.C., 17 C. 137, P.C., *Relied on*; 2 M. 10, R.) When plaintiff has established his title it is not necessary for the defendant to prove a better title, or establish that he has acquired a good title by adverse possession, which has extinguished the title of the plaintiff, but plaintiff must prove his possession also within 12 years. Nature of evidence required in such cases discussed. Revenue Survey Maps are evidence of title and possession. (30 C. 291, 22 C. 252, R.) They are not conclusive and may be shown to be wrong, but, in the absence of evidence to the contrary, they may be properly and judicially received in evidence as correct when made. The doctrine of constructive possession applies only in favour of the rightful owner, and must not, as rule, be extended to the wrong-doer, whose possession must be confined to land of which he is actually in possession. MIRZA SHAMSHER BAHADUR v. MUNSH KUNJI BEHARI LAL, 12 C.W. N. 273 = 3 M.L.T. 212 = 7 C.L.J. 114. (21 C. 256, 20 C. 518, 20 W.R. 25 R.)

(4)—*Suit for possession—Cause of action—Dispossession—Whether plaintiff must prove possession and dispossession within 12 years.*—The general rule of law is that, when a suit is for possession and the cause of action is dispossession, the plaintiff is bound to prove possession and dispossession within 12 years, or, in other words, the plaintiff must not only show that he has a title, but that he has a subsisting title, which he has not lost by the prescriptive sections of the Limitation Act. MA PYU v MA MAIN MU, 14 Bur. L.R. 200.

(5)—*Possession is good title against trespasser—Suit for possession more than six months after dispossession.*—Held, that a person who has been dispossessed can, as against a trespasser, succeed, on proof of prior possession alone, without showing title, even though he does not bring his suit within six months of the date of dispossession. RAM KUMAR v. PANHARI DAS, 12 O.C. 129 (B) = 2 Ind. Cas. 599. (2 O.C. 3, 26 M. 514, R.)

(6)—*Possessory suit—Title—Possession.*—In a suit to recover possession of land where plaintiff comes into Court, not on the ground simply of previous possession but on a distinct and definite title, and entirely fails to prove his case, he is not entitled to a decree even if there is evidence that he was long in possession in one capacity or another. RAMDHAN CHUKKERBUTTY v. SRIMATI KOMAL TARA, 3 B.L. R.A.C. 99, Note = 11 W.R. 301.

Possession—continued.—6.—**Suits for Possession**—continued.

(7)—*Suit for possession on mere possessory title—Ouster and continuance of possession till ouster, necessary—Trespasser, suit against—Burden of proof of ouster.*—Where the plaintiff sues for possession, merely on the ground that his vendor had been in possession for some period within 12 years of the institution of the suit: *Held*, that the plaintiff is entitled to a decree, if he can prove a possessory title with himself or his vendor. But the possession on which the plaintiff relies must extend up to the date of ouster by the trespasser; that is to say, before a plaintiff can succeed on mere proof of possession, he must prove ouster. If the party sued entered into a possession peaceably, then his possession is just as good as that of the plaintiff. The burden of proving ouster lies on the plaintiff. *SAWANJI v. MT CHINKI*, 5 N.L.R. 33=2 Ind. Cas. 25. (12 C.P.L.R. 59, R. & F.)

(8)—*Suit for possession—Onus.*—A person seeking to recover possession of lands on the allegation that they are situate in his estate, is bound to prove his allegation. *JOYCHUNDER CHUKERBUTTY v. JARACANT CHOWDRY*, 1 W.R. 219.

(9)—*Suit for possession and mesne profits—Plea of title—Adverse possession not pleaded—Proof of plaintiff's possession and dispossession.*—If in a suit for possession and mesne profits, the defendants did not allege possession for 12 years and more, so as to bar the plaintiff, but stood upon their title, the Judge was wrong in dismissing the suit on the ground that possession and dispossession had not been specifically shown, even if it did not appear from his own judgment that these matters had been sufficiently proved. *MAHOMED KHOSSAL v. LAL CHAND DOSS*, 5 W.R. 228. [D., 8 W.R. 385.]

(10)—*Suit for possession—Limitation—Proof of date of dispossession—Act VIII of 1859, s. 26.*—A person suing to recover possession of lands is bound, under the provisions of s. 26, Act VIII of 1859, to give the date of dispossession as accurately as he can, especially in a case where one of the issues is whether the plaintiff has been in occupation of the lands within 12 years of suit. *BOYDONATH SURMAH v. OJAN BIBEE*, 11 W.R. 238.

(11)—*Title—Evidence and proof—Presumption.*—The ordinary presumption that possession goes with the title would be of no avail in the presence of clear evidence to the contrary, but where there is strong evidence of possession on one side opposed by evidence apparently strong also on the other side, the presumption may be made that possession was with the true owner. *RUNJEET RAM PANDEY v. GOBURDHUN RAM PANDEY*, 20 W.R. 25, P.C. [F., 12 C. 38, 8 C.W.N. 876, 7 C.L.J. 414=12 C.W.N. 273=3 M.L.T. 212, 6 Ind. Cas. 392; *Appr.*, 19 C. 660, P.C., 11 Bom.L.R. 1087=33 B. 712, 218 P.L.R. 1911.]

(12)—*Case good—Evidence false—Dismissal of suit—Practice.*—In India, it would not be

Possession—continued.—6.—**Suits for Possession**—continued.

right, if the plaintiff has a good case, but has foolishly and wickedly relied in support of it upon false evidence, that the whole case should be dismissed. *FULTOO MAHOMED v. HURDEB DOSS*, 19 W.R. 107.

(13)—*Suit for possession—Specific title and adverse possession.*—Where a person claims generally the possession of land under some specific title, but coupled with a possession extending over twelve years, he is entitled to a decree on proof of his twelve years' adverse possession alone, which gives him a title of itself, whether he proves his specific title or not. But where a plaintiff sues for a decree, declaring himself to be the owner of property on the strength of some particular title, he must establish the title. *GOLUCK CHUNDER MASANTA v. NUNDO COOMAR ROY*, 4 C. 699=3 C.L.R. 450. (3 C. 224, F.; 11 W.R. 301, *Not F.*) [F. & R., 4 L.B.R. 238.]

(14)—*Conflict between two wrong-doers.*—In the case of a conflict between two wrong-doers, the person who is in possession of the property is entitled to be maintained in possession. *USUF KHAN v. SARVAN*, 13 A. 403=A.W.N. 1891, 141.

(15)—*Title to property—Wrong-doer—Wrong doer's title, transfer of—Suit for recovery of possession of property.*—Twelve years' continuous possession, by a wrong doer, not only extinguishes the title to the property of the rightful owner, but confers a good title upon the wrong-doer. [F., 4 C. 699=2 C.L.R. 450, 3 A. 435; R., 7 M. 26, 17 M. 34, 5 Bom L.R. 186.] A dispossessed person, suing for recovery of possession of property on the double ground of purchase and of a twelve years' possessory title is entitled to succeed on proof of possession, even though the purchase is not proved. A suit for possession is different from that for declaration of a particular title. *Semble*—The title of the wrong-doer can be transferred to a third person, while it is in course of acquisition and before it has been perfected by a twelve years' possession. *GOSSAIN DASS CHUNDER v. ISSUR CHUNDER NATH*, 3 C. 224. [R., 16 B. 722, 9 O.C. 161.]

(16)—*Title—Possession—Evidence.*—In this case, the Privy Council refused to disturb the possession the defendants admittedly had for upwards of ten years, the plaintiffs having failed to establish title of possession, so as to entitle them to obtain possession. Reviewing the whole of the proceedings, their Lordships observed that, if they had been sitting as a Court of first instance, they would have deemed it impossible upon such proof of title as the plaintiffs had given, to disturb an admitted possession of ten years; and it seemed to their Lordships that the High Court having originally treated the title of the plaintiffs as depending upon a release by the Judicial Commissioner, and finding that that release was not made out, fell back upon the proceedings

Possession—continued.**—6.—Suits for Possession—continued.**

of the Deputy Collector; and that they had not given sufficient consideration to the nature of the proceedings of the subordinate officer, and the manner in which they were dealt with by his official superiors. *WISE v. BROJENDRO COOMAR ROY*, 18 W.R. 91, P.C.=2 Suther. 619=4 Sar. 788.

(17)—*Burden of proof—Wrongful ejectment—Suit to recover possession.*—Where a person wrongfully ejected from a piece of land sued for possession thereof, but failed to establish his right to recover possession, the mere fact of his having been in possession is not a sufficient ground for putting him back. *SHUSTEE DHUR MOZOOMDAR v. NUTEEJA BIBEE*, 7 W.R. 36.

(18)—*Of part of a village not—Of plaintiff lands.*—Possession of a part of a village is not sufficient to justify a finding that the plaintiff is in possession of the land in suit though it is a part of the village. *CHIDAMBARAM CHETTY v. RAMA CHETTY*, 3 M.L.T. 313.

(19)—*Suit for possession—Illegal dispossession.*—A plaintiff who proves that he, and his father before him, had been in uninterrupted possession until he was illegally dispossessed, is entitled to come into the Civil Court, and to ask that possession should be restored. *HUREEHUR PERSHAD DOSS PUBRAJ BIDYADHUR BHONIAH MOHAPATTUR v. BOLIE SETHEE*, 24 W.R. 22.

(20)—*Declaration—Right to possession—Ouster—Restoration.*—Where a suit is brought to establish a certain right, but it is manifest that the suit is not properly one for a declaration and the object of the suit and the effect of the declaration would have been to put the plaintiff in possession of that from which he had been ousted, the case must be treated by the Court and argued upon the question of whether there is a right to possession. Where a person has been ousted from a possession which he held upon a good title by those who have shown none, the plaintiff has a right to the restoration of that possession. *NARAYANASAMI MUDALI v. KUMARASAMI GURUKAL*, 7 M.H.C. 267.

(21)—*Confirmation of possession, suit for—When maintainable—Evidence of possession.*—The legal principle which holds that no suit for confirmation of possession will lie, if possession, at the time of the institution of the suit is not shown, refers to cases where no possession of any kind is shown within a reasonable time before suit and not to cases where legal possession under a decree has been found. To hold that, in the latter cases, no suit would lie, would be to render a decree for possession wholly inoperative and a nullity. *BEEGO ROY v. BAL MOKUND MISSER*, 17 W.R. 421.

(22)—*Suit for confirmation of possession—Onus on plaintiff.*—A plaintiff suing merely for confirmation of possession of land should be made to prove that he was actually in possession. *MUSSAMUT LATEEFOONISSA BIBEE v. SYUD RAJAOR RUHMAN*, 8 W.R. 84.

Possession—continued.**—6.—Suits for Possession—continued.**

(23)—*Suit based on allegation of possession.*—A suit based on allegation of possession ought to be dismissed at once, if the plaintiff be shown to be out of possession. *SUKRAM v. KALA KAHAR*, 3 B.L.R.A.C. 105.

(24)—*Pleading—Suit for confirmation of possession when plaintiff not in possession—Survey Act (V of 1875, B.C.), ss. 40, 41, 62—Order in survey proceedings throwing disputed land within defendant's estate, effect of.*—Where the case of the plaintiff, as made in the plaint, is that she has been all along in possession, and it is found that she has not been in possession, a decree for recovery of possession would be inconsistent with the suit. Where there had been a survey under Act V (B.C.) of 1875, and, by an order made in 1901, the boundary line between the estates of the plaintiff and the defendant had been maintained, which threw the land in suit into the defendant's estate, and the plaintiff sued for confirmation of possession on the allegation that she has been in possession from before the survey proceedings, and not on the allegation that she has obtained possession at a later date: *Held*, that the effect of the survey proceedings was that the plaintiff was out of possession and the defendant was in possession of the disputed land, and the decision in those proceedings, having under the Survey Act the effect of a decision of a Civil Court, is binding, and it is not, therefore, open to the plaintiff to now bring a suit for confirmation of possession. *MUSSAMMAT RANI BISSESWARI KOER v. RAM PROTAB SINGH*, 4 Ind. Cas. 547. (11 C.L.R. 443, 11 C.L.R. 451, D.)

(25)—*Suit for possession—Proof of partial possession—Effect.*—Where a suit for confirmation of possession is based upon an allegation of possession, the suit should be dismissed if the plaintiff's allegation of possession is wholly unfounded, but not if the plaintiff is found to be in possession of a portion of the lands in dispute. *ROOPA KOONWAR v. JUGGOO LALL OPADHYA*, 11 W.R. 257. *See also RAM CHURN PATTUCK v. KOOR PANDEY*, 10 W.R. 176, and *BUSHEE-ROODDEEN v. DAL CHUND*, 3 Agra 231.

(26)—*Suit for confirmation of possession, under bill of sale—Onus of proof—Practice—Court's duty first to try plaintiff's case.*—The plaintiff sued for confirmation of possession over certain lands under a bill of sale, by setting aside a bond in favour of one R. and a sale in execution of a decree of the Small Cause Court on that bond. The first Court found that the bill of sale was fraudulent and the plaintiff was not in possession and dismissed the suit. On appeal, the Judge, on an objection taken for the first time orally in his Court, *held* that the Small Cause Court had no jurisdiction to try the suit on a bond in which land was hypothecated as security, and without going into the plaintiff's case, gave him a decree. *Held*, that the Judge ought to have tried the plaintiff's case first and not the defendant's, that

Possession—continued.**—6.—Suits for Possession**—continued.

the plaintiff was first bound to prove his possession, and the genuineness of the bill of sale upon which his cause of action arose, and it was only after he had proved these, that the question of the jurisdiction of the Small Cause Court could arise. **RASH BEHAREE ROY v. SHAIKH EZUD BAKSH, 11 W.R. 276.**

(27)—*Suit for confirmation of possession—No possession at the time of suit—Relief.*—Where a plaintiff prays for confirmation of possession, and it appears that he is the rightful owner, and that he was not in possession at the time of suit, but was in possession at some previous time, his suit may be treated as a suit for recovery of possession. **KASEE NATH MOOKERJEE v. MOHESH CHUNDER GOOPTO, 25 W.R. 168.** [R., 1 C.L.J. 73 ; D., 4 C. 46.]

(28)—*Suit by purchaser for confirmation of title and possession—Previous transfer pleaded by defendant—Duty of Court to inquire into transfer.*—Plaintiff had instituted this action for the confirmation of his title and possession in a fractional share of a village purchased by him, and for setting aside certain conveyances under which the defendants claimed to hold it. The latter pleaded that the rights and interests in question had previously been transferred to a person who sold it to their vendor. On the ground that the conveyances to the defendants were genuine documents, and that they were in possession since their purchase, the lower appellate Court dismissed the suit of the plaintiff. Plaintiff urged on second appeal that the alleged transfer to the defendants was the foundation of their title and the lower appellate Court was wrong in having made no enquiry into it. The High Court accepted the ground as a good one and remanded the case to the lower appellate Court to try whether the alleged purchase on which the defendants' title depended was a genuine transaction or merely a colourable one. **MUSSAMUT BHUGOBUTY v. BIKRAMAJEET SINGH, 8 W.R. 477.**

(29)—*Joint owners—Suit for confirmation of possession—Plaintiff found out of possession—Frame of suit.*—A suit for confirmation of possession of property belonging jointly to plaintiff and defendant, where the plaintiff is found on his own showing to be out of possession, should be treated as a suit for recovery of possession. **RASH DHAREE SINGH v. NUTHOONEE SINGH, 24 W.R. 301.** [R., 1 C.L.J. 73.]

(30)—*Suit for confirmation of possession—Plaintiff not in possession—Plaint bearing stamp sufficient to cover claim for possession.*—Where the plaintiff sued for confirmation of possession, alleging that she applied to the Collector to register her name under the Land Registration Act in respect of certain property purchased by her at an auction-sale and that the defendant succeeded in getting her name registered with regard to it, and the prayer in the plaint was for an order declaring the title of the plaintiff and confirming her possession

Possession—continued.**—6.—Suits for Possession**—continued.

and for expunging the name of the defendant from the Collectorate register, and directing the registration of the plaintiff's name instead, and it was found that the plaintiff was out of possession and the suit was brought on a stamp sufficient to cover a suit for recovery of possession, *held* that the plaintiff, by setting up in her plaint that she had failed to obtain registration, admitted that she had been kept out of possession wrongfully, and by asking for the registration of her name she made a prayer to be put into possession, and that, though the plaint was erroneous in form, she should be given a decree for possession. **CHAMPU DAI v. UMA DAI, 11 C.L.R. 451.** (11 C.L.R. 443, F.)

(31)—*Civ. Pro. Code, 1859, s. 246—Claim disallowed—Suit—Limitation—Act IX of 1871—Act XV of 1877—Suit for confirmation of possession—Plaintiff not in possession—Title established—Decree.*—A claim to attached property was disallowed on the 25th July, 1876, under s. 246 of the Civ. Pro. Code, (Act VIII of 1859), and the suit by the unsuccessful claimant was brought on the 17th February, 1879. *Held* that the suit was within time, being governed by the Limitation Act, IX of 1871, under which the period of limitation for contesting an order under s. 246 of the Civ. Pro. Code, was 12 years, and by the Limitation Act XV of 1877, which came into operation in October 1879. Where, in a suit for confirmation of possession, it was quite apparent, on the face of the plaint, that although in form it was a suit for confirmation of possession, it was in substance a suit for recovery of possession and the plaintiff has established a title to the property, although he was out of possession, *held* that, under these circumstances, it would be extremely technical to dismiss the plaintiff's suit, merely because there was some defect in the form of the suit, and that the plaintiff should be given a decree for possession. **AMIR HOSSEIN v. IMAMBANDI BEGUM, 11 C.L.R. 443.** (16 W.R. 27, F.) [F., 11 C.L.R. 451.]

(32)—*Suit for confirmation of possession—Change in form of suit—Suit for recovery of possession—Bona fides.*—When a plaintiff has a *bona fide* case, which he has proved in substance, but not in form, there are circumstances, under which the Courts assist him. But, where a plaintiff put forward a distinct allegation of possession founded on a deed of sale, which is found by the Court to be false, this is not a case in which the general rule ought to be relaxed and the plaintiff assisted to establish a case which he did not originally put forward. **TERIETPUT SINGH v. GOSSAIN INDERSAN DAS, 4 C. 46.** (15 W.R. 286=16 W.R. 27 & 1 I.A. 192, D., on the ground that they were *bona fide* cases.) [R., 1 C.L.J. 73.]

(33)—*Plaintiff stating in plaint to be in possession and praying merely for confirmation of the same—Dispossession found—Relief.*—A plaintiff who, stating in his plaint that he is

Possession—continued.**—6.—Suits for Possession—continued.**

in possession, prays merely for confirmation of possession, will not be given a decree for recovery of possession, if it is found that he was dispossessed by the defendant before suit, and that he had no possession as stated in the plaint. *FATIMA BIBEE v. AHAMAD BAKSH*, 31 C. 319. [On appeal, 35 C. 271, P.C.=35 I.A. 67=12 C.W.N. 214=7 C.L.J. 122=10 Bcm.L.R. 51=18 M.L.J. 6.]

(34)—*Decree for confirmation of possession—Proof of title.*—When a suit is brought for confirmation of possession under a certain title, the plaintiff is bound by the title which he sets up, though it is otherwise when he sues to recover immovable property from which he has been ousted. A decree for confirmation of possession cannot be executed so as to give to the plaintiff possession of anything of which he was not then in possession. *UMBICA CHURN BANERJEE v. DIGUMBEREE DABEE*, 12 W.R. 429. [R., 16 W.R. 218.]

(35)—*Suit for possession—Plea of joint possession—Limitation—Long possession—Title—Evidence.*—In a suit for confirmation of title and possession, the defendants pleaded that they were also jointly in possession with the plaintiffs, but failed to prove this allegation of joint possession. Held that the defendants could not then plead limitation. In a suit for confirmation of title and possession of certain property which was admittedly acquired about a century ago and of which the defendant claimed to be in joint possession, the plaintiff cannot be reasonably expected to prove the specific source from which the acquisition was made. The question of possession is the only material point in the case. Long possession is not only evidence of title, but in a case of this sort, it is a good and valid title by itself. *RUNG LALL MISSER v. RAGHOOBUR SINGH*, 9 W.R. 169. [D., 11 W.R. 550.]

(36)—*Of land—Plaintiff already in possession—Form of suit.*—Where, according to the evidence, plaintiff is still in possession of the land in suit: Held that he cannot sue for what he has already got, but should either sue for a declaratory decree or else for an injunction restraining the defendant from disturbing him. *MAUNG LU GALE v. MAUNG KAN THA*, L.B.R. 1893–1900, 641.

(37)—*Suit for confirmation of possession—Onus of proof.*—A plaintiff coming into Court for confirmation of possession is bound first of all to prove that he is in possession. *SHEO SHRUN LALL v. CHUMUN LALL*, 24 W.R. 220.

(38)—*Confirmation of possession—Burden of proof.*—A plaintiff who comes to Court alleging that he is in possession and that that possession has been threatened by the act of the defendant, and asking for confirmation of that possession is bound to prove that he is in possession. *SANSAR ROY v. INDRASUN ROY*, 25 W.R. 6.

Possession—continued.**—6.—Suits for Possession—continued.**

(39)—*Suit for possession, not barred by one year's limitation under s. 77 of Act X of 1859—Dismissal of previous rent case—School of law governing joint Hindu family, admission by ancestors of parties good evidence of.*—The appellant, having attained a certificate under Act XX of 1841 for collecting the debts due to the estate of his maternal uncle, sued two of the tenants of the landed property belonging to the estate and obtained decrees, but, on appeal by the tenants, plaintiff's claim was dismissed. He then, alleging that he had been dispossessed by the defendants from the whole of the lands belonging to the share of his uncle, brought this suit for possession of the whole. Defendants pleaded that, as succession in the family was guided by the Mitakshara school of Hindu law, plaintiff, as the sister's son, had no right to the property in suit; that the decree by the appellate Judge in the previous suit for rents in which the defendant had intervened under s. 77 of Act X of 1859 was dated 7th November, 1861, and the present action of the plaintiff having been instituted more than one year after that date, the suit was barred by limitation. The lower Court dismissed the claim of the plaintiff on the ground that as succession in the family was governed by the law of the Mitakshara school, plaintiff had no right. On appeal to the High Court by the plaintiff, the respondent asked for the trial of the objection regarding the application of the one year's limitation mentioned in s. 77 of Act X of 1859. Held that s. 77 of the said Act X of 1859 does not contemplate that the effect of a decree for rent claimed from one or two of a number of tenants, awarded to an intervenor, should be considered as an estoppel to the right of the party cast to sue for the possession of the entire property, if he does not sue within a year of the decree in the rent case, though, from the nature of the case, the plaintiff may, when he sues in the Civil Court, have occasion to sue for his title to the whole estate, and not simply to recover his rents from a particular tenant or tenants. Though plaintiff was never in possession of any portion of the estate of his maternal uncle, yet he was in time from the death of the intervening widow whose demise it was that gave him a right to sue, since no cause of action can have arisen to the plaintiff before her death. On the point of the Mitakshara law governing the succession in the family, it was held that when the fact is not known by which school of Hindu law succession among those who have migrated from a different country is guided, it is to be presumed that the old law imported with the family still prevails, until the contrary is shown by the opposite party. But the plaintiff in this case had clearly established by the evidence of friends and relatives, that, in the family of the parties before the Court, in several cases where succession according to the Bengal law, was to go to one and according to the school of Mitakshara to another, the

Possession—continued.

—6.—Suits for Possession—continued.

succession was according to the former or Bengal school. On these grounds the High Court decreed the appeal and awarded the claim of the plaintiff to the estates of his maternal uncle as asked, except the rents of the two jotes, his claim for which had been disallowed by the Judge in the previous rent suits. **CHUNDRO SEEKHUR ROY v. NOBIN SOONDUR ROY**, 2 W.R. 197. [F., 5 W.R. Act X, 87; R., 9 B. 198, F.B., 5 M.L.T. 169, 33 M. 342=20 M.L.J. 49=7 M.L.T. 17=5 Ind. Cas. 42.]

(40)—*Possession—Suit for—Plaintiff proving enjoyment and wrongful dispossession—Defendant's title—Absence of proof of—Plaintiff entitled to decree.*—Where a plaintiff made out that he was in possession of the land and afterwards wrongfully dispossessed by the defendant, the plaintiff would be entitled to a decree, unless the defendant is able to make out his title to the property. **GOVINDA PADAYACHI v. DORAISWAMI PADAYACHI**, 9 M.L.T. 409=9 Ind. Cas. 595.

(41)—*Failure of plaintiff to prove title.*—In a suit for possession, when the Court finds that the plaintiffs wholly failed to establish the title which they came into Court to establish or any other title under which they could recover against the defendants, the suit ought to be dismissed, although the defendants are trespassers and the plaintiffs had long prior possession. **KEDAR NATH SANYAL v. RAJ NATH NEOGI**, 3 C.W.N. 497.

(42)—*Burden of proof—Wrongful ejectment—Suit to recover possession.*—Where a person wrongfully ejected from a piece of land sued for possession thereof, but failed to establish his right to recover possession, the mere fact of his having been in possession is not a sufficient ground for putting him back. **SHUSTEE DHUR MOZOOMDAR v. NUTEEJA BIBEE**, 7 W.R. 36.

(43)—*Possession—Evidence of title.*—In a suit for possession of land, if a party who claims to hold the land by grant evidenced by a sanad fails to prove execution of the sanad, he is at liberty to prove the grant by other means. The presumption is that a lower Court has done its duty, neglect not being assumed at the suggestion of the appellant. **RAJAH RASH BIHARI LAL SINGH v. NABAYI PADDAR**, 3 B.L.R.A.C. 99=11 W.R. 465.

(43-a)—*Lease—Suit for khas possession by landlord—Title set up by defendant—Onus of proof.*—Where plaintiff, as landlord, sued for khas possession against a lessee, and the latter set up the title of a third party to defeat the plaintiff's admitted right as zemindar, held that the onus lay on the defendant to prove the title set up by him. **BEHAREE SAHOO v. PURYAG MAHTOON**, 23 W.R. 291. [F., 11 C.L.R. 476; R., 15 C. 89; Appl., 9 C.W.N. 144.]

Possession—continued.

—6.—Suits for Possession—continued.

(44)—*Suit for possession—What plaintiff should prove.*—Where plaintiff sues for possession, alleging that he was wrongfully dispossessed by the defendant, the plaintiff need not prove that he held the land free of rent. All that must be proved by him is that he was peacefully in possession of the holding and that he was wrongfully dispossessed by the defendant. **NAGORE MONEE DEBIA v. SMITH** 23 W.R. 291.

(45)—*Suit to recover khas possession—Dispossession of defendant—Evidence—Onus of proof.*—A suit to recover khas possession by dispossessing defendant must be dismissed, where plaintiff fails to prove his cause of action and the defendant adduces sufficient evidence to show that he is entitled to remain in possession. **RAJAH RUN BAHADOOR SINGH v. KUNNO MANJHEE**, 17 W.R. 194.

(46)—*Suit for possession—Plea of limitation—Burden of proof.*—In a suit for possession, the plaintiff is bound to show that his cause of action arose within twelve years before suit and that he has a subsisting title, and he is not bound to show that he has had undisturbed possession for twelve years before suit. **KHODA NEWAZ CHOWDHRY v. BROJENDRO COOMOR ROY CHOWDHRY**, 24 W.R. 417.

(47)—*Suit for possession of property in hands of another—Allegation of title, nature of.*—S. 9, Specific Relief Act, 1877.—The mere allegation that a claimant is entitled by law and custom to the gaddi of a temple is not a sufficient allegation of title. Something more than general allegations are requisite in the plaint where a claim is made to the possession of property which is in the possession of another person, always of course provided that the case is not one falling under s. 9 of the Specific Relief Act. **RAM RAKH NATH v. SUNDAR NATH**, 20 A. 299=A.W.N. 1898, 36.

(48)—*Suit on allegation of dispossession—Manner of dispossession not essential—Decree for lands with specified boundaries—Mistake in plaint as to number of beegahs—Permission to plaintiff to file supplementary plaint.*—This was a suit for cancellation of certain survey proceedings and recovery of possession of the lands, of which the plaintiff was alleged to have been dispossessed by the defendant in those proceedings. It was contended on appeal that, as the plaintiff stated his dispossession to be owing to the survey proceedings, and it appeared that the dispossession was not owing to those proceedings, he could not in his suit get a decree. But the High Court held that plaintiff was entitled to a decree. His suit was throughout one for possession of those lands, and it was immaterial in what manner he was dispossessed, so long as it was proved, as it had been, that he was really dispossessed by the defendant. It was also urged that the decree was bad, as

*Possession—continued.***—6.—Suits for Possession—continued.**

having been passed for 44 beegahs where as only 36 beegahs were originally sued for, but, it was held that the difference was only owing to a difference in measurements between boundaries correctly given by the plaintiff and, as he had, in effect, got a decree for no lands, save what he originally sued for; his having by mistake called them 36 beegahs, when they were in fact 44 beeghs could not render it improper or irregular to give him a decree for the 44 beegahs contained within the boundaries originally given by him. **RAJAH JOY MUNGUL SINGH v. RAJAH MOHENDAR NARAIN SINGH, 2 W.R. 154.**

(49)—*Suit for possession—Limitation—Adjudication.*—In a suit for possession where the plaintiff's title to the suit land is denied and the plea of limitation is set up, the Courts below are bound to determine one way or the other on the plaintiff's title and on the question of limitation; and cannot refrain from coming to any conclusion on the ground that there is some difficulty in ascertaining the boundaries. **RAJ CHUNDER BHUTACHARJEE v. TRIPOORA DEBIA, 25 W.R. 77.**

(50)—*Khas possession of ijmalee lands—Boundaries not given—Decree—Form.*—Where, in a suit to recover possession of a certain quantity of land on the strength of an ijmalee potah granted to plaintiff by the second party defendant, who, he alleged, was the proprietor of a 2 annas share of the talook within which the lands in dispute were admittedly situated, the plaintiff did not give the boundaries of the quantity of land claimed by him, but gives the boundaries of a large area of land, and after making certain deductions in favour of certain parties mentioned in the plaint he says that the quantity of land claimed by him was situated within those boundaries, and the contention of the defendant throughout was that the lands of the talook were ijmalee, and that the plaintiff was not entitled to obtain *khas* possession of any specific lands whatever, it would be incumbent on the Court, before giving a decree to the plaintiff, to ascertain the precise lands for which the suit is brought, and then to determine whether those lands appertain exclusively to the 2 annas share admittedly belonging to the second party defendant. **KALEE KINKUR v. ISHAN CHUNDER, 20 W.R. 344.**

(51)—*Suit for possession—Boundaries—Ascertainment of plots claimed.*—In a suit for possession, it is for the plaintiff to point out the precise plots of land for which he is suing, and there is no use in going into any general consideration of the question of boundaries until the precise plots claimed are accurately ascertained. **GOOROO PERSHAD DUTT v. SREENATH BANERJEE, 15 W.R. 314.**

(52)—*Variance between title alleged and proved—Decree upon adverse possession not set up in plaint.*—Where, in a suit for the recovery of land as being lakhiraj land, the title was

*Possession—continued.***—6.—Suits for Possession—continued.**

found not proved, and the first Court held that the plaintiff was not entitled to a decree upon the strength of twelve years' adverse possession which he proved, on the ground of his not having set it up in the plaint and on the ground of no issue upon it having been raised, and the plaintiff got a decree upon the latter ground in the lower appellate Court, the High Court, on second appeal, confirmed it, as the defendant, having had express notice of the plaintiff's ground, did not object to it, nor desire to be allowed an opportunity to let in evidence to rebut it, and as he was therefore not prejudiced by the course adopted by the lower appellate Court. **SUNDURI DASSEE v. MUDHOO CHUNDER SIRCAR, 14 C. 592.** (21 W.R. 444, 2 C. 418, 8 C. 975 *Disc.*) [*Cited.* 3 C.L.J., 316; R., 6 C.L.J. 621.]

(53)—*Possession on title by purchase—Specific title alleged, not proved—Title by adverse possession not being inferable from plaint or issue—Limitation.*—A declaration cannot be given on a title not distinctly stated in the plaint or the issues. (2 C. 418, *F.*) In a suit for possession based on title by purchase, if the specific title alleged is not proved, and if, on reading the issue with the plaint, it cannot be said that it raises the question of title based on 12 years' adverse possession, a declaration of the title on the strength of adverse possession for more than 12 years cannot be made. **SOMASUNDARAM CHETTY v. VADIVELU PILLAI, 4 M.L.T. 344.**

(54)—*Title—Possession—Issues—Procedure.*—A plaintiff may be entitled to a decree restoring him to possession on proof of 12 or 20 years' possession before suit, though he should fail in proving the specific title set up. When a suit has been based on a particular and specific title put forward by the plaintiff, and the defendant has also put forward a pedigree of the family supported by distinct evidence, directly at variance with the pedigrees put forward by the plaintiff, the Court cannot properly try the case or decide upon the questions between the parties without inquiring into the title alleged by the plaintiff as well as the question whether the plaintiff was, as he alleges, in possession for 20 years before the suit. Such a case cannot be deemed to have been sufficiently disposed of by the trial of the mere question of possession for a period of 12 or 20 years before the suit. **MOULVIE ABDOLAH v. SHAHA MUJEESSODEEN, 16 W.R. 27.** [*F.*, 24 W.R. 301, 25 W.R. 168; R., 2 C. 418; D., 4 C. 46; 1 C.L.J. 73]

(55)—*Suit for declaration—Application to amend plaint by adding prayer for possession—Rejection of application—Subsequent suit for possession.*—Where in a suit for a declaratory decree, the plaintiff makes an application for the amendment of the plaint by adding a prayer for possession, and such application is refused, it is his duty to appeal against such refusal. He cannot acquiesce in such refusal, and bring a

Possession—continued.**—6.—Suits for Possession—continued.**

subsequent suit for possession. *Stuart, C.J. SARSUTI v. KUNJ BEHARI LOL, 5 A. 345, F.B. [R., 14 B. 31.]*

(56)—*Dispossession — Suit for recovering possession—Burden of proof of present title—Plaintiff whether bound to prove specific title alleged—Objection relating to stamp, whether admissible in respect of document admitted by lower Court.*—Suit for recovery of possession on dispossession. In special appeal, the defendants contended that the plaintiff cannot succeed because his title was founded upon a deed of gift which was insufficiently stamped and unregistered. It was further contended that, if the instrument be not a deed of gift, but of transfer for consideration, it would be void as having been made for an immoral consideration. *Held* that the objection as to stamp was untenable because the penalty had already been levied and the document admitted in evidence by the lower Court. Plaintiff was further entitled to succeed upon facts found independently of the deed. Plaintiff sued to recover possession from the defendants, alleging a recent dispossession by them, otherwise than in due course of law, and proved a prior peaceable possession lawfully derived from the defendants, during which he assumed to act as owner. This was *prima facie* proof of ownership in the plaintiff, and was sufficient to throw upon the defendants, the burden of proving a present title to the land in themselves. This burden the defendants having failed to discharge, plaintiff was held entitled to succeed without proof of a specific title in himself based upon the deed of gift. *SUDAMA v. KESHO, 102 P. R. 1879. [R., 26 P.R. 1882, 121 P.R. 1882, 51 P.R. 1904; D., 126 P.R. 1884, 116 P.R. 1888, 120 P.R. 1894.]*

(57)—*Possession, Suit for — Res judicata — Judgment inter partes in a previous suit, Admissibility of — Civ. Pro. Code, s. 13 — Recognition of claim—Evidence Act, s. 13*—The respondents brought a suit against the appellants for possession of some lands in a village, on the allegation that they had acquired title to the land in suit as well as the other land of the village by adverse possession. They filed a judgment in a suit brought by their father for a declaration of his title to the lands of that village, the title being based upon mortgages alleged to have become irredeemable. The decision was that he was entitled to 22 bighas, and the rest of the claim was dismissed. In the course of that judgment, the Court recorded an opinion that the plaintiff was proved to be in possession of the whole land now in suit, but dismissed the claim except as to the 22 bighas on the ground that the plaintiff, though in possession, had not proved his title. The judgment was *inter partes*. *Held*, that the question of possession of the land, with regard to which the suit was dismissed, was not *res judicata*. A bare expression of opinion in a judgment upon a question of possession, which is not given effect to by the decree, is not a

Possession—continued.**—6.—Suits for Possession—continued.**

recognition of a right within the meaning of s. 13 of the Evidence Act and is not admissible in proof of possession, either at the date of the judgment or at any other time. *MUSAMAT KARIMA BIBI v. SRI GOBIND, 7 O.C. 122.*

(58)—*Suit for possession—Possession at time of suit.*—Where the plaintiff who alleged dispossession for three years prior to the institution of the suit, failed to prove it, but proved that he was entitled to the land at the time of the suit, *held*, that the plaintiff was entitled to a decree for possession, although he would not be entitled to *wassilat* from the date of alleged dispossession. *MEER MOBARUCK KHAN v. SOOKBA SINDHOO BANERJEE, 13 W.R. 111.*

(59)—*Mesne profits—Necessity to establish title—Mere decree for possession.*—Mesne profits cannot be recovered until title is established. A mere decree in a suit for possession in no degree shows that the plaintiff has any right to the mesne profits. *ZUMURUDOONISSA v. RADHA CHURN GHUTTUCK, 9 W.R. 590.*

(60)—*Suit for possession — Limitation.*—Where plaintiff sues for possession, and the defendant, being in possession under the order of a competent Court, pleads limitation, the latter is entitled to a clear finding on it before the question of title is taken up and inquired into. *TARINEE KISHORE ACHARJ CHOWDRY v. NARAIN ACHARJ CHOWDRY, W.R. 1864, 142.*

(61)—*Reg. II of 1805, s. 3—Private claims to immoveable property—Allegation of fraud, force, etc.—Limitation.*—The provision in s. 3, Reg. II of 1805, that the twelve years period of limitation did not apply to any private claims to immoveable property, if the person in possession had acquired the possession by violence, fraud or by any other unjust and dishonest means whatever, had to be construed with some strictness to avoid the large class of cases that could be set up by the mere allegation of fraud, &c., and the alleged fraudulent or forcible dispossession had to be clearly established. *MAHARAJAH RAJENDAR KISHORE SINGH v. RAJAH SAHEB PERHLAD SEIN, 22 W.R. 165.*

(62)—*Dispossessed person, Suit by—Limitation.*—A person complaining of dispossession will be barred by limitation, unless he can prove that he has not been out of possession for more than three years. *GOBINDO CHUNDER MOULICK v. MUDHOOSOODUN MOULICK, 25 W.R. 550.*

(63)—*Suit for possession—Zamindar—Occupancy ryot—Limitation—Act VIII of 1869—Act X of 1859—Suit under Act VIII of 1869—Limitation—Burden of proof.*—A suit to recover possession of property against the zamindar by establishment of title, (namely) right of occupancy and ancestral holding, is not cognizable under Act X of 1859, nor could it be treated as a suit under Act VIII of 1869. Such a suit would not be barred if brought within 12 years of dispossession. *[R., 17 C. 926; D., 9 C. 280.]*

Possession—continued.**—6.—Suits for Possession—continued.**

Ordinarily, it is for the plaintiff to prove that his cause of action accrued within the time allowed by law. But in a suit for possession under Act VIII of 1869, where limitation is set up on the ground that the plaintiff had not filed his suit within one year from the date of an alleged relinquishment, the defendant will have to make out the plea if he relies upon his evidence of possession for more than one year to put the plaintiff out of Court. **MUSSAMUT DHORJOBUTTY CHOWDHRAIN v. CHAMROO MUNDUL**, 25 W.R. 217.

(64) — *Suit for possession—Allegation of ouster—Admission—Limitation.*—Where plaintiff sued for possession of a share in an estate alleging her dispossession thereof by the defendants, and that her deceased husband was undivided from his brother under whom the defendants claimed, and where the evidence in the case showed that the defendants had been in undisturbed possession for 11 years and 11 months and one day, and that the plaintiff's husband had, in two petitions presented to the Collector 24 and 27 years previous to the sale in favour of the defendants, stated, in most unequivocal terms, that he had separated from his brother and further prayed the Collector to make settlement with him separately from his brother, *held*, that the suit was time-barred, having been brought at the close of 12 years from the date of plaintiff's ouster and also because there was no reliable evidence let in by the plaintiff to show that the family was joint at any time within 12 years before the sale to the defendants. **BHROMAR COOMAR DEBEE v. BANEE MADHUB BANERJEE**, 17 W.R. 505.

(65) — *Dismissal of declaratory suit—Subsequent suit for possession—Civ. Pro. Code, 1859, s. 7.*—The dismissal of a declaratory suit on the ground that the plaintiff could sue for possession, does not bar a subsequent suit for possession. **DARBO v. KESHO RAI**, 2 A. 356, F.B. [F., 5 A. 345, F.B.; R., 14 B. 31.]

(66) — *Possession, Suit for—Decree—Title.*—A decree in a suit for possession is defective, unless it decides the question of title. **GOBIND CHUNDER BABOO v. KHOSSAUL CHUNDER BABOO**, 1 W.R. 208.

(67) — *Possession for more than 12 years—Dispossession under a decree.*—A party who has been in possession for more than 12 years cannot be dispossessed in execution of a decree to which he is not a party. **BABOO GANESH LALL SINGH v. SHAIKH AHMEDOOLLAH**, 5 W.R. 261. [Appr., 8 W.R. 333, 354; R., 8 W.R. 386, 12 W.R. 256.]

(68) — *Suit for possession—Previous suit on the basis of possession without title, dismissal of—Subsequent dispossession—Effect of previous decree.*—Defendants brought a suit in 1886 for a declaration of their title to, and to recover possession of, certain lands from the plaintiff. The suit was dismissed, defendants having failed in that suit to prove their title. Defendants subsequently dispossessed the plaintiff

Possession—continued.**—6.—Suits for Possession—continued.**

in 1890; and plaintiff instituted the present suit in 1896, but could not prove his title. *Held*, that the effect of the decree in the previous suit was to declare as against the present defendants, that plaintiff's possession was lawful, and such being the case, and the defendants being wrong-doers and having no title, the plaintiff in the present suit, on the basis of the decree in the previous suit and his previous lawful possession, is entitled to recover if the lands are the same. **FAZLAR RAHMAN CHOWDHRY v. RAJ CHUNDER SEN**, 5 C.W. N. 234. (20 C. 834, 3 C. 145, 3 C.W.N. 568, D.)

(69) — *Decree in favour of two or more persons—One decree-holder alone purchasing property in execution of decree and obtaining possession—Subsequent dispossession—Other decree holders, if necessary parties in suit for possession—Non-joinder.*—Where a money-decree has been obtained by three persons and, in execution of the decree, the properties of the judgment-debtors have been sold, and one of the decree-holders, after having obtained leave to bid at the sale, has bought the properties in his own name and for himself alone and has obtained a sale certificate in his own name and has been put into possession of the properties by the Court, and is subsequently dispossessed of the same by the judgment-debtors, a suit by such decree-holder purchaser for recovery of possession of the properties is not bad for non-joinder of the other decree-holders as parties. **ARUMUGAM CHETTI v. SUNDARARAJA AIYANGAR**, 8 M. L.J. 3.

(70) — *Decree for possession—Application for execution—Actual possession not taken—Formal possession given—Regular suit for lands decreed—Limitation.*—Plaintiffs had obtained a decree for one-third of an estate in January, 1872. They had applied formally for execution of the decree and their application was made over to the Revenue authorities in order that the fields representing the plaintiffs' share might be divided off to them. This was duly done and an order was passed that the partition was completed and that effect should be given to it in the papers of the Patwari. Plaintiffs did not take actual possession of the fields allotted to them, but 'formal possession' having been awarded to them, their claim to the fields was subject to the limitation of twelve years commencing from the date of such formal possession. **MUSST. KARIM NISSAN v. BASHO**, 75 P.R. 1882.

(71) — *Purchaser getting symbolical possession—Suit for actual possession.*—An execution-purchaser getting formal possession has a right of suit for actual possession, as such formal possession, operates as a complete transfer of possession. **KARAM BAKSH v. NAND LAL**, 103 P.R. 1884.

(72) — *Wrongful dispossession—Right of lawful owner against wrong doer and purchaser from him.*—The lawful owner of property of which he has been wrongfully dispossessed can

Possession—continued.**—6.—Suits for Possession—continued.**

recover it, either from the original wrong-doer or from *bona fide* purchasers from the original wrong-doer. RAMSOONDER CHUCKERBUTTY v. BEKWITH, 1 W.R. 255.

(73)—*Conveyance by person out of possession.*—A lease or a transfer of property by a person out of possession is not *ipso facto* void. LOKE-NATH GHOSE v. JUGOBUNDHOO ROY, 1 C. 297. [R., 2 B. 299; Not F., 6 B. 380.]

(74)—*Suit for possession—Plea of lekhraj—Onus of proof.*—In a suit for possession of certain land, the plaintiff claiming it as the lekhraj of one T, purchased by him some years previously, the defence was that it was originally the lekhraj of R, from whom W, the father of T, held it as jummai land, that the defendant purchased it from R's heirs, continued W in his holding and eventually sued W for arrears of rent and sold the tenure in execution of the decree, purchasing it himself. The Court of first appeal decreed the suit on the ground that, even if plaintiff's purchase was made on a wrong declaration as to the nature of T's right, still as it was admitted that T held the property under some sort of legal right, plaintiff was entitled to possession by virtue of his purchase. *Held* that the above opinion was bad in law, and that the plaintiff was not entitled to a decree, he having failed to prove his case. JUGGUT CHUNDER CHOWDHRY v. ISSUR CHUNDER FOTADAR, 23 W.R. 60.

(75)—*Mortgage decrees—Auction sales—Priority.*—A purchaser in execution of a decree on a first mortgage of certain immoveable properties is not entitled to sue for possession against a prior auction purchaser in execution of a decree on a second mortgage of the same properties, for, he cannot be ousted until it is proved that the land is still liable for another debt, and then, only if he neglects or refuses to pay off that debt and allows another sale to take place. AJOODHYA PERSHAD v. MUSST. MORACHA KOOR, 25 W.R. 254. [R., 2 A. 698.]

(76)—*Suit for khas possession, effect of dismissal of—Plaintiff not entitled to declaration of right to proprietary title.*—The Court of first instance dismissed the suit for khas possession of the property purchased in execution of a decree finding in favour of certain claimants that had set up a title to it, and directed that the plaintiff should be given possession of proprietary title, or in other words, that he might receive rent from those who admitted tenancy. The lower appellate Court having reversed the latter portion of the decision of the first Court, the High Court *held* that the lower appellate Court was right because the plaintiff sued for khas possession and his suit ought to be decided upon the ground upon which he based it. GOPEE MOHUN GOSSAIN v. ISSUR CHUNDER BANERJEE, 2 W.R. 237.

(77)—*Suit for possession by purchaser at revenue sale—Limitation, Calculation of.*—In a

Possession—continued.**—6.—Suits for Possession—continued.**

suit for possession, by a purchaser at a sale for arrears of Government revenue, the period of limitation is to be counted only from the time of the purchase, because, as purchaser, he is entitled to recover the property free of all encumbrances and his cause of action arises only on the date of his purchase. NARAIN CHUNDER v. TAYLER, 4 C. 103=3 C.L.R. 151. [Appr., 22 C. 244.]

(78)—*Auction purchaser in Court-sale—Suit for possession—Limitation—Adverse possession.*—Where no possession had been obtained by the auction purchaser or by his representatives, for a period of more than 12 years, *held* that a suit for possession was barred. It would not be necessary that there should be proof of actual possession in order to avoid limitation. Proof of possession by operation of law would be sufficient. MEHTAB KHAN v. MUHAMMAD ALI, A.W.N. 1882, 31.

(79)—*Auction purchaser put in possession—Dispossession—Conditional vendee from judgment-debtor—Limitation.*—If the defendants, having purchased and having been lawfully put in possession of the rights and interests of the judgment-debtors, have unlawfully dispossessed the plaintiff who is admittedly the conditional vendee of the property from the judgment-debtors and who was in possession of the property at the time of the defendants' purchase, the defendants being wrong-doers, the plaintiff's right to recover the land may be asserted against them within the ordinary time of limitation. SETH OODEY KURRUN v. CHAIT RAM, 2 Agra 125.

(80)—*Cause of action—Decree for possession—Property in possession of Collector under attachment—Suit for khas possession on withdrawal of attachment.*—The father-in-law of the plaintiff and his brother's son were living joint in food and estate. While so living, the plaintiff property was purchased with their joint funds in the name of the nephew. Subsequently, they separated in food only and the plaintiff's father-in-law died. The nephew having fraudulently and collusively obtained possession of the property, a suit was instituted against him, and a decree was passed for possession in favour of the plaintiff in respect of her husband's half-share in the property. As the property was then under attachment by the Collector by order of the Court under the provisions of Reg. V of 1812, s. 26 as modified by Reg. V of 1827, the plaintiff did not obtain khas possession of it. After the withdrawal of the attachment, the plaintiff brought the present suit for a declaration of her right in a share in the plaintiff property as specified in the prior decree. The defendant contended that the suit was barred by limitation. *Held*, that, as the property was attached by the Collector under the orders of the Court on account of disputes between the sharers, the possession of the Collector was not on behalf of the defendant

Possession—continued.**—6.—Suits for Possession—continued.**

only, but was on behalf of all the parties interested in the property. Consequently, plaintiff had a cause of action on the withdrawal of the attachment, and, as it was within twelve years, the suit was not barred by limitation. *JEEBUNESSREE DABEE v. KRISTO MONEEDABEE*, 22 W.R. 265.

(81)—*Injunction—Prayer for injunction to quit—Prayer for possession.*—A prayer for an injunction to the defendant to leave a house is really nothing more than a prayer for possession. *NAGASAWMY AIYAR v. PERUMAL AIYAR*, 13 M.L.J. 475.

(82)—*Suit to recover possession of property—Possession, first permissive and not adverse—Adverse possession subsequently set up—Burden of proof—Wrong description of land given in the decree—Order passed for execution in respect of property claimed, reversal of—Application for restitution—Fresh suit for declaration and injunction—Whether ss. 43 and 244, Civ. Pro. Code, and s. 56 of the Specific Relief Act, any bar to such suit.*—In 1889, the plaintiff and his father executed a nominal sale-deed in respect of family property in favour of the defendant and put him in possession thereunder. In 1901, plaintiff sued the defendant and obtained a decree for possession of his share in the property. But owing to some clerical error in the plaint, a wrong description of land, as survey No. 287-L was given in the decree. The District Munsiff, in spite of such error, allowed the plaintiff his share in the property claimed, i.e., in survey No. 287-S, but his order was reversed by the District Judge as survey No. 287-S was not found in the decree. Plaintiff then filed a fresh suit for declaration that such property belonged to him and for an injunction restraining the defendant from taking possession in restitution proceedings, and the defendant put in his application for restitution. The lower Court gave a decree in favour of the plaintiff as prayed for, but the District Judge dismissed the suit on the ground of limitation. *Held*, (i) that the possession of the defendant was, in the first instance, permissive and not adverse, and it lay on the defendant to show when his possession became adverse; and as no evidence was let in, the plea of limitation must fail; (ii) that s. 244, Civ. Pro. Code, is no bar to the suit; (iii) that s. 43, Civ. Pro. Code, is also no bar, as the plaintiff neither omitted to sue in respect of the suit land, nor intentionally relinquished it, there being only a clerical error in the description of it in the former suit; (iv) that, as the defendant's application for restitution was not pending when plaintiff filed his suit for injunction, neither cl. (a) nor cl. (b) of s. 56 of the Specific Relief Act can have any application, and that therefore s. 56 is no bar to the injunction sought by the plaintiff. *THAKA NATARAJA AIYER v. KI SUBRAMANIA IYER*, 5 M.L.T. 294=1 Ind. Cas. 806.

(83)—*Specific Relief Act, I of 1877—Amendment Act, XII of 1891, s. 9—Suit to recover possession*

Possession—continued.**—6.—Suits for Possession—continued.**

more than six months after dispossession—Possession is title against all but true owner—Plea of jus tertii by person in possession.—Suit to recover possession brought more than six months after dispossession. The question was whether, assuming that the plaintiff had no title to the suit property, he could maintain an action of ejectment on the strength of his prior possession. *Held* that as against a wrong-doer, prior possession of the plaintiff in an action of ejectment, is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of and the wrong-doer cannot successfully resist by showing that the title and right to possession are in a third person. A plea of *ius tertii* is no defence unless the defendant can show that the act complained of was done by the authority of the true owner, and it is immaterial, however short or recent the plaintiff's possession was. *Held* also that the only effect of s. 9 of the Specific Relief Act is that if a summary suit be brought within the time prescribed by s. 9 of the Act, the plaintiff therein who was dispossessed otherwise than in due course of law will be entitled to be reinstated even if the defendant who thus dispossessed him be the true owner or a person authorized by or claiming under him, but a decree in such a suit will not have the force of *res judicata* on the question of title. *NARAYANA ROW v. DHARMACHAR*, 26 M. 514. (26 C. 579, Diss.) [R., 27 M. 262, 32 M. 86=5 M.L.T. 80, 1 Ind. Cas. 525, 12 O.C. 129; D., 29 A. 52=3 A.L.J. 775=A.W.N. 1906, 264.]

(84)—*Ejectment—Suit for possession by person dispossessed against person with better title—Onus—Specific Relief Act, s. 9.*—If a suit not of the nature contemplated in s. 9, Specific Relief Act, for recovery of immovable property, after dispossession by the defendant, is to be successful the possession relied on must be of a proprietary character and of long duration. A plaintiff, not the real owner of the suit property but a mere temporary squatter, who was dispossessed under colour of title by the defendant, in whose name mutation was made by the Revenue authorities, cannot succeed by merely proving such previous possession but must also establish a title in himself to justify a decree for recovery of possession. *TULLA v. GOPI*, 51 P.R. 1904. (102 P.R. 1879, R.)

(85)—*Suit for possession based on possessory title of plaintiff's predecessor—Plaintiffs never themselves in possession—Cause of action—Specific Relief Act, s. 9.*—Plaintiffs sued, as heirs, to recover certain property, which had been in the possession of their deceased father, without any legal title, and was appropriated by their brother, to the exclusion of the plaintiffs, and purchased by the defendants in execution of a decree against him and was in the peaceable possession of the defendants for a little less than 12 years. *Per Knox, J.*—*Held*, that, inasmuch as the plaintiffs had never, at any time, been in possession of the

Possession—continued.**—6.—Suits for Possession—continued.**

property claimed by them, their suit would not lie. (24 A. 157, 26 M. 514, 27 A. 169, 12 A. 51, 20 C. 834, D.) *Per Aikman, J. (Contra)*—The plaintiffs' father having held a possessory title heritable and transferable—good as against all except the true owner, there was nothing to prevent his heirs bringing the present suit. **SHRI GOPAL v. AYESHA BEGAM, A.W.N. 1906, 264=3 A.L.J. 775=29 A. 52.** (13 A. 537, 24 A. 157, 27 A. 169, A.W.N. 1906, 184, 26 M. 514, 12 A. 51, R.)

(86)—*Act XIX of 1841, s. 18—Possession—Execution—Order of Judge, when final—Appeal.*—For the purpose of settling actual possession, s. 18 of Act XIX of 1841, declares the Judge's decision to be final; but when questions arise in the execution of a decree or order passed on an application under the Act, then, that section does not apply and an appeal would lie. **DHUNPUT OJHA v. MUSSUMAT OUDHA KOOR, 3 N.W.P. 151.**

(87)—*Possession—Summary suit—Acts XIX of 1841, X of 1851.*—Where a summary suit is instituted to enforce a claim to possession of property, and the question in dispute necessarily involves the right, the claimant ought to be directed at once to proceed under Acts XIX and XX of 1841 and X of 1851, which do not determine the right, but only give possession to the *prima facie* heirs. **ASHRUFFOODOWLAH AHMED HOSSEIN v. HYDER HOSSEIN KHAN, 7 W.R.P.C. 1=11 M.I.A. 94=1 Suther. 659=2 Sar. 223.**

(88)—*Suit for possession alleging ouster—Proof of anterior possession not sufficient—Onus on plaintiff to prove title—Act XIV of 1859, s. 15, possessory suit under.*—Suit for recovering possession after ouster. The plaintiff had been distinctly held to have a bad title whilst the title of the defendant had not been entered into. Held that it was not competent to the person out of possession to oust the person in possession simply by proving anterior possession but that the former must prove a title. In such a case, the proper remedy is a necessary suit under s. 15 of Act XIV of 1859 brought within the proper time. **MUSST. TUKROONISSA BEGUM v. MUSST. MOGUL JAN BEBEE, 8 W.R. 370.**

(89)—*Act XIV of 1859, s. 15—Possessory suit—Award under Act XXV of 1861, s. 318.*—The object of s. 318 of the Crim. Pro. Code, Act XXV of 1861, is to maintain a party in possession temporarily at least, whether that possession is a wrongful one or not, while the object of s. 15 of Act XIV of 1859 is to restore to possession parties dispossessed otherwise than by due course of law; therefore, an award under s. 318 of the Crim. Pro. Code, is no bar to a possessory action under s. 15 of Act XIV of 1859. **CHYTUN CHUNDER ROY v. BROJO KANT ROY, 20 W.R. 12.** [*Appl.*, 3 Bom. L. R. 919=26 B. 353; D., 7 C.L.J. 547=12 C.W. N. 696.]

Possession—continued.**—6.—Suits for Possession—continued.**

(90)—*Suit for possession—S. 318, Crim. Pro. Code, 1861.*—Laid down that s. 318, Crim. Pro. Code, implied not that any party, who can show in the Civil Court a possession prior to the Magistrate's award, would be entitled to have the award set aside, and to be put in possession; but only that the party out of possession must prove title. **SHIB PERSAD ROY v. RUGHOO NATH SINGH, W.R. 1864, 295.**

(91)—*Dispossession of tenant—Crim. Pro. Code, 1861, s. 318.*—Where the order of a Magistrate under s. 318, Crim. Pro. Code, 1861 dispossesses a tenant, he need not sue to have the order set aside for recovering possession. **SREEMUTTY LUKHEE DEBEA CHOWDHRAIN v. GOOROO DOSS SEIN, W.R. 1864, Act X, Rul. 54.**

(92)—*Crim. Pro. Code, 1861, s. 318—Suit for possession by setting aside order under, not maintainable without reference to title.*—To set aside the effect of order passed under s. 318, the plaintiff ought not to be permitted to sue for restoration of possession on the sole ground of previous possession without reference to title, for, when a person has been put in possession by a competent Court, the only remedy open to the opponent is to prove his right and title and to recover possession by a regular suit. **RAJESSUREE DEBIA v. BRINDABUTTY DEBIA, 7 W.R. 212.** [*Cons.*, 9 C.L.R. 305.]

(93)—*Possession—Evidence—Dispute as to possession between purchaser from heir and grantees from widows—Effect of decision of Magistrate—Putni—Dur-putni—Mokurruree right.*—In a former suit by the appellant as purchaser from a person who became entitled to it as heir of a former proprietor, instituted on the death of the last survivor of the four widows left by such proprietor, to establish her mokurruree right to certain lands against certain persons who claimed under a grant from the widows of such proprietor, she obtained a decree establishing such rights as against the defendants in that suit. When she came to take out execution of her decree, the respondents, who had not previously intervened in the suit, objected to such execution on the ground that the lands in dispute formed a putnee tenure which had been sold in auction for arrears of rent due by S, the former proprietor and purchased in 1849 by K and H who had granted a dur-putnee of the same to the respondents. On this claim being so made, it was put in course of trial as a regular suit between the objectors (respondents) as plaintiffs, and the decree-holder (appellant) as defendant, and the lower Courts decided the suit in favour of the respondents. It appeared that in 1841, there was a proceeding before the Magistrate, in which the grantees of the dur-mokurruree right under the widows were plaintiffs, and S, the putneedar, was the defendant, in which the whole title and the respective rights of the parties, as they then stood, were gone into and

Possession—continued.**—6.—Suits for Possession—continued.**

investigated. As the result of that investigation, the Magistrate found in favour of the then plaintiffs that they were and had been in possession as dur-mokurrureedars under the widows; and he accordingly, by his order, quieted them in such possession, and remitted the putneedar to institute a suit in the Civil Court to enforce his claim. No such suit was brought. *Held*, that this proceeding of 1841 was conclusive of the present case, and that in 1841, the actual possession was clearly in the grantees of the widows and that it was in the highest degree improbable that the said grantees having established their possessory right against S, would, without a struggle, have allowed themselves to be turned out of possession by their relatives as purchasers of S's right; and that the possession of the grantees was obtained and continued under the widow's title, and was to be referred solely to the title which was now vested in the appellant, and that the right of the appellant could in no wise be affected by the acquisition of the title in 1849. **SHEROOCOOMAREE DEBIA v. KESHUB CHUNDER BOSSOO**, 18 W.R. 1, P.C.=2 Suther. 581.

(94)—*Award under Act IV of 1840—Execution—Ejectment—Suit for possession.*—In a suit for possession of certain lands with mesne profits, where the plaintiff alleged that the defendants, who set up a hereditary right to the lands in execution of an Act IV award given in their favour in respect of a small portion of the lands in suit, ousted him (plaintiff) from all the plaintiff lands, the Court must try the question of the hereditary nature of the tenure raised by the defendants, but must not dismiss the claim on the ground of the inability of the plaintiff to explain how he was ejected from the whole of the lands in dispute, while the award in favour of the defendants was only in respect of a small portion thereof. **BHYRUBNATH SANDYAL v. HURRO SOONDERY DEBEA**, 1 W.R. 32.

(95)—*Boundaries—Jalkar lands—Onus probandi—Magistrate's award—Act IV of 1840.*—In a case of disputed boundaries where one of the claimants is in possession by virtue of a Magistrate's order under Act IV of 1840, it lies on the party seeking to oust him, to show a better title to the land claimed. **PARADAKANT ROY v. CHUNDER KUMAR ROY**, 2 B.L.R.P.C. 1=12 M.I.A. 145=11 W.R.P.C. 1=2 Suther. 169=2 Sar. 403. [*Rel. on*, 9 C.L.R. 305; R., 19 C. 544, F.B.; D., 11 W.R. 566.]

(96)—*Suit for possession and reversal of Act IV award—Suit for damages—Splitting of cause of action.*—A suit for possession of land under title and reversal of an Act IV award need not imperatively include a claim for damages on account of the subsequently misappropriated materials of a house, as the subject-matter of each suit is perfectly distinct as to time and cause of action. **KALEEKANT ROY CHOWDHRY v. HURO MOHINEE CHOWDHRAIN**, 5 W.R. 128.

Possession—continued.**—6.—Suits for Possession—continued.**

(97)—*Possession, Suit for—Previous possession for eleven years—Jalkar—Attachment by Criminal Court under s. 146, Crim. Pro. Code (Act V of 1898).*—A jalkar was attached by the Criminal Court, under s. 146, Crim. Pro. Code. The plaintiff brought this suit for recovery of possession and proved undisturbed and peaceable possession for eleven years before the attachment, and the defendant was proved not to have been in possession before the Magistrate's order: *Held*, that the plaintiff was entitled to maintain the possession which he had against all but the true owner; the defendant had not shown himself to be the true owner, and therefore, the plaintiff was entitled to a decree. **SHAMA CHARAN ROY v. SURJA KANTA ACHARYA BAHADUR**, 6 Ind. Cas. 806.

(98)—*Crim. Pro. Code, s. 145—Magistrate's order—Possessory suit—Jurisdiction of Mamlatdar to entertain.*—A Mamlatdar has jurisdiction to try a possessory suit and this jurisdiction is not taken away by the fact that a Magistrate has previously passed an order regarding the same property under s. 145 of the Crim. Pro. Code. **NAGAPPA v. BADRUDIN**, 3 Bom. L.R. 919=26 B. 353.

(99)—*Dispute as to possession of immoveable property—Competency of Revenue and Civil Courts—Concurrent jurisdiction—Bombay Act V of 1864—Act VIII of 1859.*—Although Bombay Act V of 1864 gives to Mamlatdars the power to hear and decide suits in regard to immediate possession, it does not follow that the Civil Courts have no power to decide suits of the same nature. Act VIII of 1859 declares that they shall have such jurisdiction. In such cases, Civil and Revenue Courts have concurrent jurisdiction. *Ex parte* **NAGOVA kom JAKAN GAUDA**, 3 B.H.C.A.C. 108. [R., 8 B.H.C.O.C. 185, 4 B. 168, 31 B. 86=8 Bom. L.R. 904; D., 1 B. 624.]

(100)—*Possessory suit—Issues to be considered by Mamlatdar.*—In a suit for possession filed in a Mamlatdar's Court, under Act III of 1876 (Bombay), the only issues which the Mamlatdar has to consider are:—(i) whether the plaintiff is in possession. (ii) whether the defendants obstructed or disturbed that possession, and (iii) whether such obstruction or disturbance was within six months before suit. **BALAVANTRAO v. SPORT**, 23 B. 761. [*Appl.*, 25 B. 395=2 Bom. L.R. 1136.]

(101)—*Possession, joint or exclusive—Frame of suit.*—It cannot be affirmed as a general proposition of law that, whenever a party asks for recovery of property, on the allegation that he is exclusively entitled to possession thereof, his suit must necessarily be dismissed, if he proves that he is entitled to joint possession; but if he claims possession of a specific portion of a large area as representing his share, he cannot recover joint possession of the whole property upon failure to prove his exclusive title. **SASTI CHARAN DE v. SARAJINI DEBYA**, 10 C.L.J. 213=2 Ind. Cas. 492.

Possession—continued.**—6.—Suits for Possession—continued.**

(102)—*Suit for exclusive possession—Joint ownership—Decree.*—If, in a suit by plaintiffs for exclusive possession, it is found that the property belongs to the litigant parties jointly, the Court can award a decree for joint possession. *JAG RAM v. HANS RAJ*, 17 P.R. 1893.

(103)—*Purchasers of shares in joint property, right of, to recover possession.*—Plaintiff sued to recover, from defendants joint possession of certain lands. Plaintiff claimed by purchase from the proprietors and the defendants were also purchasers from parties who bought from the plaintiff's vendors. The Judge of the first appellate Court found on the evidence that the estate of which plaintiff bought a portion was a joint undivided one, and that, therefore, the plaintiff was entitled to his share *ijmalee* with the other shareholders; but he decided against the plaintiff on the ground that he had not been able to prove that he had ever been dispossessed after getting possession. It was admitted by the Judge that the plaintiffs had purchased shares in joint property, and that they held possession of the lands, but he considered that they did so separately, not being aware of their *ijmalee* rights at the time; but the High Court held that it did not matter what position plaintiffs considered themselves to have occupied originally whilst in possession. It having been proved that they were in possession, they were entitled on establishing their right to recover possession whether that possession was originally joint or separate. *RAJ-BULLUB SHAMINEE v. WARIS MAHOMED*, 8 W.R. 450.

(104)—*Suit for exclusive possession of property to which parties are entitled jointly—Form of decree.*—One of two joint owners of immoveable property, having been forcibly ejected by the other from some land of which he was in possession through a tenant, brought a suit upon title to recover exclusive possession. Held, that, in such a suit, not being a suit under s. 9 of the Specific Relief Act, the plaintiff was not entitled to more than a declaration of his title to possession jointly with the defendant, and an injunction was also issued to the defendant prohibiting him from dealing with the land of which he was in possession to the prejudice of the plaintiff without the plaintiff's consent. *RAM JATAN SHUKUL v. JAISAR SHUKUL*, A.W.N. 1894, 166.

(105)—*Practice—Suit for exclusive possession—Decree for joint possession.*—It is competent to a Court in a suit in which the plaintiff claims exclusive possession of immoveable property to give a decree for joint possession thereof. *RAM CHANDAR RAO v. MADHO RAO*, A.W.N. 1891, 45. (17 C. 814, F.)

(106)—*Co-sharers—Dispossession—Decree for joint possession.*—Where a person who was in possession of property jointly with another, is illegally dispossessed from a portion of such

Possession—continued.**—6.—Suits for Possession—continued.**

property, he is entitled to be put back into the possession which he enjoyed before he was evicted. *BHAIRON RAI v. SARAN RAI*, 26 A. 588, F.B. = 1 A.L.J. 183 = A.W.N. 1904, 106. (A.W.N. 1901, 48, D.) [F., 27 A. 153 = A.W.N. 1904, 199 = 2 A.L.J. 481; R., A.W.N. 1905, 160, 4 C.L.J. 198; R. & D., 33 C. 1201; D., 27 A. 88 = 1 A.L.J. 488 = A.W.N. 1904, 194.]

(107)—*Suit for exclusive possession—Decree for joint possession—Practice.*—Where plaintiff sued for exclusive possession of certain lands, and it was found that the lands belonged to him jointly with the defendant. Held, that the plaintiff could be given a decree for joint possession along with the defendant, to the extent of his interest. *PICHINATHOO v. RAMASAMY NAICK*, 6 Ind. Cas. 502 = 8 M.L.T. 57.

(108)—*Hindu Law—Possession of a member of the family—Its nature.*—A member of a joint Hindu family cannot say that he is in possession of any particular portion of the family property on his own account, his possession being only the possession of the family. *COOVERJI HIRJI v. DEWSEY BHOJA*, 17 B. 718. [R., 3 Bom. L.R. 322, 25 B. 478, 11 C.L.J. 61 = 14 C.W.N. 298.]

(109)—*Suit for share in family property—Claimant out of possession—Question for decision.*—In a suit for a share of joint family property, the claimant being out of possession, the question for decision is when did the possession of the defendant become adverse to the plaintiff or the person under whom he claims by purchase. *RAM LAKHI v. DURGA CHARAN*, 11 C. 580. [F., 12 M. 292.]

(110)—*Possession—Evidence of title—Parties.*—A suit for possession of certain property was instituted by the plaintiff against the heirs of A and some others on the grounds (1) that the property originally belonged to himself jointly with A and B, both of whom had died, (2) that the heirs of A had abandoned their share to him, and (3) that he was the heir of B. The suit was decreed, the Court having found that there was sufficient evidence of the abandonment of A's share and that the plaintiff was in fact the heir of B. On second appeal, it was contended that, as between the plaintiff and the principal defendants, the heirs of B, who had appeared, the plaintiff had not proved his title to possession of A's share. Held that, all parties who might be interested being before the Court, and the plaintiff having as between himself and the heirs of A shown himself entitled to his share, he was entitled also to recover possession of the whole property from the other defendants. *UMBICA CHURN BHUTACHARJEE v. PROSONNO COOMAR SEN*, 9 C.L.R. 365.

(111)—*Donees from one of several joint owners—Suit for possession—Sustainability.*—A suit by the donees under the deed of gift executed by one of two or more joint owners, for the

Possession—continued.**—6.—Suits for Possession—continued.**

recovery of the possession of property, is not sustainable, as it is not one for partition. Members of a tarward, who get certain property under a devise by somebody in their favour, take the property as tarward property. **KUNHI MOIDIN v. KYPATTAMBU, 1 M.L.J. 739.**

(112)—*Suit for possession—Female plaintiff—Evidence—Undivided property—Suit for possession—Decree—Evidence—Property in possession of female's relations—Collection of rents—Presumption.*—A female plaintiff suing to recover possession of certain property in the possession and enjoyment of the defendant must rely on the strength of her own rights, whatever they may be. She cannot succeed merely because it is the property of her husband who does not object to her recovering it. In cases where the matter in question is the right to undivided shares of property, it is incumbent on the Courts to see that a decree is not given against some only of the shareholders for the recovery of a share of the property, unless it is proved distinctly that those shareholders, and not any other shareholders, are in the enjoyment and possession of it, and interfering with the claimants' enjoyment thereof. In respect of property in the possession of a respectable female's relations, such as, her husband, brother or son who had been receiving the rents thereof, the presumption does not necessarily arise that their possession is possession on her behalf and not on theirs. **KAFATOULLAH v. AZIRA BIBEE, 23 W.R. 264.**

(113)—*Suit for possession—Real and benami purchasers—Parties to suit.*—In a suit to recover possession of property which was purchased by one party in the name of another, the real purchaser ought, by the rule of Courts of Equity, to be a co-plaintiff. Where this is not the case, a decree obtained by the plaintiff may be reversed on appeal, as the real purchaser, not having been a party, would not be bound by such decree. **KULLY PRASANNO BOSE v. DINONATH MULLICK, 11 B.L.R. 56 = 19 W.R. 434. [R., 5 C.L.J. 102, 22 B. 672; Discussed, 10 C. 697.]**

(114)—*Suit to recover possession of property—Benami purchase.*—A suit to recover possession of property which was purchased by a vakil from his client *benami* in the name of another, and which was never made over to that other, cannot be maintained in the name of the ostensible owner. **FUZEENBUN BEBEE v. OMDAH BEBEE, 11 B.L.R. 60, Note = 10 W.R. 469.**

(115)—*Suit for possession—Plea of bona fide purchase for value—Onus of proof—Benamiee—Enquiry as to title—Vendor's name registered as exclusive owner—Vendor alone sued for rent.*—Where in a suit to recover possession, the defendant pleads that he is a *bona fide* purchaser for value without notice of the plaintiff's title, the *onus* of making out that plea is upon him (the defendant). It is very doubtful whether the doctrine of *bona fide* purchaser for value

Possession—continued.**—6.—Suits for Possession—continued.**

can be introduced in this country for the purpose of defeating the vested rights of parties. The *benamiee* system which notoriously prevails in this country is not prohibited by law, except in certain specified cases; it is one of the recognized institutions of the land, and it would, therefore, be extremely dangerous to hold that a purchaser in this country has discharged himself of the *onus* which lies upon him by looking only to the apparent title. The mere fact that the name of the vendor alone has been registered in the Zamindar's books as the exclusive owner of the putnee, or that the vendor alone was sued by the Zamindar for the rent of the putnee, does not discharge the purchaser of the *onus* which lies upon him of showing that he is a *bona fide* purchaser for value without notice. **BIBEE JEEBUNISSA v. UMUL CHUNDER CHACK-LANUVIS, 18 W.R. 151.**

(116)—*Purchase of house with one's own funds—Right to recover possession—Benami.*—The purchaser, with his own funds, of a house, is entitled to recover possession of the same. **CHINNA PAKKIRI NAGASWARAGARAN v. GOVINDASWAMI PILLAI, 8 M.L.T. 283 = 8 Ind. Cas. 283.**

(117)—*Mortgage—Covenant to give the mortgagee possession—Suit for possession after expiration of term.*—Where a mortgagor covenanted to put the mortgagee in possession of the mortgaged property, but did not do so, and the mortgagee sued for possession after the expiry of the mortgage term, held that the mortgagor was precluded, by his breach of the mortgage contract, from objecting to the maintainability of the suit on the ground that it was brought after the expiration of the mortgage term. **HAR SAHAI v. CHUNNI KUAR, 4 A. 14 = A.W. N. 1881, 105.**

(118)—*Act IX of 1859, property of rebel sold under, suit for possession on ground of foreclosure by mortgagee, subject to limitation of one year from date of seizure or sale.*—In this case, the property in suit was claimed by a party suing under the allegation of having a mortgage lien on it. The property in question was sold as that of a rebel under the special laws, Act XXV of 1857 and Act IX of 1859. Admittedly, no suit was brought within one year to set aside the sale, but it was pressed by the opposite party that the property was sold with notice of mortgage and that only the rights and interests of the rebel were sold. It was further contended that s. 20 of Act IX of 1859 referred only to suits brought in the Special Court which administered that law but nothing therein prevented suits being brought to confirm civil rights such as those under a mortgage, in the ordinary Civil Courts, within the period of 12 years, the ordinary period of limitation recognised in such Courts. The High Court held that the suit was barred by limitation, and added that the plea of the petitioner as to there being a concurrent period of 12 years to

Possession—continued.**—6.—Suits for Possession—continued.**

sue in other Courts, was not borne out by any express or implied provision in s. 20, Act IX of 1859. **GOBIND PANDEY v. HEEMUT BAHADUR**, 6 W.R. 42.

(119)—*Suit for possession of occupancy holding by usufructuary mortgagee—Jurisdiction of Civil and Revenue Courts.*—A suit for possession of occupancy holdings by an usufructuary mortgagee of an occupancy tenant should be brought in a Civil Court and not in a Revenue Court. **BINDESHRI RAI v. SADHO CHARAN RAI**, 26 A. 591. (15 A. 219, R.; 26 A. 78, Disc.)

(120)—*Suit for possession.*—In a suit for possession, the plaintiff must establish his title to property in question. Hence, where the plaintiffs sued to obtain possession of property which their predecessors in title had purchased in execution of a decree for sale passed on a prior mortgage, and the defendants resisted the plaintiff's claim on the ground that they were the representatives of another purchaser of the same property sold in execution of a subsequent decree passed upon a subsequent mortgage, the prior mortgagee not being a party to the suit upon the subsequent mortgage and the subsequent mortgagee not having been impleaded in the first mortgagee's suit, *held*, that the plaintiff's title was not of such a character as to justify a Court in ousting the defendants. **DARBARI MAL v. SHIAM DEI**, 1 A.L.J. 90.

(121)—*Limitation—Possession, suit for—Mortgagee purchaser—Formal possession—Period from which limitation runs—Third person in actual possession—Ouster.*—In execution of a mortgage decree, the mortgagees purchased the property under mortgage on the 7th October, 1888, and took formal possession of it on the 17th February, 1890. The plaintiff, who bought the property from the auction-purchaser, brought a suit for possession on the 20th December, 1901, against the mortgagor and his vendees, who were not parties to the mortgage suit. *Held*, that the suit was barred by limitation, as the cause of action accrued when the mortgage security ceased on the 7th October, 1888. (16 W.R. 33, P.C., F.) In the case of a third person who had already purchased the property and obtained actual possession, delivery of possession, as against the judgment-debtor alone, cannot amount to an ouster of the person in possession. **RAMJAN MAHOMED v. CHUNDER MOHAN ADITYA**, 7 C.L.J. 640. (22 A. 269, F.; 4 C.W.N. 297, D.)

(122)—*Suit for possession under a sale-deed—Sale declared invalid—Prayer for possession as mortgagee—Inconsistent reliefs—Pleading—Practice.*—Plaintiff sued for possession on the strength of a sale from first defendant's son. The land sued for was already mortgaged to plaintiff by 1st defendant. The Court found that plaintiff's vendor had no title to convey the land to plaintiff. Plaintiff urged in second appeal that he may be allowed to remain in possession as mortgagee from first defendant: *Held*, that, as such a claim was inconsistent

Possession—continued.**—6.—Suits for Possession—continued.**

with the absolute right claimed in the plaint, plaintiff was not entitled to possession as mortgagee. **KUMARASAMI CHETTY v. POOSARI SAKKA NAICK**, 4 Ind. Cas. 37=20 M.L.J. 141.

(123)—*Cause of action—Possession given by Court—Obstruction.*—The plaintiff who was a usufructuary mortgagee of the suit land obtained a decree for possession, in execution of which he received possession formally through the Court Amin. When, in pursuance of this delivery of possession, he entered upon the land for the purpose of exercising his rights over it as possessory mortgagee, he was resisted by the defendant. *Held* that the plaintiff had a good cause of action against the defendant for instituting a suit for possession and mesne profits. **UTTAM CHAND v. SHAIKH GHAZI UDDIN**, A. W.N. 1883, 192. (4 A. 184=A.W.N. 1882, 4, F.)

(124)—*Suit for possession of land—Burden of proof.*—It is quite true that in many cases when a man proves a *prima facie* title by possession, or, as it is called, a possessory title, it is sufficient to put the defendant upon proof to show that he has any title better than the possessory title of the other side. But where plaintiff sues for possession alleging that some 70 years ago the ancestor of the defendants, who was then the proprietor, mortgaged the plaint land to the ancestor of the plaintiff and that owing to that mortgage not having been redeemed the plaintiff became possessor of the land and continued to hold it until he was dispossessed by the defendants, the plaintiff must fail, if he does not prove the mortgage on which he relies; and the mere admission of the defendants that the transaction originated in a mortgage does not shift the burden of proof upon the defendants. **HANUMAN v. RAM CHARITTAR** A.W.N. 1887, 51.

(125)—*Zur-i-peshghee mortgage—Redemption—Suit for possession—Defendant in possession pleading his possession under different title—Limitation—Fraud.*—Where plaintiff sued to recover possession of a certain land, alleging that it was given in *zur-i-peshghee* mortgage to the first defendant, who, it was alleged, opposed the plaintiff's re-entry after redemption, and it was found that the 2nd defendant, who claimed the land as *Kharijee* land of a different mouzah and who was in possession, was not identical with the mortgagees between whom and the 2nd defendant there was no collusion, *held*, that the suit was barred by limitation unless the plaintiff could show that he had been in possession within 12 years next preceding the date of suit. **SYUD AKBAR HOSSEIN v. TOOLSEE RAM**, 23 W.R. 17.

(126)—*Suit by usufructuary mortgagee wrongfully dispossessed of land by holder of decree against his mortgagor.*—The plaintiff respondent's father, as well as he himself in succession was usufructuary mortgagee in possession of the land. The decree obtained by the applicant

Possession—continued.**—6.—Suits for Possession—continued.**

(first defendant), Ma Shwe Ma, was that the second defendant, Nga Po Maung, should redeem the land from Nga Yan Bye, the father of the present plaintiff, Nga Chit U, and make it over to Ma Shwe Ma. All that the mortgagee, Nga Yan Bye, was required to do at the outset was to accept a certain sum for redemption from Nga Po Maung and to restore the land to him. It was then Ngo Po Maung's business under the decree to deliver the land to Ma Shwe Ma. Instead of having the decree of the Court executed in this way, the defendant Ma Shwe Ma has attached the land and ousted the mortgagee Chit U—a proceeding which was entirely unwarrantable and which the Court that allowed it in execution of decree should now be required to explain. The Courts below ought to have found out by examination of the parties what the actual state of affairs was, and to have adjudicated upon it, notwithstanding the erroneous frame of the suit and the practical difficulty now in adjusting matters, and the application for revision itself asked for alteration of the decree as one of the modes of relief sought. The plaint would be treated as amended into a suit for recovery of possession with mesne profits. *MA SHWE MA v. MAUNG CHIT U*, U.B.R. 1892 — 1896, Vol. II, 602.

(127)—*Mortgage—Suit by mortgagee for possession—Mortgage-debt to be repaid by rent—Relation of parties—Limitation—Act VIII of 1869, s. 27.*—Where a mortgagee claimed possession, alleging that, under the terms of the mortgage, he should repay himself the debt by taking the rent reserved during the term (the mortgage in this case being a zuri-peshgee lease), held that the limitation prescribed by s. 27, Act VIII of 1869 (B.C.), was not applicable to the case, the relation between the parties being different from that of landlord and tenant contemplated in the above section. *PURIAG DUTT ROY v. FEKOO ROY*, 19 W.R. 160. [F., 19 W.R. 431.]

(128)—*Possession of mortgagee—Civ. Pro. Code, 1859, s. 230—Civ. Pro. Code, 1877, s. 332—Repealing of old law—Effect of procedure under new law—Proof in such proceedings.*—The possession of the mortgagee under the mortgage is "possession on his own account" within the meaning of s. 230 of the Civ. Pro. Code (1859) and s. 332 of the Civ. Pro. Code (1877); he is, therefore, entitled, when dispossessed in execution of a decree against the mortgagor, to which he is not a party, to be restored to possession under s. 332 of the Civ. Pro. Code (1877). A person, dispossessed under the above circumstances, after the Civ. Pro. Code (1877) came into force, in pursuance of an order passed under the old Code, is entitled to be restored to possession under the provisions of the new Code. A person dispossessed under the above circumstances, need not, in seeking to be restored to possession, prove his title; it is enough if he proves his possession. *SHAFI-UD-DIN v. LOCHAN SINGH*, 2 A. 94. [Not F., 6 O.C. 110.]

Possession—continued.**—6.—Suits for Possession—continued.**

(129)—*Suit by mortgagee to declare lien—Subsequent suit for possession.*—Where a suit by a mortgagee, who purchased the mortgaged property in execution of a money-decree only, for a declaration of his lien over the property, against the defendant, who had purchased the same property in execution of another decree against the mortgagor, was dismissed on appeal by the High Court. Held by a Full Bench that a subsequent suit for possession of the property would not lie, that his first suit for declaration of lien was properly brought, and that such mortgagee was entitled to a review of the former judgment; and held by the Bench, before which the review came to be heard, that he was entitled to such review and to declaration of the lien. *JONMENJOY MULLICK v. DASS-MONEY DASSEE*, 8 C. 700.

(130)—*Suit for possession into suit for redemption, Conversion of.*—A suit based on fraud and fought out on the ground of fraud and dismissed in the first Court on the ground of there having been no fraud, cannot be converted, in the Appellate Court, into one for redemption. But under special circumstances, a suit for possession may be converted into a suit for redemption on the establishment of an existing mortgage. *RAM DAS MONDAL v. INDROMONI DAS*, 3 C.W.N. 325. [R., 5 C.L.J. 527, 5 C.L.J. 653.]

(131)—*Possession with contract to sell—Re-sale.*—A property was agreed to be sold to M and possession was given. M paid only a part of the consideration. So the document was not registered. Now the property was re-sold to A by a registered deed. A sued the vendor and M for possession. Held, the owner had a lien for the unpaid purchase-money on the property, and consequently A could not recover. *MOIDIN v. AVARAN*, 11 M. 263. [R., 16 M. 464, 29 M. 336.]

(132)—*Different mortgage decrees on the same property—Right to possession determined by priority of purchase.*—Where the same property is mortgaged to two persons on different dates, and the later mortgagee, suing on his mortgage and becoming purchaser, takes possession, and then the earlier mortgagee obtains a simple decree on his mortgage, purchases the same property in execution and sues the later mortgagee for possession, the later mortgagee, having first purchased the mortgagor's interest and having first obtained possession, is entitled to retain such possession as against the other, although his own right may be merely that of a trustee for the mortgagor and may be subject to the plaintiff's mortgage lien, if the latter takes proper proceedings to enforce it. *DIRGOPAL LAL v. BOLAKEE*, 5 C. 269. [R., 21 C. 116, 18 M. 500, 31 C. 737, 5 C.L.J. 527.]

(133)—*Suit for possession between two rival mortgage decree-holders—Question for decision.*—Where a certain property is mortgaged to two persons on the same date, both obtain decrees

Possession—continued.**—6.—Suits for Possession—continued.**

on their mortgages and one of them sells the property and becoming purchaser gets into possession, and the other, also becoming purchaser in execution, sues for possession, the question for decision is not one as to whose mortgage is prior but as to who has the prior right to possession. In such a case, the question of the priority of mortgage must be raised in a suit properly framed for the purpose. **NANACK CHAND v. TELUCKDYE KOER**, 5 C. 265 = 4 C. L. R. 358. [*F.*, 26 M. 486; *D.*, 12 C. 299, 7 O. C. 243, 32 C. 891 = 1 C.L.J. 371 = 9 C.W.N. 728; *R.*, 21 C. 116, 5 C.L.J. 527, 18 M. 500, 24 C. 569, 10 M.L.J. 347 = 24 M. 171, 32 M. 485, 7 C.W.N. 11, 31 C. 737.]

(134)—*Ejectment—Wrongful dispossession—Jus tertii—Right of suit—Act XIV of 1859, s. 15.*—Where the plaintiffs have been ousted by the defendants who have no title to the land in dispute, the latter cannot, in a suit to recover possession of the land, set up that somebody else other than the persons whom they ousted have or may have some title so as to defeat the claim of the plaintiffs to be restored to possession as against them. The fact that such a suit is not brought within the time limited by s. 15 of Act XIV of 1859 does not in any way affect the plaintiffs' right to a decree for possession. **KUMUL DUTT v. MOHUN MALLA**, 15 W.R. 278.

(135)—*Decree declaring title and confirming possession—Fresh suit under Act X of 1859 necessary to remove person in possession.*—In this special appeal it was urged that the Principal Sudder Ameen, when he found the plaintiff's title to the land proved, and the defendant's false, should have removed the latter from possession, or at all events should not have confirmed him in it. The High Court saw no reason to interfere in this matter; plaintiff who sued only for declaration of his title and confirmation of a possession which he alleged himself already to have, got all that he asked for; his title was declared, and his possession as talookdar confirmed; but, as he did not ask for *khas* possession or for the ejection of the defendant, who had been found by the Principal Sudder Ameen to be in actual possession of the land, he could not have that relief afforded him in the present suit. If plaintiff wished to evict him and enter upon *khas* possession of the property, he should bring a suit for the purpose under Act X of 1859. **GUGUN CHUNDER GHOSE v. RAJ CHUNDER KUR**, 8 W.R. 281.

(136)—*Jurisdiction of Civil Court—Suit for possession—Ejectment—Mesne profits.*—A suit for possession with mesne profits on the allegation that defendant, who had once been a tenant, was, notwithstanding the determination of his tenancy, holding on as a trespasser, does not lie under Act X of 1859. **HARI NATH DAS v. SHEIK ASMAT ALI**, 6 B.L.R. App. 118 = 15 W.R. 171.

(137)—*Suit under Beng. Act X of 1859—Proof of title.*—If a person, evicted without

Possession—continued.**—6.—Suits for Possession—continued.**

legal process from land in his occupation, sued for possession under Act X of 1859, he was bound to prove his title. **MADUR KHAN v. WOOMA MOYEE DABEE**, Marsh 389 = 2 Hay 434; **SHUSTEE DHUR MOZUMDAR v. NUTEEJA BIBI**, 7 W.R. 36.

(138)—*Act X of 1859, s. 23, cl. 6—Act XIV of 1859, s. 15—Ordinary civil action—Evidence—Damages.*—In an ordinary civil action not brought under the provisions of cl. 6, s. 23, Act X of 1859, or under s. 15, Act XIV of 1859, the plaintiff cannot obtain a decree for possession against the undisputed owner of the lands in dispute merely by proving his previous possession and dispossession, but he may claim damages for the value of crops taken away. **RAM MOHUN DOSS v. JHUPPRAO DOSS**, 14 W.R. 41. [*Appl.*, 21 C. 244.]

(139)—*Suit for possession—Shikmee talukdar.*—A suit for possession may be brought by a *shikmee talukdar* under cl. 6, s. 23, Act X of 1859. **RAJ CHUNDER SURMA GOSAIN v. ALI NEWAZ KHAN**, W.R. 1864, Act X Rul., 133.

(140)—*Suit by ejected tenant against adverse holder with title accrued prior to suit—Act X of 1859, s. 23, cl. 6, if applicable—Jurisdiction.*—This was a suit by a tenant who had been ejected by the defendants, who claimed under a lease from the zemindar who was also made a co-defendant. The plaintiff obtained a decree in the first Court. An intervenor, who claimed as purchaser under one of the defendants, appealed to a Principal Sudder Ameen who dismissed the suit on the ground that the suit was cognizable only by the Collector under Act X of 1859. But the High Court held that the plaintiff could not have instituted the present suit under Act X, and the lower Court was therefore wrong in having dismissed it. He could not, under cl. 6 of s. 23, Act X of 1859, have recovered possession of the lands as against the defendant, whose title as adverse holder had accrued prior to the institution of the suit. **RUTTUN MOONEE DEBEA v. DHURMOMOYEE DASSEE**, 2 W.R. Act X Rul. 9. [*R.*, 14 W.R. 246, 15 W.R. 463; *D.*, 17 W.R. 151.]

(141)—*Act X of 1859, s. 23, cl. 6, suit to recover possession under—Points to be proved by plaintiff.*—This suit which was one under cl. 6, s. 23 of Act X of 1859, should, by reason of s. 30 of the same Act, have been brought within one year from the date of the cause of action. The lower appellate Court had decided the suit in the plaintiff's favour on the insufficient ground that, because the plaintiff was admittedly in possession in 1255, and because the defendants did not prove the tenancy to have lapsed in 1257, the plaintiff might be inferred to have held on until ousted as alleged by him. The High Court was of opinion that the above reasons of the Judge were insufficient and unsatisfactory and held that the plaintiff must be

Possession—continued.**—6.—Suits for Possession—continued.**

called on to show when his cause of action commenced, when and how he was dispossessed, and whether his suit was instituted within the time prescribed by Act X of 1859, and, setting aside the decision of the Judge, remanded the case to him for a clear finding on the above points. **RAM NARAIN SINGH v. SHEO PURSUN LAL**, 4 W.R. Act X Rul. 24.

(142)—*Act X of 1859, s. 23, cl. 6 and s. 25—Eviction.*—S. 25, Act X of 1859, enacts that if a zemindar requires assistance to eject a cultivator not having a right of occupancy or a tenant after the determination of his tenancy, he shall make application to the Collector, who is thereby authorized to deal with the matter. If the ryot, upon the expiration of his tenancy, having no longer a legal right to hold the property, be required by the zemindar to quit, the zemindar is entitled to resume possession, and is moreover entitled to obtain possession by any legal peaceable means on the expiration of the tenancy. He is not allowed to eject by force or illegally, but is bound to apply to the Collector if he finds any legal impediments to his resuming his possession. To maintain a suit under cl. 6, s. 23, Act X of 1859, the plaintiff must show some right to be restored to his tenure. It is not to be assumed that he was in lawful possession, and therefore entitled to be restored to possession, because he was ejected without an application to the Collector under s. 25 of the Act. **RUGHONUNDUN SINGH v. GOPAL SINGH**, 1 W.R. 191.

(143)—*Act X of 1859, s. 23, cl. 6—Suit under—Jurisdiction of Civil and Revenue Court.*—A Revenue Court has no jurisdiction to entertain a suit instituted under cl. 6, s. 23, Act X of 1859, for recovering possession of land, in which the zemindar's servants were the nominal defendants, the real defendants not being shown to be in receipt of the rents, but setting up a different and independent right. Such a suit is cognizable only by the Civil Court. **RAM DEHUL PANDEY v. KASHEE RAWUT**, 14 W.R. 232.

(144)—*Suit for possession—Ejectment—Act X of 1859, s. 23, cl. 6—Jurisdiction.*—A suit for possession of land from which (as stated in the plaint, the plaintiff was illegally ejected, but of which the plaintiff had never been in possession, the claim being based on a certain document alleged to be a genuine patta is cognizable by the ordinary Civil Court, and not by a Revenue Court under cl. 6, s. 23, Act X of 1859. **JODOONATH GHOSE v. RANEE SOOKHMOYEE DOSSEE**, 1 W.R. 201. [*F.*, 2 Agra 181.]

(145)—*Act X of 1859, s. 23, cl. 6—Suit for possession.*—Where a ryot brought a suit under the provisions of cl. 6, s. 23, Act X of 1859, for possession, held that as the zemindar admitted tenancy at some time and the Judge had found that the tenure had lapsed, the onus was on the zemindar to show that the tenancy had been determined. The judgment of the lower

Possession—continued.**—6.—Suits for Possession—continued.**

Court being meagre, the suit was remanded. **SHEO PURSUN LALL v. BABOO RAM NARAIN SINGH**, 1 W.R. 361.

(146)—*Act X of 1859, s. 25—Civil Court—Jurisdiction—Possession—Mesne profits.*—A suit for possession with mesne profits may be brought in a Civil Court. S. 25, Act X of 1859, does not prevent this. **ROY OODIT NARAIN SINGH v. RAM SARUN ROY**, 1 W.R. 221.

(147)—*Act X of 1859, s. 77—Suit for possession based upon title—Limitation.*—S. 77, Act X of 1859, does not bar a suit by a plaintiff who has been shown, not to have been in the actual receipt and enjoyment of rents under s. 77. A suit for recovery of possession founded upon title may be brought by a person against whom a decision of the Revenue Court has been passed, subject to the ordinary law of limitation. **BARO BIBEE v. MAHOMED ALI KAZI**, 5 W.R. Act X Rul. 92. [*Appr.*, 25 W. R. 550.]

(148)—*Dismissal of proceedings before Collector—Subsequent Civil suit for confirmation of possession—Limitation Act, X of 1859, ss. 77, 140.*—On special appeal in this suit, it was objected that the Courts below were wrong in having held the suit to be subject to the period of limitation prescribed by ss. 77 and 140 of Act X of 1859, and the High Court upheld the objection. The said sections were held to refer exclusively to cases where the Collector has before him one party who is admittedly a tenant of somebody and two other parties each of whom claims to be the landlord of the first. Such limitation, therefore, would have no application to the present suit brought for confirmation of possession of land which had been the subject of a previous suit by the plaintiffs before the Collector, to establish that the land was their own rent-free land, which the Collector, had dismissed confirming the then claim of the present defendants. **SHAIKH KHAIRULLAH v. RAJ KISHEN MOOKERJEE**, 2 W.R. Act X Rul., 95.

(149)—*Act VIII B.C. of 1869, ss. 23, 27—Construction—Limitation.*—The words "all suits to recover the occupancy of any land, farm, or tenure from which a ryot, farmer, or tenant has been illegally ejected by the person entitled to receive rent for the same," which appear in s. 27 of Act VIII of 1869 of the Bengal Code, bear the same meaning as the same words did bear or were interpreted to bear in s. 23 of Act X of 1859; and those words describe only possessory actions brought against persons entitled to receive rent, and do not describe or include suits in which the plaintiff sets out his title, and seeks to have his right declared, and possession given him in pursuance of that title. (7 W.R. 186, *F.*) The limitation of one year, which is prescribed by s. 27, Act VIII of 1869 (B.C.) applies only to simple cases of possessory action. **NISTARINEE v. KALEE PERSHAD DOSS CHOWDHRY**, 21 W.R. 53. [*F.*, 23 W.R. 460, 9 C. 423; *Appr.*, 21 W.R. 121; *R.*, 17 C. 926.]

Possession—continued.**—6.—Suits for Possession—continued.**

(150)—*Suit for possession—Question of title—Limitation—Bengal Act VIII of 1869, s. 27*—A suit for the declaration of the plaintiff's title as the holder of a jote under the defendant by whom he was forcibly dispossessed, and for recovery of possession upon a claim of an occupancy right, the defendant denying his title (except to a small portion) and the occupancy right, was held to be one to try a *bona fide* question of title so as to be maintainable within 12 years from the date of the cause of action, and not to be barred by the one year's limitation under s. 27 of Bengal Act VIII of 1869. *BASARUT ALI v. ALTAF HOSAIN*, 14 C. 624. (12 C. 606, D.) [R., 17 C. 926, 8 C.W.N. 446 = 31 C. 647, F.B.]

(151)—*Suit for possession of land by dispossessed occupancy ryot—Decree on ground of occupancy right, not claimed in plaint—Limitation—Act VIII of 1869 (B.C.), s. 27*—Where a plaintiff, suing to recover possession of land as under a *mourasi mokurari* title and claiming mesne profits, fails to make out his claim, he cannot be awarded possession on the ground of occupancy right. (24 W.R. 444, R.) [D., 7 C.L.R. 103.] A suit by a mere occupancy ryot for the recovery of possession of land must be brought within a year, under s. 27 of Act VIII of 1869 (B.C.), from the date of dispossession by the zemindar. *BRINDHABUN CHUNDER SIRCAR v. DHUNUNJOY NUSHKUR*, 5 C. 246 = 4 C.L.R. 443. [D., 7 C.L.R. 103.]

(152)—*Act VIII of 1869 (B.C.), s. 27—Limitation—Plaint—Possessory suit*—When the Legislature passed Act VIII of 1869, they had before them the construction that had been judicially put upon cl. 6, s. 26, Act X of 1859. The period of limitation prescribed by Act VIII (B.C.) of 1869, does not apply to all suits under that law which was not intended to cut down the remedy of ryots, farmers, and tenants, by reducing the period within which they would be entitled to bring a suit on their title. A plaintiff, who succeeds in proving the facts stated in his plaint as necessarily implying a right of occupancy, may succeed in a suit for possession, even though he does not prove the title on which he specifically relied. *SURJOO PERSHAD v. KASHEE RAWUT*, 21 W.R. 121. [F., 7 C.L.R. 103.]

(153)—*Suit for—Title at the date of suit—Bengal Tenancy Act (VIII of 1885), s. 167—Notice, proof of, service of—Notice, validity of—Order sheet of the proceedings, entries in, evidential value of*—In a suit for recovery of possession, the plaintiff can succeed only on the title as it stood on the date of the institution of the suit. Until the notice has been properly served under s. 167 of the Bengal Tenancy Act upon the incumbrancer, the incumbrance subsists. It is obligatory on the purchaser to show that the notice under s. 167 had been served in the manner prescribed. The entries in the order-sheet are not *prima facie* evidence against the incumbrancer that the notice was served.

Possession—continued.**—6.—Suits for Possession—continued.**

(7 C.L.J. 251, F.) The purchaser, who relies upon the service of notice, must prove it either by the production of the person who served the notice or by any other means recognized by law; and if a question arises as to the validity of the notice it must be shown that it was a valid notice and was signed by a competent officer as required by cl. (1) of s. 167 of the Bengal Tenancy Act. *RADHAY KOER v. AJODHYA DAS*, 7 C.L.J. 262. (29 C. 813, R.) [R., 36 C. 726 = 10 C.L.J. 189.]

(154)—*Suit for possession—Suit by landlord against tenant—Limitation*—A party admitting tenancy of lands, as alleged by plaintiff to be in a certain estate, cannot plead limitation successfully against his landlord. But where the plaintiff's case is that the lands are in the plaintiff's estate A and the defendant in no manner whatever admits that he is a tenant of any lands in plaintiff's estate A, defendant cannot, then, come under the rule which prohibits a tenant pleading limitation against his landlord. *BRINDABUN CHUNDER CHUCKERBUTTY v. NUBO KISHEN DEY*, 9 W.R. 378.

(155)—*Tenant—Suit for possession against zemindar—Recognition of right as tenant*—A tenant cannot sue the zemindar or any one who holds a title under the zemindar for possession until he has himself been recognized as tenant, or has been registered as such in the zemindar's sheristah. *MOOKTA KESHEE DOSSIA v. PEAREE CHOWDHRAIN*, 7 W.R. 158.

(156)—*Defence, alternative—Possession either as a tenant or for more than 12 years—Adverse possession*—It is open to the defendants, in the first place, to plead, that the lands were comprised in their tenancy and that consequently the plaintiffs were not entitled to recover possession, and, in the second place, to assert that if the tenancy was not established, as they had held possession for more than 12 years, the right of the plaintiffs to recover possession was extinguished by the law of limitation (21 W. R. 70, F.B., 12 B.L.R. 274, F.B., F.) when the case of the plaintiffs was that the defendants were tenants in respect of other lands not in dispute and that by act of trespass they came to occupy the disputed land within 12 years before suit, but it was proved that the defendants had been in occupation for more than 12 years, the title of the plaintiffs to recover possession by ejectment of the defendants was barred by limitation. The question is not one of adverse possession but of limitation. *RAK-TOO SINGH v. SUDHRAM AHIR*, 8 C.L.J. 557. (2 C.L.J. 125, F.)

(157)—*Possessory suit—Ejectment*—In a suit by a putneedar for a declaration of his rights, and to obtain *khas* possession, where it was found that the zemindar and ijardar had received rents from the defendants as jotedars: Held, that plaintiff had no right to treat defendants as trespassers, and sue for direct possession, and was not entitled to determine their tenancy

Possession—continued.**—6.—Suits for Possession—continued.**

without proceeding to do so in a legal manner. **AMAR CHAND LAHATA v. KOOR HURENDRO NARAIN SINGH, 21 W.R. 237.**

(158)—*Sudden and recent ejectment—Suit to recover possession—Question for decision—Lakheraj title.*—In a suit to recover possession, where the plaintiff alleges that, having been many years in possession, he was suddenly and wrongfully recently turned out of possession, all that he has to prove is that he was in possession, and had some right (of what kind so ever) to be in possession, at the time he was turned out, apart from any question of the validity or otherwise of the lakheraj title which the plaintiff sets up. **BOODHA MUDHA v. SHAIKH KHYRAT ALI, 5 W.R. 269.** [R., 8 W.R. 160; D., 15 W.R. 261.]

(159)—*Suit based on one title—Proof of different title—Effect—Suit for declaration of title—Illegal remand—Act VIII of 1859, s. 354.*—A plaintiff who sues on one title cannot be allowed to succeed on another and an entirely different title. Thus, where a plaintiff who sues for declaration of title, basing his claim on a *kobala* from a vendor, and forcible dispossession by defendant, fails to prove both, he cannot succeed by mere proof of long possession. [Appr., 12 W.R. 203, 24 W.R. 444; D., 24 W.R. 167.] Where in a suit for declaration of title, which was dismissed by the first Court on the ground that the purchase set up by the defendants was proved and the plaintiff's title not proved, the lower appellate Court, finding the purchase of the defendants was not satisfactorily proved, remanded the case for a finding on that issue, held that having regard to the terms of s. 354, Act VIII of 1859, the order of remand was illegal. **HURO SOONDUREE DEBIA v. UNNOPOORNA DEBIA, 11 W.R. 550.**

(160)—*Suit for possession—Limitation.*—Though a ryot cannot plead limitation adversely to his zemindar, two ryots can do so when contending between themselves as to the right of possession. **RAM SOONDUR SURMAH v. WOOMA CHURN, 1 W.R. 265.**

(161)—*Dispute between purchasers—Intervenor—Effect—Onus.*—Where, in a dispute between two purchasers as to their right and possession in a tank and garden, an intervenor was admitted to plead and assert his own rights, held that the admission of the intervenor entirely altered the nature of the suit and converted it into a regular rent-free resumption case in which the onus was wrongly thrown on the defendant by the intervenor. **DOORGA PERSHAD NAIK v. DWARKANAUTH CHUCKERBUTTY, 1 W.R. 207.**

(162)—*Sale under agreement—Suit for possession—Right of putneedar of vendee.*—The putneedar of the heir of a person who, under a written agreement, purchased a share of an estate (which was, however, forcibly retained possession of by the vendor) can sue to recover that property, although that person had not

Possession—continued.**—6.—Suits for Possession—continued.**

come into possession of it. **BROJO LALL SINGH v. BABOO BULLUB SINGH, 1 W.R. 216.**

(163)—*Claim for possession—Adjudication.*—Where the plaintiff comes forward with a claim to possession which has to be adjudicated upon, he is entitled to have a decision pronounced upon the claim, whether he can or cannot recover possession; and the mere determining the higher rent of the zemindar to the lands as forming a portion of his estate is no determination of the plaintiff's claim to be put in possession of the lands. **GUNESH CHOONEE DASSEE v. MANIK LUSHKUR, 1 W.R. 336.**

(164)—*Evidence—Suit for possession—Pottah set up, but not proved.*—In a possessory suit, plaintiff's failure to substantiate an alleged pottah does not preclude him from falling back upon other evidence. **LUKHEE CHUNDER CHUCKERBUTTY v. RAMDHUN SHAHA, 15 W.R. 399.**

(165)—*Suit to exclude properties from butwarra and for maintenance of possession—Admission of plaintiff's possession—Plea of tenancy—Failure to prove tenancy—Effect.*—In this case, the plaintiff prayed that certain properties which the defendant had caused to be included in a *butwarra* before the Collector should be excluded from the *butwarra*, and that the plaintiff's possession in respect of those properties should be maintained. Held that as the plaintiff's possession was admitted, and as the defendant failed to prove his plea, viz., that the plaintiff's possession was by way of tenancy under him, the plaintiff was entitled to a decree. **BEPIN BEHAREE LUKHUN v. SHAIKH GHASOO, 11 W.R. 16.**

(166)—*Possessory suit—Possession of landholder.*—Where, on a rent suit having been dismissed on the ground that defendant was not plaintiff's tenant, plaintiff sues her co-sharer and the same defendant to recover *khas* possession, the Court is not at liberty, on such a plaint, to find plaintiff entitled to possession as landlord, and so to get symbolical possession. **NILA-BIBEE v. SONAIBIBEE, 21 W.R. 422.**

(167)—*Suit for recovery of possession of land—Title.*—The defendant No. 1 being a *tarkthugyi* employed in the revenue administration, chose, for purposes of his own, to enter the holding in the name of his son Nga Po Chit in the map, and the plaintiff was introduced upon the holding as a tenant of the first defendant. In course of time the plaintiff, for purposes of his own, refused to pay rent, and asserted that he was himself the holder of this holding, having good reason to think that the defendant would try to avoid litigation, the fact, however, being that the plaintiff had never been more than a tenant under defendant No. 1. As a tenant who had been evicted after failure to pay rent, the plaintiff sued to recover possession of the holding without showing that he was dispossessed otherwise than by due course of law and without proving any right to possession. Held, that the weakness of defendant's title

Possession—continued.**—6.—Suits for Possession—continued.**

as between the defendants and the Government is no ground for decreeing the plaintiff's claim to recover possession. *MAUNG SHWE THE v. MAUNG HNAN*, L.B.R. 1893—1900, 232.

(168)—*Nazul land in Oudh, Suit for possession of—Burden of proof—Lord Canning's Proclamation of 15th March, 1858, Effect of—Power-of-attorney signed by Deputy Collector for Deputy Commissioner, Presumption as to.*—In a suit for possession of a plot of land in Fyzabad brought by the appellants against the respondents, the power-of-attorney filed by the Government pleader on behalf of the respondent No. 1 purported to have been signed by the Deputy Collector "for the Deputy Commissioner." The Settlement paper showed that the land was Nazul. *Held*, that in view of the general practice that in the absence of a Deputy Commissioner or a Collector from the Head Quarters of his district one of his subordinates does sign and has authority to sign papers and documents on his behalf, it must be presumed that the Deputy Collector had authority to sign for the Deputy Commissioner. *Held*, further, that having regard to Lord Canning's Proclamation of 15th March, 1858, which divested the proprietors of all the landed property in Oudh and transferred it and vested it in the British Government, it was for the appellants to prove that they claimed title to the land in suit through the Government. *SAIYAD MAHOMMED HAIDAR v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL*, 7 O.C. 65.

(169)—*Lease—Suit for possession—Jurisdiction of Civil Courts—N.W.P. Rent Act, XVIII of 1873, s. 95 (n).*—A suit to establish a lease of a village and obtain possession of the village is cognizable in a Civil Court, as such a suit is not one for the recovery of the occupancy land of which a tenant had been wrongfully dispossessed. *CHAIT RAM v. HIRA*, A.W.N. 1881, 54.

(170)—*Suit to recover possession of land—Title.*—In a suit to recover possession of certain lands under a *mowrasi patta* which had been lost, proof of ten years' possession alone by the plaintiff would not entitle him to recover possession of the land. He must prove the specific title set up by him. *BHOLAI MANDAL v. JARIF GAZI*, 3 B.L.R. App 93.

(171)—*Suit for rent—Suit for possession from trespasser—Cause of action.*—A suit to recover rent which treats the defendant, as a tenant, and a suit to recover possession, which treats him as a trespasser, are not suits for the same cause of action. *KADIR BUKSH v. GOLAM ALI GOMASTAH*, 9 W.R. 90.

(172)—*Possession, suit for—Facts to be proved.*—Where plaintiff sued for possession of a *jote*, alleging his dispossession thereof by the defendant, the Court held that the plaintiff need not prove that he was ousted on a particular date but that the real issue was whether or not the plaintiff was entitled to the *jote* in

Possession—continued.**—6.—Suits for Possession—continued.**

question and was kept therefrom by the defendant. *CHUTTO SINGH v. BROJO LALL SINGH*, 17 W.R. 501.

(173)—*Mokurruree patta—Suit for possession—Abandonment—Evidence.*—In a suit for possession of a tenure, plaintiff alleging that his father had held it on a mokurruree patta till his death, though the patta was found to be invalid, the plaintiff was held entitled to possession of the tenure, which admittedly was his father's, and which was not proved to have been ever abandoned by the plaintiff. *KALEE COOMAR PATTUR v. KHETTUR NATH BAUG*, 17 W.R. 47. [F., 7 C.L.R. 103.]

(174)—*Suit for possession—Jote pottah—Declaratory decree—Ejectment—Act XIV of 1859, s. 15.*—Plaintiff had a jote-pottah from the superior landlord for six parcels of land. One of these was in the occupation of the defendant. Plaintiff having taken possession of it, defendant brought a suit under s. 15, Act XIV of 1859, and in that suit he was declared entitled to possession. Plaintiff thereupon brought this suit to have his right to possession declared and confirmed. *Held* that, according to the pottah, plaintiff was entitled to possession of the land, unless the defendant was occupying by a title which saved him from being ejected. *KALEE CHURN PAL v. RAJ COOMAR CHUCKERBUTTY*, 24 W.R. 316.

(175)—*Auction purchaser—Occupancy ryot—Suit for possession.*—A person suing for possession by right of auction purchase is entitled to get rid of the defendant's occupancy, unless the defendant can show that he comes within the privileged class. *CHYTUN KRISTO BISWAS v. JUGGURNATH BYSACK*, 25 W.R. 90.

(176)—*Pottah and kubooleut—Omission to deliver pottah—Right to claim kuas possession.*—Where in a case in which the pottah and kubooleut executed between the parties are in force, the person bound to deliver the pottah did not do so, he could not be permitted to maintain a suit for *khas* possession by taking advantage of his own breach of contract. *AZEEZOODDEEN KHAN v. GUJDHUR LALL HULWAI*, 18 W.R. 437.

(177)—*Possession as tenant—Rights of tenant—Lessee.*—The fact that a person has possession of certain immoveable property as tenant for a term of years cannot create any right in his favour to retain such possession as against one who is a lessee from the proprietor of the property. *NAZIR LUSHKUR v. GOLAPOODEEN LUSHKUR*, 14 W.R. 410.

(178)—*Suit for possession—Declaration of title—Defendant in possession—Admission by plaintiff—Limitation.*—In a suit for confirmation of possession by declaration of title, the plaintiff is bound to make out his title, it being insufficient for him to show that possession was with him. *Held* further that, as regards a

Possession—continued.**—6.—Suits for Possession—continued.**

portion of the land which was admittedly in the possession of the defendant, an admission by the plaintiff that the defendant held such possession as his tenant could not avoid the plea of limitation. **SHAIK OZEER ALI v. SHAIK MUKBOOL ALI**, 19 W.R. 282. [F., 21 W.R. 79.]

(179)—*Possession—Question as to character of possession—Proof.*—Where plaintiff's possession is admitted, and the only question is as to the character of the possession, the lower Court is wrong in dismissing a case, because the copy of a kobala filed by plaintiff is found to contain signatures as of subscribing witnesses which had been added to the original deed. **KULTOO MAHOMED v. HURDEB DOSS**, 19 W.R. 107.

(180)—*Khast tenure—Plea against Mokurrureedar—Burden of proof—Possession.*—A person, who sets up *khast* tenure as against the admitted mokurrureedar is entitled to possession of every beega of land in the village, unless the party cultivating the same can show a good title as against him. **RAM NIRAJUN BHUT v. RAM NATH SINGH**, 22 W.R. 447.

(181)—*Power of ryot to question authority of Jumma Nuvis.*—A tenant is incompetent to dispute the authority of the *Jumma Nuvis* of a zemindar to grant a *hukumnama*, when the zemindar himself does not do so on being impleaded as a defendant. **HUR GOBIND KOTE v. JAPRA HAREE**, W.R. 1864, 276.

(182)—*Growing tree, Suit for—Immoveable property—Limitation.*—A tree standing on land is immoveable property and a suit for the possession of such tree is governed by the 12 years' rule of limitation. **SAKHARAM MULSHET MHADIK v. VISHRAM**, 19 B. 207.

(183)—*Possession—Decree for value of trees—Finding as to possession of land.*—Where, in a suit to recover the value of certain trees cut down from the disputed land, it was decreed that, inasmuch as the plaintiffs had cut them down, they were entitled to the value of them until final decision with regard to the title to the land was passed in the Civil Court. *Held* that that was no finding whatever that the plaintiffs were in possession. **SHAIKH ASHRUF v. MAHOMED HOSSEIN**, 15 W.R. 276.

(184)—*Suit for possession—Decree on title not set up.*—Where in a suit to obtain possession of a certain mowrosee jote by establishing his *kaimee* mohurruree title under a pottah, the plaintiff failed to support his case, the lower appellate Court had no right to introduce an entirely new element of title into the plaintiff's case, i.e., a right of occupancy provided by s. 6 of Act X of 1859, and was not justified in determining the case in his favour on the new title which was never set up by him. **JANNOBEE CHOWDHRAIN v. GENDOO TURRUFAR**, 12 W.R. 203.

Possession—continued.**—6.—Suits for Possession—continued.**

(185)—*Possession, suit for—Suit based on title—Prima facie title in plaintiff—Plea that plaintiff was only nominal owner.*—Plaintiff sued for possession, basing his title on a mokurruree lease and a bill of sale in his favour. He alleged that defendant was in possession under colour of an order of a Magistrate acting under s. 348, Crim. Prc. Code, relating to a different land. The defendant contended that the plaintiff was the nominal owner of the mouzah, a portion of which was the suit property, and as such was not entitled to maintain the suit. *Held* that the defendant was not at liberty, in a suit of this description, to raise the question whether plaintiff was only nominally the owner of the property, somebody else being the real owner, inasmuch as the plaintiff had a *prima facie* title to the land in question under the lease and the bill of sale. **RAM BHUROSEE SINGH v. BISSESSUR NARAIN MAHATA**, 18 W.R. 454. [R., 5 C.L.R. 102, 16 C. 364, 18 A. 69, 1 O.C. 10, 13 C.P. L.R. 33, 30 C. 265, 273, 36 B. 37 = 13 Bom. L. R. 947 = 12 Ind. Cas. 532].

(186)—*Question of lakhiraj not involved in suits for possession.*—The decree in a former suit for enhancement of rent in favour of the present defendant,—then plaintiff—will not conclude the question at issue in this suit, viz., the present plaintiff's right to be restored to possession. Whether the present plaintiff has or has not a valid *lakhiraj*, or whether he holds at a rent which is liable to enforcement or not, are questions not involved in the present suit. **RAJAH PERTAUB CHUNDER SINGH v. SHEEB DOSS KAYET**, 1 W.R. 111. [F., 5 W.R. 269.]

(187)—*Invalid lakhiraj—Suit for possession and assessment.*—In this suit, the plaintiff claimed possession and assessment of certain lands said to be held rent-free under an invalid tenure. The defendant relied on possession under a series of documents of title showing a *lakhiraj* title existing previously to 1790. *Held* that the validity of the grant was not open to the Judge's consideration. The Judge had merely to determine whether the tenure was in existence before 1790, and, if so, to apply the law of limitation. **SHAIKH SAHEB ALI v. LALLA BISSESSUR LALL**, 1 W.R. 110. [F., 5 W.R. 269.]

(188)—*Allowance of malikana to maliks—Effect.*—Old maliks, with whom a settlement is not made, and who were, instead, allowed to receive *malikana* at the usual rate, have no right to retain possession. **SHEIKH ZAHOR HUQ v. SHEIK MORAD ALI**, 1 W.R. 82.

(189)—*Suit for possession—Two rival ryots—Pottahs from zemindar—Failure of one pottah—Claim to occupancy—Effect.*—Two ryots claimed possession under different pottahs from the same zemindar. The appellant's pottah failed. *Held* that the appellant still had a right to have a judicial determination of his claim to occupancy. **BYDNATH SHAHA v. JADUB CHUNDER SHAHA**, 3 W.R. 208.

Possession—continued.**—6.—Suits for Possession—continued.**

(190)—*Suit for possession and mesne profits—Claim under gantedaree pottah granted pending suit for possession by grantor against defendant—Burden of proof.*—Plaintiff sought to enforce a pottah issued to him by the respondent and to obtain possession with mesne profits. Respondent pleaded that the pottah contained a condition to the effect that, as a suit relating to the property was then pending, possession should not be given to the plaintiff until respondent who had issued the pottah, himself obtained possession of the property from the Court in the pending suit. The lower Court held that the pleas advanced as to the consideration were proved and that the consideration was illegal and the pottah void, and dismissed the suit. On appeal to the High Court, this decree was confirmed on the ground that, quite independently of the pottah being void or the consideration illegal, the pottah was to be of no effect so far as getting possession was concerned, except in the event of respondent getting possession. He never got possession certainly no such possession as made it possible for him to give effect to the pottah. **BROJOKISHORE MITTER MOJOOMDAR v. NAWAB NAZIR SIDDHEE NAZZUR ALI KHAN, 2 W.R. 168.**

(191)—*Suit for possession—Title deed lost—When plaintiff entitled to decree.*—In a suit for possession, where plaintiff proves that he had been in possession for more than 12 years before he was dispossessed, a decree should be passed in his favour, even though the kobala under which he claimed to have purchased be not established. **NOBIN² MOHUN NUNDEE v. RAMTARUK BURAL, 23 W.R. 204.**

(192)—*Suit for possession of chur lands—Claim by both parties under grants from same zemindar—Case of one supported by Zemindar—Burden on other party of proving title.*—Both parties in this case admittedly claimed through grants from the proprietor of the lands and, as he supported the lease granted by him to the plaintiffs but repudiated the title of the defendants, it was clearly necessary for the latter to prove their title. The High Court held that the defendant's title was not proved and that the plaintiffs were, therefore, entitled to judgment. **MEN RAKHAN ROY v. RAM DHYAN MISSEER, 2 W.R. 324. [R., 2 B. 19; D., 11 W. R. 501.]**

(193)—*Suit for possession—Right of suit—De facto owner.*—Where the *de facto* owner of the Britti mehal complains that defendants, as owners of adjacent estates, have, without right, dispossessed her of lands appertaining to her mehal, and of which she is in possession, that constitutes a sufficient title to enable her to maintain the suit. **JOGMAYA CHOWDHRAIN v. HURREE MOHUN ROY, 24 W. R. 99.**

(194)—*Suit for possession—Trespasser—False statement of cause of action.*—Where a plaintiff brings a suit for possession alleging that the

Possession—continued.**—6.—Suits for Possession—continued.**

defendant is a trespasser, the moment it is shown that the defendant is not in possession as a trespasser, but holds as a tenant under the plaintiff, the suit must be dismissed, no matter what the character of the tenancy may be. **RAM GOLAM SINGH v. HEET NARAIN SAHOO, 2 C.L.R. 292. [R., 1 N.L.R. 4.]**

(195)—*Possession, suit for, on certain title—Decree on different title.*—Held that the plaintiffs who sued to recover possession of certain lands on the strength of *mouroosee mokurruree* tenure, but failed to establish that title, could recover possession of land on the strength of long occupation, where the one main contention throughout the suit had been whether the plaintiffs were or were not tenants of the lands in dispute. **SHIB CHUND LAHIRI v. JOYMALA DAS, 7 C.L.R. 103. (24 W.R. 444, 2 C.L.R. 443, R.)**

(196)—*Suit for possession—Proof of title—Non-execution of patta.*—Where the plaintiff, alleging that he was the ijaradar of the defendant, sued to recover possession, and the defendant pleaded that the plaintiff was only a collector of rents, and the lower Court found that the plaintiff was the ijaradar as he alleged himself to be, held, that such a finding was a complete finding in favour of the title of the plaintiff and that it was not necessary for him to sue for specific performance for executing a patta for the tenure which had been wrongfully denied him by the defendant. **JOHEEROD-DEEN MAHOMED v. DABEE PERSHAD SINGH, 13 W.R. 21.**

(197)—*Sale of putni taluk for arrears of rent—Tank in land purchased—Permanent and transferable interest—Character of grant—Optimus interpretes rerum usus—Landlord and tenant—Evidence as to nature of enjoyment.*—The plaintiff, the purchaser of a taluk which was sold by the zemindar under the provisions of Reg. VIII of 1819 on account of arrears of rent due from the talukdar, sued for possession of a tank which the defendant held by purchase of the interest of G who had purchased the same in 1851 from the heirs of P, who had himself purchased it in 1807 from K. The taluk had been held upon payment of an unvarying rent for a very long period, and long before the grant of the taluk held by the plaintiff; the tank had been so held for a considerably long period, in all probability prior to the permanent settlement. Held that, upon the application of the general maxim *optimus interpretes rerum usus*, it might be shown by evidence as to the nature of the enjoyment what the grant in its origin really was; and the frequent transfers of the interest in the tank without any change in the terms of the holding or in the amount of rent paid extending over a period of more than 60 years, and the fact that one of the transferees of the tank had been the owner of the taluk in which it was, were held to prove that the interest was a permanent and transferable one which could

Possession—continued.—6.—**Suits for Possession**—continued.

be maintained against the proprietor of the taluk in which the tank was situate; and accordingly, the plaintiff was not entitled to a decree for possession. There is no rule of law which prevents a person who pays an annual rent (even if it be inferred therefrom that he holds derivatively or as a representative only) from showing what the nature of his interest is by evidence as to the nature of his enjoyment. **NIDHI KRISHNA BOSE v. NISTARINI DAS**, 13 B.L.R. 416=21 W.R. 386. [R., 8 C.W.N. 804=31 C. 937.]

(198)—*Suit by heir of under-raiyat—Suit to recover possession with mesne profits—Heritability.*—Irrespective of custom or local usage, the heir of an under-raiyat under an annual holding is entitled, on the death of the under-raiyat, to remain in possession of the land until the end of the then agricultural year, for the purpose, if the land has been sublet, of realising the rent which might accrue during the year, or, if not sublet, for the purpose of tending and gathering in the crops. **ARIP MANDAL v. RAM RATAN MANDAL**, 31 C. 757, F.B.=8 C.W.N. 479 [R., 34 C. 516, F.B.=11 C.W.N. 626=5 C.L.J. 457=2 M.L.T. 219; *Expl.*, 11 C.W.N. 519.]

(199)—*Suit for ejectment beyond six months from dispossession—Right of plaintiff to rely on previous possession—Absence of title in defendant.*—In this suit for ejectment against the defendant who had dispossessed the plaintiff, both parties claimed under *kowle* alleged to have been granted by an inamdar. The lower appellate Court found that the plaintiff's *kowle* though proved was inadmissible for want of registration, but that the defendants' *kowle* had been taken from an unauthorized person. Though the suit was brought beyond six months from dispossession, no possessory suit, having been instituted, the plaintiff was yet held entitled to rely on his previous possession. The object of Act XIV of 1859, s. 15, and of the Specific Relief Act, s. 9, has been to discourage people from taking the law into their own hands however good their title may be, and, in the absence of any words to show such intention, the mere omission of the party dispossessed to avail himself of their provisions, is not to be deemed as amounting to acquiescence in the act of the dispossessor so as to deprive him of his right to rely on his previous possession in an action of ejectment against a trespasser. **KRISHNARAV YASHVANT v. VASUDEV APAJI GHOTIKAR**, 8 B. 371. [*Not F.*, 17 C. 256; *F.*, 9 B. 527; *Appr.*, 13 A. 537, U.B.R. 1897—1901, Vol. II, 270, 1 S.L.R. 107; R., 15 B. 685, 7 C.P.L.R. 3, U.B.R. 1892—1896, Vol. II, 619, 12 C.P.L.R. 59, 25 B. 287, 5 Bom. L.R. 225, 8 C.W.N. 446, U.B.R. 1905, 4th Qr., *Evidence*, p. 7, 3 L.B.R. 27, 10 Bom. L.R. 571; *D.*, L.B.R. 1893—1900, 462.]

(200)—*Pleas not taken in Courts below—Alluvial lands—Resumption proceedings.*—Where a defendant has by his answer put his defence

Possession—continued.—6.—**Suits for Possession**—continued.

upon a certain ground and issues for trial are framed by the Court to meet the case so pleaded, the Judicial Committee as the final Court of appeal will not determine the appeal on any other issues or grounds, which have not been taken or considered in the Courts below. Where, in a suit for recovery of possession of alluvial lands, the only point raised by the defendant in the Courts below was one as to the identity of the lands, that is, whether they were included in certain resumption proceedings as appertaining to the plaintiff's estate, it was held that the defendant could not in appeal before the Privy Council raise the question as to whether the lands had been improperly settled by Government with those whom the plaintiff now represented. **SRIMATI DAS V. RANI LALANMANI**, 11 W.R. P.C. 27=2 B.L.R. P.C. 64=12 M.L.A. 470=2 Suth. 199=2 Sar. 453. [*F.*, 21 W.R. 59, 15 M. 503.]

(201)—*Possession—Limitation—Presumption.*—Where plaintiffs suing for recovery of possession of a julkur allege themselves to have been in enjoyment down to the year 1266 when they were ousted by Government who ultimately relinquished their rights in favour of defendant: held that, if plaintiffs made out their possession down to 1263, and defendants did not show a clear interruption of possession immediately subsequent to 1263, plaintiffs were entitled to the presumption that the possession had continued down to the interruption by Government in 1266. **TARINEE CHURN SINGH v. THE COLLECTOR OF NUDDEA**, 21 W.R. 138.

(202)—*Suit for possession by adjudication of right to settle—Resumption of land by Government—Jurisdiction—Right of suit.*—In a suit to obtain adjudication of right to a settlement of certain lands and to be put in possession thereof, on the allegation by the plaintiff that he was the rightful owner of the lands which had been resumed by the Government, but that the defendant, by false allegations of ownership and of possession, had induced the Revenue Authorities to enter into settlement with him, the plaintiff is entitled to an adjudication of his right to settlement. It is not discretionary with the Collector, under such circumstances, to settle the lands with any person he pleases, nor is such settlement final as regards all claims. **MAHOMED ISRAILE v. WISE**, 13 B.L.R. 118, F.B.=21 W.R. 327. [*F.*, 13 M. 89.]

(203)—*Suit for possession—Lands enjoyed by tenants holding under defendant—Civ. Pro. Code, s. 264.*—In a suit against the Crown regarding certain properties, the mere fact that the properties are in the enjoyment of certain tenants holding under the Crown will not exonerate the plaintiff from suing for possession. A suit for a mere declaration will not lie in such a case. Delivery of possession can be given under s. 264, Civ. Pro. Code. **ANDALA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL**, 3 M.L.J. 242.

Possession—continued.**—6.—Suits for Possession—continued.**

(204)—*Possession, Suit for—Land in possession of village community—Delivery to defendant by Government and assignment as cultivable natham—Right of the village community—Secretary of State, whether a necessary party.*—The land in suit was found to have been enjoyed by the village community till 1903. In 1903 the Revenue Officials gave possession to defendants, and entered it in the Register kept for *natham* lands for cultivation. *Held*, that the action of Government in assessing the land as *natham* and giving it to defendants did not deprive the plaintiffs (members of the village community) of their rights to the land. **REVEREND P.G. SIMON v. THURAIMUTHUA KADAMBAN, 6 Ind. Cas. 419=8 M.L.T. 248.**

(205)—*Possession—Sale-deed—Title—Burden of proof.*—The plaintiff alleged a distinct title under a deed of *baimokasa* or sale instead of dower, which deed she never produced. The Court found that she was never in possession. *Held* that she was bound to prove her title as alleged. She cannot claim the benefit of a decision to which she was not a party, nor of an admission by her own husband which cannot bind the defendants who are in possession, till ousted by a better title. **MUSST. SOBRATUN v. MUSST. TOOVA, 7 W.R. 273.**

(206)—*Mahomedan Law—Devise to daughter possible only of moiety of estate—Heirs of person taking probate, not estopped from disputing Will—Possession as manager for rest of family—Adverse possession.*—Plaintiff based his case on the allegation that the Will of the Mahomedan testator bequeathing his entire estate to his daughter was invalid under the Mahomedan law. On first appeal, the Judge found that the Will was genuine and valid and that under the Will the testator's daughter, the present defendant, was entitled to the whole estate. On second appeal, the Judge was held to have been in error in having decided that the Will was valid, because, under the Mahomedan law, a person could not devise to his daughter more than her legal share in the estate, i.e., a moiety. It was however contended for the defendant that, as the testator's brother had taken out probate of the Will, his widows, the plaintiffs, were estopped from disputing the Will, and that, as one of the plaintiff, was in possession acting as manager for the defendant, the plaintiffs were barred by the statute of limitations, but it was held that the Will was clearly invalid under the Mahomedan law, that the act of the person who took out probate was not binding upon the heirs and that the possession of one as manager for the rest of the family could not be deemed to have been adverse. **MAHOMED MUDUN v. KHODEZUNNISSA, 2 W.R. 181.**

(207)—*Suit for possession—Failure of cause of action—Proper decree to be made in such a case—Possibility of media concludendi being the same in other actions gives the Court no power to pronounce upon them.*—Where the

Possession—continued.**—6.—Suits for Possession—continued.**

plaintiffs claimed to have possession of their mother's property on the ground that she was dead, and the Court held that it was not proved that the lady was dead, the inevitable inference would seem to be that the suit should be dismissed. The mere circumstance that some of the *media concludendi* might be the same in other actions does not vest the Court with any right or duty to pronounce upon them in a suit which has gone by the board because of the failure of the ground of action. **MUS-SUMAT WALIHAN v. JOGESHWAR NARAYAN, 7 C.L.J. 44, P.C.=10 Bom. L.R. 9=12 C.W.N. 227=17 M.L.J. 226=2 M.L.T. 509=35 C. 189=14 Bur. L.R. 101=35 I.A. 38.**

(208)—*Compromise by guardian against interest of minor, dispossession of minor in pursuance of—Suit for possession by minor—Cause of action—Limitation.*—Plaintiff instituted a suit in 1270 alleging that, in pursuance of a *soleh-namah* entered into by his guardian when he was a minor, the defendant had dispossessed him in 1259. The defendant pleaded that plaintiff was out of Court, more than twelve years having elapsed since the deed, which had to be set aside, had come to his knowledge. The lower Court held that the suit was barred. On special appeal, the contention of the plaintiff that his cause of action arose not on the date on which he became aware of the *soleh-nama* but on the date on which defendant acted on it and dispossessed him, and that consequently he was within time, was accepted by the High Court which remitted the case to the Court of first instance with direction to enter into the merits of the case and to distinctly adjudicate on all the issues either of law or of fact. **RUTNESSUR PAUL CHOWDHRY v. DHUNUNJOY SHIKDAR, 6 W.R. 18.**

(209)—*Witness—Contract—Minor—Partnership.*—Where a plaintiff institutes a suit to recover certain land, alleging that he is the owner and admits having executed a deed of sale of the land in question to a third person, but alleges that the transaction was really a mortgage and that he had paid off the debt: *held*, that it is incumbent on plaintiff, in order to prove his title, to establish his allegations as to the transactions being a mortgage and as to repayment of the loan; and where a Court omits to examine a witness present on behalf of the plaintiff on the ground that the witness had not been entered in the list of witnesses and had not been present at the last hearing. *Held*, that a Judge is bound to examine any witness produced by the plaintiff before he closed his case. A minor may be a member of a partnership and may take part in carrying on the business (see Chap. XI of the Indian Contract Act, 1872). Moreover, a contract entered into by a minor is not void, but only voidable at his option (11 C. 552, 13 B. 50, 18 C. 259, R.). As between the present parties, it was not necessary that the defendant, who was in possession, should give strict proof of

Possession—continued.

—6.—Suits for Possession—continued.

his title to the land. *K. N. K. V. VENYATHEN CHETTY v. A. K. KUPPUSAMY PILLAY*, L. B. R. 1893—1900, 398.

(210)—*Act XV of 1877, art. 91.*—G.S. in 1876 executed a deed of gift in favour of his daughter, P, who was then a minor. G.S. died in 1880. In March 1884, mutation of names was effected in favour of P on the strength of the deed of gift, and possession was taken by her. In January 1896, S.K. another daughter of G.S. sued for possession of half the property comprised in the deed of gift:—*Held*, that the suit was barred by limitation under art. 91, sch. II, Limitation Act XV of 1877. *SUGHAR KUAR v. PHULJHARI*, 1 O.C. 229. [R., 4 O.C. 247.]

(211)—*Property purchased by faction seceding from a caste—Possession of property by member of faction—Suit for recovery of possession brought on behalf of caste—Cognisability of suit by Civil Court.*—The property in dispute was purchased by a small section of a caste which had seceded from the caste. This section subsequently became reunited with the caste excepting one member of it the defendant, who remained in possession of the property. Plaintiff sued to recover possession of such property for and on behalf of the caste. The lower Courts had decided wrongly that the suit involved a caste question and was not therefore cognisable by the Civil Courts. *Held* on second appeal that, although, if the lands in dispute had been originally the property of the caste, the question would have been between the caste and a section of it and would form a caste question not cognizable by the Civil Courts, yet, as the lands had been admittedly purchased by the members who had seceded and formed the small section, out of their own funds and for their own purposes, it was for the Civil Court to determine who was entitled to the disputed property, notwithstanding that it might be incidentally necessary for that purpose to inquire into the usages and practices of castes and sections of castes in respect of properties acquired by the sections. *METHA JETHALAL v. JAMIATRAM LALUBHAI*, 12 B. 225. [R., 19 B. 507, 26 B. 174, 9 Bom. L.R. 569, 34 B. 467=11 Bom. L.R. 1014.]

(212)—*Decree for possession against several defendants, subsequent possessory suit against some of the defendants alone barred, Civ. Pro. Code, s. 223.*—Plaintiff had previously obtained a decree for possession of the lands in question against the present defendants and certain others. He preferred the present suit for the purpose of recovering possession of the same lands from the defendants and the lower appellate Court passed a decree in his favour. It was objected that no cause of action different from that heard and determined in the first suit had been shown by the plaintiff to exist in relation to the present suit and that therefore he was barred by the previous decree from instituting the present suit. The real matter

Possession—continued.

—6.—Suits for Possession—continued.

of the plaintiff's complaint was that he was unable hitherto to obtain execution of his prior decree against the defendants and the proper mode of proceeding would have been by putting in force the provisions of s. 223. Further, he was unable to show any other cause of action to justify the present suit than the one upon which he had sued and obtained the previous decree. The suit was accordingly dismissed; but the defendants were deprived of their costs in the lower Courts inasmuch as they never set up the above ground of objection until they came to the High Court. *RAMSURN MUHTON v. JINONATH BHUGGUT*, 10 W.R. 396. [R., 12 W.R. 285, 16 W.R. 4, 16 C.P.L.R. 110.]

(213)—*Suit to recover possession of land—Civil and Revenue Courts—Jurisdiction.*—A suit to recover possession of lands, which the plaintiff alleged, he had leased to the defendant, the manager of an indigo factory, and also of other lands over which he had given a *zuri-peshgi* lease, is undoubtedly cognizable by the Civil Courts, and the Revenue Courts have no jurisdiction in the matter. Where the defendant made no objection in the lower Courts to the manner in which plaintiff had calculated damages, the question could not be gone into in special appeal. *CHARLES MACDONALD v. RAJARAM ROY*, 3 B.L.R. App. 28=11 W.R. 371.

(214)—*Right to sue—Suit for possession by some of the owners against a trespasser—Plaintiff's owners of specific shares—Decree limited to the plaintiff's share only.*—Where in a suit for possession of a grove as heirs of the last owner, the plaintiffs have definite shares of which they can be given possession, they are entitled to possession of those shares only and not the whole grove. *ROHAN SINGH v. AHSAN BEGAM*, 10 A.L.J. 518=17 Ind. Cas. 469. (A.W.N. 1901, 36, 5 A. 602, D.)

(215)—*Possession, Suit for—Dispossession of plaintiff by defendant—Non-acquisition of prescriptive title by defendant—Right of prior possessor to possession.*—In a suit for possession, where it appears that plaintiff, who was in possession, had been dispossessed by defendant, and, at the date of suit, defendant had not acquired a title by prescription, and neither party is found to have a good title, plaintiff, as the prior possessor, has a right to recover possession from the defendant, who cannot show a better title. *KALYANA BASAVAYA v. ALAKAM MALLAPPA*, 15 Ind. Cas. 613. (26 M. 514, 13 M.L.J. 146, 10 Bom. L.R. 571, 29 A. 52, 3 A. L.J. 775, A.W.N. 1903, 264, R.; 26 C. 579, 3 C.W.N. 568, Diss.)

(216)—*Suit for possession—One plaintiff purchaser from co-sharer of other plaintiff—Wrongful dispossession by defendant—Misjoinder of parties and causes of action—Waste land—Presumption—Possession follows title—Limitation.*—In a suit for possession on the ground that the defendant wrongfully encroached upon

Possession—continued.**—6.—Suits for Possession—continued.**

the disputed land, one of the plaintiffs was a purchaser from the co-sharer of the other plaintiff:—*Held*, that the suit was not open to the objection of misjoinder of parties or of causes of action. (18 A. 131, 18 A. 219, 2 C.L.J. 602, D.; 33 C. 367=10 C.W.N. 508, 22 C. 833, 16 C.L.J. 1=16 Ind. Cas. 84, R.) In the case of waste land covering a very small area, possession may be presumed to follow the title. BHAGWAN CHANDRA DEY v. DAYAL HARI DAS, 16 Ind. Cas. 623.

(217)—*Cause of action, absence of—Possession, suit for, upon proof of title—Dispossession, date of, whether material—Possession within 12 years of suit sufficient—Civ. Pro. Code (1882), s. 335—Effect of proceeding under s. 335, what is—Variance between pleading and proof—Dismissal of suit.*—The effect of an order in a proceeding under s. 335 of old Civil Procedure Code, 1882, is to deprive the plaintiff of possession of the disputed property and to secure possession to the defendant. In a suit for declaration of title and for recovery of possession of immovable property, it is wholly immaterial in what precise manner or on what exact date the dispossession took place. The plaintiff has to prove his title first; if he does so, he has further to prove his possession within twelve years prior to the suit. On what precise date within this twelve years he lost possession, is not a matter of consequence. The determination in a cause should be founded upon a cause either to be found in the pleadings or involved in or consistent with the case made thereby. (11 M.I.A. 7=6 W.R. P.C. 57=2 Ind. Jur. N.S. 87, Rel. on.) But every variance between pleading and proof is not material and does not justify a dismissal of the claim. NABADWIPENDRA MOOKERJEE v. MADHU SUDAN MANDAL, 16 Ind. Cas. 741.

(218)—*Suit for possession of property—'Twelve years' possession—Title.*—In a suit to recover possession of land, anterior possession for 12 years of the land sought to be recovered does not dispense with the necessity which lies on the plaintiff to prove his title to the property. He is not on that fact alone entitled to be re-placed in possession of the property without regard to any right which may be alleged by the defendant. LAKHI KAMAR v. RAM DUTT CHOWDHRY, 3 B.L.R. App. 44=11 W.R. 447.

(219)—*Ejectment—Possession—Onus.*—Tenants long in possession and paying rent can only be ejected in a suit in a Revenue Court by a person entitled to receive rent. Where, in a suit for ejectment and possession, the defendant admits that the tenure of certain lands formerly held by him has passed to plaintiff, but that the lands in dispute do not form part of the tenure and are held by himself, under another title, *held* that it lay with the plaintiff to prove his case. The fact of the matter being peculiarly within the knowledge of the

Possession—continued.**—6.—Suits for Possession—continued.**

defendant, did not vary the rule of law in respect to proof, and shift the *onus* on to the defendant. GIRDHAR HARI v. KALI KANT ROY CHOWDHRY, 3 B.L.R.A.C. 161=11 W.R. 501.

(220)—*Suit for possession—Onus of proof—Shifting of onus.*—In a suit for possession of land, no doubt, the *onus* is on the plaintiff to prove his title. Where, however, penal assessment was levied by the Government from the plaintiff in respect of the suit land, possession must be treated as having been with the plaintiff at the time of such levy, and the plaintiff in such a case is entitled to the same presumption of title in a suit against the Secretary of State in Council as against any one else arising from prior possession. The *onus* would then be shifted to the Government to prove antecedent possession in them, or to displace the presumption of title arising from antecedent possession. KAMBAMPATI VENKATA SUBBIAH v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, M.W.N. 1912, 881=16 Ind. Cas. 589.

(221)—*Burden of proof—Suit for possession—Onus on plaintiff—Plaintiff starting with presumption in his favour—Shifting of onus on defendant—Land appertaining to plaintiff's mouza—Submergence—Re formation in situ—Constructive possession—Trespasser.*—A plaintiff in ejectment is bound to prove his title and possession within the statutory period. The *onus*, however, which rests upon him, may be discharged or shifted on to the other side if he starts with a presumption in his favour. The land in suit appertained to the plaintiff's *mouza*. It was submerged and eventually re-formed *in situ*. An attempt to reclaim it was then made by the erection of a *bheri* by the defendant and this was done not more than 12 years before suit. The land was still lying fallow and presumably unfit for cultivation. There was no evidence that any one performed any act of possession over it for more than 12 years previous to the suit:—*Held*, that constructive possession could not be implied in favour of any one but the true owner; that, as the plaintiff was the true owner, possession during submergence, that is, till the reclamation by the erection of the *bheri* by the defendant, was his, and that, as the reclamation took place within 12 years of the suit, the plaintiff was clearly in time and the suit was not barred. GOLAP MONI DAS v. KALI CHARAN KUNDU, 16 Ind. Cas. 17.

(222)—*Suit for possession of unalienated land in Berar—Whether plaintiff should be a registered occupant.*—It is not a condition of a decree for possession of unalienated land in Berar that the plaintiff should already be a registered occupant, or that the decree should be accompanied by a declaration that the plaintiff is entitled to be a registered occupant. LAXMEN v. SHEORAM, 8 N.L.R. 73=14 Ind. Cas. 895. (6 N.L.R. 78, R.)

Possession—continued.**—6.—Suits for Possession—continued.**

(223)—*Suit by mortgagee to recover possession after eouster—Court-fee—Court Fees Act, s. 7, cl. X (b) and cl. V, para (e).*—A suit to recover possession of a garden on the ground that plaintiff had been put into possession of it under two deeds of mortgage and that he had been subsequently dispossessed of it by the defendants, was not one for specific performance of a mortgage falling under cl. X (b) of s. 7 of the Court Fees Act; it was a suit falling under para (e) of cl. V of s. 7 of the Court Fees Act and subject to an *ad valorem* fee on the value of the garden. *CHELA MALL v. FAZL BEG*, 33 P.R. 1880.

(224)—*Absentee—Entry in Settlement record by person in possession undertaking to return land—Absentee getting possession of his share—Suit for confirmation of possession and for recovery of share as reversioner—Limitation—Possession of agent, whether adverse.*—The land in suit originally belonged to two brothers, the father and uncle of the plaintiff. The father having died before and the uncle during the first settlement without issue, the plaintiff was recorded as an absentee in that as well as in the second settlement. It was also noted that the land was in the possession of the defendant (the brother and agent of the uncle's widow) who agreed to restore it to the plaintiff on his return. Plaintiff having returned ten years before suit obtained his half share of the land, though he continued to hold and cultivate it jointly with the defendant.—A year and a half after the death of his uncle's widow, the plaintiff sued for confirmation of his proprietary possession of his own share and also for recovery of the remaining half cultivated by the defendant (as the agent of his uncle's widow). The first Court gave him a decree, but the appellate Court reversed it, holding that the plaintiff's claim not only for the share of his uncle, but also for his own half share, was barred by limitation, as the possession of the defendant had been adverse from the first settlement.—*Held* that the recorded statement of the defendant during the second settlement, in which he distinctly engaged to restore plaintiff's share of the land, coupled with the fact of plaintiff by subsequently obtaining it from the defendant on his return, was sufficient to complete the title of the plaintiff to his original share; and that, with respect to the other half share, the plaintiff's claim could not be barred by limitation as there was nothing to show that the defendant had ever set up an adverse title for himself. *GOHAR v. FATTEH DIN*, 75 P.R. 1880.

(225)—*Suit for possession of land as heir—Mortgage pleaded by defendant—Absence of consideration.*—Where there is a descendible estate, subject to any just and proper charge which may exist upon it, the person entitled to claim such estate as heir, is entitled to recover it, unless any such charge is proved against him. In a suit for recovering possession

Possession—continued.**—6.—Suits for Possession—continued.**

of certain land as heir, if the defendant claims to hold a lien on it as mortgagee, and the payment of consideration for the mortgage is not proved, the defendant has no valid title to retain possession of the land against the true heir. *LAL SINGH v. ALA SINGH*, 86 P.R. 1880.

(226) — *Suit for possession — Agreement—Mortgage.*—The plaintiff sued for possession of land as mortgagee under the terms of an agreement executed by the defendant that he would, after his father's death, execute and register a deed of mortgage of land falling to his share. The lower Courts held that plaintiff could not sue for possession until the mortgage was effected. On appeal it was *held* that plaintiff might sue for possession of the land under the terms of the agreement, the defendant having refused to execute the mortgage, on the principle that equity presumed that to have been done which was agreed to be done. *JAMEYAT RAI v. SULTANA*, 59 P.R. 1873. [R., 66 P.R. 1897.]

See *ABSENTEE*, 264 P.R. 1874, Note.

Against trustees by members of temple committee—*Onus* of proof as to class of temple—See *ACT XX OF 1863*, ss. 3, 4, 11, 12 M. 366.

Suit for possession—Question of title—Limitation—See *BEN. ACT VIII OF 1869*, s. 27, 12 C. 606.

See *BEN. ACT VIII OF 1869*, s. 27, 7 C. 442 = 9 C.L.R. 137, 9 C. 423.

Suit for—And mesne profits—Pendency of proceeding before Revenue Officer—See *BEN. ACT VIII OF 1885*, ss. 103, 111, 28 C. 28.

Suit for—Duty of plaintiff—See *BEN. ACT VIII OF 1885*, ss. 161, 166, 167, 9 Ind. Cas. 248.

Recovery of possession from trespasser—Suit by occupancy raiyat—Limitation—See *BEN. ACT VIII OF 1885*, art. 3, 15 C. 317.

See *BEN. ACT VIII OF 1885*, art. 3, 16 C. 741.

Suit to recover possession of occupancy holding—Limitation—See *BEN. ACT VIII OF 1885*, sch. III, art. 3, 4 C.W.N. 326.

Mortgagee's possession—Jurisdiction—See *BOM. ACT III OF 1876*, s. 15, 19 B. 289.

Ejectment of tenant by person other than landlord—Suit for possession by tenant—Applicability of C. P. Tenancy Act—See *C.P. ACT XVII OF 1889*, s. 94 (1), 16 C.P.L.R. 145.

Suit for possession of land and removal of latrines—See *MAD. ACT IV OF 1884*, s. 261, 3 M.L.J. 223.

Suit for dispossession, whether different from suit for—Applicability of art. 144, Limitation Act, to suit for dispossession—See *PUN. ACT XVI OF 1887*, s. 77 (3), 3 P. R. 1910 Rev. = 6 Ind. Cas. 942.

Possession—continued.**—6.—Suits for Possession**—continued.

Mortgage with conditional sale, Suit for—See PUN. ACT XIII OF 1900, s. 9 (2), 22 P.L.R. 1904=91 P.R. 1903.

Of land as compensation for land allotted in partition, suit for—Jurisdiction of Civil Court, as to distribution in partition of land—See U.P. ACT XVII OF 1876, s. 219, cl. (d), 5 O.C. 140.

Suit for rent—Dismissal of suit—Subsequent suit in Civil Court to establish title to and for possession—Limitation—See U. P. ACT XII OF 1881, s. 148, A.W.N. 1885, 261.

Suit for possession against tenant—Declaration that defendant has no under proprietary rights—Jurisdiction of Civil Courts—See U.P. ACT XXII OF 1886, 4 O.C. 175.

See U.P. ACT XXII OF 1886, ss. 54, 55 and 108, cl. (10), 2 O.C. 83.

Admission of title in pleading—Suit for—Of land—Plea of limitation—See ADMISSION—ADMISSIONS IN PLEADINGS, ETC., Marsh 549.

Suit for possession of a part of a public road—See APPEAL—MISCELLANEOUS, P.L.R. 1900, 440.

Award declaring title—Subsequent suit for possession—Period of limitation—See AWARD, A.W.N. 1881, 70.

Benami transfer—Transfer in fraud of creditors—Benamidar's suit for—Plea of transfer being benami—See BENAMI TRANSACTION—GENERAL, 8 C.W.N. 620.

Claim based on title for possession of immoveable property—Right of benamidar to sue in his own name—*Res judicata*—See BENAMI TRANSACTION—GENERAL, 18 A. 69=A.W.N. 1895, 160.

Real purchaser in possession for twelve years—Suit against certified purchaser for declaration of right and for confirmation of possession maintainable—See BENAMI TRANSACTION, —MISCELLANEOUS, 28 C. 370.

See BURDEN OF PROOF—LANDLORD AND TENANT, 1 Ind. Jur. N.S. 50.

See CIV. PRO. CODE, 1908, s. 11, O. II, r. 2, 26 A. 501=1 A.L.J. 228.

Delivery of formal—In execution proceedings—Suit for actual—See CIV. PRO. CODE, 1908, s. 47, 3 A.L.J. 504=A.W.N. 1906, 213=28 A. 722.

Suit for—See CIV. PRO. CODE, 1908, s. 47, 10 C.L.R. 258.

Suit for, against certified purchaser—Maintainability—See CIV. PRO. CODE, 1908, s. 66, 8 Ind. Cas. 258.

Previous suit for—Of land—No claim for mesne profits made—Subsequent suit for mesne profits—See CIV. PRO. CODE, 1908, O. II, r. 2, A.W.N. 1882, 3.

Possession—continued.**—6.—Suits for Possession**—continued.

Suit for possession of immoveable property and future of mesne profits—Subsequent suit for past mesne profits—See CIV. PRO. CODE, 1908, O. II, r. 2, A.W.N. 1881, 58.

Suit for, maintainability of, subsequent to suit for mesne profits—See CIV. PRO. CODE, 1908, O. II, rr. 2, 4, 5, 9 O.C. 322.

Suit for—See CIV. PRO. CODE, 1908, O. XLI, r. 23, 1 O.C. 172.

Suit for possession of revenue paying land—Court-fee—See COURT FEES ACT, 1870, s. 7, A.W.N. 1881, 5.

Suit for possession of share in revenue paying estate—Court-fee on plaint—Definite share, whether must be separately assessed with revenue also—See COURT FEES ACT, 1870, s. 7, sub-s. V. cls. (a) & (d), 12 C.W.N. 990.

Suit for—Of occupancy holding—Court-fees Act, s. 7, cl. 11 (e), applicability of—See COURT FEES ACT, 1870, s. 7, cl. 11 (e), 32 C. 268.

Suit for possession—See CRIM. PRO. CODE, 1861, ss. 318, 404, 3 B.L.R.A.C. 57.

Suit by defeated party for possession of property, brought more than six months from date of Magistrate's order, not sustainable without proof of title—See CRIM. PRO. CODE, 1861, s. 319, 4 M.H.C. 478.

See CRIM. PRO. CODE, 1898, s. 145, 6 C.W. N. 841.

See CUSTOMS—PUNJAB—GENERAL, 156 P. R. 1879.

Suit for possession filed 11½ years after accrual of right—Delay—Effect—See CUSTOMS—PUNJAB—INHERITANCE, 64 P.L.R. 1911.

Declaratory suit against Government—Proof of long possession—Presumption of ownership—Burden of proving title—See DECLARATORY DECREE, SUIT FOR—GENERAL, 6 M.L.T. 306=5 Ind. Cas. 121=4 Ind. Cas. 1070=20 M.L. J. 71=33 M. 173.

See EASEMENT, 5 C.P.L.R. 53.

Suit for—See ESTOPPEL—DENIAL OF TITLE, 2 C.L.R. 208.

See EVIDENCE—MAPS, 5 C. 212.

See EVIDENCE ACT, 1872, s. 110, 2 Bom. L. R. 1111=25 B. 287.

Suit for confirmation of—Decree for recovery of—Payment of *ad valorem* Court-fees—See FRAUD—GENERAL, 11 Ind. Cas. 882.

See GRANT—RESUMPTION OF GRANTS, 4 O.C. 264.

Suit for—See HINDU LAW—JOINT FAMILY, 14 C. 610.

See HINDU LAW—WIDOW, 116 P.R. 1879.

Claimant out of possession—Whether injunction may be granted—See INJUNCTION—SPECIAL CASES, 13 C.L.J. 394.

Possession—continued.

—6.—Suits for Possession—continued.

Suit for—Based on sale-deed—Necessary issues to be tried—See ISSUES—FRAMING ISSUES, 20 B. 753.

Suit for—Of land on complete partition by Revenue Court—Mistakes or omissions, in orders regarding partition proceedings held in Revenue Court—See JURISDICTION OF CIVIL COURTS, 1 O.C. 225.

See JURISDICTION OF CIVIL COURTS, A.W. N. 1885, 332, A.W.N. 1881, 56.

See JURISDICTION OF REVENUE COURTS, 102 P.R. 1887.

Suit for, by a landlord when there is any outstanding term in a lease, whether maintainable—See LANDLORD AND TENANT—MISCELLANEOUS, 5 M.L.T. 213=19 M.L.J. 347.

Suit for possession by mukurari lessee—Part decree—Eviction—See LEASE—MISCELLANEOUS, 21 C. 1005, P.C.=21 I.A. 118.

See LIMITATION—MISCELLANEOUS, 80 P. R. 1876.

Suit for—Limitation—See LIMITATION ACT, 1908, s. 20, 13 O.C. 179=7 Ind. Cas. 567.

See LIMITATION ACT, 1908, arts. 11, 11 A. 15, 27 C. 714.

Dispossession under order passed by officer of Government—Suit for possession—See LIMITATION ACT, 1908, arts. 12, 14, 11 B. 429.

See LIMITATION ACT, 1908, art. 14, 29 C. 367=6 C.W.N. 92.

Suit for—Land sold during minority of plaintiff—See LIMITATION ACT, 1908, art. 44, 3 C.W.N. 278.

Suit for—See LIMITATION ACT, 1908, art. 44, 1 C.P.L.R. 75.

And declaration of title, suit for—See LIMITATION ACT, 1908, art. 45, 5 C.L.R. 452.

Mortgage by mother of minor—Suit by minor on attaining majority for—See LIMITATION ACT, 1908, art. 91, 107 P.L.R. 1904=23 P.R. 1904.

No prior suit for declaration that an alleged adoption is invalid—Suit for possession—Limitation—See LIMITATION ACT, 1908, art. 118, 1912, 1 M.W.N. 77, P.C.

See LIMITATION ACT, 1908, arts. 113, 144, 6 A. 231=A.W.N. 1884, 42.

Suit for possession from dispossessed vendor that has subsequently recovered possession—See LIMITATION ACT, 1908, arts. 136 and 144, 12 C. 197.

Suit for possession—See LIMITATION ACT, 1908, art. 138, 12 B. 676.

See LIMITATION ACT, 1908, arts. 138, 144, and s. 2, 18 B. 37.

Suit by reversioner for possession—See LIMITATION ACT, 1908, art. 141, 9 C. 934, F.B.=13 C.L.R. 372.

Possession—continued.

—6.—Suits for Possession—continued.

Suit for, falling under art. 142. Limitation Act—Form of issue—See LIMITATION ACT, 1908, art. 142, (1912), 1 M.W.N. 175.

Suit for possession after foreclosure by mortgagee—See LIMITATION ACT, 1908, art. 144, 6 C. 564=7 C.L.R. 583.

See LIMITATION ACT, 1908, arts. 144, 135, 90 P.R. 1895, F.B.

Malabar law—Nambudri illam—Suit by members for—See MALABAR LAW—MISCELLANEOUS, 15 M. 6.

First suit for mesne profits—Second suit for—See MORTGAGE—GENERAL, 5 B. 496.

Suit for, conversion of, into one for redemption—See MORTGAGE—GENERAL, 5 C.L.J. 653.

Possession, suit for—Plaintiff's title—Onus of proof—See MORTGAGE—REDEMPTION, 9 M.L.T. 423.

Penalty, condition in mortgage-deed amounting to—Hard and inadequate condition—Pecuniary compensation for breach of Contract Act. IX of 1872, s. 74—Act VI of 1899—Possession, suit for—See MORTGAGE—REDEMPTION, 6 O.C. 167.

When suit for possession by mortgagor against mortgagee may be instituted—See MORTGAGE—REDEMPTION, 11 C.P.L.R. 103.

Suit for—See MORTGAGE—REDEMPTION, 5 O.C. 148.

See MORTGAGE—SALE OF MORTGAGED PROPERTY, 7 O.C. 243.

Suit for possession—See MORTGAGE—MISCELLANEOUS, 134 P.L.R. 1901, 20 P.R. 1903.

Suit for possession with alternative relief for rent—Misjoinder of parties and cause of action—See MULTIFARIOUSNESS, 4 C. 949.

Suit for specific performance and possession—Subsequent purchaser—Misjoinder—See MULTIFARIOUSNESS, 18 M. 415=5 M.L.J. 164.

Specific Relief Act, 1877, s. 9—Suit for possession of exclusive right of fishing in creek—Right of fishing, whether immoveable property within s. 9—See PARTIES TO SUITS—SUITS BY REPRESENTATIVES OF CLASS, 12 B. 221.

Suit for—See PLEADINGS, 3 M.I.A. 278, 6 O.C. 247.

Suit for exclusive possession of land—Court competent on the evidence in such suit to give a decree for joint—See PRACTICE AND PROCEDURE, A.W.N. 1890, 166.

Suit for exclusive possession—Power of Court to grant decree for joint possession—Circumstances, under which such power will or will not be exercised—See PRACTICE AND PROCEDURE, A.W.N. 1893, 196.

Possession—continued.**— 6.—Suits for Possession—continued.**

Suit for possession—See **PRINCIPAL AND AGENT—AUTHORITY OF AGENTS**, 3 B.L.R. A.C. 377.

See **RECEIVER**, 5 C.W.N. 27

Sale of immoveable property by registered deed—Prior sale of same property by unregistered deed—Suit for possession by purchaser under registered deed—Admissibility of admissions before Registration officer to prove prior sale—See **REGISTRATION ACT**, 1908, s. 49, 7 M.H. C. 13.

See **BEN. REG. III OF 1793**, s. 14, B.L.R. Sup. Vol. 7.

See **RENT, SUIT FOR**, 4 N.W.P. 32.

Suit for—Not barred by a previous suit by the same plaintiff for mesne profits—See **RES JUDICATA—ADJUDICATIONS**, 5 M.L.T. 220.

Suit for declaration does not bar suit for—See **RES JUDICATA—CAUSE OF ACTION**, 6 Ind. Cas. 696.

Suit for permanent injunction—Second suit for possession barred—See **RES JUDICATA—CAUSE OF ACTION**, 8 Ind. Cas. 9.

Mortgage money, suit for—Suit for—See **RES JUDICATA—CAUSE OF ACTION**, 3 C.L.R. 395.

Cause of action—Suit for mesne profits—Former suit for possession—See **RES JUDICATA—CAUSE OF ACTION**, Marsh. 93=1 Hay 161.

Subsequent suit to redeem—See **RES JUDICATA—CAUSE OF ACTION**, 15 C. 800=15 I.A. 106, P.C.

See **RES JUDICATA—ESTOPPEL BY JUDGMENT**, Marsh. 485.

Mutation of names—Whether evidence of—See **RIGHT OF OCCUPANCY—GENERAL**, 9 Ind. Cas. 456.

See **RIGHT OF OCCUPANCY—TRANSFER OF RIGHT**, 5 O. C. 176.

Suit for—Against trespasser—Proof of plaintiff's title—Possession good title against all but rightful owner—See **RIGHT OF SUIT—GENERAL**, 9 O.C. 273.

Execution of a decree—Symbolical possession—Second suit for actual possession, maintainability of—See **RIGHT OF SUIT—EXECUTION OF DECREE**, 22 B. 667.

See **RIGHT OF SUIT—POSSESSION, SUIT FOR**, 16 N.W.P. 137.

Suit for—By purchaser against trespasser, where vendor was out of—at the time of sale—Maintainability of suit—See **RIGHT OF SUIT—MISCELLANEOUS**, 9 C.W.N. 477, P.C.=8 O.C. 155=27 A. 271=34 I.A. 113=15 M.L.J. 197.

Execution sale—Suit against auction-purchaser for possession by setting aside sale—See **SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE**, 11 C. 362.

Possession—continued.**— 6.—Suits for Possession—continued.**

Suit for possession—Maintenance, defendant's right to, out of the property—See **SET-OFF**, 5 C.W.N. 881, P.C.=28 I.A. 190=23 A. 394.

See **SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL**, 3 M.H.C. 237.

Possession, juridical, what is—S. 9 of Specific Relief Act, meaning of "possession" in—See **SPECIFIC RELIEF ACT**, 1877, ss. 8, 9, 3 S. L. R. 149=4 Ind. Cas. 359.

Suit for, based on title—Title not proved—No decree for, can be given—Plaintiff in continuous peaceful possession—Effect—See **SPECIFIC RELIEF ACT**, 1877, ss. 8, 9, 7 Ind. Cas. 495=7 A.L.J. 1078.

Suit for—Persons dispossessed whether must be co-plaintiffs—Act of—Nature of property—Grazing cattle whether an act of possession—See **SPECIFIC RELIEF ACT**, 1877, s. 9, 13 Ind. Cas. 125.

Suit on title—Dispossession within six months before suit—See **SPECIFIC RELIEF ACT**, 1877, s. 9, 4 A.L.J. 601=A.W.N. 1907, 244.

Suit for possession under will—Will found invalid—Suit for declaration of reversionary heirship—See **SPECIFIC RELIEF ACT**, 1877, s. 42, Illustration (e), A.W.N. 1881, 93.

Suit for mesne profits misappropriated—Suit for possession and profits subsequent not barred—See **SPLITTING UP CAUSE OF ACTION**, 59 P.R. 1893.

Suit for—Title, *prima facie* evidence of—Possessory suits—Evidence Act, s. 110—See **TITLE**, 5 C.L.R. 278.

Suit for—Title-deeds in plaintiff's name—Onus of proof—See **TITLE**, 6 B.L.R. 144.

Suit for possession—See **TITLE**, 3 B.L.R. A.C. 298=12 W.R. 175.

Suit for partition and exclusive—Of specific moieties of property—See **VALUATION OF SUIT**, 4 M.L.J. 110.

Suit for—Of grove—Permanent buildings on grove—See **VALUATION OF SUIT**, A.W.N. 1886, 106.

See **VALUATION OF SUIT**, 1 P.R. 1891, 56 P.R. 1892.

Possession—Joint Property—Suit by co-owner for exclusive—Practice—See **VARIANCE BETWEEN PLEADING AND PROOF**, 20 B. 627.

Suit for exclusive—Joint ownership proved but not exclusive title—Decree cannot be for exclusive possession—See **VARIANCE BETWEEN PLEADING AND PROOF**, 20 B. 569=P.J. 1895, 161.

Suit for—See **VENDOR AND PURCHASER—PURCHASE MONEY AND OTHER PAYMENTS BY PURCHASER**, Marsh. 494.

Possession—continued.**—6.—Suits for Possession—concluded.**

Buyer entitled to enforce specific performance whether could be ejected from possession—See **VENDOR AND PURCHASER — VENDOR, RIGHTS AND LIABILITIES OF**, 16 A. 344, F.B. = A.W.N. 1894, 101.

—7—Miscellaneous.

(1)—*Possession—Necessity of, to complete a sale.*—Under the law current in Madras, possession is not necessary to complete a sale. **VASUDEVA v. NARASAMMA**, 5 M. 6.

(2)—*Evidence—Possession—Mutation in the Revenue Records.*—The mere act of mutation of names in the Revenue records is insufficient to prove by itself transfer of actual possession of the mutated land, but it is some evidence of possession. **JAWAHIR v. JAIMAL SINGH**, 142 P.L.R. 1901.

(3)—*Notice—possession—Registration.*—In the Bombay Presidency, possession has, in certain cases, for the purposes of notice, the same effect as registration. **KONDIBA v. NANA**, 5 Bom. L.R. 269 = 27 B. 408.

(4)—*Foujdari Court, effect of order of—Title of party in possession.*—The effect of an order of the *Foujdari Court*, giving possession of real estate, is merely to prevent the occupation being disturbed by violence, and confers no right or title on the party put in possession. **KADIR BUKSH KHAN v. MUSSUMATAIN FUSSEHOON NISSA**, 5 M.I.A. 413 = 1 Suther 241.

(5)—*Decretal order of possession—Supplementing such order by giving wassilat.*—A decretal order directed possession only. A single Judge was held not competent to make a supplemental order thereon giving *Wassilat*. **DOORGAPERSAUD ROY CHOWDRY v. TARAPERSAUD ROY CHOWDRY**, 4 W.R.P.C. 63 = 8 M.I.A. 303 = 1 Suther 427 = 1 Sar. 774.

(6)—*Conveyance by person not in possession.*—Although a person may not have property in his possession, he is nevertheless competent to convey it. **GOWRI KOER v. AUDH KOER**, 10 C. 1087. [R., 3 O.C. 215.]

(7)—*Symbolical delivery of possession—When effectual.*—Where land is in the possession of tenants, a symbolical delivery of possession, by proclamation, of such land in execution of a decree, is as effectual to effect a transfer of possession as physical delivery. **VENKATARAMANNA v. VIRAMMA**, 10 M. 17. [R., 16 B. 722, 21 B. 98.]

(8)—*Symbolical and momentary possession, as saving limitation—Obstruction to possession of execution purchaser—Remedy—Limitation Act, 1871, art. 165—Suit for possession by execution purchaser—Limitation.* Symbolical possession of a dwelling house or of a share therein (given by the Nazir of a Court by striking a bamboo into the ground) without actual possession would not save limitation. If the purchaser of

Possession—continued.**—7.—Miscellaneous—continued.**

immoveable property at execution is obstructed in obtaining possession thereof, the executing Court could not summarily put him in possession, if the application is made after *thirty days* from the date of the obstruction; the purchaser's remedy would be by a civil suit, if not barred. [R., 11 B. 473.] A suit for possession by the purchaser of immoveable property, at an execution sale, who had taken no steps at the time to take possession of it, more than 12 years thereafter, was held barred and neither an interim symbolical possession by the Court Nazir nor a subsequent momentary possession of an illegal and irregular kind by the intervention of the Nazir was held to save limitation. **SHOTEENATH MOOKERJEE v. OBHOY NUND ROY**, 5 C. 331.

(9)—*Mortgage—Parties—Misjoinder—Symbolical possession—Limitation.*—Plaintiffs were the representatives of one H in whose favour defendants 1 to 4, and one K, the ancestor of defendants 8 to 10, had executed a mortgage bond on the 4th of August 1882. Defendant No. 16, was the mortgagee under a bond executed by the same persons on the 3rd June 1883, the money borrowed being partly employed in discharging a prior bond dated 11th November 1878, executed by the same persons in favour of H. Defendants 17 and 18 were the assignees under another bond executed by K on the 22nd September 1882. A decree was obtained on the first bond (1878) on the 31st October 1881. The decree on the plaintiff's bond was obtained on the 31st July 1883. Defendant No. 16 obtained a decree on his bond on the 19th February 1891. Defendants 25, 33 and another person R were the purchasers at the sale held in execution of the decree on the fourth bond and they obtained the sale certificate on the 13th February 1894. Plaintiffs purchased the mortgaged properties at the sale held in execution of their decree, on the 2nd June 1884, and they took symbolical possession on the 16th October 1884. Defendant No. 16 purchased the property in execution of his decree on the 29th February 1892. Now, the plaintiffs brought the present suit for possession or, in the alternative, for possession after giving the defendants an opportunity of redeeming the property. *Held*:—(a) that the decree got by the plaintiffs on the 31st July 1883 and their subsequent purchase could not affect the defendants, but the fact of their omitting to make them parties did not extinguish their right and that, therefore, the plaintiffs were entitled to possession subject to the defendant's rights of redemption; (b) that the symbolical possession obtained by the plaintiffs was effective as against the mortgagor, and that the suit was within time as possession was obtained within 12 years prior to the institution of the suit, and as the purchasers in execution of the decrees of defendant No. 16 and of the decree obtained on the fourth bond did not obtain possession till 1892 and 1894; (c) that the fact that the plaintiffs were

Possession—continued.**—7.—Miscellaneous—continued.**

parties the suits brought upon the bonds of September 1882 and June 1883 did not deprive the plaintiffs of their right to possession, as they were sued as subsequent instead of prior mortgagees and were called on to redeem that which they were not bound to do; (d) that there was no misjoinder of causes of action as the plaintiff's cause of action was one, and their right of possession rested on their purchase of the property and their dispossession, though the defendants might have different titles to the portions occupied by them; (e) that the suit was not bad in not making R a party, as the *karta* of the joint family to which he belonged was made a party. **MUSSAMAT DHAPI v. BARHAM DEO PERSHAD**, 4 C.W.N. 297. [R., 1 C.L.J. 337; D., 7 C.L.J. 640.]

(10)—*Termination of possession—Adverse possession—Trespasser—Vis major—Constructive possession—Rightful owner—Landlord and tenant—Tenant claiming adversely to the landlord.*—The possession of a tenant is in law the possession of the landlord or superior proprietor and it makes no difference whether the tenant is one who claims adversely to his landlord or not. In order to sustain a claim to land by limitation under the Indian Limitation Act (XV of 1877) there must be actual possession of a person claiming as of right by himself or by persons deriving title from him. If the possession comes to an end by *vis major* (e.g., submergence of the land) the constructive possession of the lands rests not with the trespasser but with the true owners. If a person enters upon the land of another and holds possession for a time and then without having acquired title under the statute of limitation abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. Dispossession by *vis major* has the same effect as voluntary abandonment. **SECRETARY OF STATE v. KRISHNA MONI**, 4 Bom. L.R. 537, P.C.=29 C. 518=6 C.W.N. 617=29 I. A. 104=8 Sar. 269. [F., 26 M. 410, 97 P.R. 1902=121 P.L.R. 1902; R., 27 B. 43=4 Bom. L.R. 721, 31 C. 397, 9 C.W.N. 1061, 18 P.L.R. 1904, 9 C.W.N. 111, 2 C.L.J. 1, 3 C.L.J. 316, 28 A. 760=A.W.N. 1906. 234=3 A.L.J. 567, 34 C. 753=5 C.L.J. 583=12 C.W.N. 193, 35 C. 120=8 C.L.J. 245=12 C.W.N. 16, 7 C.L.J. 414=12 C.W.N. 273=3 M. L.T. 212, 12 O.C. 45, 12 O.C. 58.]

(11)—*Person dispossessed of property disputing right of decree-holder to be put into possession. Suit by—Bona fide possession of person dispossessed—Civil Procedure Code, s. 332—Muafidar of resumable grant, Status of—Impleading of muafidar's mortgagees in suit between grantor and grantee—Oudh Land Revenue Act, 1876—Dispossession of grantee's mortgage in execution of decree obtained by grantor against grantee.*—The defendants Nos. 2 to 5 were proprietors of the village in which the land in suit lay. The land was held by N under a *muafi* grant from

Possession—continued.**—7.—Miscellaneous—continued.**

the former proprietor. In 1873, she mortgaged the land to the plaintiff with possession. After her death, defendants Nos. 2 to 5 obtained against her heir, defendant No. 1, a declaration that the grant was liable to resumption. At the time of applying for the declaration they were aware that the plaintiff was in possession under a mortgage from N. Having obtained the declaration, they sued the defendant No. 1 alone for possession and obtained the decree in execution of which the plaintiff was dispossessed. The plaintiff brought a suit against the defendants under the last clause of s. 332, Civ. Pro. Code, which was dismissed. *Held* that, in a suit under s. 332, Civ. Pro. Code, the plaintiff must prove that he is entitled to possession, that is, that he was entitled to retain possession when he was dispossessed and not merely that he was *bona fide* in possession and was not a party to the decree. Under the provisions of the Land Revenue Act of 1876, a *muafidar* the grant to whom was resumable in whole or in part, held no proprietary right in the land. He had no permanent interest which he could assign. So far as the grant was resumable in part, his possession was analogous to that of a tenant who was not liable to ejectment at will but whose rent might be enhanced at any moment at the will of the landlord, and, so far as the grant was resumable in whole, his possession was analogous to that of a tenant-at-will liable to ejectment at any time at the will of the landlord. The procedure prescribed by the Land Revenue Act, 1876, did not require an applicant to implead tenants or mortgagees of the *muafidar*. *Held*, therefore, that a tenant or mortgagee of a *muafidar* could not claim to retain the land after the grant had been declared to be resumable in proceedings fairly conducted between the grantor and the grantee. *Held*, further, that the plaintiff, not being a party to the decree for possession passed against defendant No. 1, should not have been dispossessed in execution, but, having been dispossessed, he had to prove his right to a decree for possession; and the defendants Nos. 2 to 5 having proved a superior right to the possession of the property, his suit was properly dismissed. **GAYA PRASAD v. N. TASADDUK HUSAIN**, 6 O. C. 110.

(12)—*Possession of shamilat land and demolition of construction thereon blocking a road, Suit against co sharers for—Decree for joint possession when no such relief is prayed for. Interference of Court in Second Appeal with—Blocking a road, Remedy of co-sharers against other co-sharers for.*—The plaintiff sued some of his co-sharers for possession of a piece of shamilat land and for demolition of a *chaupal* erected thereon by them. The remaining co-sharers were also added as defendants by the first Court. The plaintiff's case was that the original defendants had blocked up a road used for carts and foot passengers by erection complained of and had thereby put the plaintiff to inconvenience. The Court passed a decree in

Possession—continued.**—7.—Miscellaneous—continued.**

favour of the plaintiff for possession jointly with the added defendants. On the contention that the plaintiff having claimed exclusive possession was not entitled to a decree for joint possession, it was *held* that, even if he had done so, the Court should not, on that ground interfere in second appeal with the decree for joint possession, if on other grounds, the plaintiff was found to be entitled to such possession. On the finding that the road had been blocked to some extent, it was *held* that the plaintiff was entitled to the relief prayed for as the damage could not be remedied by a partition. **KALLU v. GAYA DEN, 7 O.C. 362. (10 A. 498, D., 10 A. 553, R.)**

(13)—*Hostile seizure during war—Possession—Title—Evidence—Restoration of possession.*—The plaintiff claimed from the Government certain marble, forming a part of tomb, formerly within a private court yard and built by one of the plaintiff's ancestors. It was contended that the house, court-yard, tomb and all other immovable property appertaining thereto were taken into Government's possession by way of hostile seizure at the capture of Delhi and stood upon the ground occupied for military purposes; the tomb only remaining undisturbed for the reason that the British Government never destroyed such monuments except when it was actually necessary to do so. In 1866, the Government sanctioned plaintiff's repairing the tomb, and also in 1869 paid a purchaser from the plaintiff the value of certain marble then taken away. *Held* that the permission to repair the tomb undoubtedly given by the defendant to the plaintiff and the permission to burn a light there and take general charge of the tomb proved nothing by way of restoration of possession amounting to re-delivery of an unqualified right of property. There was no evidence of intention to restore while the fact of original seizure was undoubted, though slight evidence was sufficient to show restoration of private property in immovables. Plaintiff's suit must therefore be dismissed; but if there had been any removal of the marble by the Government or any diversion of the building from the purposes which had been recognized by the Government since the seizure in 1857 (the purposes of a tomb) the plaintiff might have been in a position to apply for an injunction, as the Government, by its own act in derogation of the absolute title it acquired by the hostile seizure, treated the place as a tomb of which it permitted the plaintiff to take possession, and that act of admission might prevent the Government from insisting upon the absolute property in it. **MUSSUMAT IKRAMUL NISSA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 14 P.R. 1872.**

(14)—*Bill of sale by trader subsequently become insolvent—Assignments of assets to be acquired in future—Conveyance of chattels by trader to creditor—Non-delivery of possession, how far evidence of fraud.*—The Punjab Bank,

Possession—continued.**—7.—Miscellaneous—continued.**

one of the creditors of the insolvent R, claimed a lien in preference to all other creditors, under a bill of sale executed by R before he became insolvent, over the effects therein described. The transfer being impeached by the general creditors, the question arose whether it was a fraudulent transfer within the meaning of s. 26 of Act IV of 1872. The bill of sale was urged by the creditors to be void by reason of its professing to pass after-acquired property, but it was held that it could not become entirely void merely because of its purporting to assign after-acquired property. The principal point urged, however, was that the bill of sale was an act of bankruptcy, and fraudulent and void against the creditors because it was an assignment of the whole of the debtor's property, or of the whole without any substantial exception for an antecedent debt, the effect being necessarily to defeat and delay creditors. On the point which thus arose, *viz.*, whether the bill of sale assigned the whole of the debtor's property, or the whole without any substantial exception, the Chief Court was of opinion that, on the face of it the bill did not purport to be a bill of the debtor's whole property. As to whether any distinction should be made between the property acquired subsequently to the date of the bill of sale and the property previously acquired, it was held that a valid assignment can be made of future property as well, according to the English rule of equity, which the Indian Courts are to apply in preference to the rule of the Common Law. *Held* also that the deed of assignment was not void as being a fraudulent transfer of property, on the mere ground of non-transfer of possession. In an absolute grant or conveyance of personal chattels by a trader to a creditor, non-delivery of possession may be strong but not conclusive evidence of fraud. In the present case, the deed was not in effect an absolute assignment; it was in effect a mortgage, and the power to sell or to enter and sell, respectively, contained in it, was not to take effect except on default in payment on the due date of the bond, that is, two years after the date of the bill of sale, a period which had not elapsed when the grantor became insolvent. **THE OFFICIAL LIQUIDATOR, PUNJAB BANK, LIMITED v. RICHARD RICHARDSON, 162 P.R. 1879.**

(15)—*Jurisdiction—Issues—Suit for possession.*—A suit for rent having been brought in the Beerbhoom Collectorate and decreed, the case was referred in execution to the Collector of Burdwan within whose jurisdiction the property lay. The tenure was sold by the Deputy Collector of the latter district, and purchased by the decree-holder. Appeals were made to the Collector and the Commissioner by the judgment-debtor, and were rejected by both officers. The judgment-debtor then brought a suit for possession in the Civil Court and obtained a decree reversing the sale on the ground that the decree for rent had been made by a Collector who had not jurisdiction. *Held*

Possession—continued.—7.—**Miscellaneous**—continued.

that after all that had passed, it was too late to raise the question of jurisdiction. *OOMA SOONDUREE DOSSEE v. BEPIN BEHAREE ROY*, 13 W.R. 292.

(16)—Act VIII of 1859, ss. 247, 269—*Possession*.—An application under s. 246 of Act VIII of 1859, having been disallowed on the ground of unnecessary and improper delay, the attached property was sold; but in the attempt to take possession, the purchaser was obstructed by the applicant who alleged himself to be in possession. The Court made an investigation under s. 269, and determined that as applicant's claim had been disallowed under s. 246, he had no right to remain in possession, *Held* that this order was judicious and proper. *In the matter of BANEE MADHUD ROY*, 13 W.R. 431.

Suit by assignee from auction-purchaser of permanent tenure to recover from landlord, whether a suit for possession—Whether special limitation provided in s. 42 of the Chotanagpur Landlord and Tenant Act applicable to case. *See BEN. ACT I of 1879*, ss. 37 and 42, 12 C.W.N. 617=7 C.L.J. 560.

Registration of names, if constitute — Possession follows title, rule of, when applicable—Possession, delivery of, effect of—*See BEN. ACT XI OF 1859*, ss. 27, 28, 29, 37, 6 C.L.J. 472.

Purchaser at Revenue sale of a share of an estate—Right to recover possession from person who has acquired a title by adverse possession previous to default—*See BEN. ACT XI OF 1859* s. 54, 12 C.W.N. 528.

Meaning of, in s. 55, Land Registration Act—*See BEN. ACT VII OF 1876*, s. 55, 12 C.W.N. 16=35 C. 120=8 C.L.J. 245.

Suit for, of land—Valuation of suit to be based upon plaintiff's case only—*See PUN. ACT XVIII OF 1884*, s. 40 (1), 199 L.R.P. 1903.

Title against wrong doer — Plea of *jus tertii*—Purchase from ostensible owner—Transfer of Property Act, s. 41—*See ADMINISTRATOR*, 1 Ind. Cas. 525.

Attachment and sale of property in execution—Suit by claimant in—to establish title—*See BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE*, 6 B. 215, F.B.

Application for delivery of, not a step-in-aid of execution—*See CIV. PRO CODE*, 1908, s. 47, O. XXI, rr. 95, 96, 6 A.L.J. 71, F.B.=5 M. L.T. 185=31 A. 82=1 Ind. Cas. 416.

Plaintiff *prima facie* entitled to — Onus of proving that case falls under s. 43, Civ. Pro. Code (1882)—Effect of plaintiff's non-possession at time of prior suit—*See CIV. PRO. CODE*, 1908, O. II, r. 2, 2 Ind. Cas. 115.

Declaration of right — Title not proved—Maintainability of suit on the strength of possession — Trespasser — *See DECLARATORY DECREE, SUIT FOR—GENERAL*, A.W.N. 1887, 55.

Possession—concluded.—7.—**Miscellaneous**—concluded.

Claim for goods in—of third parties — *See DECREE—DECREE, FORM OF*, 22 M. 478.8

Cause of action being dispossession—Plaintiff bound to prove possession and dispossession within twelve years—*See EJECTMENT—SUIT FOR*, 14 Bur. L.R. 155.

See EVIDENCE ACT, s. 110, 1 B. 91.

Suit for joint *khas* possession, if and when lies—*See JOINT KHAS POSSESSION*, 10 C.L.J. 103=3 Ind. Cas. 399.

Is good title against trespasser defendant, though lease in plaintiff's favour is inadmissible—*See LEASE—GENERAL*, 2 Ind. Cas. 202=14 C.W.N. 141.

Creation of lien — Agreement for specific appropriation—*See LIEN*, 2 Hyde 267.

Right of person in possession to application of specific period of limitation—*See LIMITATION ACT*, 1908, s. 28, art. 120, 69 P.R. 1909=103 P.W.R. 1909=2 Ind. Cas. 981.

Property in possession of tenant, whether capable of physical possession—*See LIMITATION ACT*, 1908, art. 10, 63 P.L.R. 1908, F.B.=1 P.W.R. 1908=49 P.W.R. 1908.

Suit for declaration of—by a person in possession, maintainability of—*See LIMITATION ACT*, 1908, art. 120, 61 P.R. 1908=108 P.W.R. 1908.

And dispossession — Limitation — What amounts to dispossession — *See LIMITATION ACT*, 1908, arts. 142, 144, 2 Ind. Cas. 381.

Whether validates *hiba bil mushaa* (Gift of undivided joint property) under Mahomedan Law—*See MAHOMEDAN LAW—GIFT*, A.W.N. 1908, 104=30 A. 250=5 A.L.J. 566.

Decree for foreclosure—Delivery of possession for non-payment within time—No formal decree or order passed—Validity of delivery of possession — *See MORTGAGE—FORECLOSURE*, 12 C.P.L.R. 103.

Partition—Mode of partition — Possession, how far to be respected—*See PARTITION—GENERAL*, 2 P.W.R. 1908, Rev.

Whether and how far—affects the question of priority between registered deeds — *See REGISTRATION ACT*, 1908, s. 47, 29 B. 42.

First plaint alleging interference with—Second plaint alleging dispossession—Cause of action different—*See RES JUDICATA—CAUSE OF ACTION*, 4 Ind. Cas. 97=6 M.L.T. 375.

Legal possession, termination of—*See RES JUDICATA—MISCELLANEOUS*, 10 C.L.J. 527=4 Ind. Cas. 442.

Claim for two plots as ancestral Jammai lands—Claim for one plot admitted—Proof of—as to second plot—*See TITLE*, 10 C.L.R. 99.

Suit to eject trustee—Possession—Valuation for jurisdiction—Specific Relief Act, s. 42—*See VALUATION OF SUIT*, 8 M. 516.

Possessory Title.

Possessory title, suit for partition can lie on — Possession of co-widows of husbands property — See HINDU LAW—PARTITION, 12 A. 51=16 I.A. 186, P.C.

Post.

This circular in supersession of the Circular Order, dated 2nd May 1870, directs that all records of cases sent to the High Court be transmitted by Banghy Post prepaid, instead of by Letter Post. **Civ. Cir. No. 33, dated 23rd November 1870, 14 W.R. Civ. Cir. 43.**

This circular cancels Circular No. 7, dated 22nd March 1871, and restores Circular No. 1, dated 4th January 1871, regarding the transmission of records by the post. **Civ. Cir. No. 16, dated 22nd May 1871, 16 W.R. Civ. Cir. 1.**

Tender of patta by—See MAD. ACT VIII OF 1865, s. 9, 13 M. 42.

Presentation of plaint—Plaint sent by post. —See MAD. ACT VIII OF 1865, s. 51, 8 M. 411.

See U.P. ACT XV OF 1873, s. 43, 4 A. 102.

Applications sent by—See CIV. PRO. CODE, 1908, O. III, c. 1, L.B.R. 1872-1892, 504.

See COURT FEES ACT, 1870, s. 28, 38 P.R. 1900.

Transmission of copies by post—See LIMITATION ACT, 1908, s. 12, 14 C.P.L.R. 40.

Petition sent by post—Not a substitute for a plaint—See PLAINT—GENERAL, 6 M.H.C. 136.

Service of summons—by Foreign territory—See SUMMONS, 2 B.L.R. A.C. 59=10 W.R. 349.

See SUMMONS, 1 C.W.N. 56, 18 B. 606.

Service of notice through post by registered letter, whether sufficient—See TRANSFER OF PROPERTY ACT, 1882, s. 106, 28 C. 118=4 C.W.N. 790.

Postage.

This circular encloses circular from the Post-Master-General regarding postage on parcels. **Civ. Cir. No. 7, dated 22nd March 1871, 15 W.R. Civ. Cir. 12.**

The circular gives a Revised list of Public Offices with which the Post Office will keep accounts of postage &c., **Cir. No. 30, dated the 11th August 1886, 6 W.R. Civ. Cir. Order, p. 5.**

This circular requires encasement of certificate on bills debitable to the Wards' Rate Fund, where the bills include charges for postage, &c. **Rev. Cir. No. 9, 20 W.R. Rev. Cir., p. 14.**

This circular deals with Prepayment of Official Covers by Service Postage Stamps. **Civ. Cir. No. 2, dated 10th January 1872, 17 W.R. H.C. Rul. and Order, 1.**

Postage—concluded.

This circular deals with instructions relative to the distribution, between Government and the parties to suits, of the charge for postage incurred in certain cases. **Civ. Cir. No. 10, dated 28th March 1872, 17 W.R. H.C. Rul. and Order 10.**

Postage Stamps.

This circular circulates Financial Department Order No. 661, dated 29th January 1874, allowing officers to charge in the accounts the value of service postage stamps, $\frac{3}{4}$ ths to the Revenue, and $\frac{1}{4}$ th to the Judicial Departments **Rev. Cir. No. 5, 21 W.R. Rev. Cir., p. 8.**

This circular makes certain alterations in s. 5, Ch. XXI. of Board Rules, regarding the custody, &c., of Postage Stamp Labels. **Rev. Cir. No. 2, 20 W.R. Rev. Cir. p. 4.**

Document stamped with—Instead of receipt stamp—Stamp of improper description, meaning of—See STAMP ACT, 1899, s. 37, sch. I, art. 1, 23 A. 213, F. B. = A.W.N. 1901, 54.

Post diem Interest.

See—INTEREST.

Mortgage—Covenant by mortgagor to pay within stipulated period—Post diem interest—See MORTGAGE—MISCELLANEOUS, 1 C.W.N. 52, P.C. = 19 A. 39=23 I.A. 138.

Posthumous Chela.

Inheritance—Appointment by widow of Goshain—See HINDU LAW—INHERITANCE, 3 A.L.J. 717=A.W.N. 1906, 289=29 A. 109.

Posthumous Child.

See EVIDENCE ACT, 1872, s. 112, 29 C. 111, P.C. = 29 I.A. 17=6 C.W.N. 146=4 Bom. L. R. 243=8 Sar. 186.

Posthumous Son.

Rights of, not alterable by will in favour of adopted son—See HINDU LAW—ADOPTION, 12 B. 105.

Revocation of Hindu Will by birth of—See HINDU LAW—WILL, 17 M.L.J. 269=30 M. 369=2 M.L.T. 242.

Effect of birth of, on Hindu's will—See HINDU LAW—WILL, 16 M.L.J. 491.

Post Office.

See ACT XIV OF 1866.

See ACT VI OF 1898.

(1)—Agent of the addressee—According to English Law, the Post Office holds every letter that is once posted as agent of the addressee, and therefore where delivery of a thing is requisite to pass the property, it is generally sufficient to deliver it for transmission by the Post Office. **NARASIMULU v. ADIPPA, 13 M. 242.**

Post Office—concluded.

(2)—*Indian Government—Liability for things entrusted to Post office for conveyance.*—The Government is not responsible for any loss or damage which may occur in respect to anything entrusted to the Post Office for conveyance. *WINTER v. WAY*, 1 M.H.C. 200.

This circular draws attention to the new Post Office rules generally, and specially to the rules regarding parcels sent by banghy parcel post. *Civ. Cir. No 8, dated 2nd May 1870*, 13 W.R. Civ. Cir. 15.

Attachment of letters in Post Office—See ATTACHMENT—SUBJECTS OF ATTACHMENT, 13 M. 242.

See INSTALMENT DECREE, 24 A. 85 = A.W. N. 1901, 168.

Payment required to be made into Court within particular time—Money paid into—Within but received in Court beyond time, not a good payment—See PAYMENT INTO COURT, 22 B. 415.

Postponement.

See ADJOURNMENT.

Execution sale. postponement of—See SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 3 C. 542 = 1 C.L.R. 349.

Postponement Petition.

See ADJOURNMENT.

Suit—Petition for postponement.—Where parties put in a postpone-petition after decree, which made the amount adjudged by the decree, payable in instalments, and the process of execution to issue in case of default, and no intention existed between them to create new rights enforceable by suit in supersession of those under the decree, a suit on the postpone-petition is not maintainable. *DARBHA VENKAMMA v. RAMA SUBBARAYADU*, 1 M. 337, F.B. [F., 4 A. 240]

Pottah.

(1)—*Pottah, what is.*—The pottah granted by the Collector is not a muniment of title, but only an evidence of holding, according to a local and fiscal regulation. *FREEMAN v. FAIRLIE*, 1 M.L.A. 305.

(2)—*Patta—Court of Wards.*—A patta granted by the Court of Wards without any term of years must be considered as not extending over ten years after which, on the lessee's refusal to make a fresh settlement, the Collector may settle with other parties. *MAHOMED RAJAH v. THE COLLECTOR OF CHITTAGONG*, 6 B.L.R. App. 117 = 15 W.R. 116.

(3)—*Patta—Lease—Registration Acts.*—Looking to the language of the Registration Act, the term "patta" appears to be included in the term "lease." A lease for a term, not exceeding five years at a rent reserved not exceeding s. 50, is exempted by the Local Government from Registration. *VENKATACHELLAM CHETTI v. AUDIAN*, 3 M. 358. [R., 9 C.P.L.R. 88.]

Pottah—continued.

(4)—*Object of patta.*—The object of the Legislature in compelling the delivery and acceptance of pattas was to secure to the tenant precise information of his liability, and to the Courts a fairly certain record of the obligation of the parties. *VENKATAGOPAL v. RANGAPPA*, 7 M. 365.

(5)—*Unreasonable stipulations in patta.*—Stipulations in a patta requiring a raiyat not to reap his crop without the previous permission of the Zemindar, and making his holding liable to forfeiture and extra assessment if he should, without permission, cultivate dry land as wet land, are unreasonable and cannot be enforced. *APPA RAU v. RATNAM*, 13 M. 249. [R., 2 M.L.J. 292].

(6)—*Joint lease—Pottah—Condition that lessor should not alienate during term of lease.*—Where the terms of a pottah are such as to preclude the grantor from alienating or leasing the property to any other party during the term of the lease without giving the lessees under pottah the first refusal, these restrictions upon the malik's right, though unusual, are binding upon him. As long as the co-lessees are willing and able to pay the rent of the lease, the malik is not entitled, under the terms of the pottah, to alienate or to lease the disputed right, either as a whole or in part, to any other party. *MOHIMA CHUNDER SEIN v. PITAMBUR SHAHA*, 9 W.R. 147.

(7)—*Pottah being koorfa pottah containing no term, not sufficient ground for its rejection.*—The ground upon which the first appellate Court rejected the pottah of the plaintiff in this suit, viz., that it was a koorfa pottah and contained no term, was held by the High Court to be no sufficient ground for its rejection. Pottahs are given in all forms, and it is impossible for any Judge to state that a pottah was not given as alleged, because it is in a particular form. *GOOROO DOSS SHOOR v. DIGAMBUR CHATTERJEE*, 4 W.R. 78.

(8)—*Party in possession of Government lands whether entitled as of right to pottah from Collector.*—There is no law which obliges a Collector to grant a pottah in respect of Government lands, under all circumstances whatever, to the party in possession. *SHEIKH HAZARI v. KHANOO MIRDA*, 4 W.R. 52.

(9)—*Right to enforce—Regular suit.*—A suit to enforce the acceptance of a patta is maintainable on the regular side. *KARIM v. MAHAMMAD KADAR*, 2 M. 89. (7 M.H.C. 312, R.) [F., 13 M. 361; 14 M. 441; D., 12 M. 134.]

(10)—*Suit for possession on a forged pottah—Dismissal—Lower Appellate Court, duty of.*—Where the plaintiff sues for possession relying on a patta which was found by the first Court to be a forged one, held, that the lower appellate Court must decide whether plaintiff has sued on a forged patta and try the issue decided by the Court below and raised on the pleadings. *KEMAL KISHEN v. ACHAIPER ROY*, W.R., 1964, Act. X Rul., 55.

Pottah—continued.

(11)—*Suit to obtain a perpetual patta—Jurisdiction.*—No action for obtaining a perpetual patta, could be tried under Act X of 1859. **KOYLASH CHANDER v. KOYLASH CHANDER SEIN, W.R. 1864, Act X Rul., 94. [D., 11 W.R. 541.]**

(12)—*Suit for possession—Proof of possession—Mere production of pottah.*—Where the plaintiff sues to recover possession on the ground that he had taken possession of the land under his pottah and had been dispossessed by the defendant, the mere production of the pottah without proof of possession under it, cannot avail the plaintiff. **SHAIKH LUCKHEE v. SHAIKH BABUR, 5 W.R. 213.**

(13)—*Suit to obtain patta—Evidence.*—Plaintiff, in a suit to obtain patta, must adduce proof that he holds the lands for which he applies for a patta. **NUNDEE DASS v. SHAH BABOO TEWAREE LALL, W.R. 1864, Act X Rul., 75.**

(14)—*Grant of patta—Effect of reversal.*—The grant of a patta must, as long as an appeal against the decision of the Collector remains possible, be held to be conditional and subject to the result of the appeal. **TIRUMALASWAMI AYYANGAR v. TIRUMALAI GOUNDAN, 19 M. 324. [R., 29 M. 461 = 1 M.L.T. 278.]**

(15)—*Rates of rent—Future contingency.*—It is not irregular to define in a patta the terms of the tenancy with reference to a possible contingency which may arise in the course of the fasli for which the patta is tendered. **SATTAPPA PILLAI v. RAMAN CHETTY, 17 M. 1. [F., 12 M.L.J. 22; Appr., 27 M. 332 = 13 M.L.J. 429.]**

(16)—*Persons holding patta for tree on land, whether entitled to patta for the land itself.*—*Held Subramania Ayyar, J., dissenting*, that the mere fact that certain persons have been granted tree pattas in respect of the trees growing on Government waste-land does not entitle them to claim, as of right, in a Civil Court, to be granted a land patta for the land on which the trees stand. *Held per Subramania Ayyar, J.*, that land on which a man plants a palmyra tope is in his exclusive occupancy and possession as a raiyat of Government, subject to the liability to pay any assessment or assessments which the Government may, from time to time, be entitled to impose, and subject also to all other lawful incidents attaching to a holding of such description. **THEIVU PANDITHAN v. SECRETARY OF STATE FOR INDIA, 21 M. 433, F.B.**

(17)—*Pottahs—Attestation or registry not necessary—Decision of Appellate Court on preliminary point—Evidence on all issue on record—Appellate Court not competent to remand.*—It is not usual to have subscribing witnesses to pottahs nor to register such documents. In this case, all the evidence which the parties wished to adduce had been taken and was before the lower appellate Court. But that Court, having decided on one of the issues

Pottah—continued.

relating to the genuineness of a pottah, remanded the case to first Court for the determination of the other issues. *Held* that the decision of the lower Court, although it happened to be of one preliminary point, did not exclude evidence of facts on the other issues raised in the case. Having reference to ss. 351, 352 and 353 of the Civ. Pro. Code, the Judges had no authority to remand the case for re-trial, but should have tried it himself. **RAM JOY SEIN v. NUNDO MOYEE DEBIA, 10 W.R. 374.**

(18)—*Suit for ejectment on failure to take pottah—Plea of refusal to give pottah—Tenant not bound to take the initiative—Duty of landlord to himself make a positive tender of pottah.*—This was a suit instituted for ejectment and mesne profits. On arrangement between the parties, the defendant-respondent was allowed to continue in possession of certain lands till a particular period when he was to relinquish all of those fit for indigo cultivation; these lands, the defendant was to keep on paying rent to, and taking a pottah from, the proprietor, i.e., the plaintiff-appellant. The latter alleged that the former did not take pottah. The former retorted that no pottah was ever offered to him, but, on the contrary, pottah was refused even on application. The Sudder Ameen dismissed the suit and the High Court confirmed his decision. From the circumstances of the case it was clear that the land was absolutely essential to the respondent for indigo growing purposes and it could therefore never be supposed that there would have been any neglect on his part to take his pottah. It was held further that, in such cases, the landlord is bound to make a positive tender of a pottah and not to insist on his tenant taking the initiation. **MUROONATH ROY v. MR. GOW SMITH 2 W.R. 73.**

(19)—*Patta granted to defendant by plaintiff's naib—Authority of naib objected to by plaintiff—Inapplicability of s. 25 of Act X of 1859—Appeal to Commissioner or to Judge.*—S. 25 of Act X of 1859 would not apply to a suit for possession brought by the plaintiff who, admitting that the defendant had really got a pottah, only disputed the authority of his naib to grant pottah to the defendant; the lower appellate Court was therefore wrong in having held that the appeal in the case lay only to the Commissioner and not to the Judge. **JOY KISHEN MOOKERJEE v. RAMOHUN ROY, 2 W.R. Act X Rul., 16. [R., 2 Agra. 182.]**

(20)—*Act X of 1859, s. 23 cl. 1—Suit for delivery of pottah, maintainability of, only by ryots in possession.*—It was contended in this special appeal that, as cl. 1, s. 23 of Act X of 1859, refers to all suits for delivery of pottahs and the present plaintiff asked for the delivery of a pottah, the jurisdiction would be with the Revenue Courts. But the High Court held that the plea was altogether untenable, as the said clause contemplated only suits by ryots in possession, and, admittedly the present plaintiff was not in possession; further, what the plaintiff asked for was specific performance of an

Pottah—continued.

agreement to give a lease with a view to get possession, and till he got such possession he could not be in the relation of a tenant. **BHARUT CHUNDER SEIN v. OSEEMODDEEN**, 6 W.R. Act X, Rul. 56.

(21)—*Pottah—Refusal to register—Suit for damages—Suit on implied contract—Pottah executed and delivered—Conditions when pottah to take effect not mentioned—Presumption—Suit for refund—Deposit for rents of old lease—Right to retain money under new contract.*—A suit for a refund and damages on the ground of defendant's refusal to allow a pottah, for which a kaboolut had been given, to be registered, is not a suit brought upon the pottah and kaboolut, but a suit upon an independent contract, namely, an implied contract by the defendant, to do that which is necessary in order to give effect to this own pottah, namely, to allow it to be registered. Where a pottah has been actually executed and handed over, it would be only in accordance with the ordinary course of business that, if that pottah is not to take effect from the moment of its delivery, the conditions which are to be performed in order to make it effectual would be stated in the instrument itself. If the instrument does not contain any such conditions, it is a natural presumption that no conditions ever existed. Damages for breach of a contract in refusing to let a pottah to be registered, are not necessarily the same as damages for keeping a person out of possession of the property; but the damages would be the loss which had been occasioned to him by the contract not having been performed. In such cases, damages can only be a matter of estimation. Where the refund sued for is in deposit for the rents of an old lease which has not expired, but abandoned by defendant for a new arrangement, he cannot fall back on the old contract, or retain the money under the new contract, after refusing to register the pottah. **MONOMOTHONATH DAY v. SREE NATH GHOSE**, 20 W.R. 107.

(22)—*Patta—Tree pattadar and Land pattadar—Their respective rights and liabilities—Cancellation of tree patta, effect of—Whether tree pattadar can rely on his possession against trespassers.*—The plaintiff (appellant) held a patta for certain trees on land in certain survey fields, and the defendants (respondents) held the patta for the land. The plaintiff had possession of the trees for over 20 years prior to 1906, in which years the revenue authorities cancelled the plaintiff's patta. The defendants then interfered with the plaintiff's enjoyment of the trees and deprived him of their possession. Plaintiff had sued to recover possession of them. In second appeal, held that the plaintiff is entitled to a decree. The only effect of the cancellation of his patta was that Government no longer made any demand on the pattadar for revenue in respect of the tree. There was no grant to the defendants; and the plaintiff was in possession of the trees until dispossession by the defendants. The defendants having no title as owners were mere trespassers,

Pottah—continued.

and the plaintiff was entitled to rely on his possession in a suit to eject them. **SENGODA GOUNDAN v. RASA GOUNDAN**, 2 M.W.N. 1911, 532=10 M.L.T. 488=22 M.L.J. 201=13 Ind. Cas. 39. (21 M. 433, R.; 26 M. 574, 32 M. 367, F.)

(23)—*Occupancy—Patta—Tenant under pattadar—Presumption of occupancy right.*—There is no statutory rule that a ryot holding under a pattadar is a tenant from year to year. The grant of a patta by the Government could not have the effect of destroying the occupancy rights that may exist at the time of the grant. The use of the word "Porakudi" would not in itself denote the absence of occupancy right. With whomsoever the settlement may have been made by the Government, it had no intention whatever to affect the existing right of any class of persons. The bare fact that a man is the pattadar of the land is not sufficient to raise the presumption that the cultivators of the patta lands either originally are tenants from year to year under the mirasidar or subsequently agreed to hold as such. **VENKATACHALA GOUNDEN v. RUNGARATNAM AIYAR**, M.W.N. 1913, 434=13 M.L.T. 450=24 M.L.J. 571.

Right to pottah—Agreement fixing rent—See **BEN. ACT VIII OF 1869**, Marsh 325.

Not conferring on lessee any interest in land does not create a tenure—Sarbarakari patta, construction of—See **BEN. ACT VIII OF 1885**, ss. 3 (7), 5 (1), 65, 4 Ind. Cas. 471=14 C.W.N. 389.

See **MAD. ACT II OF 1864**, ss. 1, 2, 3, 38, 39, 7 M. 405.

Partly proper and partly improper—Enforceability of—See **MAD. ACT VIII OF 1865**, 3 M. 127, F.B.

To be issued by mortgagees of parts of a Zemindari, whether to be joint or several—See **MAD. ACT VIII OF 1865**, 16 M.L.J. 6.

Tender of, to manager of joint Hindu family—See **MAD. ACT VIII OF 1865**, 17 M.L.J. 251.

Liability for revenue of all fields included in patta—Claim for release of one field on tender of proportionate kist, validity of—See **MAD. ACT VIII OF 1865**, ss. 2, 25, 37, 8 M. 130.

Inamdars paying fixed rent to zemindar whether bound to accept—See **MAD. ACT VIII OF 1865**, s. 3, 21 M. 116=8 M.L.J. 43, F.B.

Tender of, and execution of muchilika, effect of—Second tender of, invalid—See **MAD. ACT VIII OF 1865**, ss. 3, 8, 9, 72, 30 M. 253=2 M. L.T. 325.

What is—See **MAD. ACT VIII OF 1865**, s. 7, 5 M. 136.

Tender of patta—See **MAD. ACT VIII OF 1865**, ss. 7, 9, 72, 27 M. 4, F.B.

Proper tender of—See **MAD. ACT VIII OF 1865**, ss. 7, 38, 39, 40, 20 M. 33=6 M.L.J. 278.

Pottah—concluded.

Tender of—by post—See MAD. ACT VIII OF 1865, s. 9, 13 M. 42.

Suit to enforce acceptance of—Cause of action—Limitation—See MAD. ACT VIII OF 1865, s. 9, 23 M. 474=10 M.L.J. 258.

Pargana surrendered to and re-grant by Government—Rates of rent—Terms of patta—See MAD. ACT VIII OF 1865, ss. 9 and 11, 18 M. 216.

Suit to enforce acceptance of patta—Tender of patta within fasli—Suit after expiry of fasli—See MAD. ACT VIII OF 1865, ss. 9, 50, 51, 22 M. 318.

Suit after fasli for enforcing acceptance of—Amended patta orderd under s. 10—Suit maintainable for rent—See MAD. ACT VIII OF 1865, s. 10, 23 M. 616.

See MAD. ACT VIII OF 1865, s. 11, 21 M. 503=8 M.L.J. 207.

Insertion of useless condition in a—does not make it *patta* bad—See MAD. ACT VIII OF 1865, s. 12, 16 M.L.J. 57.

See MAD. ACT V OF 1882, s. 6, 12 M. 203, F.B.

See CO-SHARERS—SUIT BY CO-SHARERS, 2 B.L.R. A.C. 159=11 W.R. 25.

Tank-bed lands granted on *darkhast*—Contravention of Revenue Board's Standing Orders—Issue of unconditional patta—Cancellation—See DARKHAST, 5 M.L.T. 31=19 M. L.J. 206=32 M. 300=1 Ind. Cas. 76.

Construction of—See ENHANCEMENT OF RENT—GENERAL, 1 Agra Rev. 54.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 27 M. 332.

Suit to enforce acceptance of patta—See INAMDAR, 7 M. 325.

Collector cannot cancel patta once granted—Second patta by Collector, power of Civil Court to declare void—See JURISDICTION OF CIVIL COURTS, 12 M. 404.

Suit to enforce exchange of—and Muchalika—See JURISDICTION OF CIVIL COURTS, 14 M. 441, F.B.=1 M.L.J. 661.

See JURISDICTION OF CIVIL COURTS, 12 M. 134.

Transfer of pottah from tenant—Old tenant not contesting validity of transfer after notice—No petition from old tenant praying recognition of transfer—Duty of Zemindar to grant a pottah to a new tenant—See LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 3 M.L.T. 235=18 M.L.J. 37=31 M. 64.

See LEASE—GENERAL, 2 M. 67=6 I.A. 170, P.C.

Validity of, to land under, obtained fraudulently—See TITLE, L.B.R. 1893—1900, 428.

Suit for—at fixed rate of rent—See VARIANCE BETWEEN PLEADING AND PROOF, Marsh 371=2 Hay 422.

Poundage.

(1)—*Sheriff—Right of poundage.*—Where a decree is satisfied, after attachment but before sale, the sheriff will be entitled to his poundage. ROY CHURN DUTT v. AMEENA BIBI, 2 C. 385.

See EXECUTION OF DECREE—MISCELLANEOUS, 5 Ind. Cas. 139.

Application to receive Poundage-fee—Application for set-off—Not steps in aid of execution—See LIMITATION ACT, 1908, ART. 182—STEP-IN-AID OF EXECUTION, 23 C. 196.

Application by decree-holder to receive poundage-fee not a step in aid of execution—See LIMITATION ACT, 1908, ART. 182—STEP-IN-AID OF EXECUTION, 22 C. 827.

See SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 20 M. 158.

See SHERIFF, 4 B.H.C. O.C. 139, 6 B.H.C. O.C. 22.

Poundage-fee.

To be taken as costs of the execution—See EXECUTION OF DECREE—MISCELLANEOUS, 5 Ind. Cas. 139.

Poverty.

See PAUPER APPEAL.

See PAUPER SUIT.

Suit for divorce by wife—Provision for costs—See ACT IV OF 1869, 9 M. 12.

See CIV. PRO. CODE, 1908, O. XLI, r. 10, 7 A. 542=A.W.N. 1885, 127, 8 A. 203, F.B.=A.W.N. 1886, 310.

See LIMITATION ACT, 1908, ss. 4, 5, 9 A. 11=A.W.N. 1886, 245.

Appeal—No ground for demanding security for costs—See PRACTICE AND PROCEDURE, 3 B. 241.

Application for ordering appellant to give security for costs of appeal on the ground of his—See SECURITY FOR COSTS, 21 C. 526.

See SECURITY FOR COSTS, A.W.N. 1886, 286.

Power of Appointment.

(1)—*Will—Creation by will.*—A general power of appointment may be exercised by will executed previously to the creation of the power and that too by mere residuary gift. DINSHAW v. DINSHAW, 9 Bom. L.R. 488=31 B. 472.

Given to testatrix by will of her husband if "property"—See COURT-FEES ACT, 1870, sch. I, art 11, 25 M. 515.

Right of Hindu testator to grant, to a person named in his will—Person appointed, qualifications necessary—See HINDU LAW—WILL, 11 O.C. 271.

Will—Testator's directions—Execution of—See WILL—CONSTRUCTION OF, 4 C. 514.

Powers, Advocate-General's.

See ACT X OF 1875.

Power-of-attorney.

(1)—*Constitution of agency by power-of-attorney—Power to borrow money for particular purpose in particular manner—Binding nature of debt contracted in different manner.*—It is an inflexible rule in the construction of powers-of-attorney that the special purpose for which the power-of-attorney was given, is first to be regarded, and the most general words, following the declaration of that special purpose will be construed to be merely all such powers as are needed for its effectuation. The owner of a ship constituted the master thereof as his agent and authorized him by means of a power-of-attorney to raise money on the ship's papers for the repair of the ship. The power further authorised the agent "to do and act in the premises as fully and effectually to all intents and purposes as" the owner might or could do if personally present. *Held*, that the master could not raise money by mortgaging the ship. The authority given was not to mortgage the ship, but to pledge the title-deeds. **SAUSONE EZEKIEL JUDAH v. ADDI RAJA QUEEN BIBI, 2 M.H.C. 177.** [Appr., 6 C.L.J. 490; R., 14 B. 455, 5 N.L.R. 146.]

(2)—*Power-of-attorney by 20 persons to borrow for the benefit of the joint estate—Power to borrow for one or more—Construction—General Power to borrow apart from Power.*—A power-of-attorney was executed to S and B by 20 proprietors of a joint estate in the following terms:—"In case necessity arises for raising loans for the purposes of our estate, both the said sarbarakkars or either of them shall borrow from any party by executing a bond on any terms and sign their or his name as the case may be, for our name in the bond; and if need be, pledge the whole or any part of the estate." S executed a bond on behalf of three of the proprietors. *Held*, that S had no right to execute a bond on behalf of any one or more of the proprietors, making him or them responsible for the whole money borrowed, to the exclusion of the rest. In a suit upon a bond which was given professedly under the above power-of-attorney, in the absence of some very clear proof that S had some general authority apart from that which he derived from the power, his authority must be considered as strictly confined to the terms of the power-of-attorney. **BUDH SINGH DUDHURIA v. DENENDRA NATH SANCUL, 11 C.L.R. 323.**

(3)—*Contract Act (IX of 1872), s. 25—Mookhtarnama to pay debts—Bond to secure barred debt.*—(a) Although, under s. 25 of the Contract Act, a contract to pay a barred debt is a good contract, still the contract must be executed by the party himself or by his authorised agent. (b) A power of Mookhtarnama to pay debts, or to secure debts, or otherwise to deal with debts, is *prima facie* a power to deal with existing debts, and it does not authorise the

Power-of-attorney—continued.

agent to revive debts barred by limitation. **HUBLAL SUKUL v. RAMGOTI DEY ROY, 11 C.L.R. 581.**

(4)—*Mookhtarnama—Construction—Power to grant ticca and ijara leases—Right to create permanent tenure—Gift, power of making.*—Where a mookhtarnama gave power to the mookhtar to grant ticca and ijara to any person on or without receipt of zuripeshgi, and when advisable, to sell, mortgage, and make gift of the whole or portion of the right of the principal out of the zemindari estates or houses, and by alienation of certain properties to purchase other properties, *held*, that the power to sell or mortgage would not render a permanent tenure created by the mookhtar valid. *Held*, also, that the power of making gift authorized the agent formally to execute a deed of gift, only when the disposing power had been exercised by the principal and that the agent had no power under the mookhtarnama to exercise the power of disposition by gift according to his will and determination quite irrespective of the concurrence of the principal. **TYEBUNNISSA v. KANIZ FATIMA, 13 C.L.R. 247.** (8 I.A. 39, R.) [R., 6 C.L.J. 490.]

(5)—*Construction of—General principles—Effect of fraud on the part of persons dealing with the agent.*—The principles applicable to the construction of all powers-of-attorney are:—(1) Language, however general in its form, when used in connection with a particular subject-matter, will be presumed to be used in subordination to that matter, and is to be construed and limited accordingly. (2) Powers-of-attorney must be construed strictly, *i.e.*, where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that, on a fair construction of the whole instrument, the authority in question, is to be found within the four corners of the instrument, either in expressed terms or by necessary implication. (3) When one is dealing with an agent, it is his duty to ascertain the extent of the agent's power. Where he knows that there is a power-of-attorney, he is liable for ignorance of its contents. (4) If the act of the agent is by express terms or by necessary implication authorized in the power of attorney, it will bind the principal as against persons dealing with the agent in good faith, notwithstanding that the agent may have acted fraudulently. (5) Where the power is given to an agent to sign promissory-notes or to accept bills for a special purpose, persons dealing with the agent must see that it is done only for that purpose. (6) General powers are not to be construed in such a way as to give a power of borrowing, if that power is not expressly stated. **EBRAHIM MAHOMED PATAIL v. S. R. M. M. ARUNACHELLUM CHETTY, U.B.R. 1902—1903, Vol. II, Power-of-Attorney, 5.**

(6)—*Power-of-attorney—Referring cases to arbitration cannot be implied—Construction of terms of power-of-attorney.*—A zemindar appointed his brother as his general attorney for

Power-of-attorney—continued.

conducting cases in Civil, Criminal and other Courts. He gave him power to buy lands and to file on his behalf receipts, acquittances, *razeenamahs* and other documents, etc. But the general attorney was not given power to refer matters in dispute in suits to arbitration. In a suit in the Revenue Court, he agreed to refer the matter to arbitration, and the award was given against the zemindar who sued for the cancelment of the award. *Held*, that, as the general tenure of the power of the attorney did not warrant the conclusion that the attorney was empowered to refer cases to arbitration, it would be adopting a dangerous rule of construction to hold that, because one extraordinary power was given, it must be inferred that other extraordinary powers were also given, and that, if it be proved that the plaintiff adopted and accepted his brother's act, he would be as much bound by it as if his brother had originally enjoyed full authority to make the reference. **THAKOOR PERSHAD v. KALKA PERSHAD, 6 N.W.P. 210. [R., 14 B. 455.]**

(7)—*Agent—Compromise—Power-of-attorney—Construction of deed—Words giving general powers—Ejusdem generis—Power to compromise not similar to power to refer to arbitration—Agent not signing on behalf of principal—One plaintiff signing for the other though not appointed agent.*—Three brothers, A B and C were plaintiffs in a suit. A and B had given a special power-of-attorney for the case to C, authorizing the latter to engage a legal practitioner or to prosecute the case himself, to present applications to Court and to refer to arbitration. The power-of-attorney then recited the following words:—"gurze ke kull sakhta pardakhta muktharmazhar ko wanzur wa makbul hoga"—"in short everything done by the *mukhtar* will be binding on me."—A compromise in writing was put in; it was signed by A and C but B neither signed the compromise nor appeared in Court to assent to it. C, signed the compromise only for himself and not on behalf of B. A signed to the following effect:—"for myself and as *mukhtar* for the other plaintiff through C *mukhtar*." C was told, on the prosecution of compromise, to produce B on a given date. C appeared on that date and said that B had not come though told to do so, and that C was then acting only for himself:—*Held*, that (1) the compromise did not bind B; (2) the words purporting to express acceptance of all acts done by the *mukhtar* must be interpreted in the light of the powers previously specifically set forth. The power to compromise, like the power to withdraw the suit or confess judgment, was not *ejusdem generis* with the powers specifically set forth in the power-of-attorney. Power to refer to arbitration could not be likened to the power to compromise—(50 P.R. 1898, F.) (3) that C, never acted in the matter of the compromise on behalf of B, and A's signature on behalf of the other plaintiff could not bind B, as A held no power-of-attorney from B. **BISHMA v. MUSSAMMAT RATTANI, 20 P.W.R. 1912.**

Power-of-attorney—continued.

(8)—*General and special power—Civ. Pro. Code, s. 37.*—Where a plaint was presented by a person who held a power-of-attorney from the plaintiff, the power in question is stamped with a one rupee stamp, and after setting out that the principal was 80 years of age and unable to come to Court, it appoints the brother-in-law of the plaintiff, to speak on her behalf and to conduct the case as her representative, *held* (1) that the power in question is sufficiently general in its terms to cover the requirements of s. 37, Civ. Pro. Code, and that the question as to whether the power is general or special cannot be decided solely by the question of stamp duty; (2) that the plaint having been admitted and no objection taken to the representation of plaintiff by her agent the suit should not have been dismissed on this technical ground. **MA TU v. MAUNG PU, 1 L.B.R. 98. (15 W.R. 245, 6 B.H.C. 159, F.)**

(9)—*Agent authorised to "sell, endorse and assign"—Agent's authority.*—The payee of promissory notes of the East India Company, by a power-of-attorney, authorized his agents at Calcutta to "sell, endorse, and assign" the notes. These notes were transferable by endorsement payable to bearer. The agents, in their character of private bankers, borrowed money of the Bank of Bengal, offering, as security, these promissory notes. The Bank made the advance, and the agents endorsed the notes, such endorsement purporting to be as attorney for their Principal, and deposited them with the Bank, by way of collateral security for their personal liability, at the same time authorizing the Bank, in default of payment, to sell the notes in reimbursement of the advances. The agents afterwards became insolvent, and, default having been made in payment, the Bank sold the notes, and realized the amount of their loan. *Held*, that the endorsement of the notes by the agents of the payee to the Bank was within the scope of the authority given to them by the power of attorney, and that the payee could not recover in detinue against the Bank. **THE BANK OF BENGAL v. MACLEOD, 5 M.I. A. 1. See also BANK OF BENGAL THE v. CHRISTOPHER GEORGE FAGAN, 5 M.I.A. 27.**

(10)—*Power-of-attorney—"Purchase, Sell, Endorse, and Transfer."*—A joint and several power authorizing the holders "to purchase, sell, endorse, and transfer for the principal and in his name and on his behalf" all his shares in any public company or Society, would not justify them to enter into a contract embodied in bought and sold notes, agreeing to sell and to purchase sometime hence at an advanced rate on their account, certain shares, the bought and sold notes bearing the same date and being one transaction. **JUMMA DASS v. ECKFORD, 9 C. 1.**

(11)—*Authority under power-of-attorney "to dispose of" property, whether includes power to pledge.*—One S R purported to mortgage the

Power-of-attorney—continued.

property, in question, under a power-of-attorney executed to him which contained the following words:—"I do hereby authorise Mr. S R to dispose of my bungalows in the way he thinks proper." The mortgage was held to be *ultra vires*, so that the mortgagee acquired no interest whatsoever in the property. In the absence of authority, it could not be assumed that the word "dispose of" was used in any technical sense so as to include a power to mortgage and, as a rule, a power-of attorney should be construed strictly. **MALUK CHAND GYANMAL v. SHAN MOGHAN VARDRAJ**, 14 B. 590. [R., 6 C.L.J. 490.]

(12)—*Pledge of Government securities by agent for unauthorised loan—Suit for recovery of securities by Principal from transferee—Government securities—"Negotiation"*—Where a person, who was authorized, jointly and severally with another, under a power-of attorney, to "negotiate, make sale, dispose of, assign and transfer" certain Government securities, pledged them for a certain advance for which he gave a pro-note, signing himself as attorney for the owner, held that the owner was entitled to recover the securities from the transferee, as the transaction was not authorized by the power. [R., 6 C.L.J. 490, U.B.R. 1902—1903, Vol. II, 3rd Quarter, Power-of-Attorney, 5.] Even granting the applicability of "negotiation" to Government securities, a power to "negotiate" them would not authorize an agent to do more than put them in the market and circulate them in the ordinary way or to endorse them, if necessary, in the name of the owner—*Per White, J.* A power to negotiate Government securities would authorize their negotiation by way of pledge. *Per Garth, C.J.* **WATSON v. JONMENJOY COONDOO**, 8 C. 934, on appeal 10 C. 901, P.C. (5 M.I.A. 27, R.) [R., 6 C.L.J. 490, U.B.R. 1902—1903, Vol. II, 3rd Quarter, Power-of-Attorney, 5.]

(13)—*Power-of-attorney, Construction of—"Negotiation" of Government Notes—Power of attorney—Disjunctive construction of words.*—Where a power-of-attorney authorized an agent to negotiate, sell, dispose of, assign and transfer certain Government notes deposited with him for safe custody, and to contract for and purchase or accept the transfer of fresh Government notes on the principal's behalf, and for such purposes to sign for the principal in such transactions, held, with respect to the general objects of the power, that the agent had no authority to pledge by indorsing one of the notes and borrowing money thereon for himself and in fraud of his principal, and that the lender of the money acquired no title to the note as against the principal. If a power to endorse had been expressly given, as in 5 M.I.A. 1 and 5 M.I.A. 27, it would perhaps have been in the power of the donee, at his discretion, to indorse the note, converting it into one payable to bearer for any purpose. 5 M.I.A. 1 and 5 M.I.A. 27 have not decided that the words in power-of-attorney are always to be construed disjunctively, though they

Power-of-attorney—continued.

may be so construed. A rule of construction, intended to aid in arriving at the meaning of the parties, may as well be applied in the construction of a power as in that of any other document. **JONMENJOY COONDOO v. GEORGE ALDER WATSON**, 10 C. 901, P.C. = 11 I.A. 94 = 4 Sar. 523. On appeal from, 3 C. 934. [R., U.B.R. 1902—1903, Vol. II, Power-of-attorney 5, 6 C.L.J. 490.]

(14)—*S. 5, Act I of 1879 (Stamp Act)—Power of attorney executed in England—Stamp.*—It is not necessary for a Court in India to see whether a power of attorney, which has operation in this country, complies with the fiscal requirements of another country. If a power of attorney executed in England and intended to operate in British India be properly stamped according to the law in force in British India, the Courts in India need not inquire whether the same has been properly stamped according to the law of England. Even if a power of attorney had been intended to operate partly in British India and partly in England, the fact of its not being stamped in accordance with the English Law would not have rendered it invalid, in so far as it was intended to operate in British India, if the requirements of the Indian Law had been complied with. *In the goods of* **MCADAM**, 23 C. 187. (8 B.H.C. 169, F.)

(15)—*Stamp Act—Power of attorney.*—A document executed by a number of mirasdars of a village, authorizing the person in whose favour it is executed to recover for them Swatantrams and other continual income appertaining to their rights, is a power-of-attorney and must be stamped with a five rupees stamp. REFERENCE UNDER STAMP ACT, S. 46, 15 M. 386 F.B.

(16)—*Option of holder to refuse to appear in suit against principal.*—The holder of a power-of-attorney authorising him to appear and defend suits on behalf of his principal may refuse to appear in a suit against his principal and may or may not act upon the power. **LUCHMEE CHUND v. THE BENGAL COAL COMPANY, LIMITED**, 8 C. 317. [R., 26 C. 944.]

(17)—*Power-of-attorney to receive money becoming due—Assignment.*—A document authorizing a person to receive on behalf of another such sums as should become due in the course of execution of a contract for work is a power-of-attorney, and not an assignment. **BHAGVANDAS KISHORDAS v. ABDUL HUSEIN MAHOMED ALI**, 3 B. 49.

(18)—*Principal and agent—Power of attorney from Bank—Private capacity—Rights of parties.*—Where a Bank Manager purports to act under a power of attorney intended to be given to him in his private capacity, but addressed to him as "Acting Manager of the National Bank," by R, a constituent of the Bank, he cannot divest himself of his character of Bank Manager. Held also that, acting in the transaction as agent for both parties, the Manager acted with wilful unfairness between them to the prejudice

Power-of-attorney—continued.

of R and to the advantage of the Bank, and that there was in fact a breach of his duty to R to which the Bank was a party. **F. BEER v. THE NATIONAL BANK OF INDIA, 19 W.R. 67.**

(19)—*Power-of-attorney—Power given to creditor to collect moneys due and appropriate same towards his debts—Election by creditor to proceed to execute his decree debt—Right of such creditor to act under power-of-attorney.*—A debtor executed a power-of-attorney in favour of his creditor authorising him to collect the moneys due to the debtor and appropriate the same towards the debts due. The power-of-attorney was not revocable except under certain circumstances. The debtor having revoked the power for reasons not mentioned therein, the creditor sued for a declaration that he was entitled to make the collections. The suit having failed, the plaintiff appealed. But, before filing the appeal, the plaintiff chose to execute a decree included in the power-of-attorney. *Held* that the plaintiff having elected to abandon his rights under the power of attorney and having taken out execution proceedings under his decree, he was disentitled to any relief on appeal in a suit based upon the power-of-attorney. *Obiter.*—The suit was barred by the proviso to s. 42 of the Specific Relief Act on the ground that the plaintiff ought to have claimed, in addition to the declaration which he asked for, payment to him by his debtor's creditor of moneys in the hands of the latter and payable to the debtor. **JUGRATH SINGH v. MIR GULAM HUSSAIN, 10 M.L.J. 125.**

(20)—*Mortgage—Benamidar—Assignment of mortgage—Representatives of deceased mortgagee—Letters of administration, if obligatory in the case of Hindus—Power-of-attorney by executrix—Power of executrix to perform discretionary duties through attorneys—Is "mortgage" a thing?—No distinction between a power by statute and power by will—Requisite in India of delegation of agency—Execution of deeds by attorney under principal's approval—Verbal authority—Ut res majis valeat quam pareat—Sufficient release.*—The widow of a Hindu sufficiently represents her deceased husband when there is no other person, short of obtaining letters of administration to his estate, who can be said to represent his estate. It is not obligatory on a Hindu heir to obtain letters of administration to the estate of the last owner. A power-of-attorney contained, amongst others, the power to sell and convert into money "the goods, effects and things belonging to" the principal; *held*, that the word "things" in the power included mortgages as being things in action, there being nothing in the deed which suggested that the things were to be limited to "choses-in-possession" and not to "choses-in-action;" *held*,—further that the mortgages were capable of being transferred by the attorney. An executrix is not competent to exercise the power of sale given by statute or will, by an attorney; there is no distinction between a power given by statute and a power given by

Power-of-attorney—continued.

a will. A power-of-attorney, in so far as it delegates to an attorney power to exercise the discretion vested in an executrix, is void. But where the executrix granting the power was actually present when certain deeds or transfer were executed, and her attorney had consulted her in all the dealings and she approved of the same, and thereafter, the attorney executed the documents under her approval, and where the documents executed did not express whether they were executed under a power given in writing or under verbal instructions, *held*, that the case fell within the legal maxim of *ut res majis valeat quam pareat* and that it must be taken that the attorney executed the document under the express verbal authority given to him by the executrix principal. **JOGENDRA CHUNDER DUTT v. APURNA DASSI, 13 C.W. N. 1190=3 Ind. Cas. 859.**

(21)—*Execution of document by attorney—Power of attorney to several persons—Name of principal signed by one attorney—Document attested by the other attorneys.*—A executed a power of attorney by which, for the purpose of paying of certain debts payable by him, he authorised B, C and D "to borrow money to the extent of the amount which is payable by me, to sign for me, to execute a document on my behalf, to hypothecate my property and to get the document registered." Subsequently a mortgage bond was executed which was signed by B on behalf of A and attested by C and D amongst others. The bond was executed and registered with the consent of B, C and D. *Held*, that it was not necessary that the three agents should have signed the name of A. *Held*, further, that, although, when an authority is given to two or more persons jointly, all the agents must concur in the execution of it in order to bind the principal in the absence of a provision that some alone shall form a quorum, yet, in the case of an authority given in the terms in which the authority was framed in this case, if all the agents concurred in the execution of it, one of the agents with the consent of the others writing the name of the principal and the others attesting the execution, the requirements of law were satisfied, it being impossible for the co-agents to sign the name of the principal jointly. **NAND DULAREY LAL v. CHAND BEHARI LAL, 6 A.L. J. 462=2 Ind. Cas. 805.**

(22)—*Stamp Act (II of 1889), s. 2 (21), s. 60, sch. I, art. 48 (g)—Power-of-attorney—Duty chargeable thereon—Document authorising holder to appear and do all acts necessary for execution of decree.*—A document authorising the holder, who is not a certificated *mukhtar* or pleader, to appear and do all acts necessary for the execution of a decree transferred from the Punjab to Cawnpore for execution, is a power-of-attorney within the meaning of s. 2 (21) of the Stamp Act, and chargeable as such with the duty of one rupee as provided by art. 48 (g), of sch. I. *Vakalatnamas and Mukhtar-namas*, as provided for in art. 10 of sch. II to

Power-of-attorney—continued.

the Court Fees Act, are excluded from the definition of the expression 'power-of-attorney.' **PARMANAND v. SAT PRASAD**, 8 A.L.J. 378, F.B.

(23)—*Power of attorney—Authority—Agreement to give reward to vakil in case of success—Public policy.*—Where a woman gave a power of attorney on behalf of her minor son to a certain person in order to enable him to represent the party to the suit in all judicial proceedings to the same extent as the party himself, if present, might be permitted or called upon to do, *held* that such power did not authorize the attorney to enter into a special agreement with a vakil to pay a minimum reward of Rs. 4,000, and, in case of success, a reward proportional to the amount awarded. *Quære*:—Whether such an agreement with the vakil is not opposed to public policy and so illegal? **RAV SAHEB V. N. MANDLIK v. KAMALJABAI**, 10 B.H.C. 26.

(24)—*Extent of authority of advocates under.*—It may be doubted whether in the absence of special authority, an advocate is entitled to admit the claim of the opposite party, and in any case an advocate incurs grave responsibility if, without fully explaining to his clients the course which he proposes to adopt and getting their explicit sanction to its adoption, he abandons their case entirely and consents to a decree for the full claim of the opposite party. (27 C. 433, R.) It is not the practice of this Court and should not be the practice of any subordinate Court to allow advocates to expect cases to be adjourned as a matter of course merely because they are unable to attend being engaged elsewhere. It is ordinarily the duty of an advocate to be present or to make suitable arrangements for the conduct of the case. **MAUNG LAT v. MAUNG TOK**, U.B.R. 1897—1901, Vol. II, 527.

(25)—*Advocate.*—It is a recognized practice, and is not contrary to law, for an advocate who is prevented by sufficient cause, such as sickness or engagement in another Court, from appearing and conducting a case, to transfer his brief orally to another advocate. *In the matter of an application by N. N. GOSH*, U.B.R. 1902—1903, Vol. II, **Power-of-attorney**, 1. (9 A. 613, 20 B. 293, 22 B. 654, U.B.R. 1897—1901, Vol. II, 527, R.)

(25-a)—*Power-of-attorney—Construction to be strict—Power to transfer decree—Necessity of existence of language to support such power.*—Where, in a power-of-attorney, there was a clause relating to the realisation of the decrees in these terms, *viz.*—"To execute all decrees in the name of my father or in any other name on my behalf or otherwise to attach and realise all moneys due thereon." *Held*, that the clause did not authorise transfer of decrees. A power-of-attorney has to be construed strictly. It is necessary to find any power contended for within the four corners of the instrument. **S.T.P.L. PALANIAPPA CHETTIAR v. T.R.M.A.R.R. M. ARUNACHALAM CHET-**

Power-of-attorney—continued.

TIAR, 12 M.L.T. 528=23 M.L.J. 595=M.W. N. 1912, 1204=17 Ind. Cas. 139. (1893, A.C. 170, R.)

(26)—*Power of attorney—What is a general or special—Legal nature of a document—Not dependent on stamp duty paid.*—The legal nature of a document must be determined by its contents, and not by the value of the stamp duty paid on it. A person who is authorised to execute all deeds, sign all contracts, etc., is a general agent. When a power of attorney authorises a person to do all things and take all steps which may be necessary to complete the execution of a decree, it must be regarded as a general power of attorney. **VENKATARAMANA IYER v. N. G. NARASINGA ROW**, M.W.N. 1913, 72=13 M.L.T. 114=24 M.L.J. 180.

(27)—*Power of attorney—Am-muktearnamah—Pardanashin lady—Authority to husband—Power to execute deed of sale, whether includes power to execute agreement for sale—Specific Relief Act (I of 1877), ss. 22, 27, cl. (c)—Transferee without notice—Notice to some of transferees, members of joint Mitakshara family, whether good—Specific relief, grant of—Discretion of Court.*—A power given to an attorney to execute deeds of sale, does not authorize him to enter into an agreement for sale. A notice to some of the transferees who are members of a joint *Mitakshara* family, in the absence of anything to show that those to whom the notice was given were entitled to represent the others, is not sufficient notice within cl. (c) of s. 27 of the Specific Relief Act. A contract for sale of land was made with a pardanashin Mahomedan lady through her husband who was her attorney. The purchase-money, although not insufficient, was considerably less than what was paid by a subsequent purchaser. The authority of the husband to bind the lady was not proved. The variation of the time at which the contract was to be performed was not shown to have been assented to by the lady herself. *Held*, that the Court may properly refuse to enforce the contract for sale. **JANKI PERSHAD SINGH v. YAHIA HOSSAIN**, 13 Ind. Cas. 637=16 C.L.J. 119.

(28)—*Persons residing within jurisdiction—Appearance by agent—Power of attorney.*—The proviso added to s. 17 of Act VIII of 1859 being in general terms, applies as well to persons living within as to persons living outside jurisdiction. A person living within jurisdiction may, therefore, appear by an agent generally appointed to appear for him not being a pleader or a party to the same suit. **DEVEE CHAND v. G. PLOWDEN**, 26 P.R. 1867.

(29)—*Mukhtarnama—Vakalatnama—Mukhtar and Mukhtarnama defined—Court Fees Act, art. 10 of sch. II—Stamp Act (II of 1889), s. 60 and art. 43 of sch. I—Case defined—Construction of statutes.*—*Held*, that a power-of-attorney (*Mukhtarnama*) empowering a person who is neither a vakil nor a certificated *Mukhtar* of a Court to represent another in a Civil

Power-of-attorney—continued.

Court, not being a Presidency Small Cause Court, is governed by art. 10 of sch. II to the Court Fees Act and not by art. 48 of the 1st sch. to the Stamp Act, II of 1899 (33 A. 487, *Diss.*) *Obiter*:—*Held*, also that:—1. A *Mukhtar* is an attorney, whether appointed specially or generally, or certificated as a Legal Practitioner, and *Mukhtarnama* is a document which empowers him to act for the person by, or on whose behalf the document is executed. 2. The use of the word 'case' in the Court Fees Act is confined to judicial cases or *quasi judicial cases* as opposed to transactions. 3. The first and most elementary rule of construction of a statute is that it is to be assumed that the words or phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not. *GANPAT V. PREM SINGH*, 108 P.W.R. 1912=202 P.L.R. 1912=15 Ind. Cas. 122.

This circular declares that the general power of attorney is to be produced on each occasion of various persons acting under it. *Rev. Cir. No. 7, 25 W.R. Rev. Cir. 9.*

Offer to be bound by opposite party's oath, persons entitled to make—Power-of-attorney empowering agent to act in suit, whether authorises agents to make offer—*See ACT X OF 1873, s. 9, 14 B. 455.*

Grant of—to exercise right of *Shrotriendar* under Rent Recovery Act—Power coupled with interest irrevocable—Acceptance by tenants of *pattas* tendered by *Shrotriendar* with knowledge of grantee's right—Subsequent tender of *pattas* by grantee—Refusal thereof by tenants—Suit by grantee to enforce acceptance of *pattas*—Maintainability of—*See MAD. ACT VIII OF 1865, 28 M. 301=16 M.L.J. 143.*

Dismissal of appeal presented by agent under unstamped power of attorney—*See APPEAL—DISMISSAL OF APPEAL, 15 C.P.L.R. 65.*

See BUDDHIST LAW—ALIENATION, L. B. R. 1893—1900, 37.

Construction of—*See CIV. PRO. CODE, 1908, O. XXX, r. 10, 10 Ind. Cas. 895.*

Construction of—*See DEED—CONSTRUCTION OF DEEDS, 6 C.L.J. 490.*

See EVIDENCE—MISCELLANEOUS, 5 W.R. P.C. 61=1 M.I.A. 494.

See EVIDENCE ACT, 1872, ss. 3, 57, 14 C. 176.

By executors, proof of, by means of declaration of attesting witnesses before notary public—*See EVIDENCE ACT, 1872, s. 85, 21 M. 492.*

See EVIDENCE ACT, 1872, s. 85, 16 C. 776.

Executed before and authenticated by a Notary—Court may call for further evidence to prove execution and authentication—*See EVIDENCE ACT, 1872, ss. 85 and 114, 9 C.W. N. 986=33 C. 625.*

No—is necessary to institute suit on behalf of the Secretary of State for India—*See GOVERNMENT, 160 P.L.R. 1905=84 P.R. 905.*

Power-of-attorney—continued.

Vakalatnamah—Power to receive documents—General and special power—*See LEGAL PRACTITIONERS—PLEADER—GENERAL, 3 C.L.R. 13.*

Effect of general power—*See PARDANASHIN WOMAN, 3 Ind. Cas. 330=12 C.L.J. 115.*

See PARDHANASHIN WOMAN, A.W.N. 1883, 24.

See PARTNERSHIP—RIGHTS AND LIABILITIES OF PARTNERS, 62 P.R. 1873.

Verification of plaint by person holding general—*See PLAINT—VERIFICATION AND SIGNATURE, 4 B. 468.*

Nazul land, in Oudh, suit for possession of—Burden of proof—Lord Canning's proclamation of 15th March 1858, effect of—Signed by Deputy Collector for Deputy Commissioner, presumption as to—*See POSSESSION—SUITS FOR POSSESSION, 7 O.C. 65.*

Declaration as to execution of power of attorney, before the Chief Magistrate, Glasgow—Certificate by Notary Public—*See PRACTICE AND PROCEDURE, 22 C. 491.*

See PRINCIPAL AND AGENT—GENERAL, 1 O.C. 159.

See PRINCIPAL AND AGENT—AUTHORITY OF AGENT, 10 B. 18.

Construction of—Act done under it challenged as in excess of authority conferred by power—Proof—*See PRINCIPAL AND AGENT—MISCELLANEOUS, 6 C.L.J. 639.*

See PRINCIPAL AND AGENT—MISCELLANEOUS, A.W.N. 1882, 39.

See REGISTRATION ACT, 1908, ss. 17, 19, 3 B. 312.

To recover rents and profits of immoveable property, whether created a charge on it—not stamped with stamp required for document creating equitable charge—Non-compliance with provisions of Registration Act—Immoveable property not affected—*See REGISTRATION ACT, 1908, ss. 17, 21, 49, 7 C.L.J. 149=12 C.W.N. 316=35 C. 845.*

Registration of—Necessity of, to give validity to registration—*See REGISTRATION ACT, 1908, ss. 32, 33, 87, A.W.N. 1906, 195=3 A.L.J. 743.*

Not executed before Sub-Registrar—Authentication—Validity of presentation of document by the attorney—*See REGISTRATION ACT, 1908, s. 33, 7 A.L.J. 157=32 A. 179=5 Ind. Cas. 766.*

Registration—Presentation of document by agent under defective—Validity of registration—*See REGISTRATION ACT, 1908, ss. 33, 49, 60, 87, 4 A. 384.*

Execution of single power of attorney by several persons—No common interest—Validity—*See STAMP ACT, 1879, s. 7, 2 M.L.J. 178, F.B.*

Power-of-attorney—concluded.

See STAMP ACT, 1879, sch. I, art. 50, cl. (b), 9 M. 358.

In favour of person not a certificated mukhtar or pleader—Stamp—See STAMP ACT, 1899, s. 2 (21), sch. I, art. 489, 9 Ind. Cas. 617.

Stamp duty applicable to—See STAMP ACT, 1899, sch. I, art. 48 (d), 3 Bom. L.R. 697, 890.

Power of Court.

(1)—*Judge's power to control his Court premises—Power to exclude a general body of persons from Court.*—A Judge has a right to control his Court premises in any manner which is most convenient to the public and the persons working there, but he cannot pass any general order excluding as a general body from his Court, any portion of the community behaving in an orderly manner. *In the matter of the petition of KHODA BUX KHAN*, 15 C. 638.

(2)—*Judge's opinion—New enactment—Practice.*—Notwithstanding the fact that in the opinion of the Judge, the sudden operation of a new enactment, e.g., the Limitation Act IX of 1871, would work hard in any particular case, he must still give effect only to the law as he finds it. *JIBHAI MAHIPATI v. PARBHU BABU*, 1 B. 59. [R., 3 B. 193, 16 B. 91.]

(3)—*Power to extend time—Umpire—Arbitration.*—A Court has power to extend the period within which an umpire may give in his decision, just as it may in the case of an arbitrator. *KUPU v. VENKATRAMAYYAR*, 4 M. 311.

(4)—*Inherent jurisdiction of Court.*—The Court has inherent jurisdiction to correct an abuse of its process. *In the matter of the petition of POONA KOOER*, 1 C. 101=24 W.R. 306. [R., 2 C.L.J. 306.]

To take into consideration facts subsequent to commencement of partition suit as death of a party to suit, etc.—See HINDU LAW—PARTITION, 16 M. 350=3 M.L.J. 137.

Local investigation, parties unwilling to have—Power of Court to direct it—See LOCAL INVESTIGATION, 12 C. 45.

Suit for exclusive possession—Power of Court to grant decree for joint possession—Circumstances under which such power will or will not be exercised—See PRACTICE AND PROCEDURE, A.W.N. 1893, 196.

Power of Sale.

See MORTGAGE—SALE OF MORTGAGED PROPERTY.

Instalment bond hypothecating land as security—given to creditor on default of payment—Suit to recover debt by sale of hypotheca—Limitation Act, art. 147—Personal remedy against mortgagor—See LIMITATION ACT, 1908, art. 147, 14 B. 377.

See MORTGAGE—CONSTRUCTION OF MORTGAGE DEEDS, 16 B. 303, 17 B. 425.

Express words unnecessary to confer power—See TRANSFER OF PROPERTY ACT, 1882, ss. 58 (b), 100, 13 A. 28=A.W.N. 1890, 216.

Powers, Trustees' and Mortgagees' Act.

See ACT XXVIII OF 1866.

Practice and Procedure.

See APPEAL—PRACTICE AND PROCEDURE.

See APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL.

See BELCHAMBERS RULES AND ORDERS.

See CIV. PRO. CODE, 1908, Or. VI and XI.

See FRAUD—PLEADINGS AS TO FRAUD.

See INSPECTION OF DOCUMENTS.

See INTERROGATORIES.

See PLAINT.

See PLEADINGS.

See PRIVY COUNCIL, PRACTICE OF.

See REVIEW—PRACTICE AND PROCEDURE.

See SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL

See VARIANCE BETWEEN PLEADINGS AND PROOF.

See WRITTEN STATEMENT.

(1)—*Act X of 1877 (Civ. Pro. Code, s. 3.*—The word "procedure" in the Civ. Pro. Code of 1877, s. 3, has not the same meanings as "proceedings" in s. 6 of Act I of 1868. "Procedure" implies the machinery by which proceedings are conducted; and this, after decree, is provided by the New Code, although the proceedings may have been instituted under the Old Code. *Per Garth, C.J. RUNJIT SINGH v. MEHERBAN KOER*, 3 C. 662=2 C.L.R. 391, F.B. [R., 4 C. 825=3 C.L.R. 593.]

(2)—*Rules of procedure, how far to be followed.*—Rules of procedure are applicable to all ordinary legal means, and in such application cannot be modified by equitable considerations; this results from there being rules of public law. They, by no means, however, exclude those extraordinary legal means which are the offspring of the principle that fraud cannot be permitted to prevail. *KRISHNAJI KESAVA PUNDIT v. SUBBAROYA TAKKER*, 7 M.H.C. 387. [R., 4 B. 594.]

(3)—*Provisions of law clear—Competency of Court to enter into questions of natural justice.*—When the provisions of law are clear, it is not competent to Courts of justice to enter into questions of "natural justice," and, having regard to the economy and social conditions of the country, the provision that the Government should be the sole Judge of what is likely to prove useful to the public is both expedient and reasonable. *EZRA v. THE SECRETARY OF STATE*, 30 C. 36=7 C.W.N. 249. [Affirmed, 32 C. 605, P.C.=9 C.W.N. 454=1 C.L.J. 227=2 A.L.J. 771=7 Bom. L.R. 422.]

(4)—*Equitable consideration no guide.*—For the application of equitable considerations, there is, as a rule, no room in matters of procedure. *DEBI DAYAL SAHOO v. BHAN PERTAP SINGH*, 31 C. 433=8 C.W.N. 408.

Practice and Procedure—continued.

(5)—*Absence of statutory law — Burmese Courts—Practice.*—The Burmese Courts are directed, in the absence of any statutory law applicable to the case, to follow the guidance of justice, equity and good conscience. **KADIR MOIDIN v. NEPEAN**, 26 C. 1, P.C. = 2 C W.N. 665 = 25 I.A. 241 = 7 Sar. 394.

(6)—*Adverse order—Notice to show cause—Practice.*—No order affecting a party should be passed without calling upon him to show cause why it should not be passed. **SIRAJ-UL-HAQ v. KHADIM HUSSAIN**, 5 A. 380 = A.W.N. 1883, 60.

(7)—*Order to a man's prejudice not to be made without giving him an opportunity of being heard.*—It is an elementary principle which is binding on all persons who exercise judicial or quasi-judicial powers, that an order should not be made against a man's interest without there being given to him an opportunity of being heard. **MAHARAJ KUMAR v. MOHUNT GANESH DAS**, 8 Bom. L.R. 719 = 10 C.W.N. 969 = 4 C.L.J. 177 = 33 C. 1178 = 16 M.L.J. 365 = 3 A.L.J. 698 = 33 I.A. 134, P.C.

(8)—*Practice — Omission to hear parties in support of, or against an application.*—Held, that, where the 1st Court passes an order accepting or rejecting an application made by a party, without calling upon the parties to urge what they have to say for or against it, the appellate Court should set aside that order and remand the case for fresh decision after hearing the objection and evidence of both parties. **NARPAT RAI v. DEVI DAS**, 17 P.W. R. 1912 = 14 Ind. Cas 379.

(9)—*Judgment — Court of first instance—Appeal Court.*—It is much to be desired that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinion on all the important points. This applies at least as forcibly to the Court of first instance as to the Court of appeal. **WASANTRAO v. ANANDRAO**, 6 Bom. L.R. 925.

(10)—*Difficulty in carrying out decree — Decree to be passed all the same.*—A Court should not be deterred from making a necessary decree from the difficulties to be expected in carrying it out. **PURAPPAVANALINGAM CHETTI v. NALLASIVAN CHETTI**, 1 M.H.C. 415. [R., 29 M. 1; D., 32 M. 167 = 19 M.L.J. 59 = 2 Ind. Cas. 341 = 4 M.L.T. 486.]

(11)—*Ben. Reg. XXVI of 1814, s. 10 — Declaration in decree—Points not recorded by the Court.*—It is beyond the power of the Court to make a declaration in a decree, upon a point not recorded in the issues, as required by Ben. Reg. XXVI, s. 10, of 1814. **RANEE COWULBAS KOONWUR v. BABOO LOLL BAHADOOR SINGH**, 9 M.I.A. 39 = 1 Sar. 831.

(12)—*Practice—Judge's reasons to be recorded.*—A High Court should record the grounds of its decision in a case which is appealed to the Privy Council. The Letters Patent of 1862, creating the High Court of Judicature of Madras (s. 42), provide that the reasons given

Practice and Procedure—continued.

by the Judges of their decision should, on appeal to England, be transmitted with the record for the information at the hearing by the Judicial Committee of the Privy Council, which direction it is the bounden duty of the Judges to comply with. **KACHEKALYANA RUNGAPPA KALAKKA TOLA UDIAR v. KACHIVIGA JAYA RUNGAPPA KALAKKA TOLA UDIAR**, 2 B.L.R. P.C. 72 = 12 M.I.A. 495 = 11 W.R. P.C. 33 = 2 Suther 206 = 2 Sar. 461.

(13)—*Trial of case—Evidence — Reason for belief—Omission to give reason for not believing evidence.*—Where the lower appellate Court was directed by the High Court to try a particular point, viz., whether the plaintiff had proved actual possession within twelve years of suit, and the Court, in dealing with the evidence, observed that it would not rely on private documents and on the witnesses, as "they were not of much importance and were easily proved," and rejected survey papers coming from proper custody, as being papers easy to alter and therefore not reliable, the High Court, in remanding the case, held that this was a most improper mode of treating the evidence. If the Court disbelieved particular witnesses or refused to receive certain documents, it should have given its reasons for the refusal with reference to these documents in particular or for its disbelief of the particular witnesses, and not with reference to documents or witnesses in general. **CHANDRA MADHAB ROY v. KHEMAMANI DAS**, 1 B.L.R.S.N. 19.

(14)—*Variation of orders—Court—Orders—Orders can be varied before they are finally signed.*—The Court has jurisdiction over its own orders and it is its own duty to see that they are properly drawn up and if any manifest error is brought to its notice before the order is formally drawn up, then it not only can but must correct it, instead of putting the parties to the fresh expense and trouble of applying for a review. It is only after an order has been formally drawn up and signed that the jurisdiction of the Court to correct the error *suo motu* without a formal application by way of petition for review ceases. **IRAPPA v. BHIMAPPA**, 4 Bom. L.R. 909.

(15)—*Judgment based on an erroneous assumption—Court's power to re-open it—Government—Grant of revenue of a village—Grantee can bring under cultivation—Uncultivated or unassessed land and profit by it.*—Where a judgment is based upon an assumption or hypothesis which is ascertained to be erroneous, the Court can disregard it and re-open that portion of the case affected by the error. **BALWANT R. NATU v. SECRETARY OF STATE**, 10 Bom. L.R. 531 = 32 B. 432.

(16)—*Order made under mistake or misapprehension—Proper course for the party affected by such order.*—In a case in which the order is made under a mistake or misapprehension, it must be taken that, on a proper representation being made to their Lordships of the Privy Council, they will make the necessary alteration

Practice and Procedure—continued.

or modification in their order which the justice of the case would seem to require. **PREMLALL MULLICK v. SUMBHOONATH ROY, 22 C. 960.**

(17)—*Errors due to oversight—Court which passed the decree should be made aware of the errors—Pleadings.*—It is at all times open to pleaders, and it is their duty to bring to the notice of the Court at the time any error that may be attributable to oversight instead of taking the case to an appeal for its correction. **VENKATRAO v. MANJUNATH, 5 Bom. L.R. 673.**

(18)—*Mutual mistake—Suit for rectification barred—Defence allowable.*—Even when a suit for rectification of an instrument on the ground of mutual mistake would be barred by limitation, the defence of the same party based on such ground would be allowable. **MAHENDRA NATH MUKERJEE v. JOGENDRA NATH CHOWDHURY, 2 C.W.N. 260.** [*F*, 30 B. 395 = 8 Bom. L.R. 296.]

(19)—*Mistake in drawing up decree—Wrong judgment and decree—Remedy.*—Where it was alleged for the appellant before the Privy Council that the Judges of the three Courts below were mistaken in saying that a certain bond had not been set up by him in a previous litigation, whereas in fact it had been so set up, and that the decree was wrong in not dealing with it, it was held by the Judicial Committee that the decree might have been corrected if not in accordance with the judgment, or appealed against when both judgment and decree were wrong; and that their Lordships could not go behind such decree, where neither of these courses had been adopted. **SRI GOPAL v. PIRTHI SINGH, 24 A. 429, P.C. = 6 C.W.N. 889 = 4 Bom. L.R. 827 = 29 I.A. 118 = 8 Sar. 293.**

(20)—*Inoperative order—Duty of Court.*—To proceed, so far as the practice of his Court will allow him, to recall and cancel an invalid order is not simply permitted to, but is the duty of a Judge, who should always be vigilant not to allow the Act of the Court itself to do wrong to the suitor. It would be a serious injury to the suitor himself to suffer him to execute an inoperative order. **SYUD TUFFAZAL HOSSEIN KHAN v. RAGHUNATH PRASAD, 7 B.L.R. 186, P.C. = 14 M.L.A. 40 = 2 Suther 434 = 2 Sar. 656 = R and J.'s No. 10 (Oudh).** [*R.*, Rat. Un. Cr. C. 137, 28 A. 671 = 3 A.L.J. 459 = A.W.N. 1906, 183. 36 C. 193 = 5 C.L.J. 611; *D.*, 29 M. 126 = 16 M.L.J. 79 = 1 M.L.T. 31, 34 C. 677 = 6 C.L.J. 84 = 11 C.W.N. 803.]

(21)—*Practice—Amendment of order—Inherent power of Courts in India—S. 152, Civ. Pro. Code (1908)—Attachment—Wrongful seizure—Withdrawal by direction of law—Sheriff's right to poundage.* The Courts in India have the same inherent power, as the Courts in England, to amend or vary a perfected order, when they find that the judgment as drawn up does not correctly state, what the Court actually decided and intended, even if the matter does not fall within s. 152, Civ.

Practice and Procedure—continued.

Pro. Code (1908) (corresponding to O. XXVIII, r. II, English Supreme Court Rules). Where there was no levy but only a seizure, and where the seizure was wrongful and with drawn by direction of law, the sheriff receives no poundage. **BRIJARATAN v. JAYANARAIN, 37 C. 649 = 7 Ind. Cas. 876.**

(22)—*Abuse of process—Inherent Jurisdiction of Court.*—The Court has inherent jurisdiction to correct an abuse of its process.—*In the matter of the Petition of POONA KOOER, 1 C. 101 = 24 W.R. 376.* [*R.*, 2 C.L.J. 306.]

(23)—*Delay, how far a bar to legal remedy.*—Mere delay is no bar to a legal remedy unless it amounts to a waiver or abandonment of the right sought to be enforced or to acquiescence of the act complained of. **KAZI MAHAMAD v. NAROTAM, 9 Bom. L.R. 1117.**

(24)—*Proceedings on Sunday, whether void—Lord's Day Act—Application to India.*—A Munsif went on an inspection on Sunday. While there the parties entered into a compromise which was recorded by him and a decree passed on the spot. Held, that the proceedings of the Munsif were not vitiated by the fact that they were taken on a Sunday. Lord's Day Act does not apply to India. **SHEORAM TIWARI v. THAKUR PRASAD, 5 A.L.J. 106 = A.W.N. 1908, 43 = 3 M.L.T. 211 = 30 A. 136.** (7 M.H.C. 285, *R.*)

(25)—*Procedure—Special Procedure—Legislature.*—Where a special procedure is provided for extraordinary extrajudicial methods of settling dispute claims, *semble*, that it was the intention of the legislature that that procedure and no other was to be followed. **RUKHANBAI v. ADAMJI SHAIK RAJBHAN, 10 Bom. L.R. 366 = 33 B. 69.**

(26)—*Right to begin—Defendants supporting plaintiff must begin before defendants opposing him—Plaintiff, meaning of—Civ. Pro. Code, (Act XIV of 1882), ss. 26, 179, 180—Judicature Act, 1873, s. 130.*—If some of the defendants in a suit support wholly or partly the plaintiff's case, they must address the Court and call their evidence before the defendants, really opposed to the plaintiff's case, commence their case. The word "plaintiff" means every person asking relief against another person. **Haji Bibi v. H. H. Sir Sultan Mahomed Shah, 10 Bom. L.R. 327 = 32 C. 599.**

(27)—*Summons—Non-service of the summons—Practice and Procedure.*—Where a party to a suit is not to blame for the non-service of the summons on his witnesses the Court is not justified in refusing to issue fresh summons. **MUDGALLACHARYA v. RADHABAI, 1 Bom. L.R. 859.**

(28)—*Summons, service of.*—The service of summons on a person through the Presidency Small Cause Court of Bombay, was held not proper where no signature or mark of his was affixed on the original copy of the summons, on the ground he could not write. **MAJI v. AMBI, 8 Bom. L.R. 584.**

Practice and Procedure—continued.

(29)—*Act VIII of 1859, ss. 41, 97, 272, 327—Act XI of 1865, s. 32—Confession of judgment—Discretion of Judge.*—Where a defendant voluntarily appears in Court, the necessity for serving a summons is dispensed with; and where he further admits the claim, the plaintiff is entitled to a decree as of the date of such appearance and confession. The Court has no other course than at once to give judgment for the plaintiff, provided it is satisfied of the identity of the defendant or that the Advocate who appears for him is duly instructed. No question of fraudulent preference can then be gone into (*Per Markby, J.*). Where, on the presentation of the plaint, the defendant appears and confesses judgment, the Judge is not obliged to hear the defendant at that time, but is at liberty to fix a date for hearing, and to refuse to hear him until that date arrives; every Judge having a discretion, where an agreement has been come to or judgment confessed, to decide the suit at once according to such agreement or confession (*Per Jackson, J.*). **BANK OF BENGAL v. CURRIE & CO., 3 B.L.R. A.C. 396 = 12 W.R. 432.**

(30)—*Notice to respondents — Duty of appellant—Re-issue of notices, when to be ordered.*—It is the duty of an appellant to watch the progress of the service of notices on the respondents and to supply all needful information to the serving officer to complete it. In the present case, no sufficient grounds appeared to require the Court to assent to the re-issue of notices on the respondents. Before such notices can be re-issued, an application must have been made, with that view, detailing the ground on which the application has been made. **RAM LOCHUN SIRCAR SURBURKAR v. PRITHEE RAM CHOWDHRY, 2 W.R. Mis. 37.**

(31)—*Practice—Order under s. 88, Transfer of Property Act.*—In cases under s. 88, Transfer of Property Act, the Court should be careful to draw up the order strictly in accordance with the law. **WAJAHAN alias ALIJAN v. BISHWANANTH PERSHAD, 18 C. 462.**

(32)—*Court of law—Obstacles to creditors getting payments—Execution according to law*—No Court of law would show any desire to throw obstacles in the way of creditors obtaining payment of their just claims. At the same time, the Court must insist that creditors, in executing their decrees, shall proceed in a legal and proper manner. *In the matter of SHARD,* **28 C. 574.**

(33)—*Jurisdiction—Allegation in plaint to change venue—Allegation false—Procedure.*—Where the Court of first instance thinks that an allegation in a plaint is falsely made for the purpose of avoiding the jurisdiction of the Small Cause Court, the proper course for the Court is to require the plaintiff to satisfy it that the allegation is *bona fide* and not merely colorable to change the venue. **APPARAO v. SOBHANADRI RAO, 24 M. 158.**

Practice and Procedure—continued.

(34)—*Act XXIII of 1861, s. 4—Suit upon bond—Place of execution of document to be distinctly stated.*—In all applications under s. 4 of Act XXIII of 1861 in suits brought upon a bond or other documents, the place at which the document was executed must be distinctly stated. **PROCEEDINGS, 10th AUGUST, 1874, 7 M.H.C. App. 34.**

(35)—*Camp inquiry—Necessity for informing time and place of inquiry in Camp.*—It is not enough that a party should be informed that a case will be taken up in camp. The place where it will be taken up and the date must be made known to him. **WARLIA v. NAKKU TELI, 5 C.P.L.R. 96.**

(36)—*Petition sent by post, Court not bound to attend to.*—In this case, there had been received by post a petition purporting to be sent by both parties, stating that they desired to refer the question at issue between them to arbitration. The High Court, nevertheless, disposed of the case ignoring the petition on the ground that a petition sent by post could not be attended to by the Court. **SHUBBUN v. MUSUMAT JEONEE, 2 N.W.P. 108.**

(37)—*Application—Continuation of proceedings.*—The Court looks at the substance of the manner, and if it finds that the proceeding before it can only be regarded with justice to the parties as a continuation of the original application which has never come to an end, then instead of investigating any question of limitation it holds that it is not a fresh application, but a continuation of the original application and so within time. **MAHOMED v. BASHE-TAPPA, 7 Bom L.R. 819.**

(38)—*Suit by creditor on behalf of others—Leave to sue—Civ. Pro. Code, s. 30.*—A suit by a creditor on behalf of other creditors is maintainable only with the leave of the Court obtained prior to institution of the suit. Such leave cannot be granted at the hearing. The word "parties" in s. 30 means "persons." **THE ORIENTAL BANK CORPORATION v. GO-BIND LALL SEAL, 9 C. 604 = 13 C.L.R. 142.** [*R.*, 10 C.W.N. 449; *Compare*, 23 M. 28, M. 399 and 21 B. 784.]

(39)—*Summary suit on promissory note—Power to extend time for defendant to apply for leave to defend.*—The High Court has power to extend the time within which a defendant in a summary suit, on a promissory note, can come in and obtain leave to defend. **GROOM v. WILSON, 3 C. 539.** [*D.*, 5 C.W.N. 259.]

(40)—*Setting down case in general cause list—Duty of Registrar.*—Where an attorney for the defendants has entered appearance on behalf of the defendants, the Court has power to set the cause down at once in the general cause list for hearing, although the time within which to appear granted to them by the summons has not expired. When an attorney enters appearance for a defendant before the expiry of the time mentioned in the summons, it is the duty of the Registrar to put it down immediately in

Practice and Procedure—continued.

the cause list or at all events he ought to ask the Judge whether he should do so or not. **CUMMING v. GREEN, 4 B.L.R. App. 75.**

(41)—*Revenue Courts—Open days—Plaint.*—Revenue Courts have no authority to specify certain days on which plaints shall not be received. **GOBIND KUMAR CHOWDHRY v. HARGOPAL NAG, 3 B.L.R. App. 72.**

(42)—*Decree—Maintenance.*—In decrees where maintenance is awarded Courts should insert words which would enable them to review and set aside or modify their orders as circumstances might require, and in such cases when the reduction in the amount of maintenance is sought, the remedy would be the more appropriate one by application for review of judgment. **GOPIKABAI v. DATTATRAYA, 2 Bom. L.R. 191 = 24 B. 386.**

(43)—*Maintenance—Privy Council does not interfere in questions as to the amount of.*—It is not the practice of the Judicial Committee of the Privy Council to interfere in a question as to the amount of maintenance. **KACHI KALIYANA v. KACHI YUVA, 7 Bom. L.R. 907 = 2 C. L.J. 231, P.C. = 28 M. 508 = 10 C.W.N. 95 = 15 M.L.J. 312 = 2 A.L.J. 845 = 32 I.A. 261 = 8 Sar. 855.**

(44)—*Court taking point of limitation.*—If, upon the facts, it is clear that a suit is barred by limitation, the Court may, of its own motion, take the point and dismiss the suit. **DEO NARAIN CHOWDHURY v. WEBB, 28 C. 86 = 5 C.W.N. 160. [R., 34 C. 941, F.B. = 11 C.W.N. 959 = 6 C.L.J. 237, 7 C.L.J. 152.]**

(45)—*Judge's opinion—New enactment—Practice.*—Notwithstanding the fact that in the opinion of the Judge, the sudden operation of a new enactment, e.g., the Limitation Act IX of 1871, would work hard in any particular case, he must still give effect only to the law as he finds it. **JIBHAI MAHIPATI v. PARBHU BAPU, 1 B. 59. [R., 3 B. 193, 16 B. 91.]**

(46)—*Proceedings in competent Court erroneously taken in enforcement of ineffectual orders.*—*Applicability of exception in s. 4 of Reg. III of 1793.*—The respondent in this case had been continually endeavouring by resort to competent Courts to recover his rights, and on that ground, he was held to be entitled to the benefit of the exception in the previous law of limitation (Reg. III of 1793, s. 14). It did not matter that the order which he was seeking to enforce was itself ineffectual by reason of its having been passed by a single Judge of the Sudder Court and confirmed by a second Judge. Such erroneous proceedings could not amount to a total abandonment of his rights under his decree. A decree for possession only cannot be added to by single Judge's order for wassilat. **DOORGAPERSAUD ROY CHOWDRY v. TARAPERSAUD ROY CHOWDRY, 4 W.R.P.C. 63 = 8 M.I.A. 308. [R., 9 W.R. 402, 3 C. 654 = 1 C.L.R. 499 = 5 I.A. 31, P.C., D, 7 W.R. 327.]**

(47)—*Order made out of time—Notice to the judgment-debtor—Right of third party to question.*—Where an order, which was said to

Practice and Procedure—continued.

have had the effect of reviving the decree, was made out of time, though no notice to the judgment-debtor, held there was nothing to prevent a third party questioning the propriety of that order though the parties to the suit might be precluded from doing so. **TINCOWAREE DAWU v. DEBENDRONATH MOOKERJEE, 17 C. 191. (6 C. 504, doubted.)**

(48)—*Two suits between same parties in two Courts under jurisdiction of two different High Court—Power of High Court to order stay of proceedings in one Court—Civ. Pro. Code (Act XIV of 1882), ss. 20 and 24.*—Where two suits were pending in two Courts under the jurisdiction of two different High Courts, in which the parties were the same and a portion of the subject-matter of the one was included in the other, it was held that the High Court under the conjoint operation of ss. 20 and 24 of Civ. Pro. Code could determine that the proceedings in one Court should be stayed pending trial in the other. **VENKATASA BROD v. MAKSUNDAM DAS, 35 C. 541.**

(49)—*Court cannot find a fact which both parties deny in their pleadings.*—Where in a suit for khas possession, the parties, both the plaintiff and the defendant plead that the defendant is not the tenant of the plaintiff, the Court is wrong in finding that the defendant is a tenant of plaintiff, a fact which they themselves in their pleadings deny. **FAYJ DHALI v. AFTABUDDIN SIRDAR, 6 C.W.N. 575.**

(50)—*Decision of a point beyond the pleadings.*—It is not open to a Judge to decide a case in favour of the defendant on a point not raised by him, so as to cast on him a far larger pecuniary liability than would have been cast if the Court had made an order which the plaintiff asked for. **RAICHAND v. NARAN BHIKHA, 6 Bom. L.R. 62 = 28 B. 310.**

(51)—*Existence of two or more remedies—Effect.*—Where the law provides two or more remedies, it cannot be said that one debars the other. **SHANKARAHAI v. DIN DIAL, 12 A. 409 F.B. = A.W.N. 1890, 145.**

(52)—*Ss. 2, 244, Civ. Pro. Code—Appeal presented to Court as appeal from order—Appeal converted into appeal from decree.*—It would be erroneous procedure if the Court should permit an appeal, wrongly presented to the Court as an appeal from an order, to be converted into an appeal from a decree within the meaning of s. 244 read with s. 2, Civ. Pro. Code. **KEDAR NATH v. LALJI SAHAI, 12 A. 61 (F.B.). [D., 14 A. 221.]**

(53)—*Revival of suit—Civ. Pro. Code (of 1877), s. 372—Plaint in fresh suit taken as petition to revive.*—A suit, by the trustee under a will, against the executrix for the administration of the trusts, which was struck off the board, after decree, for want of prosecution, can be revived, on the death of both the plaintiff and the defendant, by the plaintiff's heirs, it being within the spirit, though against the

Practice and Procedure—continued.

strict language, of s. 372 of the Civ. Pro. Code, to do so in such a case; and, if no persons are living, whose consent may be got or to whom notice may be sent under s. 372, the Court could dispense with the consent or the notice. The plaint, in a fresh supplemental suit by such heirs of the plaintiff against the Administrator-General, might be allowed to be amended into a petition, under s. 372, with liberty to the defendant to put in any answer as if in a proceeding by petition in the first instance. The words "pending the suit" in s. 372 relate to a suit in which no final order has been made. **GOCOL CHUNDER GOSAMEE v. THE ADMINISTRATOR-GENERAL OF BENGAL**, 5 C. 726 = 5 C.L.R. 569. [F., 8 C. 837; Rel. on., 30 C. 609 = 7 C.W.N. 517; R., 10 A. 97.]

(54)—*Civ. Pro. Code, s. 244—Where reliefs claimed in plaint could not be asked for in separate suit—Whether plaint can be treated as execution petition.*—Where it appeared that the reliefs claimed in the plaint could not, under s. 244, Civ. Pro. Code, be asked for in a separate suit, it was held that it was competent to the Court to treat the plaint as an execution petition. **T. R. GANESHA RAO v. T. V. TULJARAM RAO**, 4 M.L.T. 288 = 6 M.L.J. 325 = 19 M.L.J. 4 = 1 Ind. Cas. 380.

(55)—*Appeal—Making a new case in appeal.*—It is not open to an Appellate Court, to make out a new case for the first time in appeal contrary to the pleading in the first Court. **MULLA ABDUL v. KHATIJA BEGAM**, 10 Bom. L.R. 514.

(56)—*Judge's liberty to make different case for appellant.*—A Judge is not at liberty in appeal to make a different case for the appellant from that which she alleged for herself in the lower Court. **KACHUBHAI Bin GULABCHAND v. KRISHNABA Kom BABAJI**, 2 B. 635.

(57)—*Pleadings—Case, strength of.*—A plaintiff can only succeed on the strength of his own title. **MUSSAMMAT SHAFQ-UN-NISSA v. RAJA SHABAN ALI KHAN**, 6 Bom. L.R. 750 = 26 A. 581 = 9 C.W.N. 105 = 7 O.C. 290 = 31 I. A. 217 = 8 Sar. 674.

(58)—*Statement of facts—Inference.*—A party professing to state facts, in Court has no right to give his own inferences as facts, but ought to disclose the real facts and leave the Court to make its own inferences. **SURAJMAL v. MANEKCHAND**, 6 Bom.L.R. 704.

(59)—*Pleadings—Relief—Issues—Evidence.*—As a general rule the plaintiff is not entitled to relief not founded on the pleadings, but where on the pleadings, the issues and the evidence, the relief is clear, the general rule does not apply. **GOKUL v. SHRIMAL**, 6 Bom. L.R. 288.

(60)—*Parties to suit—Approbation and reprobation.*—It is a sound principle of law that as between the same litigants a defendant cannot defeat the claim of the plaintiff by a plea

Practice and Procedure—continued.

negating a contention advanced by him in a former suit, if he thereby approbates and reprobates. **VARAJILAL v. BHAIJI**, 6 Bom. L.R. 1103.

(61)—*Plaintiff alleging one state of facts—Denial of defendant—Plaintiff's right to carry on suit.*—It would be an unusual thing to allow a plaintiff, who has alleged one state of facts, as against the defendant who has denied that case and alleged another state of facts, to turn round and ask to be allowed to carry on the suit and claim relief on the ground that the defendant's statement of facts was true and his own false. **RAMDOYAL v. JUNMENJOY COONDOO**, 14 C. 791. [R., 5 C.W.N. 304.]

(62)—*Notice—Written statement.*—Where a person is shown to have notice of a fact contained in a written statement put in in a case, he is fixed with it; and it is immaterial that the written statement was thrown out. **SANTAN v. GULAB HARI**, 6 Bom. L.R. 284.

(63)—*Written statement—Irrelevant matter.*—Where matters irrelevant and improper were found in the written statement, the Court ordered it to be taken off the file with leave to file a fresh one. **KASUBLAL DAY v. C. E. TRENEARNE**, 3 B.L.R. App. 12.

(64)—*Plaintiff's case not proved in entirety—Plaintiff whether entitled to succeed on proving facts sufficient to support decree.*—In a suit for ejectment based upon two grounds, viz., (1) that the plaintiff was the owner of the property and that the defendant without any title had wrongly withheld possession from the plaintiff, and (2) that the defendant had been the plaintiff's tenant and that the tenancy had been determined by notice, the Court framed only one issue, viz., whether the defendant had rented the building in dispute. Although no specific issue as to title was framed, evidence of title was given on both sides. Held that the plaintiff was entitled to a decree for ejectment on proving his title. **BALMAKUND v. DALU**, 25 A. 498 = A.W.N. 1903, 112, F.B. (15 A. 186 overruled; 10 B. 451, A.W.N. 1884, 285. 9 B.H.C. 6, D.; A.W.N. 1901, 188, R.; A.W.N. 1903, 18, F.) [F., 12 O.C. 183 = 3 Ind. Cas. 589; Appr., 1 N.L.R. 4; R., 8 O.C. 266, 10 C.L.J. 538 = 6 M.L.T. 255 = 2 Ind. Cas. 346; D., A.W.N. 1904, 33 = 26 A. 331].

(65)—*Failure to prove immaterial allegations in plaint—Effect.*—A suit does not necessarily fail, because plaintiff fails to prove allegations in his plaint that are not material. **RAMDHUN KHAN v. HARADUN PURAMANICK**, 12 W.R. 404 = 9 B.L.R. 107, N.

(66)—*Practice—Failure of plaintiff to prove case alleged by him—Plaintiff cannot succeed upon failure of defendant to prove his defence.*—The plaintiff sued the defendant alleging that the defendant was the tenant of a certain house belonging to him, that the tenancy had commenced some eleven years before suit, that for the last three years the defendant had

Practice and Procedure—continued.

ceased to pay rent, and had recently denied the plaintiff's title. The defendant denied the ownership of the plaintiff and the alleged lease and pleaded that he had been in adverse possession for more than 12 years. The plaintiff failed to prove the allegation of tenancy and did not show that he had been in possession 12 years of the suit. *Held* that the plaintiff was not entitled to a decree merely because defendant failed to prove 12 years adverse possession. **Haji Khan v. Baldeo Das, 24 A. 90 = A.W.N. 1901, 188.** (15 A. 186, A.W.N. 1889, 176, A.W.N. 1901, 157, R.)

(67)—*Overstatement of claim.*—A plaintiff is bound to prove his own title, and cannot succeed on the weakness of the defendant's case. The fact that the defendant has set up an exaggerated statement of his own claim will not affect the duty of the plaintiff to prove that his own claim will not affect the duty of the plaintiff to prove that his own claim is not overstated. If it appears that both parties have overstated their rights, that will be no reason for making the defendant alone suffer and for giving to plaintiff more than he has proved himself entitled to. **Rajaram v. Nanchand, 5 Bom. L.R. 225.**

(68)—*Plaintiff claiming too much—Relief by Court.*—A plaintiff ought not, by reason of his having claimed too much, to be precluded from recovering the amount to which he appears to be entitled, if the pleadings are wide enough to cover the claim. The question is not one of indulgence. **Malik Ahmad v. Musammatt Shamsi Jahan, 8 Bom. L.R. 397 = 10 C.W.N. 626 = 3 A.L.J. 360 = 3 C.L.J. 481 = 28 A. 482 = 16 M.L.J. 269 = 33 I. A. 81 = 8 Sar. 918.**

(69)—*Consistency of pleas.*—A party cannot be allowed to make claim as defendant which he could not make as plaintiff by reason of limitation. **Mahomed v. Ezekiel, 7 Bom. L.R. 772.**

(70)—*Pleadings—Inconsistent pleas.*—Ordinarily he who seeks assistance from the Court cannot for the purpose of securing to himself a further measure of relief assert that, on the negation of which, relief has already been awarded to him in relation to the same transaction. **Ahmedabad A. S. and W. Co. v. Lakshmishankar, 6 Bom. L.R. 790.**

(71)—*Inconsistency of pleas—Pleadings—Agreement—Revision—Performance.*—It cannot be laid down as an abstract proposition that there is any necessary inconsistency in a party who has unsuccessfully tried to rescind an agreement afterwards claiming performance of it. **Shrish Chandra v. Roy Banomoli, 6 Bom. L.R. 501 = 31 C. 584 = 31 I.A. 105 = 8 C.W.N. 594 = 14 M.L.J. 185 = 2 A.L.J. 31 = 8 Sar. 677.**

(72)—*Setting up inconsistent pleas—Defence of want of genuineness of a deed—Issue upon that basis—Plea of misrepresentation, undue influence or fraud, not allowed subsequently.*—

Practice and Procedure—continued.

A genuine document might or might not be binding upon a party, but if the party who has executed it intends to raise the defence that it is not binding he ought either to raise it in his written statement or get an issue framed on it. If a party denies the execution of a document he cannot strictly speaking, be allowed to raise the inconsistent defence that the document is not binding upon him. Where in a suit upon a deed the defence is that the deed is not genuine and upon that issue the parties go to trial, it is not open to the defendant subsequently to rely on misrepresentation, undue influence or fraud as vitiating the deed. **Prag Narain v. Chodra Chhatia, 10 Bom. L.R. 494.**

(73)—*Pleadings—Declaration of title based on adverse possession—Claim based on adverse possession not set up in the plaint.*—A decree declaring the plaintiff's title to immoveable property, such title being based upon adverse possession, ought not to be given to a plaintiff unless such a title is clearly set up in the plaint. **Zaki-ud-Din v. Nazar Muhammad, A.W.N. 1908, 277.** [2 C. 418, F.]

(74)—*Application for ad interim protection in insolvency proceedings—Grounds of opposition.*—In applications for ad interim protection pending proceedings in insolvency, the practice is to allow opposing creditors to oppose only on grounds of fraud or misconduct arising out of his own particular claim and to adjourn all other grounds to be dealt with at the hearing. *In the matter of Dinendra Nath Mullick, 9 C.W.N. 221.*

(75)—*Setting up a claim or defence based upon a wrong construction of document.*—Where a party relies on a document in support of his claim or defence, the mere fact that he in support of that claim or defence put a wrong construction on it is no reasonable ground for depriving him of the right he has on a proper construction of the document. **Raghavji v. Narandas, 8 Bom. L.R. 921.**

(76)—*Practice—Relief on grounds not alleged, whether can be granted.*—A plaintiff who fails to prove the case upon which he came into Court cannot be allowed to succeed upon another case not disclosed by his pleadings. In this case, the plaintiff sued the defendant on the allegation that the defendant on the 4th June 1881, took from him (the plaintiff) a lease of two rooms at a rent of 4 annas a month. It was found that this allegation was false. *Held* that the Court could not decree the plaintiff's claim to eject the defendant from the rooms in question upon some other grounds not disclosed in the plaint. **Bajrang Das v. Nand Lal, 4 A.W.N. 1884, 285.** [D., 25 A. 256, F.B. = A.W.N. 1903, 18, 25 A. 498, F.B. = A.W.N. 1903, 112.]

(77)—*Pleadings—Alternative and inconsistent claims—Amendment of plaint.*—The right to enhance rent and the right to evict are in

Practice and Procedure—continued.

their nature different and cannot be tried in one suit; and where the plaint consists of alternative claims, the plaintiff must elect to give up one of them. **BULDEO v. HAFIZ ALI**, 15 P.R. 1869. [R., 21 P.R. 1873.]

(78)—*Practice—Grounds not taken in plaint—Relief not to be granted on.*—No relief can be granted on grounds not taken in plaint. **MUHAMMAD ALADAT KHAN v. NARPAT**, A.W.N. 1887, 130.

(79)—*Practice—Pleading—Case proved different from that set up in plaint.*—The plaintiff came into Court alleging that he was the owner of a certain cattle-shed, part of which he had let in June, 1898, to the defendant at a rent of 4 annas a month. He alleged that the defendant had paid rent for three months, but had subsequently declined to pay any more. The plaintiff accordingly sued for the rent said to be due and for ejectment of the defendant. The suit was filed in January, 1899. The defendant denied that the plaintiff was the owner of the cattle-shed, and alleged that he himself had been in adverse proprietary possession for more than twelve years. The Court of first instance found that the plaintiff had built the cattle shed about two years before the suit; but that his allegation as to the defendant's tenancy was not proved. On appeal the lower appellate Court found that the plaintiff had failed to prove the tenancy set up by him. *Held* by Knox, Acting C.J., that as the plaintiff had failed to establish the case set up by him, the facts of which were recent and well within his knowledge, and presumably capable of easy proof, but had come into Court on a false case, he was not entitled to any decree. (21 W.R. C.R. 59, 15. 186, F.; A.W.N. 1887, 43, D.) *Per Aikman, J.*—On the facts established, the plaintiff was entitled to a decree, although he may have failed to prove the whole case set up by him. **BALMAKUND v. DALU**, A.W.N. 1901, 157. (A.W.N. 1887, 43, A.W.N. 1893, 163, A.W.N. 1897, 145, A.W.N. 1884, 140, 21 W.R.C. R. 59, 9 Bom. H.C.R. 6; R., 15 A. 186, Diss.) [R., 24 A. 90; D., 25 A. 257, F.B.; On appeal, 25 A. 498.]

(80)—*Plaint—Grant of relief not prayed for*—As a general rule, no relief other than that asked for in the plaint should be given. But the High Court declined to interfere with the granting of such relief in a certain case, having regard to the circumstances of the case, and to the finding of the lower appellate Court. **HAR NARAIN v. BUDHU**, A.W.N. 1831, 10.

(81)—*Relief not asked for in plaint and not consistent with plaintiff's case—Court's power to grant.*—The Court ought not to grant the plaintiffs a declaratory decree upon a case not made in the plaint and inconsistent with the case made in the plaint. **RAI JATINDRA NATH CHAUDHURI v. AMIRTA LAL BAGCHI**, 5 C.W.N. 20. (11 M.I.A. 7, R.)

(82)—*Relief not asked for in plaint, when awardable—Title covered by issues and put in*

Practice and Procedure—continued.

evidence—Declaration of plaintiff's title by Court dismissing suit—Form of decree.—Where the Court makes a declaration in plaintiff's favour in a dismissed suit, the proper course will be to direct an enquiry as to who are the persons entitled, and to reserve further directions under which it will be probably found possible to place them in legal possession and so to terminate the litigation. As a rule, relief not founded on the pleadings should not be granted. But, where the substantial matters which constitute the title of all the parties are touched, though obscurely, in the issues, and have been fully put in evidence and formed the main subject of discussion and decision in the Courts, such a case would not be within the rule, and the Court may make a declaration of the rights of the parties, and may found on the declaration an inquiry into the plaintiff's title. In the present case in which plaintiffs claimed possession of an estate from the defendant, the first Court's decree dismissing the suit was reversed by the first appellate Court which decreed the plaintiff's suit. The High Court, however, on the finding of facts by the lower Courts and on the construction of certain official correspondence on the record, decided that the claim of the plaintiff to exclusive possession must fail and dismissed the suit, but, with a view to settling the rights of the parties, added a declaration to the effect that the defendant was entitled to a moiety only of the estate in question, and that the plaintiffs were entitled, among themselves, to the other moiety. Their Lordships of the Judicial Committee agreed with the High Court on the substance of the case, but substituted for that Court's decree a simpler one in point of form, declaring that the defendant was entitled to a moiety only of the estate and that his successors-in-title are now entitled to a like moiety, and that the other moiety belongs to the persons entitled thereto by virtue of official correspondence on the record, viz., the plaintiffs, and directing an enquiry as to who, having regard to these declarations, are, either directly or otherwise, entitled to the last-mentioned moiety, and reserving further directions. **SRI MOHANT GOVIND RAO v. SITA RAM KESHO**, 21 A. 53, P.C. = 2 C.W.N. 681 = 25 I. A. 195 = 7 Sar. 370. [R., 28 B. 153, 6 Bom. L.R. 288; D., 11 Bom. L.R. 606.]

(83)—*Adverse possession—Declaration of title—Plaint—Issues.*—A declaration of title may be made on the strength merely of 12 years' adverse possession. (6 M.H.C. 420, Diss., 20 W.R. 104, F.) Where such a declaration is sought, the 12 years' adverse possession must be distinctly stated in the plaint, or set out in the issues. **SHIRO KUMARI DEBI v. GOVIND SHAW TANTI**, 2 C. 418. [F., 7 C. 560; D., 14 C. 592.]

(84)—*Amendment of plaint—Prayer for relief on footing of defendant's story.*—When the parties to suit have come to trial to determine which of two a stories is true, the Court cannot allow the plaintiff to amend the plaint,

Practice and Procedure—continued.

by abandoning his own story and adopting that of the defendant and asking relief on that footing, the question whether on that footing the plaintiff is entitled to relief being one to which the defendant's attention has not been called, and as to which he has had no opportunity of answering. *SHIBKRISTO SIRCAR v. ABDOL HAKEEM*, 5 C. 602=5 C.L.R. 455. [R., 10 B. 451.]

(85)—*Practice—Suit by firm—Plaint—Signature and verification by one partner—Act XIV of 1870—Procedure.*—It has been the practice of the Court in a suit brought by a firm, to allow a member of the firm, without special leave, to verify the plaint on his own behalf and also on behalf of his co-partners. *Quære.*—Whether such a practice is right or ought to be allowed to continue? Act XIV of 1870 does not affect the procedure of the High Court in any way. The preamble, as well as the body of that Act, shows that the Act merely repeals what has become unnecessary and does not affect or alter any existing practice or procedure. *RAMACHUNDER v. CHOONEE LALL*, 12 B.L.R. 35.

(86)—*Pleading and proof, Variance between—Alleged inconsistency in pleadings.*—Where, on appeal from a suit brought after the death of a Hindu widow, by the plaintiff (a collateral relation, suing as heir), to have a sale of a portion of her husband's estate effected by her set aside on the ground that the sale was invalid, except in so far as it affected the rights of the widow herself therein, it was contended on behalf of the defendant, that the plaintiff, having sued as heir, could not be allowed to succeed on the basis of a *solenamah* entered into between himself and the heir by virtue of which he had acquired the rights of the heir, as this would be contrary to the rule laid down in 11 M.I.A. 7,—that the determinations in a cause should be founded on a case, either to be found in the pleadings or involved in or consistent with the case thereby made and that the equities and ground of relief originally alleged and pleaded by the plaintiff should not be departed from, the Judicial Committee fully affirming the rule stated, held, that if this objection had been taken in the first Court, the plaint and issues might and ought to have been amended, but, as it was not so taken, and the substance of the case in the plaint was that the sale by the widow was invalid beyond her own interest, under the circumstances of the case, there was no weight in the contention of the appellant. *NURUL HOSSEIN v. SHEOSAHAI LAL*, 20 C. 1, P.C.=19 I.A. 221=6 Sar. 205. [F., 4 C.L.J. 370=11 C.W.N. 85; R., U.B.R. 1897—1901, Vol. II, 231, 91 P.R. 1901=113 P.L.R. 1901, U.B.R. 1906, 3rd Qr. Tort (9).]

(87)—*Practice—Variance between pleading and proof—Relief not asked for.*—In a suit brought to establish a right of ownership of property, it is not competent to the Court to enter into and decide the question of right to an easement over the same. Though the Courts are bound to take into consideration all the rights of the parties to a suit both legal and equitable,

Practice and Procedure—continued.

and give effect thereto by their decrees, as far as possible, they are not at liberty to grant a relief either not prayed for in the plaint, or that does not flow naturally from the ground of claim as stated in the plaint. *SAMBAYYA v. GOPALAKRISHNAMMA*, 15 M. 489=2 M.L.J. 257.

(88)—*Pleadings and proof—Specific relief prayed for not proved—Decree on general prayer.*—Although the plaintiff had failed to prove the case on which he claimed a special relief, the Court in this case held that he had established a case in which, upon the plaint and the general prayer for relief, he was entitled to a decree. *GOBIND CHUNDER MOOKERJEE v. DOORGAPERSHAD*, 14 B.L.R. 337=22 W.R. 248.

(89)—*Act VIII (B.C.) of 1869—Agricultural holdings—Erection of building—Proprietor's consent—Right to hold land in perpetuity—Filing of plaint—Further statement by plaintiff after filing of defendant's written statement.*—Act VIII (B.C.) of 1869 applies only to agricultural holdings and does not apply to disputes regarding a street in a town. The mere fact that a building has been erected on a land with the consent of the proprietor of the estate, does not give to the occupant a right to hold the land perpetually at the same rate. If the proprietor with an ultimate view of raising the rent brings a suit for ejectment, he has a right to have his title to eject determined in that suit. [Appl., 3 C.L.R. 543.] After written statement was filed in a suit for ejectment, the plaintiff, without leave of the Court, filed a further statement without the claim that he made in the plaint and substituting in its place a claim for enhancement of rent. Held that the supplemental statement of the plaintiff must be rejected. *THE COLLECTOR OF MONGHYR v. HAKIM MADAR BUKSH*, 25 W.R. 136.

(90)—*Plaintiff stating in plaint to be in possession and praying merely for confirmation of the same—Dispossession found—Relief.*—A plaintiff who, stating in his plaint that he is in possession, prays merely for confirmation of possession, will not be given a decree for recovery of possession, if it is found that he was dispossessed by the defendant before suit, and that he had no possession as stated in the plaint. *FATIMA BIBEE v. AHAMAD BAKSH*, 31 C. 319.

(91)—*Practice—Pleadings—Defective plaint—Extension of plaint by subsequent statement of plaintiff—Civ. Pro. Code, ss. 118, 146, 147.*—The plaintiff came into Court claiming a decree declaring his title to and his possession of, certain plots of land, or, in the alternative, a decree for possession; but, with respect to the latter relief, he made no specific assertion that he had been dispossessed, or, if so, at what date such dispossession had taken place. On being challenged by the defendant to state whether he had been dispossessed, he filed an application admitting that he was out of possession, and further, on being examined by the

Practice and Procedure—continued.

Court under s. 118 of the Code of Civil Procedure, confirmed that statement, and said that he did not recollect the exact date of disposition. The claim for a declaratory decree was undoubtedly barred by limitation. As to the remaining portion of the claim, it was held by *Blair, J.* that the plaint disclosed no cause of action for a suit for possession, and it was not possible to supply the defects in the plaint by means of the subsequent petition and deposition of the plaintiff, and with this view of the case, *Aikman, J.*, substantially agreed. *Per Banerji, J.*—The plaint though ambiguous, was capable of being supplemented by the plaintiff's deposition, and was so supplemented, and the lower Court was wrong in refusing to decide the plaintiff's claim for a decree for possession. *KASHI NATH BISWAS v. RAM NIRANJAN CHAUBE, A.W.N. 1902, 35. (5 B. 609, R.)*

(92)—*Defendant's failure to dispute point—Admission—Judgment by default—Plaintiff's duty.*—The system of procedure in this country is not such that, if a defendant fails to dispute or contest a point, he thereby admits it. On the contrary, if he allows judgment to go by default, the plaintiff is just as much bound to prove his case. *BHUBAN CHANDRA SHOME v. RAMDAYAL SHAMANTA, 5 B.L.R. App. 62 = 14 W.R. 555.*

(93)—*Failure to prove case set up in plaint—Admission by defendant—Decree for plaintiff as to such portion.*—Where a plaintiff states in his plaint that the lands in dispute are his self-acquisition and fails to prove his averment, it is no ground for dismissing his suit altogether, if he is entitled in part to the relief sued for on the facts admitted by the defendant himself. *NARASANNA v. GURAPPA, 9 M. 424.*

(94)—*Grounds of appeal in argument.*—Though, as a rule, the Court will not permit grounds of appeal to be taken in argument which have not been taken in the memorandum, yet where a decree comes before it, which is upon its face illegal, the Court is bound to take up the point itself and rectify the mistake. *PERAN SOOKH CHUNDER v. PARBUTTY DOSSEE, 3 C. 612 = 1 C.L.R. 404.*

(95)—*Practice—Suit—Different case in appeal.*—Where a plaintiff went to trial alleging that the land claimed was attached to his estate as alluvial, he was not allowed to raise in appeal a different case, one simply of original ownership of the site of the lands reformed. *EKOWRI SING v. HIRALAL SEAL, 2 B.L.R. P.C. 4 = 11 W.R.P.C. 2 = 12 M.I.A. 136. [F., 21 W.R. 224; Appl., 22 W.R. 238.]*

(96)—*Setting up a different case in Court of appeal.*—Parties who have had a suit determined upon questions which they thought fit to raise in the first Court are not entitled to make a different case in the Court of appeal, though the appellate Court may in some cases allow

Practice and Procedure—continued.

this to be done. *OMDA KHANUM v. BROJENDRO COOMAR ROY CHOWDHRY, 12 B.L.R. 451 = 21 W.R. 352.*

(97)—*Tacit admission in lower Court—Recession in appeal.*—Where parties allow a suit to be conducted in the lower Court as if a certain fact was admitted, they cannot afterwards in appeal question this fact and recede from their tacit admission. *KANAI LALL KHAN v. SASHI BHUSON BISWAS, 6 C. 777 = 8 C.L.R. 117.*

(98)—*Grounds of claim—Change of grounds in appeal.*—A plaintiff cannot in appeal be allowed to change the grounds on which he alleged himself to be entitled to claim relief. *MASUMA BIBI v. THE COLLECTOR OF BALLIA, 7 A. 687 = A.W.N. 1885, 227.*

(99)—*Practice—Change of grounds—Declaratory suit.*—The widow of a deceased judgment-debtor sued the decree-holder for a declaration that certain property was not liable to be sold in execution of his decree against her husband on the ground that she had got a transfer of the same in consideration of her dower-debt and that she was in possession of the same. On appeal she contended that she was in possession lawfully and had a claim for an unsatisfied dower-debt and was therefore entitled to be maintained in possession under the provisions of the Mahomedan Law. Held that the appellant was not competent to change the grounds on which her claim had been brought. The position claimed by her on appeal was only that of a creditor of her deceased husband and would give her no right to oppose the decree-holder. *AMIR BIBI v. NATHMAL DAS, A.W.N. 1883, 147.*

(100)—*Shifting the issues in a Court of Appeal.*—One who seeks to set aside a purchase completed under the sanction of the Court should allege the grounds on which he claims to impeach it, and should not be allowed after the trial of the case to rely on other grounds which have not been the subject of trial or adjudication in the Court which takes the evidence. It is not easy to formulate a rule which will fit every case, but the principle is clear enough, that a party shall not be condemned in Court, on allegation which turn on evidence and which he has not been led to rebut by evidence. It is always unsatisfactory to reverse a decree for the reason that the ground on which it rests was not that on which the parties come to issue. But it is obvious that great injustice may be done by shifting the issue in the Court of appeal, and so deciding without due investigation. *MAHOMED v. SAVVASI, 2 Bom. L.R. 640.*

(101)—*Practice—Suit brought on one ground cannot be decreed against the defendant on another—Amendment of plaint—No amendment allowed after hearing arguments in appeal.*—A suit brought against the defendant on one ground, which fails, should not be decreed against him on another ground which he had no opportunity

Practice and Procedure—continued.

of meeting. After arguments in an appeal have been heard, the Court will not allow amendment of the plaint, so as to convert a suit of one character into a suit of a substantially different character. *DAYABAI v. HAJI NOOR MAHOMED*, 11 Bom.L.R. 237=34 B. 244.

(102)—*Oral pleadings—Point raised before lower Court not noticed—Evidence.*—In all cases where the Courts below really omit to notice a particular objection urged, the parties must be able to satisfy the High Court that the point was actually taken before the Judge in the oral pleadings. This can be done either by an affidavit of some person actually present in Court who heard the point raised, or by a petition to the Judge drawing his attention to the omission, and asking him to pass an opinion on the particular point. In the absence of any such evidence, the High Court is bound to presume, from the fact of the Judge taking no notice whatever of the point, said to have been pressed before him that it was in fact never pressed. *YUSOOF ALI CHOWDRY v. MUSSAMUT FYZOONISSA KHATOON CHOWDHRAIN*, 15 W.R. 296.

(103)—*Madras Civil Service Annuity Fund, right to refund of, completed before 1853, not affected by revised rules of 1853—Two sets of defendants severing in defence—Lodging separate case.*—This was an appeal by the East India Company from a decree of the Supreme Court of Judicature of Madras by which that Court declared the respondent to be entitled to a refund or repayment of the surplus paid by him in excess to the Madras Civil Service Annuity Fund, as a subscriber to that fund beyond the half-value in the plaintiff's annuity. On the main question whether the respondent's right to the refund of the excess of his subscriptions had been in any manner lost or destroyed, it was contended on the part of the appellants, the East India Company, that it had been lost or destroyed, because the revised rules of 1853 did not contain the provision for refund which was contained in the rules of 1838, and the respondent, being a subscriber to the fund, was bound by those revised rules; but, according to their Lordships, the revised rules could not operate retrospectively so as to destroy rights which had been acquired before they were passed. In their Lordships' view, the real question was whether the respondent had or had not, before the revised rules were passed, acquired a title to the refund of the excess of his subscriptions, and their Lordships were of opinion that he had, for, in the year 1852, he had accepted the annuity on condition that the excess of his payments should be refunded to him. [R., 10 B. 313, 22 B. 451.] Two sets of defendants severed in defence (their interests involving an alternative as to which was responsible to the plaintiff), and Court below fixed one set of the defendants with the liability. Upon an appeal in which plaintiff was made sole respondent, the other defendants were held entitled to appear,

Practice and Procedure—continued.

and to lodge a separate case. *THE EAST INDIA COMPANY v. ROBERTSON*, 4 W.R.P. C. 10=7 M.I.A. 361.

(104)—*Law of procedure, change in—Procedure applicable to pending suits—Amendment of plaint, whether a question of procedure.*—In a case instituted under Act XIV of 1882, held, that the question, whether a plaint can be amended so as to enable the Court to give the plaintiff a declaration, is a mere question of procedure; and on the principle that a litigant has no vested right in procedure, the question of amendment arising subsequent to the passing of the new Civil Procedure Code (Act V of 1908) will be governed by it. *GOKUL PRASAD v. ALI BAKSH AND OTHERS*, 13 O.C. 152=6 Ind. Cas. 1015.

(105)—*Right of appeal—Not matter of procedure.*—To disturb an existing right of appeal is not a mere matter of procedure. *NANA ABU v. SHEKU ANDU*, 10 Bom. L.R. 330=32 B. 337.

(106)—*Reversal of judgment.*—A Court of appeal ought never to reverse the judgment of an inferior Court unless quite confident that the judgment given in the Court below is wrong. *YEMUNABAI v. BALSHEET*, 5 Bom. L.R. 584.

(107)—*Appeal—Events, cognizance of, since the filing of a suit or appeal.*—A Court is entitled to take cognizance of events which have happened since the filing of a suit or an appeal. *AHMADJEE v. MAHAMADJEE*, 1 Bom. L.R. 218.

(108)—*Who should be made respondent.*—The party against whom some further relief is claimed should alone be made respondent and it is needless to join other parties as respondents, if against them no further relief is sought. *A. CASPERSZ v. KISHORI LAL ROY CHOWDHRI*, 23 C. 922, P.C.=1 C.W.N. 12.

(109)—*Judgment—District Court.*—A party who appeals to the District Court is entitled to obtain the decision of the appellate Judge himself upon the points in dispute. The District Judge should give actual and precise findings of fact and not merely doubt and inclination and a statement of the belief of the lower Court. *RAMAPPA v. GURUBASAWA*, 1 Bom. L.R. 845.

(110)—*Lower Court's procedure—Presumption.*—The rule is to presume that a lower Court has done its duty. Neglect of duty cannot be assumed at the mere suggestion of the appellant. *RAJAH RASH BIHARI LALL SINGH v. NABAYI PADDAR*, 3 B.L.R.A.C. 99=11 W.R. 465.

(111)—*Appeal—Presentation, when proper.*—An appeal must be presented to the Judge and not to the Moonsarim. The placing of a petition on a table when the officer is not present is not a presentation to him. *TAJ ULDEEN KHAN v. MUSST. GHAFOR-UL-NISSA*, 3 N.W.P. 341.

Practice and Procedure—continued.

(112)—*Two Judges hearing an appeal and differing in their opinions—Whether appeal should be dismissed—Civ. Pro. Code, s. 575.*—The two Judges before whom these appeals were heard differed in their opinions. One considered that the accident was due to the negligence of the defendants' servants; the other was of opinion that the facts shewed that the defendants were not guilty of negligence. Therefore, under s. 575 of the Civil Procedure Code, both the appeals must be dismissed, each party to pay his or her own costs. **MEERAMA v. BABU BHIKARAJ SAGARMULL, 14 Bur. L.R. 257.**

(113)—*Civ. Pro. Code, s. 575—Reference of appeal to other Judges—Composition of Bench hearing referred appeal.*—Where the Judges who hear an appeal differ on a point of law, and decide to refer it to another Bench of Judges, such Bench must include the Judges who first heard the appeal. **ROHILKAND AND KUMAON BANK (LIMITED) v. ROW, 6 A. 468.** (6 W.R. 269, R.) [Appl., 7 A. 523 = A.W.N. 1895, 139; R., 6 Bom. L.R. 131.]

(114)—*Reference by Division Bench to third Judge—Civ. Pro. Code, s. 575—Scope of appeal.*—Where an appeal is referred to a third Judge by a Bench of two Judges under s. 575 of the Civ. Pro. Code, the whole appeal is open for argument before him, and not simply the point or points on which the Judges differed. **SESHADRI AYYANGAR v. NATARAJA AYYAR, 21 M. 179.** [R., 6 Bom. L.R. 230, 14 Bur. L.R. 59.]

(115)—*Suit instituted under Civ. Pro. Code of 1859 but decided after its repeal—Procedure on appeal.*—The appeal, in a suit instituted under the Civ. Pro. Code of 1859, but decided after the Code of 1877 had come into operation, is governed by the procedure under the latter Code, by virtue of s. 3 of the same. Such appeal may be dismissed for default under s. 556, and the appellant may apply for its re-admission under s. 558, and by s. 588 (cl. 5) he is entitled to an appeal on refusal. **ELAHI BAKSH v. MARACHOW, 4 C. 825 = 3 C.L.R. 593.** (3 C.L.R. 208, F.; 1 B.L.R. 101, F.B., 3 C. 662, 3 C. 669, R.)

(116)—*S. 562, Civ. Pro. Code—Appeal—Decision on an issue upon which there is no finding.*—Where the Court of First Instance takes evidence, but does not find on the issues and decides the suit on a point of law, it is not necessary for the appellate Court to remand the suit under s. 562, but it may come to a decision upon the evidence recorded, if that is considered sufficient. **BANDI SUBBAYYA v. MADALAPALLI SUBANNA, 3 M. 96.** [R., 8 A. 576, F.B.]

(117)—*Suit in Subordinate Court—Value of suit less than Rs. 2,500—Appeal to District Court—Validity of proceedings.*—Where a suit, the value of which was within the pecuniary limits of the jurisdiction of a Munsiff's Court, was instituted in the Subordinate Court, and a

Practice and Procedure—continued.

decree passed by it, and an appeal was preferred from that decree to the District Court (which would have had cognizance of the appeal even if the decree had been passed by the proper Court, viz., the Munsiff's Court), the determination of the appeal by the District Court, which had jurisdiction, does not cure the initial defect of jurisdiction of the Subordinate Court. An Appellate Court is only a Court of error and the trial by the Appellate Court cannot be accepted in place of a trial by the Court of first instance. **VELAYUDAM v. ARUNACHLLA, 13 M. 273.** [Doubted, 23 M. 367 = 9 M.L.J. 263; R., 2 L.B.R. 117, 2 L.B. R. 192.]

(118)—*Rejection by Civil Court of petition of appeal—Petition not containing particulars required by order of High Court—Rejection held wrong.*—Where a petition of appeal was rejected by the Civil Court because it did not contain the particulars required by the order of the High Court, dated 26th June, 1867, held by the High Court, that the order of rejection was wrong and that the utmost which the old rules justified was the non-receiving. **ARABHI SESHACHELLAM APPA RAU v. RAMAYA, 6 M.H.C. 422.**

(119)—*Appeal against joint decree by some of the defendants on grounds common to all.*—In an appeal against a joint decree by some only of the defendants on grounds common to all of them, the whole decree may be reversed. **HIRA CHAND v. ABDUL, 1 A. 455.**

(120)—*Construction of decree—Appellate Court not bound by explanation of Judge.*—If a decree were equally susceptible of two constructions, of which one rendered it in accordance with law, and the other did not, the appellate Court will give it the former. It will not be bound by the explanation of the Judge himself who passed the decree; and much less by notes taken by a Deputy Registrar at the time of judgment. **SAMAR AHMED v. HAJI ISMAIL HAJI HABIB, 1 B. 158.** (1 B. 1, F.)

(121)—*Practice—Appeal—Alteration of date fixed for hearing.*—On the 3rd February, the respondent, in an appeal pending before the District Judge, informed the Court that he was prepared for the case being taken any day that week. The 9th March was then fixed for hearing. On the 3rd March, the application was made on behalf of the appellant that the case might be taken on the 5th for the convenience of the counsel who was being brought from Allahabad on that date. This application was opposed by the pleader for the respondent, on the ground that the respondent had engaged counsel for the 9th, and could not be informed of the change of date in so short a time. On the 4th March, the application was brought before the Judge, and he then ordered that the hearing should take place on the 5th, and, upon the 5th, the appeal was heard, the pleaders for the respondent being present, but taking no part in the argument. The Judge decreed

Practice and Procedure—continued.

the appeal. *Held* that care should be taken not only in fixing the original date for the hearing of a case, but in altering the date of hearing so that none of the parties should be taken by surprise, but that there was nothing illegal in a Judge taking an appeal on any day he chose to fix, so long as the parties or their pleaders had sufficient notice and no prejudice was caused, and that, in the present case, there was no proof of surprise or prejudice. **ANDHA KUAR v. DALIP LALL, A.W.N. 1889, 20.**

(122)—*S. 22—Act XXIII of 1861, s. 11—Jurisdiction — Appeal.*—When the decree or order which is the subject of appeal is made in a suit, whether during the execution proceedings or previously, the subject-matter in dispute within the meaning of Act VI of 1871, s. 22, is the subject-matter in dispute in that suit, and not the mere amount of money which the order itself may directly affect. Where a question, such as is contemplated in Act XXIII of 1861, s. 11, was determined by the order of a Subordinate Judge engaged in executing a decree, the appeal from such order was held to lie to the District Judge, and not to the High Court, although the original subject-matter in dispute which had been less than Rs. 5,000 had grown, by the addition of interest, to a sum exceeding Rs. 5,000. **MUSSAMUT RUTTANJOTE KOORER v. RAM DASS, 10 B.L.R. 290 = 19 W.R. 131. [F., 12 A. 581.]**

(123)—*Bengal Act VIII of 1869, s. 102 — Appeal to High Court.*—Act VIII (B.C.) of 1869, s. 102, does not apply to a case decided by the Additional Judge. **NOBOKISTO KOONDO v. NAZIR MAHOMED SHEIKH, 10 B.L.R. App. 30 = 19 W.R. 202. [Appr., 1 C.L.R. 39.]**

(124)—*Re-hearing of ex parte appeal—What the applicant must satisfy Court upon.*—Upon a petition for the re-hearing of an appeal heard *ex parte*, the applicant must satisfy the Court that the notice was not duly served or that he was prevented by sufficient cause from attending, when the appeal was called on for hearing. **ANUNDA SHAH BISWAS v. KEMA BEEBEE, 6 C. 548.**

(125)—*Appeal between co-defendants—Appeal when allowed.*—Where a Court deals with a case at the hearing as if it raises not only a question between the plaintiff and the defendants but also one between the defendants, *inter se*, it is not competent to one of the defendants to appeal against the decree as between himself and the other defendant. **SOIRU PADMANABHA RANGAPPA v. NARAYAN RAO bin VITHALRAO, 18 B. 520. [R., 25 C. 565, 16 C.P.L.R. 42, 31 C. 643 = 8 C.W.N. 496, 28 M. 229 = 15 M.L.J. 212, 12 O.C. 260; Cons., 3 N.L.R. 85]**

(126)—*Interlocutory order—Finality—Review or appeal.*—It would be contrary to the usual procedure and practice of the Court for one Judge to make an order which has been refused by another Judge, even though arguments should be urged before him which were not

Practice and Procedure—continued.

urged before the Judge to whom the first application was made. If an order is wrongly refused, the proper course is to seek to review it or to appeal from it; not to seek to obtain the order by resorting to another Court. **MOTIVAHU v. PREMVAHU, 16 B. 511.**

(127)—*Withdrawal of suits or appeals—Withdrawal of suit—Landlord and tenant—Forfeiture for non-payment of rent—Right to relief from application in motion.*—A motion was made on summons that a suit, seeking a declaration that defendants had forfeited their right to a lease by reason of non-payment of rent, be discontinued or dismissed. *Held*, such an application should not be made by motion, but the defendant was entitled to be relieved from the forfeiture on payment of what was due. **GHOLAM MAHOMED v. CALCUTTA CLUB, Cor. 67.**

(128)—*Withdrawal of appeal—Respondent who has filed objections, right of, to appeal.*—A respondent, who has filed cross-objections, unless he satisfies the Court upon affidavit that he was himself ready to appeal and would have done so within time but for the appeal by the other side, should not be granted leave to appeal on the withdrawal of the appeal by the appellant. **GOUR HARI SANYAL v. PREM NATH SANYAL, 9 C. 735 = 12 C.L.R. 395. [R., 23 B. 692.]**

(129)—*Permission to withdraw second appeal—Review on new evidence discovered—Civ. Pro. Code (Act X of 1877), s. 623.*—The last paragraph of s. 623 of the Civ. Pro. Code indicates that it is the pendency of an appeal preferred by the party and nothing else, which stands in the way of his application for review. It is however just and reasonable and in accordance with practice that a party who has discovered fresh evidence, soon after he has presented his second appeal, should be allowed by the High Court to withdraw such appeal, so that he may apply for a review to the lower Court which alone could consider his new evidence. **PANDU v. DEVJI, 7 B. 287. [R., 30 B. 625 = 8 Bom. L.R. 842; D., 18 M. 480.]**

(130)—*Absent respondent—Right of appeal—Civ. Pro. Code (Act VIII of 1859), s. 119 = s. 108 of the Code of 1882.*—The respondent in the lower appellate Court is not precluded, because of his non-appearance in such Court, from appealing to the High Court. S. 119 of the Civ. Pro. Code (of 1859) applies only to an absent defendant and not to a respondent. **KALI KISHORE ROY v. DHUNUNJOY ROY, 3 C. 228.**

(131)—*Memorandum of appeal, misdescription in heading of—Dismissal of appeal.*—An appeal, described in the memorandum as a "First appeal from order," whereas in reality it was an appeal from an order under s. 244 of the Civ. Pro. Code, which amounted to a decree, should not be dismissed on account of the mistake. The misdescription, not having prejudiced the respondent, must be corrected and

Practice and Procedure—continued.

the appeal heard. Nor did the mistake, in any respect, affect the stamp on which, under the Court Fees Act, the memorandum should be presented, whether it was a memorandum of appeal from a decree or one from an order strictly so called. *SANTLAL v. SRI KRISHEN*, 14 A. 221 = A.W.N. 1892, 66. (12 A. 61, R.) [F., 22 A. 430 = A.W.N. 1900, 136.]

(132)—*Civ. Pro. Code, 1882, s. 541—Appeal, copy of decree to accompany memorandum of.*—A copy of the decree appealed against being a necessary accompaniment at the presentation of the appeal against it, where no such copy has been put in with the memorandum of appeal, the appeal cannot be regarded as having been validly presented. *CHAMELA KUAR v. AMIR KHAN*, 16 A. 77 = A.W.N. 1893, 223. (A.W.N. 1892, 47, F.) [R., 9 C.P.L.R. 109.]

(133)—*Notice on pleader if notice to client—Appeal from preliminary decree, disposed of—Arrival of records in Lower Court—Parties how to be notified.*—An appeal preferred to the High Court against a preliminary decree for accounts having been dismissed for non-prosecution, the record was returned to the Lower Court, which directed notices to be served on the pleaders of the parties for the further hearing of the case, a week hence. Notice was served on the defendant's pleader but he did not inform the defendant. *Held*, that the notice was not a good notice on the defendant, and an *ex parte* decree passed against the defendant on the date fixed should be set aside; that the case should be reheard upon notice served on the defendant personally. *E.F. SANDYS v. UPENDRA CHUNDRA SINHA ROY*, 13 C. W.N. 142 = 2 Ind. Cas. 547.

(134)—*Religious endowment—Mohunt, competency of, to appoint successor by will—Direction in will to appoint successor—Construction of will—Rules regulating Mohunts and their offices, derivable from established custom and usage—Plaintiff claiming Mohuntship, duty of, to establish his title to office.*—A, the Mohunt of a wealthy endowed religious institution, made his last will addressed to B reciting that B should succeed as the next Mohunt and have his name entered as proprietor in the records in substitution of that of the testator and take charge of all the properties and, as Mohunt of the institution, perform the religious duties in the usual way. The Will also directed that on B, finding himself incapable of fulfilling the above duties, he should appoint in his place C the present appellant, as Mohunt. *Held*, on the true construction of the Will, that it did not give the appellant an absolute positive and unqualified right at any time to the Mohuntship even on the incapacity of B to perform the duties of Mohunt. Until B became incapable, no trust or duty was even suggested, and even when he should actually become incapable, it cannot be put higher than as a gift in the nature of a precatory trust—that is, one requesting B to perform the wishes of the testator and to appoint the appellant as

Practice and Procedure—continued.

his successor. It was unnecessary for their Lordships to consider whether in point of law, a grant of Mohuntship can be made by any holder of the office with the superadded obligation imposing on the grantee the necessity of following the wishes of the grantor, as to the person whom he is to appoint to be his successor in that office. Their Lordships observed that the only law as to the Mohunts and their offices, functions and duties, was to be found in custom and practice, which was to be proved by testimony and no evidence had been adduced before their Lordships to show that any such appointment had ever been made in reversion on any former occasion. It had only to be considered whether, upon the case as it stood, the appellant had made out his title. It was not necessary to consider whether he had shown any infirmity whatever in the title of the respondent, but whether he had made out a satisfactory case to entitle him to recover the office and the lands and property belonging to it. Their Lordships therefore decided both on the consideration of the Will and on the evidence brought before them that the appellant had completely failed in his attempt to set up his own title, and that, consequently, the decision of the Court below, to the effect that he had failed to establish any title of his own, ought to be affirmed. *GREEDHAREE DOSS MOHUNT v. NUNDOKISHORE DOSS MOHUNT*, 8 W.R.P.C. 25 = 11 M.I.A. 405. [F., 9 C. 766, P.C. = 13 C.L.R. 30; *Appr.*, 1 M. 235, P.C. = 4 I.A. 76; R., 1 I.A. 209, 5 C.L.R. 73, 8 B. 432, 11 B. 185, 10 M. 375, 31 M. 293, 23 B. 131, 7 C.W.N. 145, 5 C.L.J. 360, 8 C.L.J. 499, 11 C.L.J. 2 = 3 Ind. Cas. 408.]

(135)—*Application to restore appeal dismissed for default—Evidence of sufficient cause for restoration.*—An applicant for the restoration of an appeal which has been dismissed for default of appearance should produce all the evidence in support of the application before the Court to which it is made. If he does not do so, and his application is dismissed, he will not be permitted to supplement such evidence in the Appellate Court on an appeal from the order dismissing his application. *MUZAFFAR ALI KHAN v. KEDAR NATH*, 20 A. 266 = A.W.N. 1898, 34. (A.W.N. 1890, 166, F.) [R., 31 C. 150]

(136)—*Appeal to Privy Council—Restoration.*—The High Court has the power, and ought to exercise its discretion in each particular case, with regard to restoring appeals to the Privy Council dismissed for default, or removed for any reason from the file of the High Court. *In the matter of the petition of RADHA BINODE MISSER*, B.L.R. Sup. Vol. I, 730, F.B. = 7 W.R. 530.

(137)—*Same subject matter—Two suits.*—A suit should not be proceeded with while an appeal relating to the same property and between the same parties is pending before the Privy Council. *SHEOPROSUN MISSER v. MAHARAJAH RAJENDER KISHORE SINGH*, W.R. 1864, 100.

Practice and Procedure—continued.

(138)—*Delay to forward depositions to England—Peremptory order to send papers forthwith.*—In a case of great delay by the officers of the *Sudder Dewanny Adawlut* at Calcutta in not forwarding certain depositions filed in the cause, which had been omitted in the transcript forwarded to *England*, the Judicial Committee peremptorily ordered the *Sudder Dewanny Court* forthwith to transmit the omitted evidence to *England*. **BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER, 5 M.I.A. 146.**

(139)—*Security from respondent in possession—Madras Reg. VIII of 1818, s. 4—Privy Council, Jurisdiction of—Quære.*—Whether there is any jurisdiction in the Judicial Committee, under s. 4 of *Madras Reg. VIII of 1818*, to call for security from the respondent when in possession. **NAGALUTCHMEE UMMAL v. GOPOO NADARAJA CHETTY, 6 M.I.A. 309.**

(140)—*Lower Courts failing to decide the principal questions—Questions of fact—Interference by the Judicial Committee.*—Although the Judicial Committee adhere to the rule not to disturb the findings of two concurrent Courts, in *India* upon a question of fact, yet such rule does not prevail, where the Courts in *India* have never dealt with the real question raised by the issues, and have drawn wrong inferences from the evidence. In such a case, the Court of ultimate appeal will disregard those concurrent judgments, and decide the case upon the evidence contained in the record. **MOULVIE SAYYUD UZHUR ALI v. MUSSUMAT BEBEE ULTA F FATIMA, 13 M.I.A. 232.**

(141)—*Extension of time to appeal, jurisdiction of the Judicial Committee to grant—Enlargement of time for prosecution of appeal.*—The Judicial Committee have no jurisdiction to entertain an application for extension of time to appeal until the petition of appeal is lodged. Where it appeared that an inquiry was pending before the Master in the Court below, arising out of the decree, which was the subject of the appeal, the result of which might render the prosecution of appeal unnecessary, the Judicial Committee enlarged the time prescribed by r. V of the Order in Council of the 13th June 1853, for prosecution thereof, until further order. **GUNGADHUR SEAL v. SREEMUTTY RADDAMONEY DOSSEE, 6 M.I.A. 209.**

(142)—*Appeal to Sudder Court—Appeal on single issue—Whole appeal opened up—Cross-appeal.*—When a case is brought by way of appeal before the *Sudder Dewanny Court*, the whole cause is before that Court, although the appeal is limited to a single issue. A cross-appeal is not necessary. **PRANNATH ROY CHOWDRY v. ROOKEA BEGUM, 7 M.I.A. 323.**

(143)—*Hearing appeal to Privy Council ex parte—Personal service on respondent, evidence of.*—Their Lordships declined to hear an appeal, from the *Sudder Dewanny at Madras ex parte*, without evidence of the respondent having been personally served with notice that the appeal

Practice and Procedure—continued.

was pending; and ordered the appeal to stand over, with leave for the appellant to proceed in the Court below, to render service of such notice effectual. **KONADRY VALABHA v. VALIA TAMBURATI, 4 M.I.A. 213.**

(144)—*Award of partition—Act XVIII of 1848—Appeal to Privy Council from decision of Governor-in-Council—St. 3 and 4, will. IV. c. 41, ss. 3 and 4, St. 7 and 8, Vict. c. 69.*—An Act of the Legislature of India, No. 18 of 1848, empowered the Governor-in-Council of Bombay, to administer the private estate of the Late Nawab of Surat; and, by s. 2, it was enacted that no act of the said Governor of Bombay in Council in respect of the administration to, and distribution of, such property, from the date of the death of the said Nawab should be liable to be questioned in any Court of Law or Equity. No provision was made for an appeal from the Governor's decision. In pursuance of the power conferred by this Act, the Government Agent at Surat, to whom the matter was referred, made an award distributing the estate in certain shares, among the heirs of the deceased, which award was confirmed by the Governor-in-Council. Upon an application by a claimant dissatisfied with the award to the Judicial Committee for leave to appeal from the Governor-in-Council's confirmation of the award; *held*, that the award was not such a judicial act as to come within the meaning of s. 3 of the Statute 3rd. and 4th., Will. IV., c. 41, or the 7th. and 8th. Vict. c. 69, and could not be entertained by the Judicial Committee, without a special reference to them by the Crown under s. 4 of the Statute, 3rd and 4th Will. IV., c. 41. **In re THE NAWAB OF SURAT, 5 M.I.A. 499.**

(145)—*Validity of deed—High Court dismissing suit as containing same point as previously decided suit—Decision in prior suit reversed by Privy Council—Ex parte appeal from subsequent suit—Practice.*—The High Court dismissed an appeal from the *Zillah Court* on the ground that it involved the same question as had been decided by them in another suit brought by the plaintiff in respect of the validity of a *Zur-i-peshgi* deed. The decision in the prior suit was, on appeal, reversed by the Judicial Committee. In such circumstances, on the appeal from the decision coming on for hearing *ex parte*, their Lordships, with the consent of the appellant, remitted the case to the High Court, with a declaration that the deed was valid; and with a direction, if the respondent did not appear within a reasonable time to be fixed by the High Court, to dismiss the appeal from the *Zillah Court*, and, in the event of the respondent appearing, then to hear the case on the merits. **KALEEPERSHAD TEWARREE v. LALLA BINDA LALL, 12 M.I.A. 343.**

(146)—*Prior High Court decision ruling that polliem was not heritable estate—Subsequent decision ruling contra—Appeal against prior decision not made in time to Privy Council—Conflict of decisions—Special leave to appeal.*—Where the High Court first decided that a *polliem* was not

Practice and Procedure—continued.

an estate of inheritance, but subsequently a year after it held that a polliem was an ancestral hereditary estate, the Privy Council gave special leave to appeal, on the ground of a conflict of decisions, from the first decision though the applicant was out of time. **OOLAGAPPA CHETTY v. ARBUTHNOT, 7 M.L.J. 190.**

(147)—*Execution of decree in different Courts—Plea of limitation—Conflicting decisions—Appeal against one—Effect.*—A decree for possession of certain immovable properties situated in the Districts of Gya and Shahabad with *wasilat* was confirmed by the Privy Council on appeal on the 28th July, 1871. Since the date of the confirmation of the appeal by the High Court in 1865, proceedings had been going on simultaneously in both the Shahabad Court and the Gya Court. On the 31st of December, 1877, an application was made to the Shahabad Court to execute the decree, and the High Court on appeal by the judgment-debtor held, on the 13th September, 1880, that this application was barred by limitation. While these proceedings were going on in the Shahabad Court and the High Court, the decree-holder made an execution application to the Gya Court on the 23rd August, 1879. On the 12th June, 1880, the Gya Court disposed of the plea of limitation in favour of the decree-holder, and the defendant preferred no appeal, but the decree-holder preferred an appeal against an order refusing to attach certain property of the judgment-debtor, and in the appellate Court the judgment-debtor contended that the order of the High Court dated 13th September, 1880, precluded the decree-holder from proceeding with her application of the 23rd August, 1879. *Held*, that the decree-holder was entitled to proceed with the execution of the decree, and the judgment-debtor was not entitled to refer to the order of the 13th September, 1880, to show that the decree had been declared to be incapable of execution. **BHOOBOONA ALUMBABI KOER v. JOBRAJ SINGH, 11 C.L.R. 277. (8 C. 218 = 10 C.L.R. 425, R.)**

(148)—*Appeal against co-plaintiff.*—By consent of parties and to avoid further litigation, in this case, the High Court allowed an appeal by one plaintiff against another plaintiff, and adjudicated upon their rights. **BHAGIRTHI BAI v. BAYA, 5 B. 264. (15 B. 145, 16 B. 119.)**

(149)—*Mode of consent.*—The practice of the High Court at Calcutta on its original side in the case of decrees by consent is to require the defendant in person, or some one instructed by him, to appear in Court to consent. **SAUNDERS v. ROMANATH PAUL, 1 Ind. Jur. N.S., 395.**

(150)—*Trial of charges of fraud—Consent decree—Practice.*—A consent-decree cannot be set aside on motion, on the ground that it was obtained by fraud and misrepresentation. Charges of fraud cannot be tried on affidavits and a separate suit will, therefore, have to be

Practice and Procedure—continued.

brought for that purpose. **FOOLCOOMARY DASI v. WODOY CHUNDER BISWAS, 25 C. 549.**

(151)—*Estoppel by conduct—Settlement of issues—Omission of material issues—Consent of parties.*—A statement was prefixed to the issues settled in the Court below, to the effect that "the vakils of the parties accept the following issues." *Held*, that it was not competent, after such consent, to object on special appeal that a material issue was omitted. **SABITRA MOONEE v. MUDHOO SOODUN SINGH, Marsh, 519.**

(152)—*Civ. Pro. Code, Act X of 1877, s. 375—Practice of High Court—Consent decree.*—According to the practice of the High Court, a consent decree upon a compromise will not be granted, unless the suit be entered in the cause list of the Court. **PELL v. VALETTA, 5 C.L.R. 464. [R., 26 B. 76 = 3 Bom. L.R. 431.]**

(153)—*Review of judgment, wrongly so called—High Court, when would interfere.*—Where a proceeding in the lower Court was erroneously called proceedings in review of judgment, the High Court refused to interfere, as substantial justice had been done in this case. **TULSI RAM v. GANESH, A.W.N. 1881, 105.**

(154)—*Refusal of Court of first instance to examine all the plaintiff's witnesses—Appeal by defendant decreed—Remand.*—Owing to the direction of the Court of first instance only a portion of the evidence available in support of the plaintiff's case was recorded by that Court, which decreed the plaintiff's suit. On appeal, however, the lower Appellate Court took a different view of the plaintiff's evidence and dismissed the suit. *Held* that the plaintiff should be given an opportunity of producing the evidence which had not been recorded owing to the attitude taken up by the Court of first instance. **PABITRA KUNWAR v. THE MAHARAJA OF BENARES, A.W.N. 1908, 140 = 5 A.L.J. 468 = 30 J.A. 367. (11 C.W.N. Notes, p. XCII, A.W.N. 1905, 266, R.)**

(155)—*Order of remand—Appeal from, after decree in suit—Civ. Pro. Code, ss. 562, 588, 591—Pre-emption—Wajib-ul-arz—Arazidari land "Haqiat"—"Hissedar"—Deh.*—An appeal lies from an order of remand passed under s. 562, Civ. Pro. Code, even though before the filing of the appeal, the suit has been decided in compliance with the order of remand. Arazidars in District Basti are not members of the co-parcenary body in a village. A custom of pre-emption, recorded in a *Wajib-ul-arz*, in respect of the transfer of a *haqiat* by a *hissedar* applies only to co-parceners and no claim can be maintained in respect of the sale of *arazidari* land. **UMAN KUARI v. JARBANDHAN PATHAK 5 A.L.J. 447, F.B. = A.W.N. 1908, 195 = 4 M.L.T. 162 = 30 A. 479. (12 A. 510, F.B., 12 C. 45, 3 A.L.J. 40, F.; 29 A. 659, Overruled.)**

(156)—*Remand to Lower Appellate Court—Appellant not entitled to notice—Date of hearing on remand—Change of settled practice.*—Where the High Court, on hearing a second appeal,

Practice and Procedure—continued.

remands a case to the lower appellate Court for a fresh decision, the appellant in the latter Court is not entitled to a notice intimating the date on which the case will be taken up. (2 C.W.N. 318, R.) A settled practice cannot well be disturbed, unless it is shown to be illegal. (12 A. 120, 34 C. 1037, 2 C.P.L.R. 32, 17 W.R. 70, 21 W.R. 65, R.; 5 W.R. Mis. 22, D.) The position brought about by a remand to a Court of first appeal resembles that in O. XLI, r. 12 (= s. 552 of Act XIV of 1882) rather than what is reached by successive adjournments after the date originally fixed for hearing. Once the appeal has been admitted and registered, the date of hearing may be fixed at once or after an interval; but, in either case, the appellant is not entitled to receive individual notice of that date. *ATMARAM v. KRISHNA*, 4 N.L.R. 166.

(157)—*Remand—Main point in issue not decided.*—The lower appellate Court having omitted to determine the material issue, whether the property sold to the plaintiffs belonged to the vendor, and whether he was competent to sell it, the case was remanded for re-trial and fresh decision. *SHADEE RAM v. SURMA*, 2 Agra 110.

(158)—*Procedure—Lower Appellate Court declining to exercise jurisdiction vested in it by law—Facts undisputed—Remand unnecessary.*—Where the lower appellate Court declined to exercise a jurisdiction vested in it by law, the High Court would have remitted the case to that Court for re-trial, if there were any dispute as to the facts. In case of the facts being well established and practically admitted, the High Court, instead of remanding the case to the lower Appellate Court, would proceed to decide the question on those facts. *RAM NARAIN SAHOO v. BANDI PERSHAD*, 31 C. 737.

(159)—*Practice—Remand—Appellate Court, whether to deal with whole appeal after return of findings.*—In an appeal where the respondent filed objections under s. 561 of the Civ. Pro. Code, the Court, without delivering judgment, remanded an issue with reference to the objections, stating however that the appellant was in its opinion entitled to succeed. It was apparent that, at that time, the appeal could not have been argued out, and the true meaning of the facts as found could not have been present to the mind of the Court. *Held* that, upon the return of the findings on remand, the Court could not treat the appeal as already decided, and the objections the sole matter for consideration, but should consider the question which has been raised by the appellant and the objections raised by the respondents, and decide the whole case. But from this ruling it must not be inferred that, where Judges have heard arguments on some of the issues and have come to or expressed their views on those issues and have remanded another issue or issues under s. 566, the same Judges should be bound to hear the case *de novo*, on the return of the remand. In such a case, the counsel

Practice and Procedure—continued.

may be confined to the findings on remand. *LACHMAN PRASAD v. JAMNA PRASAD*, 10 A. 162 = A.W.N. 1887, 295. [F., 80 P.L.R. 1902.]

(160)—*Second appeal—Practice—Party refusing to produce evidence in lower Court—Case not to be remanded.*—Where a party had ample opportunities to produce his evidence, but refused to submit to the ruling of the first Court as to the onus of proof and declined to produce evidence, the High Court refused in second appeal to remand the case so as to give the party another opportunity of putting in his evidence. *KANHAI LAL v. DEBI DAS*, 22 A. 141 = A.W.N. 1900, 2.

(161)—*Remand order, Appeal against—High Court bound by findings of fact of lower appellate Court.*—Whether an appeal is made against an order of remand by the Court of first appeal, or whether the propriety of such order is questioned only in a second appeal from the decree which might ultimately be made by that Court, in either case, the High Court cannot question the findings of fact of the lower Court, unless they are contrary to law, if partly of law and partly of fact, or unless there was no evidence to support them. *TIKA RAM v. SHAMA CHARAN*, 20 A. 42 = A.W.N. 1897, 195. [R., 14 P.R. 1904 = 140 P.L.R. 1904.]

(162)—*Disposal of a preliminary point—Reversal of decree on appeal, and irregular remand of case under s. 562, Civ. Pro. Code, 1877—Power of succeeding Judge to retry preliminary point.*—Where the District Judge reverses the lower Court's decision on a preliminary point, and remands the case under s. 562 (though irregularly) for the trial of a certain issue, it is not competent for his successor, when the case comes up again in appeal, to retry and decide such preliminary point. *SURAJ DIN v. CHATTAR*, 3 A. 755 = A.W.N. 1881, 55. [R., 32 M. 318; Appr., 14 A. 348.]

(163)—*Practice—Defendant's application to summon plaintiff—No order passed—Procedure—Remand by appellate Court—Plaintiff summoned by defendant—Absence of plaintiff—Summons not legal—Adverse inference.*—When a suit was before the first Court, an application was made by the defendant that the plaintiff should be summoned and examined, but the Court did not then pass any order upon that application. When it came before the lower appellate Court upon the appeal of the defendant, and this omission on the part of the first Court was brought to his notice, the Judge directed the first Court to entertain that application and consider whether or not it ought to be granted, and if it ought to be granted, then to summon the plaintiff and record his evidence. *Held* that there was nothing irregular in the lower appellate Court taking this course, although there was nothing which provided specially for it in the Civ. Pro. Code. Where the plaintiff who was summoned by the other side absented himself, the Court was perfectly justified in taking the circumstance of his

Practice and Procedure—continued.

neglect to attend into consideration when deciding the case upon the facts. **BONOMALEE CHURN MYTEE v. SHEIKH HAFIZUDEEN**, 13 B.L.R. 247, Note=12 W.R. 317.

(164)—*Ex parte decree affirmed in appeal and special appeal—Re-hearing—Beng. Act VIII of 1869—Notice of suit—Remand.*—In execution of a decree by the Deputy Collector—confirmed in appeal by the first appellate Court and by the High Court in special appeal against certain defendants then present and the husband of the first respondent, who had since died and who was not then present, an application was made for the sale of certain of his immoveable properties and thereupon the respondent filed a petition applying for a re-hearing on the ground that her husband had received no notice of the suit. This application was refused by the Munsif to whom it was presented, Act VIII of 1869 (B.C.) having in the meantime come into force, on the ground that the re-hearing was barred by the institution of an appeal and special appeal. *Held*, that the Munsiff was clearly wrong, for if the husband of the respondent really had no notice of the suit, he could not be concluded by anything done in it. Where, on appeal from the Munsif's decision, the Judge held that the Munsif had no jurisdiction in the matter, but that the application for the re-hearing should be made in the Revenue Court, *held* that everything that had been done in the case by the Revenue Court and the order of the Judge remanding the case to the Revenue Court must be set aside as altogether without jurisdiction. **RAJA MOHESH CHUNDER SINGH SURMAN v. BHOOBUN MOYEE DEBIA**, 13 B.L.R. 217, Note=18 W.R. 252.

(165)—*Tender of documentary and oral evidence—Refusal by first Court to record oral evidence—Reversal of decree by lower appellate Court without admitting fresh evidence—Power of High Court to remand.*—In this case the Court of first instance refused to hear the witnesses for the plaintiffs, as unnecessary having formed a strong opinion in favour of the plaintiffs on their documentary evidence. The Court of first appeal, totally disregarding the fact that the plaintiffs had tendered evidence before the lower Court which had not been put on record by that Court, reversed its finding on the only issue in the case. The action of the lower appellate Court was held to amount to a substantial error of procedure such as would allow of an appeal to the High Court under s. 584 of the Code, and though the case did not fall within any of the sections of the Code relating to the procedure in remanding a case or in procuring additional evidence in second appeals, the High Court was bound, *ex debito justitiæ*, to quash the whole of the proceedings in both the lower Courts and direct the Court of first instance to restore the case to its list and try it upon the merits according to law, admitting for the purposes of that trial all admissible evidence

Practice and Procedure—continued.

tendered by either party. **DURGA DIHAL DAS v. ANORAJI**, 17 A. 29=A.W.N. 1894, 190. [R., P.L.R. 1900, 202, 23 A. 167, 91 P.R. 1904=5 P.L.R. 1905, 33 C. 927=3 C.L.J. 67.]

(166)—*Privy Council—Remand to Zilla Judge to arrive at certain results by certain enquiries—Reasons for enquiry—Judicial record.*—When the Privy Council remits a case with directions to this country that the Zilla Court may arrive at certain results by certain enquiries, the reasons and objects of these enquiries as recorded by the Privy Council are to be considered part of the judgment or judicial record, and be used for the guidance of the Zilla Court, and may be communicated to the Zilla Court with the decree of the Privy Council. **GOLUCK CHUNDER DUTT v. MOHUN LALL SOOKUL**, 5 W.R. 271.

(167)—*Reversing decree as to part of disputed property and remanding the suit as to remainder—Piecemeal decision.*—A Court of appeal dismissed a suit as against two of the defendants, and so far as concerned part of the plaint property; but remanded it for decision on other points as regards the remaining property and defendants. *Held*, that the High Court cannot countenance this piecemeal decision of the suit. Findings on the issues may of course be recorded from time to time as the hearing proceeds, but in the nature of things the pronouncement of the decree must be reserved until the materials laid before the Court have all been fully assimilated. **GANU ANANTSHET v. GANU MAHADEV**, 9 Bom L.R. 966.

(168)—*Remand by appellate Court after taking evidence.*—Where the appellate Court raised issues on the whole case and, after taking the evidence offered, decided them all, and remanded the case reversing the finding of fact: *Held*, (reversing the order of remand), that the procedure was throughout illegal, for it could not be said that the Court disposed of the suit on a preliminary point. The Judge should himself have disposed of the appeal and of all the points in contest therein. **PARAMCHAND v. NIRVANI**, 1 Bom. L.R. 72.

(169)—*Remand—Taking of evidence by District Court permissible.*—It is the invariable practice of the Courts in the mofussil that when a remand involving the taking of fresh evidence is ordered, the District Court sends down the case to the first Court in order that the evidence may be taken there, and this is done in the interests of the parties themselves and for their convenience. But nevertheless the District Court still remains empowered by the order of remand to take what evidence it may see fit to take, and record its findings upon it. **KUSHABA v. CHANDRABHAGABAI**, 10 Bom. L.R. 536=32 B. 441.

(170)—*Appellate Court directing further evidence to be taken by original Court—No date to be fixed for further hearing.*—When an appellate Court passes an order directing further

Practice and Procedure—continued.

evidence to be taken by the lower Court and to send it up when taken to the Appellate Court, it is wrong for such Appellate Court to fix a date for further hearing in the Appellate Court until the record is returned from the lower Court. **ASAMUDDIN KARI v. KARIM SHUKOOR**, 4 L.B.R. 239.

(171)—*Oaths Act (X of 1873), ss. 10, 11—Referee's deposition inadequate to decide question referred—Death of referee—Appeal.*—The parties to a suit agreed to be bound by the deposition of a referee in the manner contemplated by ss. 10 and 11 of the Oaths Act, and a decree was passed in favour of one of the parties on the strength of that deposition. The referee died afterwards, and it was found on appeal that the said deposition did not fully cover the questions in issue between the parties. *Held* that the case was, therefore, to be remanded to the lower Court for disposal according to the usual procedure. **MAHABIR PRASAD MISR v. DAT MISR**, 13 A. 386, A.W.N. 1891, 143.

(172)—*Procedure—Irregularity—Practice.*—Where the lower Appellate Court remanded a case to the Court of first instance instead of sending down an issue in conformity with the provision of law, the High Court held that there was no occasion to interfere with the order solely on that ground. **CHHOTIRAM v. MITHARAM**, 2 Bom. L.R. 135.

(173)—*Set off—No issue—No decision—Practice.*—Where a claim of set off was asserted by the defendant in his written statement, but no issue on the point was raised; no pronouncement on it was made by the first Court; it was not made, in appeal, the subject of cross objection nor was it urged in argument before the Appellate Court; the Court of appeal being of opinion that it formed an integral part of the suit, framed appropriate issues and sent the case to the first Court for trial upon them, with a view of determining the validity of the defendant's claim to set off. **AHMEDABAD A. S. & W. CO. v. LAKSHMISHANKAR**, 6 Bom. L.R. 790.

(174)—*Practice—Destruction of lower Court's record pending appeal—Remand for trial as fresh suit.*—Where in a case pending appeal, the lower Court's record was entirely destroyed, but the Appellate Court decided after re-examining witnesses, without the pleadings or evidence as originally given, the High Court on second appeal set aside the proceedings of the lower Appellate Court and remanded the case to the first Court to re-try it as a fresh suit. **GHULAMAN v. KARIMA**, A.W.N. 1888, 117.

(175)—*New trial—Discovery of document after judgment—No application for discovery before judgment—Fraud.*—Where, no cause of fraud or surprise having been made out, a party to the suit sought for a new trial on the ground of discovery after judgment of an important document, which was in the possession of an opposite party, but of which the party first

Practice and Procedure—continued.

named had neglected to obtain discovery before judgment: *Held* that a new trial should not be granted. **TURNBULL AND CO. v. DUVAL**, 6 C.W.N. 809, P.C.

(176)—*Civ. Pro. Code, 1882, s. 588 (b)—Loss of plaint.*—When it is established that the plaint has been stolen or destroyed, the suit or appeal may proceed upon a copy thereof or, failing a copy, upon oral evidence of the contents thereof. **MOHAMMED ALI KHAN v. MUHAMMAD NABI**, 1 A.L.J. 695.

(177)—*Appeal—Records destroyed—New trial.*—The mere fact that the record was accidentally destroyed in the interval between the original hearing of a case and the appeal cannot give the appellant a right of retrial. It is open to a Court of appeal to try the case upon any materials proved to have been used at the hearing in the first Court, but it is for the appellant to put those materials before the Court. **HAR KUMAR PAL CHOWDRY v. SHEIKH ASIATULLAH**, 3 C.W.N. 150.

(178)—*Practice—Duty of High Court in revision.*—In second appeals, it is not the duty of the High Court to enter into the merits of the evidence, *a fortiori*, in cases of revision. All that the High Court, as a Court of revision, is required to do, is to see whether the requirements of the law have been duly and properly obeyed by the Courts whose orders are subjected to revision, and whether the irregularity as to failure of exercise of jurisdiction is such as would justify interference by the High Court. **MUHAMMAD HUSAIN v. AJUDHIA PRASAD**, 10 A. 467 = A.W.N. 1888, 179.

(179)—*Findings of lower Courts on questions of fact.*—It is not the practice of the Judicial Committee to disturb the findings of the Court below upon mere issues of fact, unless their Lordships are clearly satisfied that there has been some miscarriage, either in the reception, or in the appreciation, of evidence. In cases that turn upon the credibility of the testimony given, the Appellate Court is disposed to defer to the judgment of the Judges who, with the advantage of local experience, have had the means of seeing the witnesses under examination, and of inspecting the original documents. **GHOOLAM MOORTOOLAH KHAN BAHADOOR v. THE GOVERNMENT**, 9 M.I.A. 456 = 2 Sar. 23.

(180)—*Practice—Question of fact—Concurrent findings of two Courts.*—The Judicial Committee will not disturb the concurrent findings of two lower Courts on a question of fact. In this case also the Committee preferred not to depart from the general rule as to concurrent decisions on fact stated above. **ASHGAR REZA v. NEHDI HOSSEIN**, 20 C. 560, P.C. = 20 I.A. 38 = 6 Sar. 283.

(181)—*Findings of fact based on conjecture—Powers of High Court.*—*Per Mahmood, J.*—Findings of fact not based on evidence, but upon conjecture made by the lower Courts, are, strictly speaking, legal inferences and the

Practice and Procedure—continued.

expression of their legal views; and the High Court can, in second appeal, decide whether such inferences and such views are correct under the law. **SANKAR LAL v. SUKHRANI, 4 A. 462 = A.W.N. 1882, 106.**

(182)—*Practice—Question of law—Preliminary issue—Maintainability of suit—Disposal on merits.*—Where the Court finds that the condition precedent to the plaintiff's coming into Court did not exist and that the plaintiff's status to ask for possession has not been established, it should dismiss the plaintiff's claim *in limine* and should not proceed to dispose of the other questions of fact. **RADHA v. JAGANATH, A. W.N. 1883, 57.**

(183)—*Interference by High Court in special appeal.*—The High Court will always refuse to interfere with the appellate judgment of a lower Court, unless it commits some error of law or is under some misapprehension of law. **NOOR ALI MIAN KHONDKHAN v. ASHADULLA, 11 C. 608.**

(184)—*Question of fact.*—The High Court cannot accept a finding of fact, arrived at without an application of sound principles to the consideration of evidence, as binding upon it. **SHARIFA v. MUNEKHAN, 3 Bom. L.R. 167 = 25 B. 574.**

(185)—*Question of facts—Inferences from facts found.*—A Court of appeal ought never to reverse the judgment of an inferior Court unless quite confident that the judgment given in the Court below is wrong. Where the case depends upon the proper inferences to be drawn from facts indisputably established by the evidence, an appellate Court may be in as good a position to judge as the original tribunal. But where the case hinges on the question which of the two conflicting stories is to be believed, to which witnesses credence is to be given, the original tribunal is far better placed than the Appellate Court to correctly gauge the truth. **INDIAN MANUFACTURING CO. v. LALJI, 6 Bom. L.R. 1130.**

(186)—*Second appeal—Interference with impossible finding—Finding insufficient basis for conclusions.*—Where the decree of the lower Appellate Court is founded upon an impossible finding or where its findings form an insufficient basis for its conclusions, the High Court will interfere in second appeal. **BASA MAL v. GHAYAS-UD-DIN, 2 A.L.J. 27 = 27 A. 356 = A.W.N. 1904, 276.**

(187)—*Practice—Reversal of finding by Judge without discussion of grounds—Effect.*—Where a District Judge expresses an opinion and records a finding without discussing at all the several grounds on which a Subordinate Judge came to a contrary conclusion, such a finding ought not to be accepted. **BABU MADHAV SHAN BHOG v. VENKATESH MANJAYA, 16 B. 540. [R., 5 Bom. L.R. 956.]**

(188)—*Suit on rent-note—Issue raised as to ownership—Omission to give finding on it—Duty of Court.*—The plaintiff instituted a suit

Practice and Procedure—continued.

on a rent-note. An issue was raised as to the ownership of land in the suit. Both the parties gave evidence at the trial on that issue. On appeal, the Judge thought it unnecessary to arrive at any finding on that issue. *Held* that the lower appellate Court ought to have found on that issue. **RAMKOR GOPALJI v. GANGA RAM, 16 B. 545.**

(189)—*Want of jurisdiction—Ground for new trial.*—Though the plea of want of jurisdiction was not formally raised or recorded at the original hearing, a new trial on that ground may be granted. **CHUNDEE CHURN DUTT v. EDULJEE COWASJEE BIJNEE, 8 C. 678 = 11 C.L.R. 225.**

(190)—*Jurisdiction—Civil and Revenue Courts—Suit instituted in wrong Courts—Act XII of 1881 (N.W.P. Rent Act), ss. 206, 207, 208.*—Where a plea to the jurisdiction, in respect of a suit instituted in a Revenue Court, is raised in that Court and is repeated before the District Judge, the latter should, where there are no materials on the record sufficient for the determination of the suit, only entertain the plea *pro tanto* for the purpose of determining to what Court he should direct his order of remand, and should not pass an order, the effect of which is to dismiss the suit. **DEBI SARAN LAL v. DEBI SARAN UPADHIA, 6 A. 378 = A.W.N. 1884, 122. [Appr., 12 A. 419; R., 6 A. 442.]**

(191)—*Objection to jurisdiction—When to be taken.*—An objection as to jurisdiction to try an issue which, if taken at the first opportunity, would lead to the dismissal of a suit, cannot be taken after the close of the trial. **SETH RAM RATTAN v. SUNDER DAS, 118 P.R. 1892. (9 A. 191, P.C., F.)**

(192)—*Legal objection—When can be raised.*—An objection to the plaintiff having no cause of action may be taken at any stage of the suit. (6 B.L.R. App. p. 73, *Rel. on.*)—The House of Lords in England has decided that a legal question may be raised even in the ultimate Court of appeal, which has not previously been taken. **CHAMPA KUAR v. MINA MAL, A.W.N. 1887, 1.)**

(193)—*Plaint disclosing no cause of action—Competency of defendant to obtain the declaration of the Court upon the question—Objection not taken in written statement.*—It is competent to the defendant to obtain at the earliest possible stage of the hearing the declaration of the Court upon the question whether there is or is not a cause of action disclosed in the plaint, whether or not that question was expressly raised in the written statement. **UMAMOYEE DASSEE v. RAJ KRISTO NUNDAN, 3 C.W.N. 220.**

(194)—*Practice—Appeal—Objection allowed as going to root of suit, though not taken in memorandum of second appeal—Objection in accordance with Full Bench decision reversing previous decisions on which plaintiff respondent had relied—Costs.*—An objection on a matter of law and which goes to the very root of the

Practice and Procedure—continued.

suit would be allowed in second appeal, though not taken in the memorandum of such appeal. An objection to the decree of the lower appellate Court, that, under s. 244 of the Civ. Pro. Code, 1882, the plaintiff-respondent's remedy was not by suit but by appeal in the execution department, was allowed, though not taken in the memorandum of second appeal. But inasmuch as in the above case, the Full Bench ruling in *Seth Chand Mal v. Durga Dei* (10 A. W.N. 1890, p. 137) reversing previous decisions of the High Court, in reliance on which the plaintiff had brought his suit, and as the question of jurisdiction was only raised at the stage of second appeal, the High Court dismissed the suit without costs in every Court. *ISHRI DAT v. MAHABIR PRASAD*, A.W.N. 1890, 183.

(195)—*Plaintiff's objections, when may be made.*—If the plaintiff has not been heard at first against the defendant's application, he may always be allowed to come in afterwards for the purpose of showing that the leave to appear and defend ought not to have been granted, or that the terms upon which it has been granted ought to have been made more stringent than they were. *VONLINTZGY v. NARAYAN SING*, 6 B.L.R. App. 64.

(196)—*Order setting aside ex parte decree. Legality of, right to object to.*—S. 119, Act VIII of 1859. — Although an order setting aside an *ex parte* decree and ordering a re-hearing is final, in the sense that it is not by itself open to appeal, the party affected by the order is not precluded by s. 119 of Act VIII of 1859 (=s. 108 of Act XIV of 1882) from objecting to the legality of the order, on the ground that it was passed after the period of limitation and so without jurisdiction. *RUNG-LALL MISSER v. TOKHUN MISSER*, 2 C. 114.

(197)—*Point not taken even in the memorandum of second appeal, if can be allowed.*—The question was whether a suit on a negotiable instrument could be dealt with as a suit for the recovery of the alleged loan apart from the instrument. This point was not suggested even in the grounds of second appeal. *Held*, that the question can't be allowed to be argued. *AMBALAVANA PANDARASANNIDHI v. SINGARAVELU PILLAI*, 5 M.L.T. 210. (28 M. 205, 18 M.L.J. 186, F.)

(198)—*Objection raised for the first time in second appeal.*—An objection, that a document, which *per se* is not admissible in evidence, has been improperly admitted in evidence, cannot be entertained for the first time in second appeal. *GIRINDRA CHANDRA GANGULI v. RAJENDRA NATH CHATTERJEE*, 1 C.W.N. 530. (19 A. 76=23 I.A. 106, D.) [R., 23 C. 142.]

(199)—*Evidence—Trying different suits together — Duty of appellate Courts.*—A sued B for rent, making C a defendant; the suit was dismissed and A appealed. Then C sued B for rent; A intervened and was made a defendant; a decree was passed in favour of C and A again

Practice and Procedure—continued.

appealed. On appeal, the Subordinate Judge tried both suits on the same evidence, though there was evidence in the second case which was not before the lower Court on the hearing of the first. *Held* that he should have recorded his reasons for doing so; but that his judgment could not be set aside on that ground, it not appearing that the party taking the objection had been prejudiced or that he had raised it before the Subordinate Judge. *PRAN NATH SANDYAL v. RAM COOMAR SANDYAL*, 2 C.L.R. 33.

(200)—*Stare decisis—Inexpediency of varying rule long adhered to.*—*Stare decisis* is a salutary rule, and where injustice is not effected by following a rule of law laid down many years ago, and consistently adhered to, it is obviously inexpedient to vary that rule. *ABDUL RAZAK v. MUHAMMAD IBRAHIM*, 14 P.L.R. 1903.

(201)—*Proper use to be made of law reports by Courts.*—A Court is entitled to refer to reports of cases as precedents. But, because a judgment, order or decree finds a place in the reports of cases, the Court should not take cognizance of such judgment, order, etc. The party relying on it should be asked to produce a copy of the same and file it in the record of the case. *SOURINDRA MOHUN TAGORE v. SIROMONI DEBI*, 28 C. 171=5 C.W.N. 307. (27 C. 1, P.C., R.)

(202)—*High Court's Ruling—Duty of subordinate Court to follow.*—Subordinate Courts in the N.W.P. should follow the rulings of the Allahabad High Court and should not be guided by conflicting decisions of other High Courts. *IMAM ALI v. SAADAT ALI*, A.W.N. 1882, 106.

(203)—*Duty of Courts subordinate to High Court to follow precedents of that High Court.*—A Court subordinate to a High Court is bound to follow the rulings of the High Court to which it is subordinate. *SHEO NARAIN RAI v. SHEO PAL RAI*, A.W.N. 1894, 14. [R., 16 A. 254.]

(203-a)—*Duty of subordinate Courts to follow decisions of superior Courts.*—It is the duty of every subordinate Court, where it finds decision of the High Court, to which it is subordinate, applicable to a case before it, to follow such decision without question. *EMPEROR v. DENI*, 2 A.L.J. 498=A.W.N. 1905, 184=2 Cr. L.J. 395.

(204)—*Practice—Different rulings of different High Courts—Judge to follow rulings of High Court to which he is subordinate.*—Where there are different rulings of the different High Courts on a particular point, a Judge should follow the rulings of the High Court to which he is subordinate. *SWAMI ROW NARAYAN DESHPANDE v. KASHINATH KRISHNA MUTALIK DESAI*, 15 B. 419. [R., 17 B. 555.]

(205)—*Practice—Different rulings by different High Courts—Duty of subordinate Courts—Practice.*—Where there are different rulings by different High Courts on the same point, a Judge must follow the ruling of the

Practice and Procedure—continued.

High Court to which he is subordinate. **BALAJI GANESH v. SAKHARAM PARASHRAM ANGAL**, 17 B. 555. [Cons., 27 B. 1; R., 8 C.W.N. 66=31 C. 83]

(206)—*Precedents to be followed by lower Courts—Conflicting decisions of several High Courts.*—The lower Courts in India are bound to follow the concurrent decisions of the High Court to which they are immediately subordinate, and are not at liberty to adopt a contrary opinion expressed by another High Court. **KORBAN ALI MIRDHU v. PITUMBARI DASI**, 13 C.L.R. 256=10 C. 82.

(207) *Matters of procedure—Decisions of various High Courts.*—In matters of procedure, it is very important that the decisions of the various Benches of the High Court should, if possible, be in harmony. **AKIKUNNISSA BIBEE v. ROOP LAL DASS**, 25 C. 133.

(208)—*Decision of High Court binding on Lower Court.*—A Lower Court is legally bound to follow the decision of the High Court. **SURET SUNDARI BARMANI v. UMA PROSAD ROY CHOWDHRY**, 31 C. 628=8 C.W.N. 578.

(209)—*Judgments of High Court.*—A judgment of the High Court by a majority is binding on the Courts subordinate to it, until it is overruled by the High Court itself. **VEDANTA v. KANNIYAPPA**, 9 M. 14, F.B.

(210)—*Decision of one High Court, if binding on other High Courts.*—Except in cases to which the principle of *res judicata* applies, a High Court, although it should give due consideration to the reasons stated by another High Court, for its decision, is not bound to follow that decision unless it agrees with it. *Per Edge, C.J.* **BHAGWAN SINGH v. BHAGWAN SINGH**, 17 A. 294, F.B.=A.W.N. 1895, 167.

(211)—*Judge deciding a case not bound by the findings in same case of his predecessor in office.*—A Judge, who has to decide a case, has seisin of the whole case, and is in no way bound by any findings, whether of fact or of law, which may have been come to by his predecessor in office. **AMIR KAZIM v. ZAINAB BEGAM**, A.W.N. 1897, 152.

(212)—*Procedure—Change of—Precedent.*—A decision under a different procedure cannot be cited as a precedent under the new Code. **AZIZ-UNNISSA KHATUN v. SHASI BHUSHAN BOSE**, 2 B.L.R. App. 47=11 W.R. 343.

(213)—*Policy of Courts of Law.*—It has always been the policy of the Courts in India not to apply the strict rules of English Law to natives of this country. **SHEIKH PARABDI SAHAN v. SHEIKH MAHOMED HOSSEIN**, 1 B. L.R. A.C. 37. [R., 17 M.L.J. 469.]

(214)—*Suit for foreclosure or sale—Money-decree—Note to decree—Effect—Affidavit filed after adjournment for convenience of counsel—Admissibility.*—In an undefended suit for

Practice and Procedure—continued.

foreclosure or sale in the usual form, on the plaintiff electing to take a simple money-decree, the Court passed a decree which was in the usual form of money-decree and to which the following note was appended—"The equity of redemption in the property comprised in the mortgage is not liable to attachment and sale under this decree." The plaintiff made ineffectual attempts to realise his money. After this, he applied to the Court to sell the mortgaged properties. *Held* that it was discretionary with the Court to grant or refuse the sale. The note at the end of the decree did not amount to an absolute prohibition against the sale. It was only meant as a guide to the Court which should have to execute the decree. It was meant to show that execution should not issue against the equity of redemption except by special leave of the Court. *Quære.*—Whether an affidavit, filed after an adjournment granted for convenience of counsel, is admissible and can be referred to by the Court? **NEERUNJUN MOOKERJEE v. OOPENDRO NARAIN DEB**, 10 B.L.R. 57. [R., 22 B. 624, 35 C. 61=6 C.L.J. 320=11 C.W.N. 1011.]

(215)—*Propriety of Judges trying a cause consulting another Judge.*—Judges who have heard the arguments and who are responsible for the decision can hardly, with propriety, rest it on the authority of one who has not heard the arguments, and is not responsible for the decision, though he also may be a Judge of the High Court. **HARRIS v. BROWN**, 28 C. 621=28 I.A. 159=5 C.W.N. 729=3 Bom. L.R. 808=8 Sar. 92.

(216)—*Admiralty cases—Consolidation of suits—Procedure—Civ. Pro. Code, 1882—St. 2 and 3, William IV, c. 51—Rules issued under.*—According to the earlier practice, salvage claims were consolidated on the application of the defendants against the consent of the plaintiffs, and also on the application of the plaintiffs against the consent of the defendants. (The "*William Hutt*," Lush, 25; The "*Melpomene*," L.R. 4 Ad. and E., 130, *relied on*). According to the later practice, salvage claims should not be consolidated against the will of the promovents. (The "*Jacob Landstorm*," L.R., 4 P.D., 191 and The "*Pasithea*," L.R., 5 P.D., 5, *relied on*.) The Civ. Pro. Code contains no provision for the consolidation of suits. Under certain circumstances, the practice of the Court of Admiralty in England ought to be followed, so far as such practice can be applied to India by analogy. (21 W.R. 196, 10 C. 58, 17 C. 337, R.) N.B.—It appears from a recent case (*In re The Strathgarry*, Weekly Notes, March 2, 1895, p. 42), that the Court of Admiralty in England has reverted to the old practice stated above. *In the matter of the FALLS OF ETTRICK*, 22 C. 511. [R., 27 C. 860.]

(217)—*Admiralty jurisdiction—Practice—Application for consolidation of salvage claims—Application for consolidation and commission for taking evidence before filing of written statement.*—Where an application is made on

Practice and Procedure—continued.

behalf of the impugnants for consolidation of two separate salvage claims made by two different promovents for salvage services rendered by them, it is within the discretion of the Court to grant the application without regard to the consent of the parties. The application for consolidation and for a commission for taking evidence *de bene esse* may be made and granted before the filing of the written statement. **RETRIEVER v. DRACHENEFLIS**, 3 C.W. N. 67. (22 C. 511, R.)

(218)—*Jurisdiction—Civil Courts Act—Court Fees Act.*—Whenever a mortgage (not admitted by the plaintiff) is proved and its amount fixed, he may propose, if the defendant do not object, to redeem that mortgage. The amount of the subject-matter may become increased in value, and then further duty should be payable. If the value of the subject-matter appears at the conclusion of the trial or before that to exceed the pecuniary limit of the jurisdiction of the Court, the Court should return the plaint to be presented in the proper Court. **CHANDU v. KOMBI**, 9 M. 208. [R., 14 M. 169.]

(219)—*Hindu Law—Adoption—Presumption—Failure of adoption, Issue as to—Conflict of evidence—Practice—Adoption of only nephew—Dwayamushyayana adoption, Effect of, on inheritance—Costs—Appealable value—Objection.*—Observations on the presumption of adoption arising from the religious duty of a childless Hindu to adopt a son, and of the circumstances which rebut such presumption. On the issue as to the failure of an adoption as to which there was a conflict of evidence, the Privy Council, in the absence of strong documentary evidence confirmatory of the adoption, and on a consideration of the probabilities of the case, reversed the judgment of the High Court which had upheld the adoption, and confirmed that of the Judge of the original Court who saw and heard the witnesses, and who considered the witnesses in support of the adoption to be unworthy of credit. An alleged adoption by an uncle, of his nephew, who, at the time of such adoption, was his brother's only son, was not, as a fact, proved to have taken place. *Semble*:—Such adoption, if made, was invalid by Hindu law. The effect by the Hindu Law of an adoption of *Dwayamushyayana* (son of two fathers) is not to extinguish the lineage of the adopted son to his natural father, or to bar him of his right of inheritance to his father's estate. In a case of an alleged adoption by gift, in which the deed of gift stated that the son was taken by the person adopting as *palluck putro*, for securing future oblations of water and funeral cake; that he would be brought up like a son; that the ceremonies of *sungskar* have been performed, and he had been constituted the representative of the person adopting; it was held that the terms did not import the adoption of a son by gift, and that it was only by reason of the gift that the filial relation to the natural father was extinguished, or the right of the son in the estate of the giver ceased. [Rel. on, 12 B. H.C. 364; R., 14 A. 67, F.B., 19 B. 428.]

Practice and Procedure—continued.

Quære: Whether, in estimating the appealable value of Rs. 10,000, the costs of suit can be added to the principal and interest decreed? An objection to an appeal, on the ground that the amount in dispute is below the appealable amount, comes too late, when made to the Privy Council at the hearing of the appeal. **NILMADHAB DAS v. BISWAMBHAR DAS**, 3 B. L.R. P.C. 27=12 W.R. P.C. 29=13 M.I.A. 85=2 Sar. 489=2 Suther, 257. [R., 19 M. 350.]

(220)—*Valuation of suit—Preliminary question.*—The proper valuation of a suit is a preliminary question and must be determined before proceeding with the trial. **JOYTARA DASSEE v. MAHOMED MOBARUCK**, 8 C. 975=11 C.L.R. 399. [R., 31 B. 73=8 Bom. L.R. 885.]

(221)—*Permission to pay stamp duty in case of lost instrument—Quære.*—Whether permission to pay the stamp duty and penalty can be given in the case of a lost instrument? **ARUNACHELLAM CHETTY v. OLAGAPPAH CHETTY**, 4 M.H.C. 312. [R., U.B.R. 1892-1896, Vol. II, 631, 23 M. 49, P.C.]

(222)—*Stamp duty. Mistake in—Rectification—Qualified privilege.*—A mistake in stamp duty can, in some cases, be rectified, but this is a qualified privilege; and this cannot be done where the relief to be granted is altogether distinct from that originally sought. In such a case, additional stamp should not be allowed to be put on the plaint. **CHOKALINGAPESHANA NAICKER v. ACHIYAR**, 1 M. 40 [F., 8 M. 516, 15 M. 15; Appl., 3 B. 230; D., 2 A. 263, 4 M. 131, 14 B. 395, 17 B. 56.]

(223)—*Issue of certificate of sale—Insufficiency of stamp—Court not bound to grant fresh certificate.*—A Court, having once issued a certificate of sale to a purchaser at the Court auction, is under no obligation to give him another for the sole purpose of evading the penalty which he has incurred by not having presented in the first instance to the Court a paper properly stamped for it. **NANDRAM MOTIRAM v. KACHA BHAV**, 9 B. 526.

(224)—*Certificate of sale left unregistered—Grant of fresh certificate.*—On attempting to get possession of the house purchased by the applicant at a Court-sale, he was obstructed, and, with his application for removal of the obstruction, presented his sale-certificate, which he had not got registered. On the refusal of the above application, because of the non-registration of the sale-certificate, he applied for a fresh certificate. The lower Courts having refused to grant the same, he made the present application to the High Court under its extraordinary jurisdiction, and that Court ordered that a fresh certificate, dated the date thereof, should be given, the original certificate in the applicant's possession being taken back. *In re* **LAKSHMAN**, 9 B. 472.

(225)—*Practice—Holding brief for another, legality of—Strict rule of law modified by old practice—Appeal argued by a pleader holding brief for another—Civ. Pro. Code, ss. 36, 37,*

Practice and Procedure—continued.

38 and 652 — *Oudh Civil Digest*, r. VIII.—*Held*, that, although no formal rule regarding the transfer of a brief by one pleader to another had been made by the Court of the Judicial Commissioner, yet regard being had to the fact that the practice was one of a long standing in the Court and one formally authorized by the other High Courts, and also to the fact that it facilitated the work of the Court and tended to the convenience of the pleaders practising before the Court and of the parties as well, the practice was a proper one and should be maintained. *Held*, further, that an appeal heard and argued by a pleader of Judicial Commissioner's Court to whom the brief had been so transferred, by another pleader was properly heard and decided and the party so represented should not be allowed to re-argue the appeal. *PRAG alias NANHU v. THE DEPUTY COMMISSIONER OF BAHRAICH*, 9 O.C. 65. (4 O.C. 303, 22 B. 654, 9 A. 613, R.)

(226)—*Lunatic not so adjudicated—Appearance*.—A man, alleged to be of infirm mind and not adjudicated a lunatic, may appear either by vakil or in person. *UMA SUNDARI DAS v. RAMJI HALDAR*, 7 C. 242=9 C.L.R. 13. [R., 13 B. 656, 20 A. 2=1897 A.W.N. 155; F., 31 P.R. 1905=54 P.L.R. 1905.]

(227)—*Practice—Pleader unwell and applying for postponement—No excuse—One pleader appearing for another*.—Where the pleader for appellant was not present in the Court at the time of the hearing of the appeal but had forwarded a letter to the Registrar intimating that he was suffering from illness and requesting the Court to postpone his case, *held* that that was no excuse, that for the purposes of meeting such a case the Court had countenanced and undertaken to recognize the appearance of one pleader on behalf of another, and that the pleader should have made arrangements so that the work of the Court should proceed in due course, and that the case should be treated as in default and that the appeal should be dismissed. *MAHANT RANGLAL BHAGAT v. DEONARAIN*, A.W.N. 1887, 282.

(228)—*Orders issued by Court*.—It is not the duty of the officers of the Court to call upon the pleaders to sign the orders issued, or to inform them of the nature of the orders passed. It is for the pleaders to be present at the proceedings, and to make themselves acquainted with the orders passed. *ROBERT WATSON & CO. v. AMBICA DAS*, 27 C. 529=4 C.W.N. 237.

(229)—*Money brought into Court under process of execution—Party or Vakil present—Duty of Court*.—When money is brought into Court under process of execution, and the party entitled to it or his duly authorized vakil is present to receive it, the Court may and should cause the same to be paid over immediately. *MUTTUVELU PILLAI v. SAMU PILLAY*, 5 M.H.C.R. App. 2.

(230)—*Special appeal—Duty of pleaders to state grounds in full*.—The rule which requires

Practice and Procedure—continued.

pleaders to certify that the grounds taken in special appeal are good, also requires them to see that the grounds are full. *RAM KRISTO DEB v. RAJ CHUNDER SURMAH*, 11 W.R. 246.

(231)—*Appeal to High Court—Appellant, a Vakil—Certificate of grounds of appeal*.—In an appeal to the High Court, where the appellant is himself a Vakil of the High Court, the grounds of appeal should not be certified by him. *THAKOOR DOSS MOOKERJEE v. AMEER MUNDUL*, 14 W.R. 168.

(232)—*High Court Rules (Appellate side), 86 and 162—Vakil's right to be heard in second appeal without certified grounds of appeal or an order admitting appeal*.—On a second appeal, where duly certified grounds of appeal have not been filed, nor has the appeal been admitted by order of Court under Rules 86 and 162, a vakil has no right to be heard on behalf of the appellant. *OLIULLAH v. BACHU LAL KHOTTA*, 15 C. 706. (3 W.R. 216, F.)

(233)—*Practice—Vakil—Right to appear before the High Court on its original side—Application to remove case to itself from mofussil Court—Vakil not entitled to file warrant of attorney—Civ. Pro. Code, 1908, not affecting rules in force before 1909*.—A vakil of the High Court has no right to file a warrant of attorney before a Judge sitting on the original side of the High Court at Fort William, in respect of an application praying for the removal of a suit pending before a mofussil Court to itself in its extraordinary original civil jurisdiction. The Civ. Pro. Code, 1908, has nothing to do with a matter governed by old rules in force before 1909. *In re VAKIL'S APPLICATION*, 37 C. 853=8 Ind. Cas. 724.

(234)—*Advocates, Right of, to appear and plead when instructed by vakils—Rules of the original side of the Madras High Court—Rule 533*.—When a party, in England, appears in person, he has a right to be heard by counsel if he can get one, although such counsel is not instructed by an attorney. The same principle applies where a client does not act in person but through a vakil, a class of practitioners unknown in England. There is no rule of law which prevents a party acting by a vakil from being heard by counsel, that is to say, by an advocate appearing for him. *K. MUNGHIAH CHETTY v. K. RAMIAH CHETTY*, 3 M.L.T. 322.

(235)—*Practice—Hearing two counsel*.—It is not the practice to hear more than one counsel or vakil in support of original motions or application against which no cause is shown in the first instance. *In the matter of the petition of BARODA SOONDREE DASSEE*, B.L.R. Sup. Vol. 609=6 W.R. Mis. 114.

(236)—*Argument on preliminary issue—Number of counsel for same party—Practice*.—When a case is argued on a preliminary issue, two counsels for the same party may be allowed to address the Court. *FATMABAI v. AISHABAI*, 12 B. 454.

Practice and Procedure—continued.

(237)—*Bom. Reg. V of 1827, s. 7, cl. 2—Decision of claim by supreme authority in State—Application of exception to clause—Absence of binding decree immaterial—Two sets of appellants—Two counsel.*—In this case, their Lordships of the Judicial Committee were of opinion that, although the *sunnud* in question was not to be considered as a judgment between the parties, yet that *sunnud*, taken with reference to the other documents connected with it, was sufficient for the purposes of limitation to bring the case within the exception in clause 2, s. 7, Reg. V of 1827, for it was clear that there had been a claim referred to an authority that had to try and decide the question, namely, the supreme power in the state having authority to decide between the parties. It was objected, however, that another condition was not complied with, *i.e.*, that there was not sufficient proof given of how it was that a satisfactory and binding decree was not obtained. The Committee however held that, although the above *sunnud* could not be considered *per se* as a binding and a regular judgment, it was quite enough, coupled with subsequent admission, to account for the party not having proceeded to obtain the judgment of the Court itself. [*R.*, 6 B. H.C. 238.] There being two sets of appellants, having separate interests and adverse claims against each other, as well as against the respondents, the Judicial Committee permitted two counsel to be heard for each set of appellants. *JEWAJEE v. TRIMBUKJEE*, 6 W.R.P.C. 38=3 M.I.A. 138.

(238)—*Two sets of defendants having same interests—Both to address Court before evidence is gone into.*—Where there are two sets of defendants, and their interests are practically the same, both should address the Court before any evidence is gone into. *In re DUKSHINA MOHUN ROY*, 29 C. 32.

(239)—*Court of appeal—Findings of facts—Suggestions by the lawyer.*—A Court of appeal should not arrive at a conclusion based upon facts merely suggested by the lawyer representing one of the parties but not put forward by witnesses in the Court of first instance. *NAWAB SHAH ARA BEGAM v. NANHI BEGAM*, 9 Bom. L.R. 80=11 C.W.N. 130=5 C.L.J. 4=1 M.L.T. 429=17 M.L.J. 32=29 A. 29=34 I.A. 1, P.C.

(240)—*Erroneous suggestion by Court—Party acting upon it.*—Where the defendant raised certain contentions, and the Court, instead of trying and adjudicating on them, referred him to a fresh suit, his acquiescence in such suggestion, instead of preferring an appeal, is reasonable submission to the Court; and, in such circumstances, the rule of *res judicata* cannot be applied with justice. *BABU LAL v. ISHRI PRASAD NARAIN SINGH*, 2 A. 582 (F.B.). [*R.*, 14 B. 31.]

(241)—*Judge's suggestion to pleader about sufficiency of evidence, how far binding on him.*—When a Judge suggests to a pleader that it is needless for him to call further witnesses

Practice and Procedure—continued.

in evidence on a particular point and suggest that they should be merely tendered for cross-examination, that is an intimation to the pleader that the Judge is satisfied with the evidence so far as it has gone and that the cross-examination of the witnesses that have been called has not impressed him, and when the Judge has made such a suggestion and it has been acted on by the pleader, he and his client have a just cause or complaint if the Judge afterwards turns round and says "I decide against you on the point." *HASAJI v. DHONDI RAM*, 6 Bom. L.R. 636.

(242)—*Counsel's address—Notes taken by the Judge—Evidence.*—The notes taken by the Judge of counsel's address are good evidence that when the counsel was addressing the Judge he did say what the Judge has noted. But if there is any real contention as to the correctness of the notes, it would be open to the other side to prove that they were not correct. *R.D. SETHNA v. MIRSA MAHOMED SHIRAZI*, 9 Bom. L.R. 1042.

(243)—*Successive mortgages of same property—Sale under both mortgages—Priority—Redemption—Form of decree—Costs.*—A person created successive mortgages upon the same property first in the name of A and subsequently in the name of A's husband, B. Suits were instituted on both the mortgages and judgments were given in both the suits on the same day. The decree on the second mortgage was first executed, the property was brought to sale and plaintiff became the purchaser of the same at the Court-auction. Subsequently, the decree in the name of A was executed and B's son C became the auction-purchaser of the property. In a suit by the plaintiff against A, B and C without impleading the mortgagor as a party, to set aside the sale to the son C, to have himself declared the purchaser and to be entitled to redeem, it was found that B, the husband or father was merely using the names of the others and that the purchase under the second sale was by himself, who had himself caused the first sale to take place, and then purchased under the second sale. *Held* that the sale to C could not stand against the purchaser under the first sale, that it must be set aside and that the plaintiff was entitled to redeem. In such a case, it is quite unnecessary and irrelevant to say in the decree whether it is, as a second mortgagee or as a purchaser that the plaintiff is entitled to redeem the first mortgage. Costs of introducing irrelevant matter is to be paid by the party so introducing. *CHOORAMUN SINGH v. MAHOMED ALI AND AHMED KHAN*, 11 C.L.R. 1=9 I.A. 21 (P.C.)=4 Sar. 329.

(244)—*Suit on debt bond—Agreement alleged for saving limitation—Evidence relating to the genuineness of agreement—Costs.*—The original plaint in this case was filed early in 1847, and proceeded upon a bond of old date, given or alleged to have been given, by the father of the defendant the present appellant; and, inasmuch as the suit would have been barred by length

Practice and Procedure—continued.

of time, unless something had taken place subsequent to the bond, the suit also proceeded upon an agreement of a latter date, which would bring the demand within time. The Zillah Judge considered that this was not shown to be a genuine document and consequently dismissed the suit. It appeared that the same claim had been once brought forward during the infancy of the predecessor of the present appellant who was the son of the original debtor, and that, although the demand was then disputed and successfully disputed, the alleged agreement which, if genuine, cleared the matter from all doubt as to the truth and honesty of the debt, was not brought forward and was not alleged to be in existence. Concurring with the Zillah Judge, the Judicial Committee dismissed the suit on the ground that the evidence in the case and the probabilities were against the genuineness of the document. The appellant was allowed costs of the appeal before Judicial Committee as well as of the Courts in India. **KUTCHY KULLYANA RANGAPPAH KALACKA TOLA OODIAR v. BALOOSAMY CHETTY, 3 W.R. (P.C.) 50=7 M.I.A. 224=1 Suth. 330=1 Sar. 651.**

(245)—*Costs—Withdrawal of appeal—Memorandum of objections—Right of respondent to costs on memorandum.*—*Quære:*—Whether, when an appeal is withdrawn by an appellant, the memorandum of objections filed by the respondent under s. 561, Civ. Pro. Code, cannot be heard. (17 A. 518, R). But the appellate Court has jurisdiction over the question of costs of the memorandum; and the proper order to make, in the absence of any agreement between the parties, would be to direct the appellant to pay the respondent the costs of the appeal as well as the memorandum of objections. **PONNUSAWMY NADAR v. SOMASUNDARAM CHETTIAR, 4 M.L.T. 482.**

(246)—*Honest, though erroneous, belief as to application of a prior case—Effect on costs.*—In this case, where it appeared that the plaintiffs and their legal advisers did not unreasonably think that the decision in a previous case of this Court applied to Berar, the Court directed that each party bear his own costs throughout. **DAWLATRAO v. GOVINDRAO, 5 N.L.R. 13=1 Ind. Cas. 243. (21 A. 374, 21 A. 441, D.) [R., 6 N.L.R. 3.]**

(247)—*Appeal—Privy Council—Security for costs—Correction of order.*—An order granting leave to appeal to the Privy Council, provided that the costs of the application for leave to appeal to the Privy Council should be costs in the appeal. The appeal was subsequently dismissed by the Privy Council for want of prosecution. The respondents applied to the High Court for an order as to their costs. *Held*, that the order passed by the High Court should be corrected, and that the costs of the respondents should be awarded. **SECRETARY OF STATE v. JANARDAN, 4 Bom. L.R. 947=27 B. 124.**

Practice and Procedure—continued.

(248)—*Costs—Trial of case.*—It is inappropriate and contrary to the practice of the Court to investigate the merits of a case merely to determine the incidence of costs. **MITHALAL v. CHUNILAL, 4 Bom. L.R. 816.**

(249)—*Costs, order directing client to pay.*—It is not the practice to make an order for payment of costs as between attorney and client, except in a regular suit against the client. **SHAIK DOMUN v. SHAIK EAMAUM ALLY, 7 C. 401. [F., 21 C. 85, 27 C. 269; D., 25 C. 887; R., 16 B. 152; Cons., 7 Bom. L.R. 547.]**

(250)—*Dismissal of appeal for want of prosecution—Restoration—Costs—Ignorance of procedure.*—Where an appeal had been dismissed for want of prosecution, no step having been taken in it for ten years, the appeal was, upon petition to the King in Council, restored, the appellant paying the costs of dismissal and restoration, it appearing that the appellant was ignorant, of the proceedings necessary to be taken in this country, and had, though after lapse of some years, instructed a commercial house in Calcutta to prosecute the appeal, but whose agent in England becoming insolvent, no proceedings were taken to bring the case to a hearing. **RAJAH DEEDAR HOSSEIN v. RANEE ZUHOORON NISSA, 2 M.I.A. 441=1 Sar. 217=2 Suth. App. Y.**

(251)—*Security for costs—Joinder of parties.*—Where it appears that the plaintiff in a suit sues on behalf of another person, not on the record, the ordinary practice is to require security for costs and stay proceedings until the same is given, or to make such person a party to the suit. **RAM COOMAR COONDOO v. CHUNDER CANTO MOOKERJEE, 2 C. 233, P.C. =4 I.A. 23=3 Sar. 654.**

(252)—*Failure of Small Cause suit owing to want of jurisdiction—Proper judgment—Costs on such failure.*—The proper judgment, upon a successful plea of want of jurisdiction, in a suit in a Presidency Small Cause Court, would be that the suit is dismissed; whatever the form of the order, it must be stated that the suit abates or is dismissed "for want of jurisdiction." The defendant is entitled to costs on such a failure of a suit. **FRECK v. HARLEY, 6 C. 418=7 C.L.R. 237.**

(253)—*Defendant in original suit applying to appellate Court for stay of execution—Costs.*—The defendants in an original suit applying to the appellate Court for stay of execution, must pay the costs of the application, even if successful, since it is an indulgence. **CHUNI LAL v. ANANTRAM, 25 C. 893. [R., 10 C.L.J. 631.]**

(254)—*Civ. Pro. Code, s. 549—Second appeal—Security for costs—Amount not fixed—Security not furnished—Liability of appeal to dismissal.*—The respondent in a second appeal applied for an order that the appellants should be required to give security for the costs of the appeal. No amount was stated as the security required. The Court ordered that the security should be furnished at any time before hearing.

Practice and Procedure—continued.

When the appeal came on for hearing, the respondent applied for the rejection of the appeal in consequence of security not having been furnished as required. *Held*, that the objection had no force. As s. 549 of the Code required specification of the amount of security to be furnished, the order requiring security without such specification was not one contemplated by the section. *Held*, also, that the proper course for the respondent was to have applied to the Judge, who passed the order to furnish security, for rejection of the appeal at any time before the case came on for hearing, and it was too late, when the case was called on for hearing, to ask the Appellate Court to reject the appeal. **THAKUR DAS v. KISSORI LAL**, 9 A. 164 = A.W.N. 1887, 7. [*Overruled*, 18 A. 101.]

(255)—*Civ. Pro. Code, s. 549—Pauper appellant.*—Security for costs under Civ. Pro. Code, 1877, s. 549 may be demanded from a pauper appellant but should not be enforced by Courts except on very special grounds. **SESHAYANGAR v. JENULAVADIN**, 3 M. 66. (17 W.R. 68, Diss.) [*F.*, 17. M.L.T. 583; *R.*, 7 A. 542 = A.W.N. 1885 127.]

(256)—*Practice—Appeal—Poverty no ground for demanding security for costs.*—Mere poverty of the appellant is no ground for requiring him to give security for the costs of the appeal. **MANEKJI LIMJI MANCHERJI v. GOOLBAL**, 3 B. 241. [*F.*, 7 A. 542 = A.W.N. 1885, 127; *R.*, 5 Bom. L.R. 661.]

(257)—*Practice of original side of High Court—Purchaser out of time, in paying into Court, balance of purchase-money—Delay on the part of party having carriage of proceedings—Costs.*—The practice of the original side of the High Court will be that a purchaser of property at a Registrar's sale should pay interest as a matter of course, if out of time in paying into Court the balance of the purchase-money, subject only to this, that if there has been delay on the part of the party having the carriage of these proceedings, and, if that party appears on the summons taken out by the purchaser, to disallow him any costs as against the purchaser. **KAMJE LALL DASS v. SHAMA CHURN DAWN**, 21 C. 566. [*F.*, 148 P.R. 1907.]

(258)—*Partition suit—Cost incurred subsequent to decree—Order for execution Practice.*—One of the parties to a partition suit, who, having the conduct of the partition proceedings subsequent to the decree, pays all the costs, is not entitled, on default being made by the other parties in payment of their respective shares of the costs incurred by him, to embody, in his order against them for payment, an order for execution. He must first get an order of Court for payment; and, if payment be not obtained, application for execution may be made. **BRIJOLALL SEN v. MOHENDRO NATH SEN**, 18 C. 199.

(259)—*Cause list—Transfer of case from undefended to defended board—Costs.*—A case

Practice and Procedure—continued.

entered on the undefended board can only be transferred to the defended board on payment of the costs of the adjournment, if any, thereby occasioned. **BINDOO MADHUB MITTER v. WOOMESH CHUNDER PAUL**, 2 Hyde 86. **BHOYRUB CHUNDER DOSS v. CHUNDI CHURN MITTER**, Bourke, O. C. 238.

(260)—*Non-production of sufficient evidence—Adjournment—Costs.*—Where the plaintiff in an *ex parte* suit failed to adduce sufficient evidence and applied for an adjournment in order to obtain further evidence, the Court remarked that such adjournments were inconvenient and granted an adjournment on condition that the plaintiff should bear the costs of the hearing. **SHANKO v. SAVAGE**, 7 C. 177.

(261)—*Funds in Court attached—Attorney's lien for costs—Attaching creditor—Priority.*—Where the money paid into Court as admittedly due to the plaintiff in a suit was attached by a third party, *held*, that the plaintiff's attorney was entitled to enforce his lien, as against the attaching creditor, in respect of costs incurred by the attorney (on behalf of the plaintiff in the suit) till the date of attachment, and that the attaching creditor had a priority over the attorney subsequently. **SUBRAMANIAM SETTY v. HURRY FROO MUG**, 14 C. 374.

(262)—*Non-payment of costs of suit in Foreign Court, no ground for staying proceedings between parties in Indian Court.*—It is not competent to a Court in India to stay proceedings in a suit before it, because the costs of a previous suit between the same parties in a foreign Court have not been paid. The English Courts are, with regard to the Courts in India, as much foreign Courts as the Courts of any other country, such as France. **ARTHUR BOWLES v. MARY J. BOWLES**, 8 B. 571.

(263)—*Suit or particular business.*—Where subsequent proceedings relating to the taxation of the costs of any opponent are taken, they are not regarded as part of the suit or application. **WATKINS v. FOX**, 22 C. 943.

(264)—*Appeal to Privy Council—Security—Practice.*—As a general rule, Judges should not transmit to the High Court documents which have been used before them for the purpose of making out the title of parties who offer immoveable property as security in Privy Council cases. But they should, in reporting upon the securities, state particulars of the documents which have been produced and proved before them, and upon which the title of the surety appears to be made out. *In the matter of AMEERONISSA KHATOON*, 14 W.R. 94.

(265)—*Act VIII of 1859, s. 122—Additional written statement—Costs.* Additional written statement by the defendant was allowed to be put in, on condition of the whole costs of the other party being paid. **S. M. DASIMANI DASI v. SRINATH GHOSE**, 3 B.L.R. App. 11 (b).

Practice and Procedure—continued.

(266)—*Objections to evidence—Stage to raise objections—Costs of Privy Council.*—Objections to evidence which ought to have been taken in the Court below, *held*, too late on appeal. Where there had been an irregularity in the Court below in the reception of evidence, the Judicial Committee, in affirming the judgment of that Court, refused to give costs of appeal. **RAJAH BOMMARAUZE BAHADUR v. RANGASAMY MUDALY, 6 M.I.A. 232=1 Sar. 536.**

(267)—*Motion for discharge of the guardians of an infant—Costs ordered to be paid out of estate—Disallowance of excessive counsel's fees by taxing officer, whether correct.*—In a motion for the discharge of the guardians of an infant, the fee paid to counsel was found by the taxing officer to have been unusually excessive. The costs incurred by the guardians, in opposing the application, had been ordered by the Court to be taxed as between attorney and client and paid out of the estate. *Held*, the taxing officer had rightly decided that the said excessive fee paid to counsel was not *prima facie* allowable on taxation for payment, either out of the estate, or by clients, who were the guardians of the infant, because, unless the taxing officer was satisfied that the client clearly understood that the payment, either wholly or in part, would not be allowed out of the estate, and that he would be personally responsible for the payment of the whole fee or for so much of it as was not allowed out of the estate, the excessive charge could not be regarded as authorised by the client and could not therefore be allowed as against him. *In the matter of THAKUR DASSEE DASSEE, 33 C. 827.*

(268)—*Pleader's fees—Probate proceedings—Appeal—Assessment of pleader's fees.*—Pleader's fees in appeals in probate proceedings should, according to a long standing practice of the High Court, be assessed at Rs. 30. **SUNDARABAI v. COLLECTOR OF BELGAUM, 10 Bom. L.R. 1197=33 B. 256.**

(269)—*Counsel's fees—Certifying counsel.*—In certifying counsel in chamber matters under r. 548, the Court has regard to the following circumstances: (1) Whether notice has been given by either side of the intention to employ counsel. (2) Whether the matter to be dealt with involves the consideration of complicated facts or merely of simple facts. (3) Whether there arises any substantial question of law which has to be argued and discussed. **ZULEKABAI v. AYESHABAI, 7 Bom. L.R. 733.**

(270)—*Interrogatories, answers to—Evidence.*—Answers to interrogatories are simply affidavits obtained in a particular way, and must be put in as evidence by the party wishing to use them. **GOSTO BEHARY PAL v. JOHUR LAL PAL, 4 C. 836=4 C.L.R. 164.**

(271)—*Rule to show cause—Affidavit.*—A rule to show cause must be supported by an affidavit. The affidavit must be sufficient, so that, if no cause is shown, the rule could be made absolute on the affidavit. *In re COMPTOIS D'ESCOMPTE DE PARIS v. CURRIE AND CO., 3 B.L.R. App. 153.*

Practice and Procedure—continued.

(272)—*Application for rule to show cause—Affidavit, to be full and specific.*—An affidavit in support of an application to the High Court for a rule calling upon a Recorder to show cause why he should not issue execution of a decree, did not state in terms that the plaintiff had got a decree, nor mentioned whether the application for execution was general or specific with regard to the property of the defendant. It merely stated that the application for execution was made in proper form, but the Recorder refused it on the ground that he had reserved a question for the consideration of the High Court.

Held, that before the High Court could grant a rule to show cause, it ought to be satisfied that, if no cause be shown, it ought to make the rule absolute; and that it would not issue a rule to show cause, as, upon the affidavit, it was quite in the dark as to whether, if no cause be shown, it should be promoting the ends of justice by making the rule absolute. *In the matter of FRANCIS CHOISY v. R. CURRIE & CO., 12 W.R. 413.*

(273)—*Affidavit—Application—Restoration of a suit dismissed for default—Affidavit.*—An application to restore a suit dismissed for default was not accompanied by an affidavit: the Subordinate Judge, on that ground alone, refused to entertain the same; *Held*, that it was material irregularity for the Subordinate Judge to say that the application was bad because it was not accompanied by an affidavit when filed. **GOKALDAS v. KISANDAS, 3 Bom. L.R. 130.**

(274)—*Affidavit of documents—Minor—Inspection—Practice—Procedure.*—An affidavit of documents may be required from minor defendants. **NATHMULL NARSINGDAS v. MALHARAO HOLKAR, 19 B. 350. [R., 23 B. 100; D., 22 C. 891.]**

(275)—*Affidavit of documents—Sealing up portions of entries not relating to matters in dispute—Inspection.*—A defendant in his affidavit of documents objected to allowing inspection of such portions of certain account-books as did not contain entries relating to the matters in question in the suit, and claimed the right to seal up such portions, but did not state what portions of the books or what particular entries did not relate to the matters in dispute, and upon the plaintiff asking for inspection, only certain entries were disclosed and inspection of the rest was refused. *Held*, the defendant should not take out a summons to consider the sufficiency of the affidavit, and the proper procedure was for the plaintiff to apply for production and inspection of books of account, and to give the defendant the liberty to seal up such parts as, by an affidavit to be made by him, did not relate to the matters in question in the suit. **HORENDRA NATH MUKERJEE v. GIRINDRAKUMAR DUTT, 3 C.W.N. 495.**

(276)—*Right of party to seal up immaterial parts of documents—Affidavit of document, nature of—Practice.*—Where certain documents

Practice and Procedure—continued.

have been filed in a suit, *held*, that the person who has filed the same is entitled to seal up such portions of the documents as do not relate to the matters in issue in the suit. The affidavit of documents filed by such person must show what portions of the documents he claims to seal up, and the grounds on which he bases his claim. *JADUB LOLL SHAW v. KANAI LOLL SHAW*, 20 C. 587.

(277)—*Filing list of documents—Suit for land—Title-deeds—Affidavit.*—In a suit for possession of land, the order that the party in possession do set forth a list of documents, is to be confined to documents other than title-deeds. Where the title-deeds are required by the plaintiff on special grounds, as, for instance, where it is alleged that the defendant is a trustee for the plaintiff, those special grounds on which they are required should be set forth by affidavit. *HEERALALL SAHA v. JADUB CHUNDER CHENCHKEY*, Cor., 66.

(278)—*Practice—Motion for commission and adjournment of suit—Application to withdraw.*—In this case, an application was made to the Judge in Chambers on the original side of the High Court for the issuing of a Commission to England, to take the evidence of a material witness in the case, and for an adjournment of the trial of the case; and on this occasion an affidavit of one of the plaintiffs was produced. The Judge declined to make an order in chambers, and so the application was renewed in Court. But the affidavit was not then produced in Court, it having been sent to the office of the plaintiff's attorneys for a copy to be made and served on the defendant. The Judge refused the application for commission and to adjourn the hearing, on the ground that the application for commission was made upon no affidavit. Then, the plaintiff's counsel, not being instructed to proceed with the hearing, asked for permission to withdraw the suit. But this was also refused, and the suit was dismissed. On appeal, *held* that the Judge acted improperly in refusing to postpone the case for the production of the affidavit in Court; and that there was no legal ground whatever for the refusal to withdraw the suit. Accordingly the suit was restored and remanded to be tried on the merits. *DADABHAI NAOROJI AND CO. v. SORABJI GAWASJI*, 3 B.H.C.O.C. 55.

(279)—*Affidavit—Time for filing.*—An affidavit, filed on the day of actual sitting of the Court for hearing an application, though not on the day fixed in notice, is in time. *In re HURRUCK CHUND GOLICHA*, 5 C. 605=6 C.L.R. 382.

(280)—*Ss. 129, 130, 134, 135, Civ. Pro. Code, 1882 (=O. XI, rr. 12, 13, 14, 18 (2), 20, present Code)—Application for further affidavit.*—The only occasion when a party can be compelled to file a further affidavit of documents under the Civ. Pro. Code, is when the

Practice and Procedure—continued.

original affidavit filed by the party is insufficient, i.e., insufficient in its terms and fails to comply with the requirements of the Code. When a party, alleging that his opponent has documents in his possession, which he has failed to disclose in his affidavit of documents, wants further documents, his proper course is to apply on affidavit stating what the documents are which ought to have been disclosed in the affidavit of documents, and that such documents are relevant to the matter in issue in the suit (23 C. 117, *Appr.*). The proper time for making an application for further disclosure of documents in the possession of the opposite party, is at the hearing of the suit and not before. *In the matter of AMARENDRA NATH CHATTERJEE v. KALLY KISSEN TAGORE*, 2 C.W.N. 17.

(281)—*Title—Evidence—Burden of proof.*—A plaintiff must succeed, if at all, upon the strength of his own title and not by the infirmity of that of his opponents. *RAHUMTULLA SAHIB v. MAHOMMED AKBAR SAHIB*, 8 M. H. C. 63.

(282)—*Claim to oust person in possession—Proof to be given by claimant—Defect of opponent's title not to be relied on.*—It is essential that a claimant, seeking to oust a party in possession of an estate, should establish his own right to the estate, and not rely upon the failure of the title impeached. *JOWALA BUKSH v. DHARUM SINGH*, 10 M. I. A. 511=2 Sar. 189.

(283)—*Existence of facts—Proof—Evidence.*—In a Court of law only those facts can be taken to exist which are proved. *PANDURANG v. KRISHNAJI*, 5 Bom. L. R. 799=28 B. 125.

(284)—*Hereditary cultivators—Claim as proprietors—Evidence.*—The plaintiffs were declared at the Settlement to be hereditary cultivators. They now sued to be declared proprietors. The defendants set up proprietary rights. In previous litigation between the parties, the plaintiffs were declared (1) to be mortgagees, (2) to be entitled to be maintained in cultivatory occupancy for five years, (3) to be hereditary cultivators for ten years, (4) to be proprietors of three-fourths of the land. The evidence went to show that the plaintiffs had not paid *malikana* to the defendants. Held that the only satisfactory mode of deciding the case was to have regard to the established facts. Those facts established beyond all doubt that the plaintiffs were entitled to be declared hereditary cultivators but not proprietors. *RAMZANEE v. UZEEZ*, 102 P. R. 1868.

(285)—*Court—Reception of legal evidence.*—It is improper for a Court to receive any information of any kind in reference to a case, whether it be relevant or not, other than such as comes before it in a way which the law recognizes in the form of legal evidence. *MOHOLAL v. SANKLA*, 6 Bom. L.R. 789.

(286)—*Questions as to admissibility of evidence to be determined as they arise.*—Questions as to

Practice and Procedure—continued.

the admissibility of evidence should be determined as they arise, instead of admitting the evidence in the first instance, and reserving the question of law as to its admissibility until the final judgment in the case. **RAMJIBUN SEROW-GY v. OGHORE NATH CHATTERJEE**, 25 C. 401 = 2 C.W.N. 188. (17 C. 173, F.)

(287)—*Admissibility of evidence—Judge to decide.*—Questions relating to the admissibility of evidence, oral or documentary, should be decided on the moment they arise. They should not be reserved until judgment in the case is given. **JADU RAI v. BHUBOTARAN NUNDY**, 17 C. 173. [F., 25 C. 401, U.B.R. 1897—1901, Vol. II, p. 376.]

(288)—*Practice—Evidence of doubtful admissibility.*—When evidence of doubtful admissibility has, under the looser practice of the Indian Courts, been received in an Indian cause, the Judicial Committee, sitting as an appellate Court, will deal with the case as they think substantial justice requires, and will not allow any merely technical objections to prevail. **AJODHYA PRASAD SINGH v. UMRAO SINGH**, 6 B.L.R. 509, P.C. = 15 W.R. P.C. 1 = 13 M.I.A. 519. (7 M.I.A. 137 = 4 W.R.P.C. 121, F.)

(289)—*Hindu Law—Verbal authority to adopt—Widow of divided member of Hindu family, right of, to life interest.*—In this case one S claimed as the widow of H and as the mother of R, the minor whom she had adopted, as she alleged, with the permission of her late husband. The validity of the instruments under which her right to adopt was claimed, and more especially, of the *Unoomuttee Pottro* on which the claim to the property was founded, failing the adoption, had to be considered. The Judicial Committee ruled that a power to adopt may, under the Hindu law, be given even verbally, and consequently the documents in the case, if authentic, must be taken to have given it or, at all events, to prove that it had been given. And there was no sufficient reason to doubt their authenticity. Also, when a member of a divided Hindu family dies childless and his widow adopts a minor but such adopted son happens to die before attaining majority, the widow is entitled to a life-interest in the estate of her deceased husband. In this case, a second adoption of one G was alleged to have been made, and their Lordships held that the said G could not, under any circumstances, have any right to the property in suit during the lifetime of the widow. But this order was made without prejudice to any question as to the rights of G (if any), after the death of S, and without prejudice also to the rights (if any) of any person not then before the Court, either in the life-time or after the death of the said S. **SOONDUR KOOMAREE DEBEA v. GUDADHAR PERSHAD TEWAREE**, 4 W.R.P.C. 116 = 7 M.I.A. 54 = 1 Suth. 294 = 1 Sar. 604.

(290)—*Whether plaintiff has sufficient evidence entitling him to decree, when to be deter-*

Practice and Procedure—continued.

mined.—Held, in the same case, that the proper time for determining whether the plaintiff offers, or can offer, sufficient evidence to warrant a decree in his favour is not at the time of the filing of the duplicate plaint but at the first hearing of the suit after service of the summons upon the defendant; if the case is then ripe for proceeding with *ex parte* under s. 100, the plaintiff is entitled to succeed if he gives *prima facie* evidence in support of his claim. **TARUK NATH MULLICK v. JEAMAT NOSIYA**, 5 C. 353.

(291)—*Non-production of evidence—Effect.*—Dismissal for non-production of evidence has the same effect as dismissal founded on evidence, in barring a subsequent suit as *res judicata*. **RAMA RAO v. SURIYA RAO**, 1 M. 84.

(292)—*Evidence—English Law—Irrelevant matter—Contradiction.*—It is one of the rules of English evidence that evidence cannot be given to contradict irrelevant matter. **KELLY v. KALLY AND SAUNDERS**, 3 B.L.R. App. 6.

(293)—*Practice—Taking further evidence on hearing of motions—Oral evidence—Adjournment.*—There is nothing in the practice of the Court on the original side to prevent a Judge taking further evidence on the hearing of a motion either by affidavit, or *viva voce*, and the Court may adjourn the hearing for that purpose. **SRIMATI BAMA SUNDARI DAS v. RAMNARAYAN MITTER**, 8 B. L. R. App. 65.

(294)—*Practice—Appeal from order dismissing application to set aside ex parte order—Fresh evidence tendered in Appellate Court.*—Where a party against whom an *ex parte* order has been passed, seeks to get that order set aside, he must produce all his evidence in the Court in which he applies. The High Court will not, in such a case, receive fresh evidence in appeal which was not tendered in the Court below. **HARI DAS MUKERJI v. RADHA KISHAN DAS**, A.W.N. 1890, 166. [F., 20 A. 266.]

(295)—*Court of appeal—Evidence of witnesses—The finding of first Court on evidence should not be disturbed on appeal except on ground of omission to appreciate some evidence.*—Where a Court of first instance has upon the evidence of witnesses examined before it come to a conclusion of fact, the Court of appeal ought not to disturb that finding unless it is satisfied that the lower Court had either omitted to consider material evidence or some cardinal fact or had given undue weight to some evidence of fact which is of little or no importance. **BAI GULABBAI v. SHRI DATGARJI**, 9 Bom. L. R. 393.

(296)—*Evidence—Production of document—Duty of parties—Duty of Court—Parties having legal advice—Conduct of cases.*—A party to a suit requiring the production of a document or the evidence of a particular witness must move the Court in proper time to take the necessary steps in the matter. Parties having the benefit of legal advice must be left to manage their own cases without interference from the Court.

Practice and Procedure—continued.

It would never do for the Courts to interfere in such matters and to undertake the business of suitors as well as that of the Judge. **NOBIN CHUNDER ROY CHOWDHRY v. ANUNGO NUNJUREE DEBIA**, 23 W.R. 83.

(297)—*Party undertaking himself to bring witnesses, right of, to subsequently apply for subpoenas.*—The mere circumstance of a party having originally undertaken himself to bring his witnesses to Court for examination is no sufficient reason for depriving him of his right to subsequently apply for and get subpoenas issued, when he finds himself unable to bring them or to detain them till they are examined, although such circumstance may be a reason for the Court not waiting for such witnesses, where the case had been in other respects finished before they could appear. **PANDURANG ANPAI v. KESHAVJI**, 6 B. 742.

(298)—*Witnesses—Parties to go in as witnesses on their own behalf.*—Every party to a suit should go into the witness-box to prove his allegations and to submit to cross-examination. If either party fail to do so and the other party wishes to call him, every possible effort should be made by the Court to compel attendance. **SUBBAJI v. SHIDDAPPA**, 4 Bom. L.R. 86 = 26 B. 392.

(299)—*Summoning defendant as plaintiff's witness and vice versa—Propriety of practice.*—The practice of the plaintiff summoning the defendant as his witness and vice versa is objectionable, and ought not to be countenanced by the Court on any account. **BALDEV TRIBUVANDAS GUJARATI v. BALDEV DAS DWARKADAS**, 3 Ind. Cas. 45.

(300)—*Evidence—Examination of witnesses Mode of taking evidence.*—Observations on the improper manner in which evidence is generally recorded in the Subordinate Courts, on the omission to examine the parties to suits, and on the practice, obtaining among judicial officers, of committing the function of taking evidence to native Muharirs. **PHUL KUAR v. SURJAN PANDEY**, 4 A. 249 = A.W.N. 1882, 40. [R., 16 P.R. 1891.]

(301)—*Suit to recover money on bond—Refusal of defendant to enter witness-box.*—A sued to recover from B Rupees 10,000 on a bond which he alleged B had executed to him when he lent him the money. B denied having received the money or executed the bond, and contended that this alleged signature was a forgery. C, B's brother, also asserted that the endorsement which purported to have been written by him was forged. Held that the evidence adduced by B was most unsatisfactory, while the refusal of B and C to enter the witness-box, to deny that they had acted as alleged by A, weighed strongly against the probability of their story. **RUGHOOBUR DUTT CHOWDHRY v. FUTTEH NARAIN CHOWDHRY**, 7 M.L.J. 311.

(302)—*Court's knowledge of character of witness.*—A Court can make use of its knowledge

Practice and Procedure—continued.

of the character of a witness, in order to decide whether to give credit to his evidence or not. **MAHOMED BUKSH KHAN v. HOSSEINI BIBI**, 15 C. 684, P.C. = 15 I A. 81 = 5 Sar. 175. [R., L.B.R. 1893-1900, 445.]

(303)—*Belief or disbelief in evidence—Different effects—Second appeal.*—Where the lower Court has omitted to consider, or has given an erroneous or improper reason for disbelieving, or setting aside as of no value, relevant evidence upon the essential question in a case, the High Court can interfere in second appeal. There is a material difference between a case, in which a Judge has assigned one bad reason for believing or disbelieving a particular piece of evidence, while he has given one or more good reasons for the same belief or disbelief; or a case in which, putting this particular piece of evidence wholly aside, enough remains to support the judgment, and a case in which, the essential question, or one of the essential questions, to be decided, rests upon the evidence believed or disbelieved, regarded as of great value, or considered worthless, for a reason which is unsound and unsustainable. **HURO PROSAD ROY v. WEMATARA DEBEE**, 7 C. 263 = 8 C.L.R. 449. [R., 7 A. 649, F.B.]

(304)—*Order of Court 'to file petition with record,' condemned as amounting to no order at all.*—In this case, a witness, putting in a proper medical certificate, stated his inability to attend Court for some days. On this, the Judge recorded the order that the "request should be filed with the record." Such an order has been repeatedly condemned by the High Court as a meaningless order and one amounting to no order at all. There was no reason why the Judge should not have given the witness a few days' time to appear in Court, and the High Court accordingly remanded the case in order that the Judge may take the evidence of the witness and decide the case afresh. **NIL MONEE BANERJEE v. SAURBO MUNGULA DEBEE**, 7 W.R. 193.

(305)—*Judgment passed without recording evidence of witness—Nati Shamil Pesh orders condemned.*—The special appellant had presented a petition to the Sudder Ameen, stating that fifteen of his witnesses were present, praying that their evidence might be taken, and asking that measures might be resorted to in order to enforce the attendance of several other witnesses who had acknowledged the receipt of summons but had not attended. Nothing was done on this except to record the objectionable order, so often condemned by this Court, of "*Nati Shamil Pesh*," which literally amounted to nothing. The omission of the Sudder Ameen was distinctly set forth before the lower Appellate Court which took no notice of it. The High Court remanded the case to the first Court directing it to record the evidence of all witnesses whom the appellants may produce within a reasonable time and to pass a fresh judgment thereon. **LUCHMEE NARAIN SAHEE v. KOSHUKEE DUT JHA**, 8 W.R. 107.

Practice and Procedure—continued.

(306)—*Dismissal for non-prosecution—Adjournment for default of defendant—Non-production of witness on adjourned date—Dismissal improper—Discretion wrongly exercised—Practice.*—On the date fixed for the hearing, the plaintiff appeared before the Court with his witness. But, as the defendants did not appear, the case was adjourned. On the adjourned date, the plaintiff was present but without his witness and the defendants were again absent. Thereupon, the Court summarily dismissed the suit for want of prosecution. *Held*, that this was not a proper exercise of discretion and the case was remanded for trial on the merits. **COLLECTOR OF JAUNPUR v. TAHULI RAI, A.W.N. 1905, 92=2 A.L.J. 345. (24 M. 200, Appr.)**

(307)—*Procedure—Entire disregard of procedure—Adjournments—Examination of witnesses—Pronouncing of judgment by different Judge.*—In this case, there was a lamentable disregard of correct procedure in the number of postponements, several of them taking place on dates previously fixed by the Court itself for the hearing of the case, the irregular manner of examining the witnesses, the refusal of Court to grant time to produce witnesses who could not be in attendance for unavoidable reasons and the pronouncing of judgment by a different Judge many months after the examination of the last of the witnesses. **BHOJOORAM MUNDUL v. RAJ COOMAREE DEBIA, 18 W.R. 101.**

(308)—*Admissibility of judgment—Conditions.*—For a judgment to be admissible, it is not in all cases necessary that it should be either a judgment *inter partes* or judgment *in rem*. A judgment not *inter partes* may not be proof of facts therein stated, yet it is admissible for the purpose of explaining the character in which possession of an estate has been enjoyed and in matter of that class. **DHARNIDHAR v. DHUNDIRAJ, 5 Bom. L.R. 230.**

(309)—*Judgment not inter partes—Dismissal of suit in appeal—Judgment in previous suit not inter partes.*—The lower appellate Court finding that the evidence was insufficient to support plaintiff's title, remarked "There is no proof whatever of any right nor of the manner in which such right was acquired.....The plaintiff has altogether failed to produce evidence of his title...I reject the appeal with costs:—" *Held*, that the District Judge committed an error of law in rejecting the plaintiff's claim *in toto*: if he considered that the evidence on the record was insufficient to enable him to do justice between the parties he should have remanded the case. A judgment in a previous suit, to which one of the parties in the subsequent suit was not a party, though not binding and conclusive against that person, may yet be admissible in evidence for certain purposes and can be used for what it is worth. **SAKHARAM v. YESHWANTRAO, 1 Bom. L.R. 486.**

(310)—*Foreign judgment—Objection to—Limitation.*—Where limitation is merely

Practice and Procedure—continued.

prohibitive of the remedy and not destructive of the right, the judgment of a Foreign Court is not open to objection on the ground that a suit on the contract would be barred by the law of limitation applicable in the country in which the contract was made. **NALLATAMBI v. PONNUSAMI, 2 M. 400.**

(311)—*Evidence—Documents—Privileges attaching to documents—Such documents to be properly described for identification—Documents passing between a company and its officials after threatened suit not per se privileged.*—The defendants are bound to describe the documents, for which they claim privilege, sufficiently for the purpose of identification to enable the Court to order their production should the Court think right to do so. In a suit against a Railway Company, the papers which passed between the Company and its officials relating to the subject matter in dispute since the plaintiff threatened a suit are not by nature privileged. If privilege is claimed for any of them, the grounds thereof should be clearly set forth in the affidavit. **NEMCHAND MANAJI v. R. D. SETHNA, 10 Bom. L.R. 796.**

(312)—*Document tendered in evidence—Objections to its admissibility, statement of.*—Where a document, tendered in evidence before Commissioners, is objected to, the party so objecting is not precluded from objecting to it on any other ground at the trial; all the objections to any document being received in evidence need not be stated when it is first tendered. **RALI v. GAU KIN SWEE, 9 C. 939.**

(313)—*Documents received without objection by lower Court—Right of Appellate Court.*—An appeal Court has no right to refuse to admit on technical grounds a document, which has been received and read in the Court below without objection, though it has a perfect right to attach such weight to the document as it thinks proper, or to say whether it ought to be treated as evidence as against particular parties to the suit. **AKBUR ALI v. BHYEA LAL JHA, 6 C. 666=7 C.L.R. 497. [F., 5 M.L.J. 81, 15 C.P.L.R. 123, 3 L.B.R. 49; R., 31 C. 155.]**

(314)—*Evidence taken at ex-parte hearing.*—Evidence taken in the absence of a defendant at an *ex parte* hearing cannot be used against him on a re-trial. **RAM BAKS LAL v. KISHORE MOHAN SHAHA, 3 B.L.R. A.C. 273=12 W.R. 130.**

(315)—*Document registered by officer having no jurisdiction—Admissibility in evidence.*—Where a Court finds that a document has been registered by an officer, who had no jurisdiction to register it, it will refuse to receive it in evidence on the ground that it has not been duly registered. The observations of the Privy Council, in 15 B.L.R. 228, upon which the decision in 7 C.L.R. 223 proceeds, are not applicable to this case, as in the former case the document in question was registered by an officer that had jurisdiction to register it. **BENI MADHAB MITTER v. KHATIR MONDUL, 14 C. 449.**

Practice and Procedure—continued.

(316)—*Civ. Pro. Code, Act VIII of 1869, s. 39—Script to refresh memory of witness—Necessity for being filed with plaint.*—Where a memorandum or script is presented to a witness by the plaintiff in a case for the purpose of refreshing his memory and not as evidence in itself, it need not have been filed along with the plaint. **RAMJI MADAUJI v. RANGAYYA CHETTI, 1 M. H.C. 168.**

(317)—*Alteration of deed—Presumption—Burden of proof as to genuineness—Transmission directed of original deed for inspection.*—In an ordinary case, the party who presents an instrument which is an essential part of his case, in an apparently altered and suspicious state, must fail, from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document. But this wholesome rule admits of exceptions, if there be, independently of the instrument, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence. And such corroborative proof will be greatly strengthened, if there be reason to suppose that the opposite party has withheld evidence which could prove the original condition and import of the suspected document. Though the onus of proof of the genuineness of an instrument in its altered state lies upon the party producing and claiming under it, yet, the altered and suspicious appearance of the instrument may be explained by proof of its original state when executed and its existing state sufficiently accounted for, to rebut the presumption of the deed having been falsified and tampered with, after execution, by the party claiming under it. [*R., A.W.N. 1903, 122, F.B.=25 A. 580.*] The original deed, which was impeached on the ground of alterations and interpolations, after execution was ordered to be transmitted by the Court of India for inspection on appeal. **MUSSUMAT KHOOB CONWUR v. BABOO MOODNARAIN SINGH, 1 W.R. P.C. 36=9 M. I.A. 1=1 Sar. 813=1 Suther. 465.**

(318)—*Objection to the admissibility of a document taken before the Privy Council but not taken at the trial—Certified copy of an old document—Its admissibility in evidence.*—Where a document was received in evidence without any objection at the trial, their Lordships were of opinion that it was too late to take an objection to the admissibility before them. A certified copy of an *ewaznama*, or deed of exchange, dated January, 1782, produced from the custody of one of the appellants, and found to be written on paper bearing the same stamp and water mark as other contemporary documents in the record of certain litigation, was held admissible in evidence. **SHAHZADI BEGAM v. THE SECRETARY OF STATE FOR INDIA, 9 Bom. L.R. 1192.**

(319)—*Admitting in evidence—Deciding the genuineness or otherwise of documents.—Per Heaton, J.*—Admitting in evidence is a mechanical and formal proceeding. When all the evidence is recorded and when it is all considered, it is in the judgment that the Judge decides,

Practice and Procedure—continued.

whether a document is or is not genuine. **AMBALAL v. SEEL, 8 Bom. L.R. 973.**

(320)—*Unproved documents filed with the record.*—Unproved documents simply filed with the record in accordance with some usage must be passed over by the Judge; and the party against whom they are intended to be used, must insist on their removal from the record. **KALLIDA PERSHAD DUTT v. RAM HARI CHUCKERBUTTY, 5 C. 317.**

(321)—*Civil Procedure Code, 1882, ss. 59, 140—Rules of High Court—Right of defendant to copy of plaintiff's documents.*—Documents sued on by the plaintiff, and produced and deposited by him with the plaint, under s. 59 of the Civil Procedure Code, having to be considered as "annexed thereto as exhibits" within Rule No. 47 of the High Court Rules, copies of the same may be furnished to the defendant under Rule No. 44. Documents deposited under s. 140 of the Code, however, fall under Rule No. 43, and inspection of these should not be allowed until they are offered and received in evidence. **Haji MAHOMED ABDUL AZIZ BADSHA SAHIB v. SUBBA NAIDU, 21 M. 490.**

(322)—*Order for production of documents—Non-compliance by defendant—Striking out defence.*—The defence of a defendant, who neglects to comply with an order for production and inspection of documents, will be struck out, though the order striking out the defence may be set aside upon sufficient grounds. **KHAJAH ASSENOLLJOO v. KHAJAH ABDOL AZIZ, 9 C. 923. [D., 2 C.W.N. 676; R., 7 C.L.J. 295.]**

(323)—*Declaration as to execution of power of attorney before the Chief Magistrate. Glasgow—Certificate by Notary Public.*—A declaration regarding the execution of a power of attorney, taken before the Chief Magistrate of Glasgow and authenticated not only by the certificate of the said Magistrate under the common Seal of the City of Glasgow, but also by a certificate of a Notary Public, can be accepted as proof of the execution of the power. *In the goods of* **HENDERSON, 22 C. 491.**

(324)—*Sanskrit works on Hindu law of adoption—Works not well known—Sworn translations of works—Inclusion in record for use in Privy Council appeal.*—In the Court below, sworn translations of Sanskrit works, little known, embodying Hindu Law, as to the custom in the different schools in respect to the Law of Adoption, were admitted and acted on by the Courts in India. On special application, the Judicial Committee ordered such translations to be sent by the Registrar of the High Court in India, and to form part of the record, to be used on the hearing of the appeal. **THE COLLECTOR OF MADURA v. MOOTTOO RAMALINGA SATHUPATHY, 10 W.R. P.C. 17=1 B. L.R. P.C. 1=12 M.I.A. 397=2 Sar. 361=2 Suther. 135.**

(325)—*Translation—Appeal to High Court—Application for translation of papers when to be made.*—In an appeal to the High Court, an

Practice and Procedure—continued.

application for translation of papers should always be made before the posting of the case. **KONDAYYA GAUNDAN v. RAMASWAMI GAUNDAN, 1 M.H.C. 130.**

(326)—*Regular Appeal to High Court—Printing papers—Duty of parties—Duty of Registrar.*—Where, in a regular appeal to the High Court, the petitioner does not furnish the Deputy Registrar with a list of papers which he desires to have prepared and placed in the paper-book, the Deputy Registrar need not serve him with an estimate of the cost of printing, translating, etc., such papers. **MUSAMUT BHOGOBUTTY KOONWAR v. MUSSAMUT ANURAGEE KOONWAR, 23 W.R. 459.**

(327)—*Regular appeal to High Court—Printing of papers—Paper-book—Duties of Registrar.*—The duties of the Registrar of the High Court in the matter of printing of papers in regular appeals are purely ministerial; all that he has to do under the rules is to provide for the printing, etc., as per lists furnished by the parties and finally settled between them. The petitioner in a regular appeal to the High Court should not be called upon to deposit the costs of translating, etc., any papers as to which the petitioner has not (by including them in a list furnished by him under the Rules of the High Court) given notice of his desire to place them in the paper-book. The Deputy Registrar has to furnish an estimate of the cost of preparing the papers entered in the list furnished by the parties. It is not for him to say what papers a party requires or ought to print. That is a matter which the party or his vakil must, in the first instance, determine, the Deputy Registrar preparing his estimate and demanding payment according to the requirements made on him. **LALLA BHOOP NARAIN v. MUSSAMUT NOWAR ABASSEE BEGUM, 23 W. R. 458.**

(328)—*Appeal to High Court—Whole case to be put in paper-book—Practice.*—An appellant before the High Court, where the appeal relates to a matter more than Rs. 10,000 in value, is bound to put the whole case (and not merely his own particular case) fully before the Court in his paper-book so far as the documents and depositions are concerned. And if he fails to do so without very good reason, he ought not to be allowed to read at the hearing anything which is not in the paper-book. **KULIAN DOSS v. MUSSAMUT GOBIND KOOR, 24 W.R. 143.**

(329)—*Application for extension of time for filing paper-books—Sufficient cause to be shown.*—Litigants must understand that the rules and orders of the High Court are intended to be, and must be, complied with. Each case must be considered according to its particular circumstances. Litigation in India is so protracted, and so much time is allowed to litigants to take the various steps, specially as regards appeals, that the Court will not enlarge the time to file paper-books in an appeal, unless sufficient grounds be shown. **MOTICHAND v. FUL CHAND, 27 C. 57.**

Practice and Procedure—continued.

(330)—*Application for extension of time for filing of paper-books in appeal—Practice.*—Unless sufficient cause is shown, an extension of time for filing of paper-books will not be granted. **GOPAL CHUNDER DAS v. RADHABULLUBH DAS, 27 C. 60, Note. [F., 27 C. 57.]**

(331)—*Para 467, Rules framed for Original Side of High Court—Filing of appeal—Appellant not delivering paper books—Right of respondent.*—Under para 467 of the Rules framed for the Original Side of the High Court, the appellant or his attorney is bound, "within six days from the presentation of the memorandum of appeal, to deliver to the Registrar, Original Jurisdiction, for the use of the Judges, two paper books containing a copy of the plaint, written statement, depositions of witnesses and of the decree and judgment and memorandum of appeal. If the appellant fail to do so within the time limited, the respondent or his attorney may deliver such paper books." On the filing of an appeal, if the appellant filed no paper book, the respondent on whom it is not obligatory to deliver such paper books, is entitled to have the appeal dismissed with costs. **KABULI v. BHULI, 17 C. 289. (14 B. L.R. App. 11, Not F.)**

(332)—*Secondary evidence, Admission of—Judge—Discretion—Appeal—Miscarriage of justice.*—The question whether secondary evidence was in any given case rightly admitted is one which is proper to be decided by the Judge of first instance and is treated as depending very much on his discretion. His conclusion should not be overruled except in a very clear case of miscarriage. **NINGAWA v. RAMAPPA, 5 Bom. L.R. 708=28 B. 94.**

(333)—*Bengal High Court Rules—Account books—Evidence.*—Account books which are not translated, and are not, therefore, a part of the paper-books, cannot, under the rules of the High Court of Bengal, be referred to in a trial without special leave. **MADHUB PERSHAD v. FOOL COOMAREE BIBEE, 19 W.R. 121.**

(334)—*Accounts produced and afterwards withdrawn—Effect.*—The fact of the defendant having tendered some accounts which, when the time for proof came, were withdrawn, leads to an inference, either that he had no accounts relevant to the question, or that, having some, he found that they would not suit his case. **MUHAMMAD IMAM ALI KHAN v. HUSAIN KHAN, 26 C. 81, P.C.=25 I A. 161=2 C.W.N. 737=7 Sar. 432.**

(335)—*Burden of proof—Non-examination of parties in a suit, Result of—English and Indian practice—Account books, Non-production of.*—The plaintiff brought a suit for the recovery of certain properties, alleging that he was adopted twenty years before the date of the suit. **Held**, the burden of proving that the alleged adoption took place twenty years before the trial rested upon the plaintiff. The presumption that would be drawn in England will be to the detriment of a plaintiff, who fails to enter the

Practice and Procedure—continued.

witness-box and face the ordeal of cross-examination. But, in cases between Natives tried in India, a species of advocacy is tolerated by the Courts of law here, in which the unworthy effort of the advocate on each side is to force his opponent to produce his own client, in order that he himself may have the opportunity of cross-examining that client. The result is that, should the opponent refuse to be led into this trap, the parties (the principal witnesses, who possibly could throw light on all these tangled transactions which so perplex those who have to decide these cases), are never examined at all, and the litigation goes forward through tortuous windings to its unsatisfactory and uncertain end. It is a vicious practice, unworthy of a high-toned or reputable system of advocacy, tending to embarrass and perplex judicial investigation, and too often enabling fraud, falsehood or chicane to baffle justice. Having regard to the well-known and often proved habits of the Indian people with regard to the keeping of accounts, recording their most minute transactions, the non-production of any book, in which anything connected with the matter in question is entered, by the party in whose possession it is, covers the parties' case with suspicion. *MUSSAMAT LAL KUNWAR v. CHIRANJI LAL*, 7 M.L.T. 57=14 C.W.N. 285=11 C.L.J. 172=12 Bom. L.R. 244=32 A. 104=20 M.L.J. 182=5 Ind. Cas. 549, P.C.=37 I.A. 1.

(336)—*Pleadings—Suit for share of property—Point not raised in the pleadings—Suggestion before Court below that account should be taken—Separate suit for that purpose necessary.*—In a suit for recovery of a share of a deceased Muhummadan's estate by right of inheritance, the plaintiff alleged that the dower-debt amounting to Rs. 40 due to the widow, who was in possession, had been satisfied out of the usufruct, and also asked for a conditional decree in the event of anything being found as due to the widow. The reliefs asked for were (1) delivery of possession of the share, (2) mesne profits for three years and (3) costs of the suit. The widow contended that her dower was a lakh of rupees and that she had been in possession of the property in lieu thereof. The suit was dismissed. Upon appeal to the High Court, it was argued that, at all events, an account ought to have been directed to be taken of the profits of the property and the amount of those profits set off against the dower-debt. *Held*, that the contention could not prevail. If the plaintiff was desirous of claiming an account of this kind, she ought to have done so in the prayer to her plaint. The question would be best raised in a suit for an account. *HUMERA BIBI v. ZUBEDA BIBI*, 2 A.L.J. 485=A.W.N. 1905, 125. (14 M.I.A. 377, F.)

(337)—*No specific direction as to accounts in the decree—Court cannot direct accounts to be taken before Commissioner when parties have arrived at an agreement after the decree—*

Practice and Procedure—continued.

Appeal against order of a Judge, when lies.—A decree of the High Court on the Original Side contemplated an account being taken between the parties but it was silent on the question as to how that account was to be taken, whether by the Commissioner of the Court or by some person selected by both the parties. The Court of first instance decided that where a direction as to account ought to have been incorporated in a decree when passed it was competent to the Court at any stage of proceedings to direct necessary inquiries or accounts to be made or taken. *Held*, on appeal, that as some account was taken under the decree by a person appointed jointly by the parties a new agreement had come into existence superseding the decree and the Court was not competent to make the order appealed against. *SIR JEHANGIR COWASJI JEHANGIR v. THE HOPE MILLS, LTD.*, 10 Bom. L.R. 488=33 B. 216, reversing 9 Bom. L.R. 1380.

(338)—*Practice — Commissioner to take accounts, disobedience of order of—Attachment.*—An attachment will issue against a party to a suit for disobedience of an order of the Commissioner for taking accounts. It is not necessary that the order of the Commissioner must, in the first instance, be made an order of Court in order to issue such attachment against the disobeying party. *DHURAM-DHARDAS SAKHARAM v. BHAI GOVIND*, 10 B.H.C. 4.

(339)—*Commissioner for taking accounts—Motion to vary report—Power of Court to extend time.*—It is competent to the Court to extend the time of 20 days allowed by the Rules of Court for making a motion to vary or discharge the report made by a Commissioner for taking accounts. So, where the party has failed to file the application for such a purpose within twenty days after the filing of the report, the Court has the discretion under this rule to give further time to such party. The report is binding on all the parties, unless the Court in its discretion, and, upon strong and sufficient cause, shall vary it, either within the time appointed or beyond it. *HORMUSJI CURSETJI ASHBURNER v. BOMANJI CURSETJI ASHBURNER*, 9 B. 250. [R., 16 B. 263.]

(340)—*Account—Commissioner's report—Motion to discharge or vary—Memo. of objections—Affidavit—Practice.*—Motion to discharge or vary the report of the Commissioner for taking accounts, must be on a memorandum of objections filed in the Prothonotary's office, and upon the evidence taken by, and the proceedings before, the Commissioner; and not on affidavits made for the purpose of the motion. The application to vary the report should be made within the 20 days as required by r. 6, ch. VI, at p. 52 of the High Court Rules. Affidavits may, however, be filed in such a motion (a) when ordered by the Court, if it desire fresh evidence; or (b) by special leave of the Court for advancing a fact not appearing in the face

Practice and Procedure—continued.

of the proceeding, before the Commissioner. **SUMAR AHMED v. HAJI ISMAIL HAJI HABIB, 1 B. 158.** [R., 13 B. 368.]

(341)—*Civ. Pro. Code (Act X of 1877), s. 3—'Decree,' meaning of—Reference to Commissioner for taking accounts—Stage of suit—Practice and procedure, pending suit.*—The word "decree" in the section meant a decree final in its nature and not an order of an interlocutory nature, such as an order of reference to take accounts, though such order in a general way could be properly termed a "decree." Consequently, a suit after reference to a Commissioner for taking accounts must still be said to be in a stage "prior to decree" within the meaning of that section. The effect of the proviso to the section was that all suits pending on the date of the enactment of the Code (X of 1877) down to their final result, were governed by the practice and procedure prevailing till then, and that execution proceedings subsequent to the final result were governed by the Code. **RUSTOMJI BURJORJI v. KESSOWJI NAIK, 3 B. 161.**

(342)—*S. 399, Civ. Pro. Code, 1882—Private Commissioner experiencing difficulty in enforcing attendance of witnesses—Practice.*—A private Commissioner finding practical difficulty in enforcing the attendance of witnesses, should return the commission to the High Court. The High Court may, under s. 386, then, send the commission to a Civil Court, within the local limits of whose jurisdiction the witnesses to be examined reside. **MAHOMED ALI v. WAZID ALI, 23 C. 404.**

(343)—*Time within which application to vary Commissioner's report should be made—Bombay High Court Rules, ch. VI, r. 6.*—Where a person desires to move the High Court to vary a report made by the Commissioner, he must file exceptions to such report and make his motion to vary it within 20 days after the report is filed, or within such further time as the Court may have allowed him for the purpose. **NAROTTAM v. HARICHAND RAM CHAND, 13 B. 368.** [R., 16 B. 263.]

(344)—*Court's power to re-open a question decided by Commissioner.*—Case where the question whether a Court has jurisdiction to re-open a point of fact decided by a Commissioner, appointed by it, on evidence properly before him, was left undecided. **WATSON v. AGA MEHEDEE SHERAZEE, 1 I.A. 346=3 Sar. 384.**

(345)—*Practice—Cross-suits between parties one on promote and the other on accounts in different Courts—All transactions dealt with in suit for account—Question of procedure becoming one of convenience, rather than of right.*—As a general rule, it would be no answer as regards a suit instituted in the S.C. Court, upon a promissory note, for the defendant to say that the claim is a matter of account. But the situation is altered when a suit for account wherein all transactions between the

Practice and Procedure—continued.

parties can be dealt with, is subsequently instituted in the High Court by the defendant in the S. C. Court suit, and when he gives security in respect of the total amount of his indebtedness. It is desirable, then, that there should not be separate proceeding in respect of the promissory note. The two should be tried and disposed of jointly. The question of procedure then, becomes a matter of convenience rather than a question of right. Justice can be done between the parties by the apportionment of costs after the account has been taken in the High Court. **ISSUR SINGH v. BERGMANN, 30 C. 627.**

(346)—*Practice—Accounts—Taking of accounts in partnership suits—Set off.*—In suits for account, as in partnership or partition suits, each party however arrayed formally becomes in turn either plaintiff or defendants, although he has not claimed a set off. **NANCHAND v. MUSSA, 6 Bom. L.R. 692.**

(347)—*Partnership—Joint adventure—Evidence.*—Two firms started into a joint adventure which was to be conducted by an agent specially appointed by both firms. One of the firms brought a suit against the other to recover their share of the alleged loss upon the joint adventure. The evidence in support of the plaintiff's claim consisted, however, almost entirely, of books of accounts kept by the plaintiffs themselves and by two corresponding branches of the plaintiff's firm. Held that their books of accounts could not be likened to books of partnership, to which all the partners in a firm have access, and which are kept by the servants of all; and that, although, the books corroborated each other, they were not sufficient evidence to entitle the plaintiffs to a decree, in the absence of evidence showing that the sums mentioned in the books as having been paid to the agent specially appointed for carrying on this joint adventure, were really applied by such agent for the purposes of the joint adventure. **SETH LAKHMI CHAND v. SETH INDRA MULL, 4 B.L.R. P.C. 31=13 W.R. P.C. 36=13 M.I.A. 365.** [D., 11 B. 514.]

(348)—*Principal and agent—Suit for accounts.*—Prayer in plaint, and the subsequent procedure, step by step, till the drawing up of the final decree, pointed out and explained. **DEGAMBER MOZAMDAR v. KALAYNATH ROY, 7 C. 654=9 C.L.R. 265.** [R., 15 C.P.L.R. 61.]

(349)—*Civ. Pro. Code—Death of appellant—Application by several persons to prosecute appeal—Determination of party entitled to appeal.*—Where; on the death of an appellant, several persons apply to prosecute the appeal, the Court is bound to determine which of the parties is so entitled. **KATAMA NACHIYAR v. THE RAJA OF SIVAGANGA, 2 M.H.C. 146, Note, P.C.**

(350)—*Dead persons—Parties to suits.*—The practice, which prevails in the mofussil Courts of this Presidency, according to which a dead man is expressed to be a party to a suit by his

Practice and Procedure—continued.

heir is erroneous. A dead man cannot himself be a party to such a suit. **GOVIND v. MOHONIRAJ, 3 Bom. L.R. 407 = 25 B. 494.**

(351)—*Dead person—Legal representative—Procedure.*—A suit cannot be brought by or against a dead man, and if the person entitled to sue or liable to be sued is dead, the suit must be brought by or against the person who is entitled or liable at the date of the suit brought making it clear on the face of the plaint how the right or liability arises. Hence, where a plaintiff sues a non-existent person as represented by an existing person and gets a decree in that form, he gets a decree against no one as the defendant does not exist and the representative is not sued as a defendant. **BALKRISHNA v. ORIENTAL LIFE ASSURANCE CO., 4 Bom. L.R. 340.**

(352)—*Misjoinder of plaintiffs—Amendment of issues—Error in interlocutory order—Appeal—Act VIII of 1859, s. 350—Procedure.*—A suit for breach of contract was brought by four persons, who alleged that they carried on business in co-partnership under the style of I. B. T. and that, at the time of the cause of action, they were partners. It turned out on the evidence that all the plaintiffs were not co-partners at the time the cause of action accrued. The Court amended the issue, and raised the question whether the plaintiffs were or were not partners. The Court, having found that two of the plaintiffs were not partners, ordered their names to be struck out of the plaint and gave a decree in favour of the other plaintiffs. *Held* that the Judge had power to amend the issue, and that it was the correct mode of amending errors in the plaint; but the more correct course would have been for the Judge merely to have amended the issue and to have allowed the names of the plaintiffs to stand in the plaint. *Held* also, that if this was a wrong order, it was an interlocutory order striking out two of the plaintiffs instead of leaving them on the record, but it was an error which had caused no injury to the defendants and consequently, under s. 350 of Act VIII of 1859, it was not a ground for reversing the decree on appeal. **THE EAST INDIAN RAILWAY COMPANY v. JORDAN, 4 B.L.R.O.C. 97 = 14 W.R.O.C. 11.**

(353)—*Practice—Question of law—Preliminary issue—Disposal of issue of fact—Misjoinder of parties and causes of action.*—Where the lower Courts held that the suit was bad on the ground of misjoinder of parties, they should not have proceeded to dispose of the questions raised between the parties on the merits. **MANNA LAL v. HUSAIN ALI, A.W.N. 1883, 64.**

(354)—*Ss. 562, 564, 53, Civ. Pro. Code.*—In a case which the lower Court should have simply returned the plaint for amendment, allowing the plea of misjoinder but failed to do so, the appellate Court has got the power to dispose of the suit in the mode in which the

Practice and Procedure—continued.

lower Court ought to have disposed of it. **LINGAMMAL v. VENKATAMMAL, 6 M. 239. (2 A. 669, Diss.) (R., 19 B. 303, 2 L.B.R. 4.)**

(355)—*Rule nisi to show cause against the addition of person as defendant—No grounds set out therein—Discharge of rule.*—Where a rule calling upon a person to show cause why he should not be added as a defendant or give security for costs, was applied for neither on petition or affidavit nor set out any grounds, such person was held entitled to know what he had to answer, and the rule was discharged as being informal. **RAMNARAIN KALLIA v. MONSE BIBEE, 9 C. 735.**

(356)—*Practice—Suit for exclusive possession of land—Court competent on evidence in such suit to give decree for joint possession.*—Where the plaintiff comes into Court claiming exclusive possession of land, the Court is competent, having regard to the evidence in the case, to grant a decree for joint possession. **RAMBHOWAN v. RAMBARAN, A.W.N. 1890, 166.**

(357)—*Practice—Suit for exclusive possession—Power of Court to grant decree for joint possession—Circumstances under which such power will or will not be exercised.*—Where a plaintiff, who had sought to eject the defendants as trespassers from certain lands and whose suit had been dismissed by both the lower Courts, pleaded in second appeal that the decrees of the Lower Courts nevertheless showed that he was entitled to a decree for joint possession with the defendants of the property in suit; the Court under the circumstances declined to grant the plaintiff's prayer for a decree for joint possession. **JAI RAJ MAL v. NIADAR, A.W.N. 1893, 196.**

(358)—*Plaintiff even though he asks for exclusive possession may yet on a proper case be awarded possession in common.*—Where the plaintiff asks in his plaint for exclusive possession only he may nevertheless be allowed possession in common. This does not involve any variance with the facts alleged in the plaint, but merely the correct determination of the relief appropriate on those facts being established. The plaintiff merely asked for a relief larger than the facts asserted by him would warrant. That is not a reason for debarring him altogether from any relief to which, on those facts, he is entitled. **BHIKU v. PUTTU, 8 Bom. L.R. 99.**

(359)—*Suits on behalf of joint family—All coparceners must join.*—Where there are one or more members of a joint Hindu family filing a suit in respect of the property of that family, it is essential all the persons composing the family should be joined as party plaintiffs. **NARANJI v. MOTI, 9 Bom. L.R. 1126.**

(360)—*Suits on behalf of joint Hindu family.*—The rule of Hindu law is that a joint family is represented in all transactions or concerns with the outside world by its *Karta* (manager) provided they are for the benefit or necessity of the family; and that any co-parcener, who does

Practice and Procedure—continued.

not occupy that position of manager, can represent and bind the family in such transactions or concerns, provided he was either previously authorised to represent it, or, in the absence of such authority, the other co-parceners subsequently by words or conduct ratified his acts. *VISHNU v. BABAJI*, 10 **Bom. L. R.** 505=32 **B.** 375.

(361)—*Joint Hindu family — Institution of suits by managers, representing minor, co-parceners.*—As a matter of practice, suits are not filed in Courts by managers representing their minor co-parceners; the practice is to join all persons interested, but it would seem that, even if on the face of the plaint there were an allegation of a sole plaintiff that he sued as manager on behalf of a co-parcenary, the minor co-parcener would not be bound by the proceedings unless by judicial sale under the decree rights had been created in innocent third parties and no prejudice were shown to the absent co-parceners. *KASHINATH v. CHIMNAJI*, 8 **Bom. L. R.** 268=30 **B.** 477.

(362)—*Suit on behalf of minor — Procedure on discovery that plaintiff was not minor at time of instituting suit.*—In a suit on behalf of a person alleged to be, but not in fact, a minor, held, on discovery that the plaintiff was of full age at the commencement of the suit, that the plaint could not be amended and that the suit must be dismissed. *SHEORANIA v. BHARAT SINGH*, 20 **A.** 90=A.W.N. 1897, 203. (21 **C.** 866, *Diss.*) [*R.*, 5 **O.C.** 355, 7 **O.C.** 234, 11 **O.C.** 159; *D.*, 2 **L.B.R.** 246, 28 **A.** 416=3 **A.L.J.** 187=A.W.N. 1906, 73.]

(363)—*Of Appellate Court—Party discovered to be a minor.*—The proper course for an appellate Court to take, if either of the parties appears to be a minor and this point has not been taken in the Court below is to remand the case, and if the question is determined in the affirmative, to set aside all the proceedings which are the subject of the appeal as void *ab initio*, but to make no order as to costs. *MAUNG AUNG MYA v. MA GYI*, 1 **L.B.R.** 38 (7 **A.** 490, 13 **C.** 189, 13 **B.** 7, 234, 14 **C.** 204, 704, *Rel. on.*)

(364)—*Minor—Suit against minor—Plaintiff—Deposition—Corroboration.*—Where a person prefers a claim against the estate of a deceased person, which has devolved upon a minor, he cannot sustain the action solely by his own deposition. *BALAPA v. BHUTAJI, BHUTAJI v. BALAPA*, 5 **Bom. L. R.** 181.

(365)—*Appeal by next friend of minor plaintiff—Objection by defendant.*—Where the defendant, in a suit, made the next friend of the minor plaintiff alone respondent in the lower appellate Court, it would not lie in his mouth, in second appeal in the High Court, preferred by such next friend, to take the objection that the latter was no party to the suit. *BHOBOTARINI DEBI v. SREE RAM PAUL*, 9 **C.** 629.

(366)—*Practice—Application by next friend for change of attorney—Order refusing change*

Practice and Procedure—continued.

of attorney—Appeal.—The next friend of an infant plaintiff is as much entitled to change his solicitor as any other plaintiff who is *sui juris*. (4 **C.W.N.** 175 (n), 5 **C.W.N.** 83 (n), *Manick Lal Seal v. Sarat Kumari Dassee*, (1883), unreported, *Diss.*) It is not necessary for him to show that such change is for the benefit of the infant, though the Court will interfere and remove the next friend, if it appears that, in the matter of such an application, he was acting in a manner detrimental to the infant's interest. (*Peyton v. Bond*, (1887) 1 **Sim.** 390, *Appr.*) As long as he continues next friend, he is entitled to appoint and change his own solicitor. *Semble.*—An appeal lies from an order refusing change of attorney, passed on an application for the same by the next friend. *DINENDRA NATH DUTT v. WILSON*, 28 **C.** 264=5 **C.W.N.** 434.

(367)—*Dismissal of appeal—Infant appellants—Restoration of appeal—Re-hearing.*—Where an order had been made *ex parte*, upon the appearance of the respondents alone for the dismissal of an appeal and affirmance of the judgment of the Court below, which purported to be upon the hearing of the cause, the Judicial Committee held that such order must be held simply as a dismissal; and it appearing that the appellants were infants, under the protection of the Court of Wards in India, and that the agent appointed by the Court to act as their guardian *ad litem*, in the matter of the appeal, had absconded, and abandoned the cause, their Lordships rescinded the order of dismissal, and restored the appeal on the terms of the appellants paying the costs and giving access to the transcript of the proceedings in the Court below, in their hands, and undertaking to lodge cases within five months. *RAJUNDER NARAIN RAE v. BIJAI GOVIND SINGH*, 2 **M.I.** **A.** 181=1 **Moo. P.C.** 117=1 **Sar.** 175.

(368)—*Decree against infant—How to set aside on the ground of guardian's laches—Suit to set aside decree against properly represented infant—Necessity for proof of fraud and collusion.*—If an infant desires to have a decree set aside on the ground that his next friend had neglected his interests, and had not put forward on his behalf good grounds of defence, which were available, the proper mode of proceeding would be to apply for a review.—If the decree were *ex parte*, the procedure given in the Civ. Pro. Code for setting aside such decrees, should be adopted. [*R.*, 6 **C.L.J.** 448.] If it be sought, by a separate suit, to set aside a decree obtained against an infant properly made a party and properly represented in the case, proof of fraud or collusion is absolutely essential for success in the suit. *RAGHUBAR DYAL SAHU v. BHIKYA LAL MISSER*, 12 **C.** 69. [*Expl.*, 23 **A.** 459=A.W.N. 1901, 147.]

(369)—*Guardian—Officer of the Court—Nazir.*—There is nothing that compels the Court to retain as guardian one of its officers, where the circumstances of the case make it clear that the interest of the minor will be

Practice and Procedure—continued.

thereby imperilled; and the Court has power to relieve a Nazir, who finds no funds for the purpose of conducting adequately the defence of the minor. *GOPIAL V. AGARSINGJI*, 6 **Bom. L.R.** 544=28 **B.** 626.

(370)—*Act XL of 1858, ss. 7, 19, 21—Recall of certificate—Power of Court to recall certificate granted under s. 7.*—A certificate granted under s. 7, Act XL of 1858, may, under s. 21, be recalled summarily without the accounts having been previously taken in a regular suit under s. 19, where the application for the recall is based on charges of waste and mismanagement. *In the matter of the petition of KHAJA SHURWAR HOSSEIN KHAN*, **B.L.R.** Sup. Vol. 720=7 **W.R.** 522.

(371)—*Act XL of 1858 and Civ. Pro. Code, s. 440, Suit in violation of—Return of plaint.*—Where a suit is brought in violation of s. 440 of the Civ. Pro. Code or of Act XL of 1858, the plaint should be returned, in order that the error may be rectified. *RUSSICK DAS BAIRAGY V. PREONATH MISREE*, 10 **C.** 102=12 **C.L.R.** 405.

(372)—*Proceedings in execution and proceedings in suits.*—Procedure in execution is not to be conducted in a slipshod and slovenly fashion, and the procedure in suits should be applied as far as it can be made applicable (s. 647, Civ. Pro. Code). *FAKIR-ULLAH V. THAKUR PRASAD*, 12 **A.** 179=**A.W.N.** 1890, 53.

(373)—*Execution case struck off improperly—Judge, Duty of—Procedure.*—A Judge, finding that he has struck off an execution case improperly, may restore it to the file, and need not proceed *de novo*. *MUSST. ZAHURAM V. W. TAYLER*, 2 **B L.R. A.C.** 86=10 **W.R.** 380. [*F.*, 12 **W.R.** 142; *Appr.*, 11 **W.R.** 517=3 **B L.R. App.** 68; *R.*, 7 **C.L.R.** 424.]

(374)—*Execution of decree—Enforcement of the terms of a decree—Court.*—The Court ought to facilitate enquiries which are necessary for the purpose of carrying out decrees passed by it, and to accept with readiness any information which shows that the litigants have disregarded any part of the Court's decree. It would be wrong to dismiss an application made with the above purpose, simply because the applicant may have made the same endeavour without success in another proceeding. *HARI V. MORO, RAGHUNATH V. HARI*, 4 **Bom.L.R.** 960.

(375)—*Decree—Execution—Court.*—When a decree-holder applies for execution the Court to which the application is made should not reject it on light grounds and even where a decree is not quite intelligible, the Court must as far as possible construe it in a fair and reasonable spirit so as to advance instead of impeding its execution. *AHILYABAI V. KASHINATH*, 5 **Bom. L.R.** 802.

(376)—*Scheme under a decree—Decree—Alteration to grant the application.*—The Court

Practice and Procedure—continued.

has unquestionably powers, in a properly constituted proceeding, to alter a scheme under a decree, but an application to that end can only be successful, if it be evident that the proposed alteration is in the interests of the foundation and in harmony with its objects. The Court, however, would be slow to act when all that was proposed was an alteration in a detail of administration on which opinions might reasonably differ. *KANDAS V. TALUKDARI SETTLEMENT OFFICER*, 3 **Bom. L.R.** 258.

(377)—*Execution of decree—Copy of decree—Act VIII of 1859, s. 212—Act XXIII of 1861, s. 15.*—Ss. 212 of Act VIII of 1859 and 15 of Act XXIII of 1861 do not enact that the decree-holder must file a copy of his decree when he makes an application to execute the same. *MODHOO DOSSIA V. NOBIN CHUNDER ROY*, 16 **W.R.** 25. [*R.*, 16 **C.W.N.** 736.]

(378)—*Execution sale—Publication and conduct of sale, irregularity in—Waiver by judgment-debtor.*—A petition by the judgment-debtor, praying for the postponement of an execution-sale, would not amount to an admission that the publication and proclamation of sale were properly made, and would be no ground to refuse to hear evidence on the matter, when irregularities are alleged by the judgment-debtor in the publication and the conduct of the sale. *THAKOOR MAHATAB DEO V. LEELANUND SINGH*, 7 **C.** 613=9 **C.L.R.** 398. [*F.*, 17 **M.** 304.]

(379)—*S. 294, Civ. Pro. Code—Execution sale—Decree-holder bidding without Court's permission—Substantial injury.*—Under the terms of the third paragraph of s. 294 of the Civ. Pro. Code, it is discretionary with the Court of execution to set aside an execution sale, wherein the decree-holder has purchased without the previous permission of the Court. Though such a matter is an irregularity in the conduct of the sale, the Courts will, before interfering with such a sale, consider whether any substantial injury has resulted to the judgment-debtor by reason of it. *MATHURA DAS V. NATHUNI LALL MAHTA*, 11 **C.** 731. [*R.*, 21 **C.** 554.]

(380)—*Damages—Assessment in execution.*—In a suit for recovery of damages, damages must be assessed by the Court which tries the case, and not in execution of the decree. A decree containing a direction that, at the time of the execution the amount of damages should be ascertained, is not complete in itself and it cannot be executed. *MUSSAMAT BIBI MANIRAN V. MUSSAMAT BIBI MASHIHAN*, 4 **B.L.R. App.** 66.

(381)—*Practice—Varying decree in execution—Jurisdiction of Court executing decree.*—The Court executing a decree cannot vary it, in the execution department. It cannot re-open the decree, on the ground that the defendant raised a new question in the process of execution. To re-open a decree is to re-hear (and not to execute it). That would be an error of procedure of a substantial kind, calculated to cause great

Practice and Procedure—continued.

irregularity in the conduct of suits. When a decree gives certain lands within specific boundaries, it is not open to the Court executing the decree to disallow possession of the same, on the plea, that the lands must have been owned by the defendants alone and would not have been decreed for plaintiffs. *UDWANT SINGH v. TOKHAN SINGH*, 28 C. 353, P.C. = 28 I.A. 57 = 3 Bom. L.R. 318 = 8 Sar. 14.

(382)—*Decree of Court of N. W. Provinces—Execution against properties in Bengal—Procedure applicable.*—Where a decree of a Civil Court of the North-West Provinces is sought to be executed by attachment and sale of properties situated in a district in Bengal, it is the procedure of the Bengal High Court in the matter of execution, and not the rules for execution of decrees, as passed by the High Court of Agra, that should govern the case. *ALI MIRZA v. RAM NARAIN SEIN*, 11 W.R. 430. (10 W.R. 12, F.B., F.)

(383)—*Payment into Court of money due under a bond bearing interest—Appropriation of such payments first towards satisfaction of interest.*—It appears to be a well-settled practice of the Courts to appropriate payments made upon a bond first to the interest due thereon, and thereafter, if any balance remain, to the principal. *MAHARAJA OF BENARES v. HAR NARAIN SINGH*, A.W.N. 1905, 167 = 2 A.L.J. 585 = 28 A. 25. (1 B.L.R. 110, 22 W.R. 525, R.)

(384)—*Ss. 377, 379, Civ. Pro. Code—Payment into Court—Right to draw money out of Court.*—On a defendant depositing money in Court in satisfaction of a claim, the plaintiff is entitled to draw out such money and prosecute his suit for balance claimed, as no interest would run on the deposit. The law here is different from the English practice. *DWARKA DASS AGURWALLAH v. GIRISH CHUNDER ROY*, 2 C. 766.

(385)—*Payment out of Court of monies on petition without suit—In the matter of Florence.*—Case where payment out of Court of monies on petition without suit was ordered in this case. *EMILY BROWNLOW AND LIBIAN KATE BROWNLOW*, 11 C. 219.

(386)—*Plea of purchaser for value without notice.*—The plea of a purchase for value without notice should be specifically put forward either in the written statement or in the issues. *DE SILVA v. DE SILVA*, 5 Bom. L.R. 784.

(387)—*Plea of purchaser for value.*—A person who alleges himself to be *bona fide* purchaser for value without notice must specifically plead that in his written statement or in the plaint as the case may be. If he does not plead all that, he will not be allowed at the hearing to go into evidence on that point. It is not sufficient for a purchaser alleging himself to be a *bona fide* purchaser for value without notice to plead simply that he is a purchaser for value and *bona fide* and without value. *MULJI JETHA AND CO. v. N. C. MACLEOD*, 5 Bom. L.R. 991.

Practice and Procedure—continued.

(388)—*Judicial sale—Right of purchaser to possession—Practice—Appeal to Privy Council—Costs occasioned by inclusion of unnecessary documents—Necessity of decision on all issues joined—Remand—Intervenor's application rejected—Effect of decree in suit.*—It is the practice of the Courts in India not to give possession under a judicial sale by removing one who is in possession under an apparent *bona fide* title. As a debtor can only assert his title to possession by a suit, so a decree-holder, who derives his title through him, must assert his title by a regular suit. In taxing the costs of appeal to the Privy Council, all such costs and expenses as may have been unnecessarily occasioned by the inclusion, in the transcript sent from India, of matters improperly introduced therein, should be disallowed. The attention of the Courts in India directed to the frequent inclusion of voluminous papers, accounts, and receipts in the transcripts in India, and sent over in that form to the Registry of the Privy Council. In appealable cases, the Courts below, by forbearing from deciding on all the issues joined, not unfrequently oblige the Privy Council to recommend that a cause be remanded which might otherwise be finally decided on appeal. Therefore, in appealable cases, the Courts below should, as far as may be practicable, pronounce their opinion on all the important points. [*R.*, 17 A. 174 = 15 A.W.N. 47, 9 C.W. N. 60, 6 Bom. L.R. 925; *Expl. & D.*, 26 A. 234 = A.W.N. 1904, 6.] A party whose application to intervene in a suit has been refused is not bound by the decree passed in that suit. *SARAKANT BANNERJEE v. PUDDARMONEY DOSSEE*, 5 W.R.P.C. 63 = 10 M.I.A. 476 = 2 Sar. 184 = 1 Suther. 631. [*R.*, 14 W.R. 401.]

(389)—*Bona fide purchaser for valuable consideration, possession by—Neglect of real owner to assert right—Limitation—Exceptions to s. 14, Reg. III of 1793, and s. 3, Reg. II, 1805, distant residence of owner not sufficient for application of—Evidence tendered to lower Court for review refused—No appeal from order of refusal—Such evidence not to be referred to in appeal.*—When question arises regarding the rights of *bona fide* purchasers of an estate for valuable consideration, from persons who had been permitted to hold themselves out to the world as the proprietors for more than 12 years before the purchase, and of the owner by whose neglect they had thus been enabled to assume the character of proprietors, the Court ought to have some other fact than mere distant residence to make out the proof of some good and sufficient cause that had precluded an earlier assertion of a right that must have been well-known to the claimant from the beginning. Plaintiff in this case contended that, although her claim was not preferred to any competent Court till more than 12 years after her cause of action had arisen, yet, that as her nephews had acquired possession of the property by unjust and dishonest means, and as the purchase by the appellant, however fair and just, had been made within 12 years, neither they nor any

Practice and Procedure—continued.

person under whom they claimed had, during a period of 12 years antecedent to the time of her preferring her claim, held under any fair title, believed to have conveyed a right of possession and property. But it was held that her case could not be brought within the exceptions of s. 14 of Reg. III of 1793 and s. 3 of Reg. II of 1805. By the express words of the regulation, the proof of the fraudulent, unjust or dishonest acquisition is thrown upon the plaintiff, so that, to avoid the effect of the lapse of time, the plaintiff in such a case is bound to establish by proof the existence of conscious injustice in the acquisition in question. [*D.*, 2 N.L.R. 99.] Evidence tendered to the *Sudder Court*, on a petition for review, which was refused, and the order of refusal not appealed from, though forming part of the transcript, cannot be referred to in the argument upon the appeal from the original judgment. *SHEIKH IMDAD ALI v. MUSSUMAT KOOTRY BEGUM*, 6 W.R. P.C. 24 = 3 M.I.A. 1.

(390)—*S. 647, Civ. Pro. Code, 1882—Right of a purchaser at a Receiver's sale—Practice of the original side of the High Court.*—The High Court has recognized the rights of a purchaser at a Receiver's sale to invoke the assistance of the Court in obtaining possession under the provisions of the Code which relate to sales in a suit. *MINATOONNESSA BIBEE v. KHATOUNNESSA BIBEE*, 21 C. 479. [*R.*, 34 C. 305 = 5 C.L.J. 270.]

(391)—*Misdescription of property in sale notification—Purchaser's remedy.*—If the misdescription of the property in the sale notification goes to the essence of the contract and materially alters the substance of it, the purchase cannot be enforced upon the purchaser. But if such misdescription does not materially alter the substance of the contract, the remedy which the purchaser can claim is adequate compensation and not annulment of sale. *ADMINISTRATOR GENERAL OF BENGAL v. AGHORE NATH MOOKERJEE*, 29 C. 420 = 6 C.W.N. 873.

(392)—*S. 545, Civ. Pro. Code—Dismissal of suit—Court dismissing suit is functus officio—Stay of proceedings—Application to Court of first instance after dismissal of suit, but before appeal, to restrain Receiver from parting with funds.*—The power, which the English Courts have of staying proceedings for costs under an order of dismissal, is given by s. 545, Civ. Pro. Code, 1882. Under the Civ. Pro. Code, once a suit has been dismissed, the court dismissing it is *functus officio*, except that it may stay execution of its own decree or order for costs. Its jurisdiction extends no further in regard to a suit which has ceased to be a pending suit. (14 W.R. 384, 11 C. 146, *F.*) Where an application for an order to prevent the disposal, pending, an appeal, of funds in the hands of the Receivers was made to a court of first instance after dismissal of the suit, *held*, that the application must be refused with costs. *N.B.*—The following English cases relating to the power, which the English Courts have of staying proceedings

Practice and Procedure—continued.

for costs under an order of dismissal considered. *Otto v. Lindford*, 18 Ch. D. 394, *Polini v. Gray*, 12 Ch. D. 438, *Hamill v. Lilley*, 19 Q.B.D. 83, *Wilson v. Church*, 11 Ch. D. 576. *YAMIN-UD-DOWLAH v. AHMED ALI KHAN*, 21 C. 561.

(393)—*Persons not parties to a suit, wherein a Receiver is appointed, application of—Practice of Court.*—Whatever is the least expensive course, consistent with satisfactory enquiry, ought to be adopted in order that the Court shall not, by its own dominant power, hold property on which the parties to the suit have no claim and hold it in despite of the real owners. If the Court can find out who the real owners are, it should do so, and in the least expensive manner. In an administration suit, brought by a daughter to administer her father's estate, a Receiver had been appointed and he took possession of certain properties more than half of which belonged to the father, whilst the remainder was formerly held by the father in the name of his son under a lease from certain zemindars. Two years after the expiry of the said lease the applicants produced to the said Receiver, a power of attorney, alleged to have been executed in their favour by the original lessors or their representatives, authorizing the donees of the power to take over possession of the properties formerly held by the Receiver. On the Receiver declining to make over possession, the applicants applied to the Court, on notice in the administration suit above mentioned, for an order that the Receiver should deliver possession to the applicants of the said lands and should pay the rents and profits accrued since the expiry of the lease. The application being dismissed on the ground that the applicants were not parties to the administration suit, *held*, on appeal, that they were permitted to apply, by motion or notice, in the suit for the purpose of establishing their rights to obtain an order directing the Receiver to make over to them the said properties held in his possession after the expiry of the lease. *MAHOMED MEDHI GALISTANA v. ZOHARRA BEGUM*, 17 C. 285. [*R.*, 36 C. 713 = 13 C.W.N. 654 = 9 C.L.J. 563.]

(394)—*Pauper—Leave to appeal—Indulgence.*—While a pauper may apply for a review of judgment with the same indulgence as to delay in making the application as a person who is not a pauper, yet, in making his application for leave to appeal, similar indulgence is not extended to him. *LAKSHMI v. ANANTA SHANBAGA*, 2 M. 230. [*Appr.*, L.B.R. 1872-1892, 149; *D.*, 15 A. 14; *R.*, 19 B. 48, 8 C.W.N. 906 = 30 C. 790.]

(395)—*Party put in possession praying for mesne profits—Party proved to be pauper—Ex parte application for security pending appeal—Practice.*—In an *ex parte* application for security pending an appeal, the respondent who had been put in possession by the High Court, was found when he applied for mesne profits, to be a pauper. The appellant applied for security to the High Court, but the application was

Practice and Procedure—continued.

refused. He now asked for an order similar to that made in *Mussamut Jariatool-Butool v. Mussamut Hoseinee Begum* (10 M.I.A. 196). *Held* by the Privy Council that, if this application could be entertained at all, it could only be on notice to the other side; but, if the facts stated are correct, the High Court might have taken an erroneous view as to security. The applicant must renew his application to the High Court for security, and, if refused, he could appeal against the refusal on notice to the other side. **SRI RAJAH VYRICHERLA RAZ BAHADOOR v. NADMINTI BHAGAVUT, 7 M.J. 190.**

(396)—*Ordinary mortgage suit placed on list of suits for liquidated claims—Suit transferred from general list of causes at the plaintiff's instance—Notice to defendant necessary.*—It has been the practice for many years to place ordinary mortgage suits on the list of suits for liquidated claims in order that they may be expeditiously disposed of, and the view held has been that the incidental relief sought in such suits did not prevent them from being regarded as suits in which the claim was in substance a claim only for a liquidated demand in money. This practice should be adhered to. When, at the instance of the plaintiff, a suit is transferred from the general list of causes, it is desirable, that this should be done *on notice* to the defendant. When this course has not been followed, the defendant is taken by surprise, and the result very often is, that an application is made for an adjournment of the case. **BENODE LALL ROY v. BUSSUNTO KUMARI DEBI, 27 C. 355.**

(397)—*Mortgage—Right to claim redemption in suit for ejectment.*—The plaintiff in a suit for ejectment cannot be permitted to redeem a mortgage on the property. **RAMASAMI PILLAI v. VELLAYA PILLAI, 2 M.L.J. 48.**

(398)—*Suit for redemption—Death of plaintiff—Two persons claiming to be representatives of deceased plaintiff—Application under s. 365, Civ. Pro. Code, 1882—Order of Court—Procedure.*—On the death of the plaintiff in a suit for redemption, two persons X and Y applied under s. 365, Civ. Pro. Code, 1882, each claiming to be the representative of the deceased. The names of both were entered on the record, and during the trial of the suit, X's title to be representative was proved and the Court passed a decree in his favour. On appeal, the District Judge reversed the decree and passed one in favour of Y, holding Y to be the legal representative of the deceased. X preferred an appeal to the High Court. *Held* that the Court of first instance was wrong in having admitted under s. 367, Civ. Pro. Code, 1882, two rival claimants as representatives of the plaintiff (deceased) and adjudicated by its decree between the rival claims of the two co-plaintiffs. **VITHU v. BHIMA, 15 B. 145. [R., 27 B. 162.]**

(399)—*Suit for cancellation of mortgage-deed—Denial of attestation—Presumption as to execution.*—The defendants were bound by the

Practice and Procedure—continued.

statements of the witnesses they had elected to put in the box, and they should not have been discredited simply because their evidence turned out unfavourable to the side on which they had been summoned. **HARDIAL v. RAM DAS, A.W.N. 1884, 19.**

(400)—*Foreclosure—Notice, form of.*—The law requires that a notice of foreclosure should be given under the seal and the official signature of the Judge. So, a notice bearing the seal of the Court but signed only by a *Moonserim* is not valid in law. **SEITH HUR LALL v. MANICKPAL, 3 N.W.P. 176.**

(401)—*Mortgage suit between Hindus—Foreclosure decree in Supreme Court—Effect—Partial sale of Zamindari for arrears of revenue—Purchaser's rights—Burden of proof—Issues of fact, Trial of, upon merits.*—The effect of a foreclosure decree in the Supreme Court in a mortgage suit, between Hindus is equivalent to a decree establishing proprietary right in the Company's Courts, on similar suits on the like instruments. Plaintiff as purchaser at a revenue sale for arrears of revenue due on a zemindari, sued for arrears of rent collected by the defendant who was in occupation of a portion of the property purchased by plaintiff. Defendant contended that the portion occupied by him was, when it was waste and uncultivated, granted by a former zemindar to his predecessor in title under a *pottah*; that the grantee brought the waste under cultivation and had ever since been in possession; he also contended that the lands so held by him were not included in the assets upon which the permanent assessment was fixed. The lower Courts had found that the plaintiff failed to make out that the lands in dispute had been included in the Permanent Settlement and that the defendant had made out the grant under which he claimed. *Held*, the plaintiff having failed to establish that the lands had been included in the Permanent Settlement, the revenue sale could give him no title. The suit was accordingly dismissed. By the procedure of the Courts in India, the Courts are bound to proceed according to the facts alleged in the plaint, and not to refuse to try issues of fact upon the merits, on the ground of the legal effect of the facts alleged in the plaint. **NAWAB SIDHEE NUZUR ALLY KHAN v. RAJAH OJODHYARAM KHAN, 5 W.R. P.C. 83=10 M.I.A. 540=1 Suth. P.C. 635=2 Sar. 198.**

(402)—*S. 39, sub-s. (1), Act I of 1895 (Presidency Small Cause Court)—Application for amendment of plaint—Revival of claim abandoned in excess of jurisdiction.*—Where the plaintiff, alleging that Rs. 2,500 was due to him by the defendant, filed a suit in the Small Cause Court against the defendant for Rs. 2,000, abandoning Rs. 500, as in excess of the jurisdiction of the Court, and, on the defendant's application, the case was transferred to the High Court, the plaintiff, on application by summons in chambers, was permitted to amend

Practice and Procedure—continued.

the plaintiff so as to include the abandoned amount. **RAM LALL v. BHAJAHARI PAUL**, 1 C.W.N. 32.

(403)—*Suit in District Munsiff's Court—Suit filed in Small Cause Court on the same day—Election.*—A suit, brought in a District Munsiff's Court, filed on the same day as a suit for the same amount brought on the same cause of action in the Small Cause Court, is no bar to the maintenance of the Small Cause suit, but the plaintiff must elect between the two. **SUBRAMANIYAN v. GANAPATHI**, 2 M. 123.

(404)—*Act XIV of 1869, s. 28—Subordinate Judge invested with Small Cause powers—Jurisdiction in respect of counter-claims—Act IX of 1887, s. 33*—A Subordinate Judge invested with the powers of a Small Cause Court, under Act XIV of 1869 is precluded by s. 33 of Act IX of 1887, from entertaining counter-claims exceeding the pecuniary limit of his Small Cause jurisdiction. **BAROTE GAGA PARSHOTAM v. SEPOY PANJU RAMJAN**, 14 B. 371. [Appr., 5 Bom. L.R. 398.]

(405)—*Suit for compensation—Damage for assault—Criminal prosecution.*—A person, who is assaulted can pursue his civil, in addition to his criminal, remedy; but, if punishment in person has been resorted to, that must always be an important element in mitigation in subsequently estimating the amount of penalty to be inflicted in pocket. **MISR RAMJI v. JIWAN RAM, AND KIDAR NATH v. MISR RAMJI**, A.W.N. 1881, 131.

(406)—*Substantial injury—Material irregularity—Inference.*—To shew that substantial injury was the result of some irregularity complained of, the judgment-debtor is only to show that there is reason for inferring that it was due to, and resulted from, material irregularity. **BHIKARI MISRA v. RANI SURJA MONI PAT MAHA DAI**, 6 C.W.N. 48. (24 C. 291, 15 I.A. 171, 16 I.A. 107, R.) [R., 30 C. 1=6 C.W.N. 688, 31 C. 815=8 C.W.N. 686, U.B.R. 1907, 2nd Qr., C.P.C., s. 311.]

(407)—*Infringement of legal right—No proof of substantial damage—Decree.*—Where A has infringed B's legal right in a suit by B, against A, though B fails to prove substantial damage, B is entitled at least to a decree that his rights have been infringed by A, though without substantial damages and without costs. **KALIAPPA KAUNDAN v. VAYAPURI KAUNDAN**, 2 M.H.C. 442.

(408)—*Pending suits—Another suit under s. 39 of the Specific Relief Act (I of 1877)—Cancellation of instrument.*—On the 16th March, 1899, C brought a suit against D to recover on a bond passed by D to C; to this suit, the defence was that the bond was void being passed for the balance due on wagering transactions. While the suit was pending, D brought a suit on the 13th June 1899, to have the bond mentioned above cancelled and delivered up to him, under the provisions of s. 39 of the Specific Relief Act, 1877; *Held*, that the

Practice and Procedure—continued.

form of specific relief under s. 39 of the Specific Relief Act, 1877, was founded upon the administration of a protective justice for fear; that in this case, there could be no fear that D would suffer serious injury if he did not bring the second suit, for the plea which was the foundation of the second action was raised by him in the defence to the first suit; and that, therefore, no necessity for the bringing of the second action had arisen. **CHAGANLAL v. DHONDU**, 5 Bom. L.R. 575=27 B. 607.

(409)—*Administration suit—Further directions—Advocate-General added as a party—Advocate-General entitled to raise a point as to the validity of the gift—Accounts and enquiries—Beneficiary—Trustee.*—K by his will, dated 4th September 1864, declared a trust for the payment of a sum of Rs. 1,000 per month for the benefit of his daughter L and for the benefit of the children of L if she should die leaving children. The residuary estate was kept on trust the income of which was directed to be spent in some charities. K died on the 4th October 1864. In 1868, the Advocate-General commenced a suit for the administration of the testator's estate. A decree for administration was passed on the 5th December 1873. L died on the 15th December 1869. In 1870, L's children and husband commenced a suit (370 of 1870) against the executors to recover the arrears of the monthly sum due at L's death, and to have a sum set apart to answer the monthly sum in future. On the 6th November 1871, a decree for general administration was passed. The Commissioner made his first report on the 31st March 1884, but it was in July 1889, that his final report was completed. In June 1902, the case came up before the Court for further directions: at this stage of the suit, the Advocate-General was added as a party at the instance of the executors and with the assent of the other parties. The Advocate-General then raised a contention that the gift to L's children was bad as transgressing the rule in the *Tagore case* and that the gift therefore lapsed into the residuary gift. The Division Court held that the Advocate-General was not, at that stage, entitled to raise the point. *Held*, that the Advocate-General was entitled to raise his point even at the stage the proceedings in the administration suit (370 of 1870) had reached. A beneficiary is generally taken as sufficiently represented by his trustees: but this does not hold where the contest lies between beneficiaries themselves. **ADVOCATE-GENERAL OF BOMBAY v. KARAMALLY**, 4 Bom. L.R. 857.

(410)—*Administration suit—Estate belonging to living Hindu.*—An administration suit brought to administer the estate of a living Hindu debtor, cannot be maintained in a civil Court. **GANGARAM v. NAGINDAS**, 10 Bom. L.R. 519=32 B. 381.

(411)—*Concurrent suits for administration—Conduct of proceedings.*—A plaintiff, who brings a suit for administration of a testator's estate, charging the executors with breaches of trust,

Practice and Procedure—continued.

is entitled to bring his suit to a hearing, notwithstanding that an ordinary administration decree *re* the same estate has already been obtained in a suit subsequently instituted where to the plaintiff is not a party; and, if a second decree is made, the accounts and enquiries already had under the first decree will be adopted under the second so far as applicable and the plaintiff in the first suit will be given the conduct of the proceedings. **ROJOMOYEE DASSEE v. TROYLUKHO MOHINEY DASSEE**, 29 C. 260 = 6 C.W.N. 267.

(412)—*Application for letters of administration by agent under a power-of-attorney from an executor—Necessity for affidavit of identity—Power to require further evidence as to identity.*—The practice of the High Court of Calcutta, for a long time, has been not to require an affidavit of identity, where an application for letters of administration is made by a person under a power-of-attorney, duly executed before and authenticated by a Notary Public. But if, in any particular case, the Judge is not satisfied with the identity of the executant of a power-of-attorney, it is open to him to call for further evidence. However, the Judge ought not to dismiss the application on this ground. *In the goods of MYLNE*, 33 C. 625.

(413)—*Provisions of Civ. Pro. Code inconsistent with those of Probate and Administration Act—Procedure.*—If the provisions of Civ. Pro. Code are inconsistent with those of the Probate and Administration Act, those of the Civ. Pro. Code must prevail, as it is the later enactment. **ESOOFF HASSHIM BOOPLY v. FATIMA BIBI**, 24 C. 30 = 1 C.W.N. 8.

(414)—*Practice in testamentary matters before Act V of 1881—Review.*—The practice in the Courts in India in testamentary matters previously to Act V of 1881, was the same as that of the Ecclesiastical Court in England, except so far as that practice might be inconsistent with the Civ. Pro. Code. There has been no testamentary case in England in which a review has been permitted. The power of review, however, is expressly given to the Courts in India in civil cases by the Civ. Pro. Codes, 1859 and 1877, and as the rules of these Courts in testamentary matters are to be consistent with those Codes, it might be right, under proper circumstances, to allow a review in testamentary matters. *In re PITAMBAR GIRDHAR*, 5 B. 638.

(415)—*Questions relating to testamentary capacity—Speculative theory derived from medical books and judicial dicta, not a safe basis.*—In questions relating to the testamentary capacity of a person, it is always dangerous to base the judgment on the speculative theory derived from medical books, and judicial dicta, instead of depending upon the facts established by the evidence in the case. **SAJID ALI v. IBAD ALI**, 23 C. 1, P.C. = 22 I.A. 171 = 6 Sar. 627.

(416)—*Trustees, suit by—Decree in plaintiff's favor—Appeal by defendants—Plaintiff's application to alter the judgment so as to defeat*

Practice and Procedure—continued.

his own action—New plaintiffs, joining of—Surrender of a decree in his favour by a trustee—Betrayal of trust—Refusal of the Court to alter the decree.—The plaintiff, the hereditary trustee of a temple, dedicated to the worship of Shiva and where the customary ceremonies of Hindu worship were carried on, sued the defendants who represented a caste called the Nadar or Shanar caste. The question between the parties was whether the defendants and the caste to which they belonged had legal right to enter and worship in the temple. The first Court decided against the defendants, who thereupon appealed to the High Court. The plaintiff thought fit to profess that he then saw that he and the Judge of the lower Court were wrong and asked the High Court that the judgment of the lower Court should be altered so as to defeat his own action. The High Court, on being applied to, as their Lordships held very properly, re-inforced the cause of the worshippers of the temple by joining certain new plaintiffs to the original plaintiff whose confidence in the justice of his suit had by that time convalesced. The High Court refused to alter the decree and their Lordships were of opinion that the principles applicable to the case of a trustee who thus betrayed his trust by surrendering a decree had been well stated and applied by the High Court. **SANKARALINGA NADAN v. RAJA RAJESWARA DORAI**, 10 Bom. L.R. 781 = 12 C.W.N. 946 = 4 M.L.T. 101 = 31 M. 236 = 8 C.L.J. 230 = 18 M.L.J. 387 = 35 I.A. 176.

(417)—*Trust suits—Party to a suit—Trust—Beneficiaries—Settlement—Settlors—Trustees—Post-nuptial agreement.*—The beneficiaries under a trust have a right to come in a suit only where there is a trust admitted or proved to exist, but where the dispute is as to the factum of the trust itself, it is a claim against a person setting up the right of trustee and he, not the beneficiary, is the necessary party. Where the claim is against the trustees of a settlement and not against any other persons, the Court ought not to go into the question whether the provisions inserted in the settlement were proper, but only whether the settlor really understood the settlement which he executed. Where a husband and wife long after marriage and after they have children enter into an agreement to invest certain moneys in the name of a third person as trustee for the maintenance and education of the children: and in accordance with the agreement the husband and the wife voluntarily convey each his or her moneys for the benefit of their children to a trustee, it is open to the settlors to subsequently set aside their own voluntary deed. **COOPER v. KISSONLAL**, 4 Bom. L.R. 358.

(418)—*Restitution of conjugal rights—Conditions attached to the decree.*—It is not competent to a Court, in passing a decree for restitution of conjugal rights, to impose certain conditions under which the restitution can be had. **MOTILAL v. BAI CHANCHAL**, 4 Bom. L.R. 107.

Practice and Procedure—continued.

(419)—*Decree—Conjugal rights—Conditional decree.*—In decreeing a suit for restitution of conjugal rights in favour of husband, the Court cannot impose on him the duty of providing his wife with a separate house and separate maintenance. *CHIMANLAL v. BAI NARMADA*, 4 Bom. L.R. 820.

(420)—*Letters Patent, cl. 10—Appeal—Appellant cannot argue points not argued before single Judge.*—In appeals under the Letters Patent, an appellant is not entitled to make a new case, i.e., he is not entitled to be heard on points which he had not raised before the Judges whose decree he was appealing from. *BRIJ BHUKHAN v. DURGA DAT*, 20 A. 258 = A.W.N. 1898, 41. [D., 11 M.L.J. 10.]

(421)—*Transfer of civil case—Grounds of transfer—Nature of questions for disposal—Local prejudice—Letters Patent, cl. 13—Practice—Affidavits on motion—Affidavits filed after adjournment for counsel's convenience.*—Where it was suggested, as grounds of an application for the transfer of a case from the mofussil, that the plaintiff's case might be prejudiced by being there tried and that difficult and intricate questions of law would arise in the case, the Court, not satisfied on the evidence that such reasons existed, refused to grant the application. The Court also declined, without the consent of the other side, to allow an affidavit in support of a motion to be read, which had been filed after an adjournment granted for convenience of counsel. *COWIJON v. COWIJON*, 9 B.L.R. App. 10. [R., 10 B.L.R. 57.]

422)—*Application under s. 15, High Court's Act—Delay.*—A party who prays for the interference of the High Court under s. 15 of the High Court's Act, should do so without delay. *BUGGOBUTTY KOWAR v. MONEY*, 2 C.L.R. 545.

(423)—*Bona fide claim*—The fact that a person adds on to an honest claim based on a substantial foundation, a claim of a disputable character would not go to shew that the whole claim is not brought in good faith and, in the plaintiff's estimation, with some prospect of success, so that it could not be said that the claim is not a *bona fide* one. *PROFODE CHUNDER MULLICK v. M. DOWEY*, 14 C. 695.

(424)—*Ex parte decision in absence of party after first hearing—Ex parte decision in absence of party at adjourned hearing*—There is a distinction made by the Code of Civil Procedure between cases decided *ex parte* in the absence of one of the parties at the first hearing, and cases decided in the absence of one of the parties at the adjourned hearing. *SITAL HARI BANERJEE v. HEERA LAL CHATTERJEE*, 21 C. 269. (2 A. 67, R.)

(425)—*Ex parte decree, application to set aside—Lenient treatment of defaulting parties—Setting aside of ex parte proceedings by consent.*—The defendant applied to set aside an *ex parte*

Practice and Procedure—continued.

decree passed against him. The plaintiff agreed on condition of payment of costs and a date was fixed by the Munsiff for their payment. On that date, the application was dismissed by the successor of the Munsiff, who originally heard the application, on the ground that the summons was duly served on the defendant and the order dismissing the application was upheld on appeal. *Held*, that the application was wrongly rejected. The defendant should have been leniently treated specially because the plaintiff had given his consent to the grant of the application. *PARTAB SINGH v. NARAIN DAS*, 159 P.L.R. 1905 = 72 P.R. 1905.

(426)—*Consul to receive notice of suit.*—A Court in India, in which a claim for wages may be made by a foreign seaman, must give the consul of the nation to which the ship belongs, a notice that the suit has been instituted. *FRITZ OLNER v. LAVEZZO*, 10 C. 878.

(427)—*Order directing stay of proceedings and trial of test case—Right of persons obtaining adverse decision.*—Persons obtaining an order directing the trial of one out of 44 cases as a *test case* and stay of proceedings in the rest, are not, after getting an adverse decision in the *test case*, precluded from requiring the consideration by the Court of the other cases. *KASHIN PRASAD SINGH v. SECRETARY OF STATE FOR INDIA IN COUNCIL*, 29 C. 140.

(428)—*Practice—Reference pending before Registrar—Filing statement of facts after appointed time, right of party.*—A party cannot be shut out from filing a statement when by doing so he is only purging the contempt he was in, in not having done so before. Each party has a right to have the dispute determined on the merits, and the Court should do everything to favour the fair trial of the issue between the parties. Where, on the Registrar's refusal to deal with a statement of facts filed after the appointed time, without an order from the Court, application was made to the Court for an order that the Registrar might be at liberty to refer to the statement of facts, and that the party filing the statement might be permitted to appear and support them. *held*, that such statement of facts could be filed by that party. *TARAK MOHINEY DASSEE v. GREES CHUNDER DASS*, 26 C. 585.

(429)—*Practice—Exceptions to report by Registrar—Notice not given—Rule 565, Rules and Orders of High Court, Original Side.*—An application to discharge or vary a certificate or report must, according to Rule 565, Belchamber's Rules and Orders, be made by motion upon notice to be given within 14 days from the date of filing thereof, or within such further time as the Court may allow. Such notice must be accompanied with the grounds of exception relied on by the party objecting to the report. *LUTCHMEE NARAIN v. BYJANAUTH LAHIA*, 24 C. 437 = 2 C.W.N. 57 [R., 28 C. 272.]

Practice and Procedure—continued.

(430)—*Succession certificate—Dismissal of suit pending decision of application for certificate.*—Held, that the dismissal of a suit for non-production of a succession certificate is improper, where application to obtain the certificate is pending in Court. **AMIR SINGH v. RAM CHAND, 94 P.L.R. 1902.**

(431)—*Applications to High Court in exercise of its extraordinary jurisdiction—Practice—Act XXIII of 1861, s. 38—Act VIII of 1859.*—S. 38 of Act XXIII of 1861 requires that the procedure prescribed by Act VIII of 1859 should be followed in all miscellaneous cases and proceedings. All applications for the exercise of the High Court's extraordinary jurisdiction should be accompanied by a copy of the orders of the lower Courts, and should be presented within the same period in which the special appeals are required to be presented. *In re NAGAPPA, 5 B.H.C.A.C. 215.* [F., 23 B. 698 = 1 Bom. L.R. 185.]

(432)—*Act X of 1859, s. 77—Introduction of third parties in rent suits by Revenue Courts.*—The Court below was held to have been wrong in having placed on the record the two intervening defendants, who did not come into the Court with any claim under s. 77 of Act X of 1859. The procedure of the Revenue Courts does not admit of third parties being introduced into the record, except under circumstances prescribed by that section. **DOORGA NARAIN ROY CHOWDHRY v. KISHEN MOHUN DOSS, 10 W.R. 54.**

(433) *Act VIII of 1859, s. 119—Act X of 1859, s. 58—Bengal Act III of 1870—Ex parte decree—Re-hearing—Procedure.*—An application for the hearing of a case in which judgment was passed *ex parte* or by default by the Revenue Court before the passing of the Bengal Act III of 1870, is governed by the procedure prescribed by s. 119, Act VIII of 1859 and not s. 58 of Act X of 1859. **OODWUNT MAHTOON v. BIDDHI CHAND CHOWDHRY, 13 B.L.R. 216, Note=18 W.R. 207.** [F., 18 W.R. 252.]

(434)—*Plaint on which decree has been passed, not returnable for presentation to proper Court—Practice of High Court of Bombay.*—After a suit was disposed of by the Division Bench of the High Court, an application was made for return of the plaint for presentation to the proper Court, but was refused on the ground that, the case having been disposed of by the High Court's decree which reversed the decree of the lower Appellate Court, it was impossible to allow the plaint, on which the decree of the High Court was passed, to be removed from the record. *In re BAI AMRIT, 8 B. 380.*

(435)—*Impartible estate—Law understood at date of sale, subsequently overruled, effect of.*—Where portions of a joint impartible zamindari in Madras were sold in 1873 and 1876 in execution of money-decrees obtained against the zamindar for debts for which the joint estate was not liable, held that the parties must

Practice and Procedure—continued.

be taken to be bound by the law as it was understood at the time of the sales and not by the subsequent rulings of the Court overruling that law, and that, therefore, only the life-interest of the zamindar passed under the sale. **ABDUL AZIZ KHAN v. APPAYASAMI NAICKER, 27 M. 131, P.C.=31 I.A. 1=8 C.W.N. 186=6 Bom. L.R. 7=8 Sar. 568.** (6 B. and S. 100, Rel.; 15 I.A. 51, 13 M. 197, 26 I.A. 83, 10 A. 272, 22 M. 383, R.) [R., 27 A. 97, F.B.=A.W.N. 1904, 174=1 A.L.J. 435, 29 M. 484=16 M.L.J. 499=1 M.L.T. 287, 6 C.L.J. 572, 32 M. 429=2 Ind. Cas. 18=19 M.L.J. 401.]

(436)—*Contest between two persons more or less innocent.*—In a contest between two persons more or less innocent whose rights to the property have to be determined, it is necessary to see whether the difficulties could at an earlier stage have been prevented by the action of the one party or of the other. **GONESH PERSHAD v. FAZUL EMAM KHAN, 23 C. 857.**

(437)—*Rule of damdupat, when applicable—Damdupat, if applicable in insolvency proceedings—Practice.*—The rule of damdupat (26 M. 622, R.) exists only so long as the contractual relation of debtor and creditor exists, but not when the contractual relation has come to an end by reason of a decree. Proof of a claim in insolvency amounts to a decree and the rule of damdupat would not apply to a claim so proved. Moreover, the uniform practice of this Court has been not to apply the rule of damdupat in insolvency proceedings. *In the matter of HARI LALL MALLICK, 10 C.W.N. 884=33 C. 1269.*

(438)—*Co-defendants—Power of one defendant to bind another.*—A defendant in a suit has no authority to bind a co-defendant by a pledge to abide by a reference to the rent-roll of a certain year for the decision of the principal matter in issue. **SHIAM LALL v. NARAIN DAS, 2 Agra 106.**

(439)—*Registration Act XX of 1866, s. 84, appeal under—Procedure.*—A petition of appeal to the High Court under s. 84, Act XX of 1866, should be in English, only when the party understands that language sufficiently for the purposes of verification, and when this is not the case, a translation accompanying the vernacular petition will be proper and sufficient. A notice in accordance with the provisions of cl. 4, s. 84 of the Act, ought to be issued on both the registering officer, and on the other persons interested in the matter. The Deputy Registrar of the High Court is competent to fix the time for the hearing of the case, and to require the appellant to insert, at the head of the petition of appeal, the names of such persons as are interested in the matter as also to serve them with notice. The document the registration of which has been refused should always be put in with the petition of appeal, and the presentation of the latter should be in the office in the same way as in the case of miscellaneous appeals. *In the matter of JUGUN PATNEE, 12 W.R. 2.*

Practice and Procedure—continued.

(440)—*Commission to take evidence in England in respect of suit in India—Taxation of bill of costs—Principle of taxation—Objection to taxation—Procedure by taxing master—Commission to England—Production of vouchers—Rule in respect of discretion of taxing master—Principle of party taxation—Obtaining transcript of evidence given and of perusing it, costs of—Amount allowed to—Witness by taxing master—Discretionary—Interference by Court—Fees of Commissioner, scale of.*—On the issue of a commission to take evidence in England in respect of a suit in India, the bill of costs as regards such commission must be taxed by the taxing master of the Court in India and not in England. It is to be taxed on the same principle and on the same scale as would be adopted in England. Where the taxing master finds any difficulty, he must refer to England for information. When an item in the taxation is objected to, the master is to re-consider and review his taxation, and, in doing so, he must throw the *onus* of proof as to the necessity of the item, upon such party as, having regard to its particular nature, he considers ought to bear it. It is impossible to lay down any particular rule as regards the production of vouchers in cases of commission to England. To require them in all cases in the first instance would occasion an unnecessary increase of costs in the proceedings. To rule that they should never be called for, would be to establish a dangerous precedent which unscrupulous practitioners might readily avail themselves of. The proper procedure is this:—Upon the objections being brought in, it should be in the discretion of the taxing master, either of his own motion or on the application of the party objecting, to require vouchers for, or further proof of, all or any of the items objected to, and, failing the production of the vouchers or proof that he may require, to disallow the item. The principle of party and party taxation in England is that the successful party shall receive only such costs as were necessary to enable him to conduct the litigation. *Quære*:—Whether, on taxation as between party and party, the costs of obtaining a transcript of the evidence given and perusing it, should be allowed or not? The taxing master has a discretion to make payments to witnesses, and Courts will always be averse to review such discretionary allowances. Where a Court in India appoints a Commissioner to take evidence in England, it expects that his fees shall not exceed those which the Supreme Court in England would allow to a special Examiner or Commissioner acting in England under its orders; and parties should choose their Commissioners with reference to this understanding. If they desire that higher fees should be allowed to the Commissioner whom they name, they should obtain an order from the Judge appointing the Commissioner. **THE GOKULDAS BULABDAS MANUFACTURING COMPANY, LIMITED v. JAMES SCOTT, 15 B. 209.**

(441)—*Fraud — Circumstantial evidence — Error in law.*—In dealing with questions of

Practice and Procedure—continued.

fraud, there is no reason why circumstantial evidence should not be acted upon, if it is sufficient to overcome the natural presumption of honesty and fair dealing and to satisfy a reasonable mind of the existence of fraud by raising a counter-presumption. If a Judge, in dealing with a question of fact, forms his conclusion upon a portion of the evidence before him, excluding the other portion under an erroneous impression that it is not legal evidence but conjecture, there can be no doubt that the investigation is erroneous in law and that the error thus committed is likely to have produced an error in the decision of the case upon the merits, inasmuch as it is impossible to say whether the Judge would have arrived at the same conclusion if he had looked into all the evidence on the record, without excluding any part of it from a mistaken idea that it was not admissible in law. **MATHURA PANDEY v. RAM RUCHA TEWARI, 3 B.L.R.A. C. 108 = 11 W.R. 482.**

(442)—*Transfer of case—Act VIII of 1859, s. 6—Evidence—Practice.*—It was never intended by s. 6, Act VIII of 1859, to enable a District Judge, after the evidence had been taken which was to form part of the evidence on which the final decision was to be given, and before the Judge who took that evidence had expressed an opinion upon it, to call up the case and put it in on his own file. **DUMREE SAHOO v. JUGDAREE, 13 W.R. 398. [R., 23 M. 314 = 10 M.L.J. 51, 32 C. 875 = 9 C.W.N. 705.]**

(443)—*Execution of decree in another district — Application by third party—Jurisdiction.*—A decree sent for execution to another district cannot be re-called on the application of a third party. **INDRA CHANDRA DUGAR v. GOPAL CHANDRA SHETIA, 3 B.L.R.A.C. 181 = 11 W.R. 557.**

(444)—*Interest — Bond debt — Practice.*—There is no fixed rate at which interest must by law be allowed for the period between the time when a bond becomes payable, and the commencement of a suit for the amount due, the matter being entirely in the discretion of the Court, regard being had to all the circumstances of the case. **SITANATH BOSE v. MATHURANATH ROY, 2 B.L.R. App. 10 = 11 W.R. 68. [R., 1 A. 603.]**

(445)—*Special appeal—Practice—Wrong issues — Assent of parties.*—The High Court cannot, in special appeal, interfere with the decision of the Subordinate Judge on a question of fact, if there was any evidence to support it. Where the parties accept the issues though wrongly laid down by the Court framing the issues, they must be held bound by them. **SHEW SUKOY LALL v. SYED WAJID ALI KHAN, 13 W.R. 205.**

(446)—*Appeal—Appellant not heard— Procedure.*—The provision that in an appeal a notice should be served on the respondent and he must be allowed to argue in defence of the decree of the lower Court, does not mean that

Practice and Procedure—continued.

the appellant should not be heard and the case decided before the date fixed for hearing and in his absence. Where a Court does so, the case must go back to the lower Court for being re-heard; and where the questions raised are purely questions of fact, though it is not open to the Chief Court to decide such questions it is still open to it to find out if there is a substantial failure of justice, so that directions may be given to the lower Court to record a finding. *MR. TER ARRATOON v. LALL CHUND*, 10 P.R. 1866.

(447)—*Suit on bond—Breach of contract—Jurisdiction—Cause of action.*—The place where a cause of action arises must be determined by not merely the locality of the breach of the contract. The whole cause of action is said to arise in the district wherein the contract is made and wherein the breach also takes place. Where the whole cause of action does not occur in any one jurisdiction, the venue must lie where the defendant dwells. *COLLECTOR OF BOOLUNDSHUHER v. NANUKCHAND*, 29 P.R. 1867. [R., 61 P.R. 1883; D., 56 P.R. 1868.]

(448)—*Bankruptcy—Procedure in respect of property outside jurisdiction—Act VIII of 1859, s. 284, et seq.*—Procedure to be followed where the property of the bankrupt is or is situated out of the jurisdiction of the Court—explained. Procedure as to the realisation of decrees that have to be executed outside the jurisdiction of the Court by which they were passed. *REFERENCE FROM SMALL CAUSE COURT, LAHORE*, 65 P.R. 1868.

(449)—*Defect of jurisdiction—Pleading for first time in appeal—Civ. Pro. Code, 1859, s. 350.*—Excess of jurisdiction is not only a matter of defence, but it is an inherent want of authority in the Court which is a defect not remedied by s. 350 of the Code, and if apparent on the record, might be brought up in appeal although passed over in the original Court. *SHEIKH NIZAMUDDIN v. THE GOVERNMENT*, 54 P.R. 1871.

(450)—*Application to file award made out of Court—Duty of the Court on the filing of the award—Judgment to be given and decree passed in accordance with the award—Decree when capable of execution.*—A decree must follow award filed in Court under s. 526 of the Civ. Pro. Code, Act X of 1877, in order that execution can be taken out and property attached and sold; and, where, as in the present case, no decree based on the award has been properly passed, the Court has no jurisdiction to execute the award. When an award has been filed, the Court must, in giving effect to it in the manner provided by the chapter of the Civ. Pro. Code in that behalf, after the time fixed for presentation of an application to set the award aside had expired, proceed under s. 522 to give judgment according to the award and upon the judgment a decree should follow. The so-called decree passed in this case, having been drawn up on the bare order

Practice and Procedure—continued.

of the Court "that the award be filed," was not a decree within the meaning of s. 522, and in executing it as if it were such a decree by attachment and sale of property, the Court had acted without jurisdiction and consequently the proceedings in execution were held liable to be set aside. *DHARM DAS v. AJUDIAH PERSHAD*, 112 P.R. 1879.

(451)—*Records of pending cases—Power to make rules regarding inspection of—Rule II of the Chief Court's Judicial Cir. No. XCIII.*—There is nothing in the rules issued by the Chief Court in Circular No. XCIII of the edition of 1879, which precludes the Judge from making a rule, in the exercise of his power of general control, by which the period up to which the record of a case pending in his Court may be inspected, is limited. The Commissioner was therefore held not to have acted *ultra vires* in having framed a rule that files of cases pending in his Court shall not be inspected by a legal practitioner engaged later than two days before the date fixed for the hearing. *In the matter of the petition of C. J. SUTHERLAND*, 103 P.R. 1882.

(452)—*Lambardar—Dismissal—Police duties—Practice.*—Though a lambardar is liable to dismissal if he fails in the discharge of his police duties, still before an order of dismissal is passed the fact of such failure must be proved by evidence. *MAYA SUKH v. CROWN*, 2 P.R. 1888, Rev.

Under this Circular, Judges and Magistrates are prohibited from forwarding to Government representations from their subordinates relating to the personal services of the latter circular. Cir. No. 6, dated the 6th April 1865, 2 W.R. Civ. Order, p. 5.

According to this Circular, Registration Memos ought to accompany records of appealed cases. Cir. No. 21, dated the 5th September 1865, 4 W.R. Civ. Cir. Order, p. 1.

This Circular lays down to whom Warrants of Commitment to the Civil or Criminal Jail should be addressed. Cir. No. 27, dated the 20th November 1865, 4 W.R. Civ. Cir. Order, p. 3.

This Circular calls upon Zillah Judges to report the state of their record-rooms. Cir. No. 26, dated the 16th November 1865, 4 W.R. Civ. Cir. Order, p. 3.

This Circular contains repeated injunction for compliance with the law regarding proper record of evidence and proper trial of suits. Cir. No. 30, dated the 7th December 1865, 4 W.R. Civ. Cir. Order, p. 4.

This Circular lays down rules as to the preparation of the Registration Memorandum. Cir. No. 2, dated the 2nd Feb. 1866, 5 W.R. Civ. Cir. Orders, p. 1.

Practice and Procedure—continued.

This Circular lays down the procedure when offence committed in or before Civil Court falls under two or more heads. **Cir. No. 27, dated 10th July 1866, 6 W. R. Civ. Cir. Order, p. 4.**

All covers sent by post to the High Court ought to be addressed to the Registrar, Appellate Side. **Cir. No. 31, dated the 14th August 1866, 6 W. R. Civ. Cir. Order, p. 6.**

This Circular prescribes the particulars to be inserted in Monthly Statements under each subordinate Judicial Officer's name. **Cir. No. 38, dated the 26th September 1866, 6 W. R. Civ. Cir. Order, p. 9.**

This Circular lays down that Records of execution cases appealed to the High Court ought to be sent up complete. **Cir. No. 5, dated the 4th Feb., 1867, 7 W. R. Civ. Cir. Orders, p. 2.**

This Circular announces that Quarterly, and not Monthly, Civil statements need be submitted to High Court. **Cir. No. 26, dated the 11th September 1867, 8 W. R. Civ. Cir. Orders, p. 5.**

According to this Circular, blank statements should not be sent up with the Quarterly Statements. **Civ. Cir. No. 12 dated 27th November 1868, 10 W. R. Civ. Cir. 7.**

This Circular prescribes the rules to be observed in the offices of Zillah Judges with regard to the furnishing of applicants with information from the records or with unauthenticated copies of papers. **Civ. Cir. No. 7 dated 16th July 1869, 12 W. R. Civ. Cir. 3.**

This Circular circulates letter from the Judicial Commissioner of Oudh requesting that civil processes for service on persons in Lucknow be addressed to the Civil Judge. **Civ. Cir. Memo No. 7 dated 4th October 1869, 12 W. R. Civ. Cir. 11.**

This Circular pertains to matters relative to the use of the Vernacular Language in the Local Courts. **Civ. and Crim. Cir. No. 8 of 6th March 1872, 17 W. R. H. C. Rules and Ors. 5.**

This Circular lays down rules regarding receipt and payment of money by Courts subordinate to the High Court. **Civ. Cir. No 9 dated 8th March 1872, 17 W. R. H. C. Rules and Ors. 5.**

This Circular invited opinion on suggestions of Judge of Bhaugulpore, relative to the transmission of Moonsiffs' and Subordinate Judges' records at out-stations to the Appellate Courts. **Civ. Cir. Memo. No. 7 of 9th April 1872, 17 W. R. H. C. Rules and Ords. 13.**

Addition of a column "total value of suits" in the Judicial Statement for Small Cause Courts. **Civ. Cir. No. 16 of 25th April 1872, 17 W. R. H. C. Rules and Ors. 15.**

This Circular in continuation of previous Circular, enjoins latest hour at which Judges should be on the Bench. **Civ. Cir. Or. No. 11, 20 W. R. Rules and Ors. of the H. C. p. 3.**

Practice and Procedure—continued.

This Circular circulates India Government Resolution requiring every order for the payment of money from a Government Treasury to be in English, unless Presiding Officer is not acquainted with that language, when the order is to be both in the Vernacular and in English. **Civ. Cir. Or. No. 15, 20 W. R. Rules and Ors. of the H. C. p. 6.**

This Circular lays down that Returns Nos. 31 and 41 ought to show only sums paid and received within the financial year. **Rev. Cir. No. 1, 20 W. R. Rev. Cir. p. 4.**

This Circular extends the use of Summons Book and Register to Courts of Moonsiffs vested with Small Cause Court powers, as well as provisions of Circular Order No. 40 of 1866 as to destruction of records. **Civ. Cir. Or. No. 7, 24 W. R. Rules and Ords. of the H. C. p. 4.**

This Circular prescribes a Form of Return for days given to Civil and Criminal Work. **Civ. and Crim. Memo. No. 9, 24 W. R. Rules and Ords. of the H. C. p. 5.**

According to this Circular, the Quarterly Statements A, B, and C need not show the names of the Officers; but Judges to collect the required information for their yearly reports. **Civ. Cir. Memo No. 12, 24 W. R. Rules and Ors. of the H. C. p. 6.**

This Circular directs that Petitions in Nagri ought to be accepted by Civil Courts and Clerks should learn the Nagri character. **Civ. Cir. Or. No. 12, 24 W. R. Rules and Ors. of the H. C. p. 12.**

This Circular makes an alteration in the title and the headings of columns of Register No. 58. **Rev. Cir. No. 1, 24 W. R. Rev. Cir. p. 4.**

This Circular prescribes that seals and signatures of Judicial Officers and name of Court issuing processes ought to be clearly rendered. **25 W. R. H. C. Rules Cir. No. 4 dated 13th March, 1876 p. 4.**

Abatement of suit—English and Indian—
See ABATEMENT OF SUITS, 6 B. L. R. 119.

Cause of action shown to exist against defendant originally impleaded—Allegations in plaint pointing also to another person concerned in the suit—Duty of Court under s. 32, Civ. Pro. Code—*See* ACT XVIII OF 1850, 59 P. W. R. 1908.

See ACT XXVIII OF 1860, s. 25, 6 M. 189.

Inspection of letters—Affidavit—*See* ACT IV OF 1869, 3 B. L. R. O C. 100.

Alimony pendente lite—Practice—*See* ACT IV OF 1869, 3 B. L. R. App. 4 (b).

Decisions of English Probate and Divorce Courts, Indian Courts must be guided by—*See* ACT IV OF 1869, 4 C. 260=3 C. L. R. 484.

Application by wife for alimony pendente lite—Means alleged, denied by respondent—*See* ACT IV OF 1869, 26 C. 764.

Practice and Procedure—continued.

Filing written statement after first hearing—*See* ACT IV OF 1869, s. 7, 4 B. L.R. O.C. 51.

Of Calcutta High Court as to service of petition on respondent governed by what prevails in English Matrimonial Courts—*See* ACT IV OF 1869, ss. 14 and 50, 12 C.W.N. 1009.

Grounds for refusing to make absolute a decree nisi for dissolution of marriage—*See* ACT IV OF 1869, ss. 17 and 57, 2 A.L.J. 420, F.B. = A.W.N. 1905, 141.

Agreement by plaintiff to take oath or to have the suit dismissed—Failure to take oath—Procedure to be adopted by the Court—*See* ACT X OF 1873, ss. 8, 9, 12, 17 M.L.J. 545 = 3 M.L.T. 98 = 31 M. 1.

Offer to be bound by opposite party's oath, persons entitled to make—Power-of-attorney empowering agent to act in suit, whether authorises agents to make offer—*See* ACT X OF 1873, s. 9, 14 B. 455.

Verification by Administrator-General—*See* ACT II OF 1874, s. 12, 26 C. 404 = 3 C.W. N. 298.

See ACT II OF 1874, ss. 12, 16, 17, 20 C. 879.

See ACT VI OF 1882, s. 134, 18 B. 65.

See BEN. ACT VIII OF 1869, ss. 3, 4, 1 C.L. R. 392.

Proceedings in Court held on close holiday, parties how far bound by—Irregularity, whether could be waived by parties—*See* BEN. ACT VI OF 1871, s. 17, 9 A. 366 = A.W.N. 1887, 34.

Practice—Second appeal—When point of law can be taken for the first time in second appeal—First Appellate Courts—Findings on cross-objections—Rights of party not appealing to attack—*See* BOM. ACT, XVII OF 1879, ss. 7 and 12, 3 S.L.R. 106 = 4 Ind. Cas. 599.

See BOM. ACT XVII OF 1879, ss. 49 (a) and 74, 19 B. 202.

Matter relating to—only, whether giving of a right of appeal is—*See* BUR. ACT VI OF 1900, s. 27, 5 L.B.R. 148 = 5 Ind. Cas. 980.

Concurrent finding—Practice of Privy Council—*See* U.P. ACT I OF 1869, s. 23, list IV, 10 C.L.J. 216, P.C. = 6 A.L.J. 767 = 13 C. W.N. 1073 = 11 Bom. L.R. 890 = 12 O.C. 304 = 31 A. 457 = 19 M.L.J. 605 = 4 Ind. Cas. 25.

Court of second appeal differing from facts found by lower Courts—*See* U.P. ACT XXII OF 1886, 25 A. 1 = 29 I.A. 203, P.C.

Refusal of adjournment—Duty of Court—*See* ADJOURNMENT, 2 S.L.R. 64.

Administration-suit—Further directions—Accounts taken in one suit adopted in another—Opportunity to take objections—*See* ADMINISTRATION, 29 B. 133.

Petition for administration summons, how to be treated—*See* ADMINISTRATION SUIT, 3 B.L.R. App. 3 (b).

Practice and Procedure—continued.

Admission in pleading of execution of agreement—Evidence to prove admitted document unnecessary—*See* ADMISSION—ADMISSIONS IN PLEADINGS, 5 B. 143.

See APPEAL—GENERAL, 8 M.L.T. 258 = 7 Ind. Cas. 202.

See APPEAL—MISCELLANEOUS, A.W.N. 1890, 144.

Amendment of decree by way of amplification of its wording—Affirmation—Insufficient time given to produce evidence, whether substantive question of law—*See* APPEAL TO PRIVY COUNCIL—GENERAL, 62 P.W.R. 1908.

See APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 5 M. 163.

See APPELLATE COURT—POWERS OF APPELLATE COURT, L.B.R. 1893—1900, 420.

Suit against two defendants—Decree exonerating one of them—No appeal by plaintiff against exonerated defendant—Exonerated defendant made liable on appeal by the other defendant—Power of Appellate Court to make exonerated defendant liable—*See* APPELLATE COURT—POWERS OF APPELLATE COURT, 27 A. 23 = 1 A.L.J. 358.

See ARBITRATION—MISCELLANEOUS, U. B. R. 1897—1901, Vol. II, 14.

Attachment before judgment, power to be sparingly exercised—*See* ATTACHMENT BEFORE JUDGMENT, 13 C.L.R. 356.

See BUDDHIST LAW—DIVORCE, L.B.R. 1872—1892, 610.

Non-examination of parties in a suit, result of—English and Indian—Account books, non-production of—*See* BURDEN OF PROOF—GENERAL, 7 M.L.T. 57 = 14 C.W.N. 285 = 11 C.L.J. 172 = 12 Bom. L.R. 244 = 32 A. 140 = 20 M.L.J. 182 = 5 Ind. Cas. 549, P.C.

Cause of action—Erroneous date of cause of action as signed in plaint—Cause of action not barred by limitation—Error as to date immaterial—*See* CAUSE OF ACTION, A.W.N. 1900, 25.

Administration—Certificate, application for, by two widows of intestate—Practice—*See* CERTIFICATE OF ADMINISTRATION—CANCELLING CERTIFICATE, 5 C.L.R. 368.

See CLAIM, L.B.R. 1893—1900, 209.

See COMMISSION, 1 Hyde 269.

In sanctioning compromise on behalf of a minor—Order to state in terms that the question, whether the compromise was for the benefit of the minors was considered—*See* COMPROMISE—GENERAL, 29 M. 104.

Contempt of Court—Punishment—Imprisonment—*See* CONTEMPT OF COURT, 19 B. 152.

See CONTEMPT OF COURT, 1 Ind. Jur. N S. 23.

Practice and Procedure—continued.

Right of raising new points in second appeal—*See* CONTRACT—MISCELLANEOUS, 15 M.L.J. 286=28 M. 413.

Attorney and client entering into agreement as to costs—Attorney's right when client wishes to change to another attorney—*See* COSTS—SPECIAL CASES, 26 C. 769.

Costs—Adjournment—Power of Court to alter its order fixing the amount of costs of an adjournment—*See* COSTS—SPECIAL CASES, A.W.N. 1902, 98.

In Admiralty causes—*See* COURT, 5 M.L.A. 137.

Second appeal—Appeal to lower appellate Court by respondent in High Court insufficiently stamped—*See* COURT-FEES ACT, 1870, ss. 10 and 12, A.W.N. 1905, 280=2 A.L.J. 839, F.B.=28 A. 270.

See COURT-FEES ACT, 1870, s. 20, 26 C. 124=3 C.W.N. 82.

Appeal—Court-fee—Memorandum of appeal insufficiently stamped, accepted and filed—Subsequent discovery of the mistake—Additional Court-fee paid in within the time limited, but appeal nevertheless not heard—*See* COURT-FEES ACT, 1870, s. 28, A.W.N. 1904, 153.

Prolonged and unnecessary cross-examination of witness on commission—*See* CROSS EXAMINATION, 30 C. 625.

Examining party after arguments on the case have been heard—Procedure unjustifiable—*See* CUSTOMS—PUNJAB—ALIENATION, 2 P.L.R. 1909=48 P.W.R. 1909=4 Ind. Cas. 632.

Suit by person in possession for declaration of title—Neither party proving title—*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 20 B. 798.

Mutation of names in a Revenue Register—Declaration of title—Amendment of plaint—High Court, power and discretion of, in second appeal—*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 2 L.B.R. 4.

Trial of charges of fraud—Consent decree—*See* DECREE—GENERAL, 25 C. 649.

Decree obtained ex parte, decree for specific performance—Declaration of plaintiff's right alone under agreement—Dismissal of defendant's application to set aside decree—Subsequent application for amending decree—Whether barred by res judicata—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, 12 B. 174.

Divergence between decree and judgment—Power of executing Court—Decree-holder to be directed to apply for amendment of decree to the Court that passed the decree—*See* DECREE—DECREE, CONSTRUCTION OF, 60 P.W.R. 1908.

Mortgage—Redemption suit—Sub-mortgage impleaded as parties—Accounts between mortgage and sub-mortgagee *inter se* to be taken—Form of judgment—*See* DECREE—DECREE, FORM OF, 15 B. 692.

Practice and Procedure—continued.

Deficient Court-fees—Procedure—*See* DECREE—DECREE, FORM OF, 18 M. 415=5 M.L.J. 164.

Debtor's legal representative without assets of debtor—Suit maintainable against—Form and execution of decree in suit—*See* DECREE—DECREE, FORM OF, 8 B. 309.

See DECREE—DECREE, FORM OF, 22 C. 100.

Guardian ad litem—Party for purpose of discovery—Interrogatories, if same applies to—*See* DISCOVERY, 10 B. 167.

Counsel should return brief when he is not able to attend—*See* DISMISSAL OF SUITS, 10 Bom. L.R. 1172=33 B. 475.

See DIVISION BENCH OF HIGH COURT, 14 M. 186=1 M.L.J. 95.

It is open to defendant to set up alternative defences—Plaintiff not allowed to raise objection as to defendant's setting up alternative defences at appellate stage of the suit—*See* EASEMENT, 8 C.L.J. 289.

See EJECTMENT, SUIT FOR, 10 B. 451.

Application for adjournment on ground of producing document—Practice—*See* EVIDENCE—GENERAL, 2 M.W.N. 1911, 166.

Judge can look at whole evidence on whichever side given—Burden of proof—*See* EVIDENCE—GENERAL, A.W.N. 1887, 299.

Contents of document, secondary evidence of—Evidence of search for the originals—Practice—*See* EVIDENCE—SECONDARY EVIDENCE, 19 C. 438, P.C.

Defendant not objecting to the admission of secondary evidence at the time of filing—Right to raise the objection in argument—*See* EVIDENCE—SECONDARY EVIDENCE, 3 M.L.T. 297.

Evidence led upon certain issues in one cause cannot be used with reference to other issues in another case—*See* EVIDENCE—MISCELLANEOUS, 7 Bom. L.R. 894.

Mortgage—Sale—*See* EVIDENCE ACT, 1872, s. 92, 2 L.B.R. 1.

See EVIDENCE ACT, 1872, s. 155 (3), 17 C. 344.

Execution of decree—Order of Her Majesty in Council—Allowance of interest on costs incurred in British India—*See* EXECUTION OF DECREE—GENERAL, A.W.N. 1897, 70.

Mesne profits—Larger amount than that claimed in plaint found due in execution—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 8 C. 295.

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 15 B. 370=P.J. 1890, 336, 18 C. 462.

Practice and Procedure—continued.

Decree upon a compromise for execution of a conveyance to be proceeded with a decree for specific performance—See EXECUTION OF DECREE—EXECUTION OF DECREE ON OR AFTER AGREEMENTS OR COMPROMISES, 10 C.W.N. 345.

See EXECUTION OF DECREE—PRIVY COUNCIL, EXECUTION OF ORDERS AND DECREES OF, 25 C. 283=2 C.W.N. 89.

See EXECUTION OF DECREE—STAY OF EXECUTION, 6 C. 485=8 C.L.R. 43.

See EXECUTION OF DECREE—MISCELLANEOUS, U.B.R. 1897—1901, Vol. II, 431.

Transfer of Property Act (IV of 1882), ss. 88, 89—Application for order absolute for sale, may be made to Court executing decree—See EXECUTION OF DECREE—MISCELLANEOUS, 13 A. 278, F.B.=A.W.N. 1891, 83.

Application for attachment of debts said to be due to judgment-debtor—Denial of debts by alleged debtors—What the Court should do—See EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1905, 277=28 A. 262=1 A. L.J. 362.

Suit instituted without next friend—Whether can be dismissed—Proper procedure—See GUARDIAN—GENERAL, 11 O.C. 159.

Appointment of guardian—Of High Court—See GUARDIAN—APPOINTMENT OF GUARDIANS, 2 C. 357.

Appointment of guardian *ad litem* how made—How long the appointment endures—Application for removal of guardian how to be made—See GUARDIAN—APPOINTMENT OF GUARDIANS, 1 N.L.R. 128.

Guardian *ad litem* appointed without complying with provisions of s. 443 of the Civ. Pro. Code—Appointment invalid—Effect of such invalid appointment on decree passed in the suit—See GUARDIAN—APPOINTMENT OF GUARDIANS, A.W.N. 1905, 229=2 A.L.J. 615=28 A. 137.

Suit against minor—Appointment of Nazir as guardian *ad litem*—Court's power to order deposit of fees by plaintiff for enabling Nazir to communicate with natural guardian—See GUARDIAN—APPOINTMENT OF GUARDIANS, 12 B. 553.

Plaintiff unable to prove his assertions—Suit to be dismissed—See GUARDIAN AND WARDS ACT, 1890, s. 41 (3), 78 P.L.R. 1911=9 Ind. Cas. 591.

Order of High Court Judge under misapprehension of jurisdiction—Power of High Court to set right—See HIGH COURT, JURISDICTION OF, CALCUTTA, 9 C. 482=10 I.A. 4=12 C.L.R. 511, P.C.

See HINDU LAW—ADOPTION, 79 P.L.R. 1902, 5 C.W.N. 162, 18 C. 385.

Case must be decided according to allegation and proof—See HINDU LAW—ADOPTION, 8 Ind. Cas. 713.

Practice and Procedure—continued.

Each party causing his opponent to be summoned as a witness—Objectionable—See HINDU LAW—ADOPTION, 5 M.L.T. 58, P.C.=9 C.L.J. 172=13 C.W.N. 370=11 Bom. L.R. 196=31 A. 116=19 M.L.J. 186=1 Ind. Cas. 128.

Pleadings not set up in the lower Court—Right to set up in the Chief Courts on appeal—See HINDU LAW—ADOPTION, 53 P.W.R. 1908=113 P.L.R. 1908.

Plaintiff suing in representative character—Form of plaint—Suit by manager of Hindu family—See HINDU LAW—JOINT FAMILY, 7 B. 467.

Suit by Manager of Joint Hindu Family, for debt due to family—Non-joinder of other members—See HINDU LAW—JOINT FAMILY, 69 P.R. 1906=118 P.L.R. 1906.

Relief sought for first time in second appeal—If can be allowed—See HINDU LAW—PARTITION, 23 B. 184.

Interim injunction to restrain adoption if can be granted—See INJUNCTION—SPECIAL CASES, 13 B. 56.

Revenue inquiry—Judicial value of inquiry conducted by revenue authorities into a crime that was alleged to be committed or about to be committed—See INQUIRY, 8 Bom. L.R. 705=1 M.L.T. 301=30 B. 523.

Judge's summons—Misdescription of party taking out summons—Permission to amend granted at hearing—See INSOLVENCY—MISCELLANEOUS, 21 B. 205.

See INSPECTION OF DOCUMENTS, 2 B. 453.

Issue not raised by parties before Lower Court—Appellate Court, power of, to try, issue—See ISSUES—GENERAL, A.W.N. 1885, 126.

Raising issues on evidence—Question not raised in written statement—See ISSUES—ADDITIONAL ISSUES, 6 B.L.R. 144.

Practice—Court cannot raise issues not issued by parties—See ISSUES—ADDITIONAL ISSUES, 10 A. 627=A.W.N. 1888, 242.

Judge orally stating judgment at the close of the hearing—Practice—See JUDGMENT—FORM AND CONTENTS, 5 M.H.C. App. 8.

High Court remanding suit under wrong impression—Irregularity—New Judge—See JUDGMENT—FORM AND CONTENTS, 5 M.H.C. 174.

Issues—Necessity for raising issues in appeal—See JUDGMENT—FORM AND CONTENTS, 10 B.L.R. 492.

Variation of judgment—See JUDGMENT—MISCELLANEOUS, 4 Bom. L.R. 129.

Pronouncement of judgment in open Court—See JUDGMENT—MISCELLANEOUS, 8 Bom. L.R. 229=30 B. 455.

Application of doctrine of decrees *in rem* to proceedings of Courts in India—See JUDGMENT IN REM, 2 M.H.C. 276.

Practice and Procedure—continued.

When objection to jurisdiction is taken for the first time on appeal—S. 16 (a), sub-s. 2, Civ. Pro. Code—Refusal of objection—See JURISDICTION—GENERAL, 7 C. L. J. 152.

See JURISDICTION—GENERAL, 3 B.L.R. App. 77.

Jurisdiction—Objection to jurisdiction taken at late stage of suit—Procedure—See JURISDICTION—QUESTION OF JURISDICTION, 1 Hyde 284.

Plaintiff to succeed on strength of his plea, and not on weakness of that of defendant—See LANDLORD AND TENANT—EJECTMENT, 15 B. 414, Note = P.J. 1880, p. 122.

See LEAVE TO SUE, 11 C. 213.

Jurisdiction—Refusal of leave to sue by one Judge—Grant of leave by another Judge later on—Discharge of leave granted—See LEAVE TO SUE, 8 M.H.C. 21.

See LEGAL PRACTITIONERS—GENERAL, A.W.N. 1899, 18.

Barrister or pleader, appearance of, as litigant—Practice—See LEGAL PRACTITIONER—GENERAL, 9 A. 180 = A.W.N. 1887, 7.

Charges against attorney—Publication of name, practice in respect of—See LEGAL PRACTITIONERS—ATTORNEY, 23 C. 576.

Attorney taking deposit of title deeds for securing costs—Summary application to enforce the equitable lien in suit in which he was not a party—See LEGAL PRACTITIONERS—ATTORNEY AND CLIENT, 21 C. 85.

Refreshers to counsel—General rule—Costs—Discretion of Court—See LEGAL PRACTITIONERS—COUNSEL, 12 C. 551.

Statement of counsel not on oath, if objected to by opposite party whether admissible in evidence—Procedure *re* statement of counsel—See LEGAL PRACTITIONERS—COUNSEL, 27 C. 428 = 4 C.W.N. 169.

Statement by Counsel to Court—No necessity for oath—See LEGAL PRACTITIONERS—COUNSEL, 3 C.W.N. 694.

Pleaders—A pleader is bound to call witnesses whose evidence his client wishes to submit to the Court even though he suspects their evidence—See LEGAL PRACTITIONERS—PLEADER—MISCELLANEOUS, 3 Bom. L.R. 562.

See LEGAL PRACTITIONERS—PLEADER—APPOINTMENT AND APPEARANCE, 20 B. 293.

Conviction of pleader of criminal offence—Reports to High Court—Argument allowed to show that conviction was illegal—See LEGAL PRACTITIONERS—PLEADER—REMOVAL, SUSPENSION, ETC., 7 A. 290, F.B. = A.W.N. 1885, 48.

See LETTERS OF ADMINISTRATION, 26 C. 407 = 3 C.W.N. 392.

Practice and Procedure—continued.

Immoveable property situate partly within the High Court's original jurisdiction—Leave to sue—See LETTERS PATENT, HIGH COURT, 1865, CALCUTTA, cl. 12, 3 C. 370.

Plaintiff to succeed on the strength of his own title and not on the weakness of the defendant—See LIMITATION—GENERAL, 63 P.W.R. 1908.

Practice—Limitation, question of, not raised in pleadings or evidence—Court's discretion to raise issue—See LIMITATION—QUESTION OF LIMITATION, 6 C.W.N. 641, P.C. = 25 M. 367 = 4 Bom. L.R. 543 = 29 I. A. 76.

Plea of limitation taken for the first time in Second appeal—Admissibility of such plea—See LIMITATION ACT, 1908, s. 3, 28 M. 67 = 15 M.L.J. 402.

Party being misled by a uniform practice of the Court—Whether "sufficient cause" for not presenting appeal within proper time—See LIMITATION ACT, 1908, ss. 4, 5, 10 O.C. 201.

See LIMITATION ACT, 1908, s. 20, 19 B. 663.

Further appeal not competent—Whether it can be treated as a petition for revision—Punjab Courts Act, s. 70 (b)—See LIMITATION ACT, 1908, arts. 91, 144, 5 P.W.R. 1908.

Cause of action partly in one place and partly in another—Leave to sue given under cl. 12, Letters Patent—Rescission of leave—See LIMITATION ACT, 1908, art. 181, 13 B. 404.

Suit by Mahomedan for partition of his share in inheritance—Right of defendant to obtain his share on paying necessary Court-fees—Practice—See MAHOMEDAN LAW—PARTITION, 23 B. 188.

Case set up in plaint—Different case proved—Remedy—See MALABAR LAW—MISCELLANEOUS, 11 M. 106.

See MARRIAGE, 28 C. 84.

Application for determination of mesne profits, how treated—See MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 28 C. 243.

See MINOR—SUITS BY AND AGAINST MINORS, 7 A. 490, F.B. = A.W.N. 1885, 101.

Suit for possession by guardian—New case set up during progress of suit—Practice—See MINORS—SUITS BY AND AGAINST MINORS, 4 C. 61.

Right of person on attaining full age to proceed with a suit instituted on his behalf, during minority—See MINORITY, 22 C. 270.

Different defendants—Plaintiff succeeding—Interlocutory judgment—Final judgment reserved—English practice followed—See MISJOINDER—OF PARTIES, 11 Bom. L.R. 34 = 33 B. 293 = 5 M.L.T. 230 = 1 Ind. Cas. 120.

Relief not claimed in the plaint, granting of—See MORTGAGE—GENERAL, 32 M. 485.

Practice and Procedure—continued.

Incorporation of sections of Transfer of Property Act as O. 34 of the Civ. Pro. Code, of 1908—Effect on practice of High Court—See MORTGAGE—GENERAL, 37 C. 907.

Return of defective plaint for amendment, when made—See MORTGAGE—GENERAL, 32 P.W.R. 1908.

Partial relief on the footing of defendant's admission—See MORTGAGE—REDEMPTION, 1 A. 194, F.B.

Suit to redeem by purchaser in execution—Absence of certificate of title—Production of certificate at hearing—See MORTGAGE—REDEMPTION, 6 B. 139.

Where successor of a Judge has to decide case already decided in part by his predecessor—Question already decided not to be re-opened except where error is obvious or patent—Such re-opening, though not illegal, is undesirable—See MORTGAGE—REDEMPTION, 41 P. L.R. 1908=42 P.W.R. 1908.

Second appeal—Suit cannot be changed in—See MORTGAGE—SALE OF MORTGAGED PROPERTY, 10 B. 461, P.C.=13 I.A. 66.

See NOTICE, 18 B. 59.

Notice, service of, on respondent—See NOTICE, 2 Bom. L.R. 281.

See OATH, 22 C. 491.

One party to a suit abiding by the oath of the other—What record of suit ought to show—See OATH, 8 O.C. 11.

Suit to set aside sale deed and for confirmation of possession—Declaratory decree—Form of relief—See PARDANASHIN WOMAN, 13 B. L.R. 427, P. C.=21 W.R. 340=1 I.A. 192.

Suit by some only of several plaintiffs entitled to sue—Others joined as co-defendants—See PARTIES TO SUIT—GENERAL, 24 A.=226 A. W.N. 1902, 31.

See PARTIES TO SUIT, SUBSTITUTION OF PARTIES TO SUIT, 4 B. 654.

Plaintiff in partnership suit seeking withdrawal or dismissal of suit—Application by defendants to be made plaintiffs—Practice—See PARTIES TO SUIT—TRANSPOSITION OF PARTIES TO SUITS, 7 B. 167.

Court's power to regulate—See PARTITION—GENERAL, 11 C.L.J. 580=6 Ind. Cas. 244.

Suit by partners—Counter-claim against each partner—Whether allowed to be set up—See PARTNERSHIP—GENERAL, 8 M.L.T. 73=7 Ind. Cas. 267.

Verification by unauthorized person—Removal from file—See PLAINT—VERIFICATION AND SIGNATURE, 1 Ind. Jur. N. S. 39.

Pleading and proof—Variance—See PLEADINGS, 25 A. 256, F.B.=A.W.N. 1903, 18.

See PLEADINGS, 55 P.R. 1868, 32 P.R. 1876, 36 P.R. 1879.

Practice and Procedure—continued.

Suit for possession under a sale-deed—Sale declared invalid—Prayer for possession of mortgage—Inconsistent reliefs—Pleading—See POSSESSION—SUITS FOR POSSESSION, 4 Ind. Cas. 37=20 M.L.J. 141.

Suit for exclusive possession—Decree for joint possession—See POSSESSION—SUIT FOR POSSESSION, A.W.N. 1891, 45.

See POSSESSION—SUITS FOR POSSESSION, 5 A. 345, F.B.

Legal effect of a transaction ignored by the parties and the Judges in lower Courts—Right of appellant to press the view in second appeal—See PRE-EMPTION—MISCELLANEOUS, 6 N.L.R. 78=6 Ind. Cas. 824.

Pre-emption—Claiming one portion by inheritance and another by pre-emption—Right of inheritance found against—Suit, whether maintainable—See PRE-EMPTION—MISCELLANEOUS, A.W.N. 1882, 79.

Delay due to official oversight, whether affects rights of decree-holder—Appeal treated as revision—See PRE-EMPTION—MISCELLANEOUS, 11 O.C. 144.

Application for rehearing of suit dismissed by Small Cause Court—Ss. 38 & 71, Presidency Small Cause Courts Act (1882)—Court-fee to be paid in full—Supply of deficient Court-fee disallowed after expiry of prescribed period—See PRESIDENCY SMALL CAUSE COURTS ACT, 1882, ss. 38, 71, 18 C. 445.

Case stated for opinion of High Court—Reference to be only on precise point of law or usage—Practice—See PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 69, 15 B. 376.

See PRESIDENCY SMALL CAUSE COURTS ACT, 1882, ss. 69 and 70, 23 C. 967.

Application for grant of probate—Questions relating to testator's title—See PROBATE—GENERAL, 19 A. 458=A.W.N. 1897, 106.

Instrument purporting to be will, probate not grantable of, where no property passes under—See PROBATE AND ADMINISTRATION ACT, 1881, ss. 2, 4, 23 M. 133.

English—and—of mofussil Courts in India in re proceedings for revocation of probate or letters of administration—See PROBATE AND ADMINISTRATION ACT, 1881, s. 50, 10 C.W.N. 955=33 C. 1001.

See PROBATE AND ADMINISTRATION ACT, 1881, s. 64, 1 L.B.R. 178.

Suit for share in the offerings of a temple—Jurisdiction—See PROV. SMALL CAUSE COURTS ACT, 1887, s. 15, 20 P.R. 1911=93 P.L.R. 1911=54 P.W.R. 1911=9 Ind. Cas. 579.

Small Cause Court suit, trial of, as regular suit without returning of plaint for presentation to proper Court—Appeal from Munsiff's

Practice and Procedure—continued.

decree in suit instituted as Small Cause Court suit and tried as regular suit—See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 27, 7 O.C. 144.

Small Cause suit—Instituted in Court not having Small Cause powers—Suit registered and tried as a regular suit—Appeal—See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 32 (2), 9 Ind. Cas. 264.

Point raised one of novelty—Fresh suit likely to be time barred—Plaintiff allowed to continue original suit—See RECEIVER, 14 C. W.N. 653=6 Ind. Cas. 24.

See RECEIVER, 28 C. 250, 1 C.W.N. 303.

See REFERENCE TO HIGH COURT, 28 C. 260.

Whether it is open to High Court in second appeal to dispose of the case on the ground of non-registration of a document when the point was not discussed in the lower Courts—See REGISTRATION ACT, 1903, ss. 17, 49, 4 M.L.T. 79.

Reference to Judge of one High Court—Establishment of another High Court—See BEN. REGULATION VI OF 1831, s. 7, 6 B.L.R. 283, P.C.=13 M.I.A. 585=15 W.R. P.C. 16.

Relief granted on grounds not stated in plaint—See RELIEF, A.W.N. 1881, 158.

Whether Court can grant relief on other grounds than those put forward in plaint—See RELIEF, A.W.N. 1887, 43.

Appeal—Cross-appeals—Decree reversed and cause remanded on appeal first heard—Cross-appeal not to be heard—See REMAND, A.W.N. 1890, 68.

Refusal of High Court to remand—See REMAND, 21 B. 325.

Adjournment, application for—Not granted—Decision *ex parte*—Remand—Civ. Pro. Code, 1882, ss. 562, 568, 569—See REMAND, 17 B. 733.

Grounds for remand—Defect in plaint—See REMAND, Marsh 198=1 Hay 467.

Objection of minority of plaintiff to suit—Taking objection on remand—Permissibility—See REMAND, 13 C. 189.

Refusal of Court to examine witnesses of a party—Remand—See REMAND, A.W.N. 1905, 266.

See REMAND, 9 A. 513=A.W.N. 1887, 146, A.W.N. 1888, 81, 27 C. 951, P.C.=27 I.A. 110=4 C.W.N. 631.

Suit for arrears of rent—Rate of rent alleged by plaintiff not proved—See RENT, 24 C. 433.

Plea finally decided between the parties by a single Bench of the Chief Court—Incompetency of Division Bench to question the opinion of the single Bench—See RES JUDICATA—GENERAL, 25 P.W.R. 1911.

Practice and Procedure—continued.

Suits by and against tenant—Both suits decided against him—Appeal from one of the decisions—Appellant to be allowed to amend his memorandum of appeal so as to make it an appeal in both suits—See RES JUDICATA—ADJUDICATIONS, 16 M.L.J. 63=29 M. 333.

New case set up in the Chief Courts on appeal—Whether allowable—See RES JUDICATA—CAUSE OF ACTION, 58 P.W.R. 1908.

Suit by creditor of a deceased person's estate against administrator—Procedure to be followed by Mufussil Courts—See RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, 29 B. 96=6 Bom. L.R. 853.

Of allowing defendant to be examined as a witness for plaintiff, propriety of—See RES JUDICATA—MISCELLANEOUS, 116 P.W.R. 1908.

See RE-TRIAL, A.W.N. 1881, 26.

Institution of two suits in same Court—Judge taking different views in deciding them—See REVIEW—GROUNDS FOR REVIEW, A. W.N. 1885, 123.

Suit on decree where there are no means of enforcing it by execution—See RIGHT OF SUIT—DECREES, Marsh 611.

Memo. of appeal, accompaniments of the—See RULES—RULES OF HIGH COURT AND SUPREME COURTS—BOMBAY, 9 Bom. L. R. 1138=32 B. 14.

Process-fees—Extension of time for payment of process-fees—See RULES—RULES OF HIGH COURTS AND SUPREME COURTS, N.W.P., A. W.N. 1897, 157.

Of Privy Council—Concurrent findings of fraud reversed—See SALE IN EXECUTION OF DECREE—GENERAL, 15 C.W.N. 648, P.C.=8 A.L.J. 587=13 Bom. L.R. 440.

Criminal proceedings arising out of civil litigation—Pendency of civil suit—Stay—See SANCTION TO PROSECUTE, 16 B. 729.

See SPECIAL OR SECOND APPEAL—GENERAL, 23 C. 335.

A document already admitted cannot be objected to on appeal on the ground of deficiency of stamp—See STAMP, 2 Bom. L.R. 25=24 B. 360.

See ST. 11 AND 12 VIC. C. 21, 1 Ind. Jur. N.S. 42.

Procedure for obtaining order of adjudication in insolvency—Rule or petition—See ST. 11 AND 12, VIC. C. 21, s. 9, 12 C.W.N. 538.

See ST. 11 AND 12 VIC. C. 21, ss. 24, 26, L. B.R. 1893—1900, 75.

Conflict of equity—See ST. 11 AND 12 VIC. C. 21, s. 26, 4 B.L.R. O.C. 63=15 W.R. O. C. 18, Note.

See ST. 11 AND 12 VIC. C. 21, s. 36, 3 B. 270.

Practice and Procedure—continued.

See ST. 11 AND 12, VIC. C. 21, ss. 36, 37, 47, 49, 60, 1 L.B.R. 249.

Of criminal proceeding during pendency of civil suit—See STAY OF PROCEEDINGS, 31 C. 858.

Citations—Mode of issuing citations—Payment for advertisements in newspapers—See SUCCESSION ACT, 1865, s. 250, A.W.N. 1903, 30.

See SUCCESSION ACT, 1865, s. 256, 26 C. 408 = 3 C.W.N. 364.

See SUCCESSION ACT, 1865, s. 259, A.W.N. 1903, 31.

Of allowing plaintiff in a suit for restitution of conjugal rights to value the relief sought in order to bring suit within jurisdiction of a Court not to be departed from—See SUITS VALUATION ACT, 1887, ss. 8, 9, 12, 3 A.L.J. 266, F.B. = A.W.N. 1906, 99 = 28 A. 545, F.B.

See SUMMONS, 1 C.W.N. 56.

Suit adjourned for hearing—Necessity for issuing fresh summons to witnesses already summoned—Practice—See SUMMONS, 24 M. 200.

Courts' power, if service cannot be effected in time—Summonses, application for—Nazir's duty—See SUMMONS, 2 O.C. 34.

Counsel's fees should be allowed for drawing up plaints in Small Cause suits—See TAXATION OF COSTS, 10 Bom. L.R. 969.

See TRANSFER OF CIVIL CASES, 2 C.L.R. 352.

Transfer of suit—Application for transfer by next friend of minor in absence of guardian *ad litem*—See TRANSFER OF CIVIL CASES, 16 C. 771.

See TRUST, 18 B. 551.

Making new case for plaintiff not set up in plaint—See USE AND OCCUPATION, 5 O. C. 222.

Plea not alleged in plaint—Power of Court to set up plea at hearing—See VARIANCE BETWEEN PLEADINGS AND PROOF, 20 B. 569 = P. J. 1895, 161.

Possession—Joint property—Suit by co-owner for exclusive possession—See VARIANCE BETWEEN PLEADING AND PROOF, 20 B. 627.

Amendment of plaint in further appeal, whether allowable and when—See VENDOR AND PURCHASER—GENERAL, 64 P.W.R. 1908.

In judging the genuineness or otherwise of a will, it is not proper for a Judge first to make up his mind about the contents of the will, and then look at the positive evidence in favour of its execution from that standpoint—See WILL—GENERAL, 9 C.W.N. 649, P.C. = 15 M.L.J. 265.

Practice and Procedure—concluded.

See WILL—CONSTRUCTION, 28 C. 621. P. C. = 28 I.A. 159 = 5 C.W.N. 729.

See WITHDRAWAL OF APPEAL, 13 M.I.A. 602.

See WITNESS—GENERAL, 6 C.W.N. 513, P.C.

Summoning of public officers as witnesses—See WITNESS—SUMMONS TO AND ATTENDANCE OF WITNESSES, 6 M.H.C. App. 6.

Evidence—Discrepancies—See WITNESS—WEIGHT TO BE ATTACHED TO EVIDENCE, 3 B.L.R.A.C. 332.

Prayaschittam.

Effect of—See DEFAMATION, 6 M.J.T. 290 = 33 M. 67 = 19 M.L.J. 714 = 3 Ind. Cas. 955.

Preamble.

See STATUTES, CONSTRUCTION OF.

Effect of—in an Act—See STATUTES, CONSTRUCTION OF, 14 C. 176.

Construction—Provision of section in Act going beyond preamble—Enacting words of statute preferred where strong enough for the purpose—See STATUTES, CONSTRUCTION OF, 2 M.H.C. 322.

Precatory Trusts.

See HINDU LAW—WILL, 14 C. 222.

See WILL—CONSTRUCTION, 4 A. 500, P. C. = 9 I.A. 70.

Precedents.

Value of—See HINDU LAW—WIDOW, 9 A. L.J. 375 = 14 Ind. Cas. 814.

Precept.

Object of—See CIV. PRO. CODE, 1908, O. XXI, rr. 46, 48, 3, 14 C.L.J. 228.

Preceptor.

See LETTERS OF ADMINISTRATION, 28 C. 608 = 5 C.W.N. 873.

Pre-emption.

- 1.—GENERAL.
- 2.—CONSTRUCTION OF WAJIB-UL-ARZ.
- 3.—LOSS OF RIGHT TO PRE-EMPT BY WAIVER, ETC.
- 4.—NECESSARY FORMALITIES.
- 5.—PURCHASE MONEY.
- 6.—RIGHT TO PRE-EMPT.
- 7.—SUBJECT OF PRE-EMPTION.
- 8.—MISCELLANEOUS.

See BUDDHIST LAW—PRE-EMPTION.

See BURDEN OF PROOF—PRE-EMPTION.

See CUSTOMS—PUNJAB—PRE-EMPTION.

See LIMITATION ACT, 1908, art. 10.

See MAHOMEDAN LAW—PRE-EMPTION.

See WAJIB-UL-ARZ.

Pre-emption—continued.**—1.—General.**

(1)—*Persons having equal rights of pre-emption—Seller not bound to offer property to both.*—Where plaintiff and defendant have equal rights of pre-emption, the seller is at liberty to offer the property to either of them, but not bound to offer it to both. All co-sharers with equal rights of pre-emption could not claim to divide the property sold among them. *MANKHAN v. MAMURKHAN*, A.W.N. 1886, 56. [D., 27 A. 465 = 2 A.L.J. 690 = A.W.N. 1905, 50.]

(2)—*Hindus—Pre-emption—Mahomedan Law.*—A right or custom of pre-emption is recognized as prevailing among Hindus in Behar, and some other provinces of Western India. In districts where its existence has not been judicially noticed, the custom will be matter to be proved. Such custom when it exists, must be presumed to be founded on and co-extensive with the Mahomedan Law on that subject, unless the contrary be shown. The Court may, as between Hindus, administer a modification of that law as to circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go to the whole length of the Mahomedan Law of pre-emption; but the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in the Mahomedan Law. *FAKIR RAWOT v. SHEIKH EMAMBAKSH*, B. L.R. Sup. Vol. 35 = W.R.F.B. 143. [F., W.R. 1864, 317, 17 W.R. 264, 5 A. 110 = A.W.N. 1882, 199; Appr., 5 A. 197 = A.W.N. 1882, 217, 12 A. 234; R., 8 W.R. 2, 6 B.L.R. 41 = 14 W.R.F.B. 1, 9 A. 513 = A.W.N. 1887, 146, 4 Bom. L.R. 811; Expl., W.R. 1864, 74, 11 W.R. 251.]

(3)—*Pre-emption—Right of—Mahomedan origin—Applies to persons other than Mussalmans—In Behar—Applicable to Hindus—Formalities to enforce the right—Disqualified heir—Manager of Court of Wards competent to comply with formalities—Court of Wards Act (Bengal Act, IX of 1879)—S. 40—Test of co-parcenary to enforce pre-emption.*—The law of pre-emption was introduced into India by the Mahomedan Government. In the province of Behar, which was an integral part of the Mahomedan empire, the right to pre-emption is enforceable, irrespective of the persuasion of the parties concerned, and exists among the Hindus of Behar. To enforce the right of pre-emption, the Mussalman law insists that the first formality technically called "the immediate demand" should be observed by the pre-emptor or some one on his behalf immediately on receipt of the news of the sale, and the second formality, "the repetition of the demand" should be done with as little delay as possible in the presence of witnesses either before the vendor, or the vendee or on the premises. These formalities could be performed by the Manager appointed by the Court of Wards on behalf of a disqualified heir even apart from the provisions of s. 40 of the Court of Wards Act. A joint liability for payment of Government revenue is sufficient under the Mahomedan Law to constitute a co-parcenary to claim

Pre-emption—continued.**—1.—General—continued.**

a right to pre-emption. *JADU LAL SAHU v. MAHARANI JANKI KOER*, M.W.N. 1912, 486, P.C. = 11 M.L.T. 361 = 16 C.W.N. 554 = 15 C.L.J. 483 = 9 A.L.J. 525 = 14 Bom. L.R. 436 = 23 M.L.J. 28 = 39 C. 915 = 15 Ind. Cas. 659 = 39 I. A. 101. (B.L.R. Sup. Vol. 35, F.; 35 C. 575, Affirmed.)

(4)—*Act XVIII of 1876, s. 3, cl. (b) Mahomedan Law—Hiba-bil-ewaz—"Sale" and "price" meanings of, in Oudh Laws Act, Chap. II—Oudh Laws Act, s. 9—Act IV of 1882, S. 4, Contract Act, s. 78.*—In a suit for pre-emption under ch. II, Act XVIII of 1876, in which the parties were Mahomedans. Held that the statutory right of pre-emption was conferred on all classes of the community alike, and the language in which that right was conferred must be construed in a uniform manner without regard to the personal laws or usages of the persons concerned:—Held that, in the chapters and sections of the Oudh Laws Act, which relate to contracts, "price" means money:—Held further, that "hiba-bil-ewaz" is not a sale within the meaning of s. 9, Act XVIII of 1876, and that it confers no right of pre-emption under Ch. II of the Act. *MIR ABID ALI v. ARAB-UN-NISA*, 1 O.C. 75 (11 M. 467, R.) [R., 7 O.C. 31, 11 O.C. 176; F., 3 O.C. 110.]

(5)—*Succession and inheritance—Buddhist Law—Karen Christians—Indian Succession Act, s. 332.*—The right of pre-emption among Buddhists is an incident of the law of succession and inheritance and cannot be separated from it. Karen Christians, converted 20 years ago, are no longer under Buddhist law, but in matters of succession and inheritance, are governed by the Indian Succession Act, 1865—Karen Christians not having been exempted under s. 332 from the operation of the Act. *EBRAHIM v. ARASI*, L.B.R. 1893—1900, 26.

(6)—*Suit for—Auction purchaser, right acquired by, before confirmation of sale—Sale of an equitable interest liable to pre-emption—Contract to sell property liable to pre-emption, if complete—Civ. Pro. Code, ss. 310-A and 311.*—Before the sale had been confirmed, the auction-purchasers transferred the property to the sons of the judgment-debtor who were not co-sharers in the village. In a suit for pre-emption, on the basis of the aforesaid sale, brought by the plaintiff-respondent who was a co-sharer in the village it was contended on behalf of the appellants, the sons of the judgment-debtor, that at the date of the execution of the sale-deed in their favour there was no interest acquired by the auction-purchasers inasmuch as the sale had not till then been confirmed, and therefore the transaction evidenced by the sale deed was not a sale which could form the basis of a suit for pre-emption, and that, if the auction-purchasers had any interest at all which they could sell, it was of such a shadowy and uncertain character that the sale of it could not be the subject of a suit for pre-emption. Held, assuming that no title passed on the

Pre-emption—continued.**—1.—General—continued.**

execution of the sale-deed, there was at least a completed contract to transfer the property which could validly form a subject of a suit for pre-emption. *Held*, further, that the interest acquired by the auction purchasers prior to the confirmation of sale was not of an uncertain character. It was an equitable interest, enforceable against the judgment-debtor, of which they could not be deprived, either by the judgment-debtor, or any other person claiming under him, except by proper proceedings taken in accordance with s. 310-A or 311, Code of Civil Procedure. **ZALIM SINGH v. KALLOO SINGH, 10 O.C. 273.** (8 O.C. 202, 24 A. 475, 2 C.W.N. 589, 9 O.C. 86, 9 O.C. 331, 21 C. 496, 9 O.C. 169, R.)

(7)—*Pre-emption—Sale by Court—Cause of action—Certificate of sale not prepared owing to objection of purchaser—Right of pre-emption not affected—Registration Act (III of 1877, as amended by Act VII of 1888), s. 17, cl. (o).*—In execution of a mortgage-decree creating a lien against land and accessory rights, the land was sold and purchased by the decree-holder on the 20th July 1897. After confirmation of sale a draft sale certificate was prepared, but the decree-holder objected that the accessory rights had not been included, and prayed that the error might be rectified. Subsequently accessory rights were sold and purchased by the decree-holder on the 20th August 1898. The sale was confirmed on the 5th October 1898, and a certificate of sale, dated 9th November 1898, was prepared, which recited the latter sale, and its confirmation by the Court, and covered the entire property. In a suit for pre-emption, filed on the 19th July 1898, in respect of land sold on the 20th July 1897, it was contended for the decree holder, vendee, that no certificate of sale having been granted till the date of suit, the suit was premature. *Held*, that the suit was not premature, as the sale was confirmed, and it was at the purchaser's own request that the certificate was not drawn up and given to him, although a draft had been prepared. The provisions of s. 316 must be held to have been sufficiently complied with. Registration of a sale-certificate granted to a purchaser of property sold by public auction by a Civil or Revenue Officer is exempted from the operation of s. 17 of the Registration Act by addition of cl. (o) by the amending Act VII of 1888. **AJUDHIA PERSHAD v. CHANDAN, 36 P.L.R. 1903=9 P.R. 1903.**

(8)—*Right of—Talab-i-ishad—Talab-i-mwasibat, performance of—Witnesses to Talab-i-mwasibat, what they are required to bear testimony to.*—To found a valid claim for pre-emption, it is necessary that the pre-emptor should perform the *Talab-i-mwasibat* (immediate claim) and *Talab-i-ishad* (affirmation with witnesses). For the due performance of the latter, it is not essential that the witnesses should be invoked to bear testimony to the fact

Pre-emption—continued.**—1.—General—continued.**

of the *Talab-i mwasibat* having been performed but it is necessary and sufficient, if the witnesses are invoked to bear testimony to the fact of declaration that the *Talab-i-mwasibat* has been already performed. **UDIT NARAIN LAL v. DASARATHI SINGH, 6 C.L.J. 48.** (17 C. 543, *Expl.*)

(9)—*One sale-deed evidencing two distinct transaction of sale—Right to sue for pre-emption in respect of only one of the properties.*—Where a single deed of sale is executed in respect of two different properties evidencing two distinct transactions, the deeds describing the two properties separately and fixing separate prices for each, it is competent for a person who can claim pre-emption in respect of both the properties to sue for pre-emption in respect of either of the properties. **LACHMAN v. TULSI RAM, 2 A.L.J. 199.**

(10)—*Several properties sold in a single bargain—Rule of pre-emptor having to take whole bargain, extent of application of—Co-sharer in well, whether and when entitled to claim pre-emption in land watered by well.*—Where a person is owner of several distinct properties, of which one is subject to a right of pre-emption and he sells such properties in a single bargain to a person other than a pre-emptor, the latter is entitled, when the pre-emption exists and the claim is made under Act IV of 1872, to bring a suit to enforce his right in respect of the property subject to his right alone, without suing to take over the whole bargain. The principle that the pre-emptor is bound to take the whole bargain, as settled by vendor, is a principle which may be admitted to the extent that the pre-emptor cannot omit to claim any portion of the property comprised in the bargain to which his right of pre-emption extends, but it cannot, consistently with the provisions of Act IV of 1872, be held to oblige him to claim the whole of the property when his right of pre-emption extends over only a portion of such property. There is nothing in the provisions of Act IV of 1872, which gives to a co-sharer in a well, as such co-sharer, a right of pre-emption over land which, being the separate property of a co-sharer in the well, is watered by the well. But it may be that by custom, when a well is owned by several co-sharers, and land, being separate property of a co-sharer in the well and watered by the well, is sold, the right to acquire such land belongs to the co-sharers in preference to all other persons. **SARDAR LALL SINGH v. DEWA SINGH, 107 P.R. 1882, F.B.** (11 P.R. 1874, 98 P.R. 1876, 106 P.R. 1880, R.) [R., 44 P.R. 1833, 64 P.R. 1886.]

(11)—*Successive purchases by same vendee—Second purchase made before institution of suit for pre-emption based on the first purchase.*—*Held* that it is not open to a defendant, in a suit for pre-emption, to set up, as a defence to the suit, a second purchase of a share in the

Pre-emption—continued.—1.—**General**—continued.

same village, made subsequently to the purchase, upon which the suit is based, but prior to the institution of the suit. **NABIHAN BIBI v. KALESHAR RAI, A.W.N. 1907, 110=4 A.L.J. 351.** (24 A. 421, D.) [R., 31 A. 530, 6 A.L.J. 699.]

(12)—*Pre-emption suit, property resold to vendor prior to—Pre-emption claim, failure of.*—Where a suit for pre-emption was brought within limitation, but the vendees had resold the property to the original vendor before institution of the pre-emption suit held, that the re-transfer is sufficient to defeat the claim of pre-emption. **SHEO CHARAN SINGH v. BHIKAD, 14 O.C. 156.** (11 O.C. 290, 14 P.R. 1879, 32 A. 340, 12 O.C. 229, 25 A. 125, R.)

(13)—*Suit by pre-emptor resulting in decree—Second suit by another pre-emptor claiming preferential right—Second pre-emptor not party to first suit—Suit, whether maintainable.*—A suit for pre-emption by one co sharer in a *mahul* was compromised and the property awarded to him by decree. Subsequently another pre-emptor, who was not a party to the first suit brought a suit for pre-emption in respect of the same property, on the ground of his preferential right to pre-empt: *Held*, that the second suit was maintainable, **MUSAMAT NASIRAN BIBI v. SHEIKH RAHIM BUX, 9 Ind. Cas 561.** (7 A. 567, 3 A.L.J. 794, A.W.N. 1906, 313, D.)

(14)—*Pre-emption—Decree in favour of plaintiff on payment of certain specified sum—Judgment-debtor liable to costs—Set-off.*—In a pre-emption suit plaintiff's suit was decreed on payment of Rs. 324-12. The decree provided that, if payment was made within a month, the plaintiff would get Rs. 9-11 as costs from the judgment-debtor. The plaintiff paid Rs. 324 within the time fixed. *Held*, that he was entitled to set off the balance of annas 12 against the costs payable to him. **BECHA SINGH v. SHAMI NATH, 10 Ind. Cas. 454.** (6 A. 351, 28 A. 676, A.W.N. 1906, 198, 3 A.L.J. 804, F.)

(15)—*Pre-emption—Re-sale after institution of suit, effect of—Transfer of Property Act (IV of 1882), s. 52—Transfer—Pendente lite.*—The re-sale of property to the vendor after the institution of a pre-emption suit does not affect the suit. **KEDAR NATH v. BANKEY BEHARI LAL, 11 Ind. Cas. 645.** (30 A. 467, 5 A.L.J. 477, A.W.N. 1908, 221, F.)

(16)—*Pre-emption decree—Money deposited by pre-emptor—Pre-emptor put in possession of property—Money recovered by a Magistrate in payment of fine due from vendee—Pre-emption decree reversed on appeal—Vendee, whether entitled to get back possession without depositing in Court the money which had gone towards payment of his fine.*—The respondent obtained a decree for pre-emption against the appellant and another person on payment of Rs. 1,600. The money was paid into Court and the decree-holder took possession of the property. The

Pre-emption—continued.—1.—**General**—continued.

appellants, however, did not withdraw the money, as they had appealed against the decree. Their appeal was successful and the respondent's suit was dismissed. While the appeal was pending, one of the appellants was convicted of a criminal offence and sentenced to pay a fine. The Magistrate having come to know that Rs. 1,600 had been paid into Court and that the accused's share in the property was one-half, applied to the Subordinate Judge for the payment of Rs. 800. The Subordinate Judge made over the money to Magistrate and the Magistrate credited the money towards the fine. On application by the appellants that they should be put into possession of the property, the Subordinate Judge ordered that they were not entitled to possession until the sum of Rs. 800 was deposited in Court. *Held*, that the appellants were entitled to take possession of the property and their right to it could not be affected by the Subordinate Judge's order. *Held*, further that the Subordinate Judge was entirely wrong in paying the money to the Magistrate before the disposal of the appellant's appeal in the pre-emption case. **HAIDAR HUSAIN v. GHASITI BIBI, 11 Ind. Cas. 227.**

(17)—*Pre-emption—Market-value, price paid much in excess of—Fabulous or excessive price—Pre-emptor must pay the actual price paid—"Good faith," meaning of—Oudh Laws Act (XVIII of 1876), s. 13—Punjab Laws Act (XII of 1878), s. 16.*—Where a person has purchased a property for a price much above the market-value, the pre-emptor must pay the price so paid before he can be allowed to pre-empt. The fact that an excessive or a fabulous price has been paid will not enable the pre-emptor to acquire the property at the market-value, even though such price may have been paid for the purpose of injuring or annoying the pre-emptor. **JADU NATH SINGH v. GANGABAKHSI SINGH, 9 Ind. Cas. 58.** (75 P.R. 1901, 123 P.L.R. 1901, F.)

(18)—*Pre-emption—Fictitious price, evidence as to—Burden of proof as to price fixed in good faith—Opinion of witness as to market value of property—Evidence—Evidence Act s. 45.*—In a suit for pre-emption only very slight evidence is required of the plaintiff to support his allegation, that the price entered in the sale-deed is not the true price, in order to shift the burden of proof on to the vendee. The opinion of a witness who is not examined as an expert within the meaning of s. 45, Evidence Act, as to the market value of the property in suit is not relevant upon the issue, whether the price entered in the sale-deed has not been fixed in good faith. **DWARKA v. LUDAR, 4 O.C. 247.** [Obs., 6 O.C. 327.]

(19)—*Price stated in sale-deed alleged to be fictitious—Burden of proof.*—When a plaintiff pre-emptor comes into Court, alleging that the price entered in the sale-deed is fictitious, it rests on him to give some *prima facie* evidence that this is the case. But comparatively slight

Pre-emption—continued.**—1.—General—continued.**

evidence is sufficient for such purpose ; and it will then be for the parties to the sale to show that the price alleged to have been paid was actually paid. **ABDUL MAJID v. AMOLAK, A.W.N. 1907, 202=4 A.L.J. 531=29 A. 618.** (5 A. 184, 9 A. 225, 9 A. 471, R.; 28 A. 617, Not F.)

(20)—*Suit for—U. P. Act XVIII of 1876 (Oudh Laws Act)—Price actually paid to vendor sufficient evidence of fair market value of property sold—Market value may be treated as evidence in dealing with question of bad faith.*—In a pre-emption suit the plaintiff alleged that the consideration which actually passed was Rs. 110, although the vendor and the vendee had fraudulently entered the sum of Rs. 200 in the deed of sale. The Court of first appeal found that Rs. 200 was not entered in good faith in the sale-deed, and that Rs. 110 actually passed between vendor and vendee, and decreed pre-emption on payment of rupees 110 holding the actual price to be sufficient evidence of the market-value whereupon the vendees appealed on the ground that the fair market value of the property exceeded rupees 110 and that pre-emption should be decreed on payment of the fair market value :—*Held*, that the sum actually paid to the vendor was under the circumstances some evidence and in the absence of other facts sufficient evidence of the fair market-value of the property sold, and the pre-emptor could not be asked to pay any further sum :—*Held*, that the market-value of the property in a pre-emption suit may be ascertained and treated as evidence in dealing with the question of bad faith. **MUKTA PARSHAD v. SHEO MANGAL, 1 O.C. 227.** (Sel. Case No. 208, Explained.)

(21)—*Pre-emption, Suit for—Market value, burden of proof of—Decree in absence of proof of market value.*—In a suit for pre-emption the plaintiffs alleged in their plaint that the price entered in the sale-deed was not fixed in good faith and that the market-value was a certain sum which was less than the alleged price. Neither they nor the defendants gave any evidence of the market-value of the property. The lower Courts accepted the market value given in the plaint and decreed the claim. *Held*, that the burden of proof of the market-value lay in the first instance upon the plaintiffs, that if they failed to discharge it and the defendants produced no evidence upon which the Court could ascertain the true market value, the plaintiffs could only obtain a decree for pre-emption upon payment of the sum, if any, admitted by the defendants to be the market-value or, failing that, the sum mentioned in the deed, but that they could not in any case be compelled to pay more than the latter sum. **HUBDAR SINGH v. NANKOO, 6 O.C. 327.**

(22)—*Pre-emption—Price of property sold—Fraudulent overstatement—Successful pre-emptor, bringing fraud to light—Suit against*

Pre-emption—continued.**—1.—General—continued.**

by vendor's representatives—Not bound by fraud—Doctrine of particeps criminis—Applicability of.—A and B sold certain land to S, father of the defendants 2 to 4, for an alleged consideration of Rs. 4,000. C, a collateral of B, instituted a suit for pre-emption of the said land. In this suit the Court found that the price stated in the sale-deed was not fixed in good faith, that the sale price was really Rs. 3,000, and that the market-value of the property sold was only Rs. 3,240. C paid that amount, obtained possession of the property and sold it to D. S and G, the sons of B (one of the original vendors who died meanwhile) instituted the present suit against D, to recover property sold to D, on the ground that the sale by their father was neither for necessity nor for consideration, and the descendants of A also sued for a declaration that the sale by A would not affect their reversionary rights. Both suits were tried together, and the lower appellate Court held that C, the pre-emptor, stood in the shoes of the original vendee and must accept that the sale was put down at Rs. 4,000 and, having found that only Rs. 3,000. was actually paid, decreed for possession and declaration respectively on payment of Rs. 3,000 by both of them together. *Held*, that, although, in many respects, a pre-emptor who obtains a decree becomes identified in interest with the original vendee, it would be contrary to all notions of equity and justice and repugnant to common sense to hold that the pre-emptor was bound, in circumstances, such as those found in this case, as *particeps criminis* with the vendee, in the fraud which it has been his object to bring to light, and that C was therefore not debarred from urging that the sale which in this case was ostensibly for Rs. 4,000, was in fact merely for Rs. 3,000. (8 P.R. 1908, 27 P.R. 1909, 127 P.L.R. 1906, R.) Where a sum of Rs. 3,000 was actually paid to the vendors and that sum fairly represents the real value of the land, the Court will not convert the sale into a mere mortgage. **DAN SINGH v. PHANGAN SINGH, 83 P.R. 1911=13 Ind. Cas. 796.** (8 P.R. 1908, R.)

(23)—*Pre-emption—Limitation Act (IX of 1908), s. 18—Fraud.*—S. 18 of the Limitation Act (1908) does not apply where there is no indication of any active or intentional concealment. Mere omission on the part of a vendor to give notice of sale to a pre-emptor does not amount to fraud within the meaning of s. 18. It must be shown not merely that the sale was not proclaimed but that it was fraudulently concealed. There is no law requiring two attesting witnesses to a sale deed, nor is it usual to register deeds of which registration is not compulsory. Therefore the mere fact that a sale-deed had only one attesting witness or that a deed not compulsorily registrable was not registered does not imply concealment within the meaning of the said s. 18. **KAKA RAM v. MUHAMMAD ALI, 130 P.W.R. 1911,**

Pre-emption—continued.**—1.—General—continued.**

(24)—*Notice, omission of—Act XV of 1877, (s. 18, Limitation Act)—Fraud—Equity of redemption, physical possession of—Act XV of 1877, sch. II, art. 10 (Limitation Act)—General allegations of fraud.*—R.S. mortgaged to the plaintiff one plot of land with possession and on the 17th May 1884 sold that plot to defendant (vendee). The sale-deed contained no mention of the previous mortgage. In July 1895, the defendant deposited the mortgage money in Court, and issued a notice on the plaintiff demanding redemption. In January 1896 the plaintiff sued for pre-emption on the allegation that the sale took place without the vendor issuing any notice to him, and that he has first learnt of the sale on the 19th July 1885. The Court of first instance dismissed the claim as barred by limitation. The lower appellate Court considered that the property was capable of physical possession, and decreed the claim. *Held*, that an omission by the vendor to issue a notice without any intention to keep the pre-emptor from the knowledge of his right will avail the pre-emptor under s. 18, Act XV of 1877 (Indian Limitation Act), but that such an omission with the intention of keeping the pre-emptor from a knowledge of his right, will avail the pre-emptor under the said section as against the vendor and also against the vendee; if the latter has been accessory to the fraud or claims otherwise than in good faith and for valuable consideration. *Held* further, that an equity of redemption does not admit of physical possession within the meaning of art. 10, sch. II of the Limitation Act. *Held* further, that when no specific allegations of fraud were set out in the plaint, the plaintiff could not succeed on general allegations. *MUNNA LAL v. AUSERI LAL*, 1 O.C. 262.

(25)—*Fraudulent transfer by vendee's husband—Plaintiff defrauded by the transfer—Vendee's husband estopped from denying the truth of the transfer—Estoppel.*—In a suit for pre-emption against vendor and vendee the vendor did not put in an appearance, and the vendee disclaimed all interest in the property pleading that in 1881 her husband in order to defraud his creditors executed a fictitious deed of sale of the property in favour of the vendor who again in 1893 executed a fictitious deed in her name, her husband being owner and in possession throughout. The vendee's husband was made a defendant and made the same defence. It was found that the plaintiff's father now represented by the plaintiff was one of those actually defrauded by the fraudulent transfer made by the vendee's husband. *Held*, that the vendee's husband was estopped from denying the truth of the transfer, and that the vendor's sale-deed in favour of the vendee conveyed a title to her which gave rise to a claim for pre-emption on the part of his co-sharers. *FARHUT-UN-NISA v. EJAZ ALI*, 1 O.C. 188.

(26)—*Execution—Conditional decree.*—Where, in suit to enforce a right of pre-emption, the

Pre-emption—continued.**—1.—General—continued.**

decree directs that on the deposit of purchase-money within one month from the date on which the decree becomes final, the decree-holder (plaintiff) should obtain possession of the property in suit, and that, if the decree-holder failed to make such deposit, within such period, the decree should become null and void, the decree becomes final, in the event of the appeal by the defendant being withdrawn, on the date on which it is withdrawn and struck off, and not after the expiry of 90 days and one month from the date of such withdrawal, on the supposition that the respondent may have grounds for appealing to the High Court, and that the decree could become final only after such appeal time has expired; for any grounds of appeal he may have, must relate to matters (such as cost in first appeal) other than those which had become final by the withdrawal of the appeal, and therefore cannot affect such matters. *NARAIN v. LACHMAN SINGH*, 3 A. 135.

(27)—*Contract of sale—Vendor's interest in the property sold—Interest ceasing to exist by Government Resolution—Vendee cannot sue vendor for breach—Pre-emption—Personal right—Transfer of—Transfer of Property Act (IV of 1882), s. 6—Sale of teak and black-wood trees—Contract.*—The defendant, the occupant of certain Survey Nos. agreed to sell to the plaintiff, on the 21st July 1904, stumps of teak and black-wood trees in his Survey Numbers at the rate of Rs. 6 per 100 stumps. At the date of the sale, the defendant had, by virtue of a Government Resn., dated 27th September 1897, a privilege of pre-emption in those stumps. Later on, on the 11th May, 1905, Government abolished the pre-emption, and directed that in its stead 20 per cent. of the net proceeds of the sale by the Forest Department of the trees should be paid to the occupant, which percentage was a gift from Government and subject to no tribunal. The plaintiff sued to recover from the defendant the 20 per cent. which he received from Government in respect of the trees on his Survey Numbers. *Held*, that the plaintiff was not entitled to succeed; for what he was claiming was a gift or bonus from Government to the defendant, which gift or bonus was not and could not have been in the contemplation of the parties when the contract was entered into and which by itself was not transferable. The right of pre-emption is a purely personal right which cannot be transferred to any one except the owner of the property affected thereby. *JASUDIN AMBIR SAHEB FAKI v. SAKHARAM GANESH SHROTRI*, 13 Bom. L.R. 1042=36 B 139=12 Ind. Cas. 693.

(28)—*Suit for—Cancellation of sale deed—Inconsistent reliefs.*—The plaintiff sued the defendants (vendor and vendee) for cancellation of a deed of sale executed by the former in favour of the latter and in the alternative for pre-emption of the property included in the deed. The plaintiffs alleged that they were joint with

Pre-emption—continued.**—1.—General—continued.**

the vendor and that the latter could not lawfully sell his undivided share of the property. The question of jointness was found against plaintiffs and the claim for cancellation of the deed was dismissed. On the question whether plaintiffs were entitled to a decree for pre-emption:—*Held* that the two reliefs prayed for by the plaintiffs were inconsistent with each other, and that under the circumstances the plaintiffs were not entitled to a decree for pre-emption. **DURGA PERSHAD v. MENDI LAL, 1 O.C. 174.**

(29)—*Pre-emption—Property sold not in possession of vendor—Oudh Laws Act (XVIII of 1876), Chap. II.*—Where property was sold which was not in the possession of the vendor at the time of sale and he had only a doubtful right to recover it, *held*, that the sale of such a right could not be the subject of a suit for pre-emption under Chap. II, of the Oudh Laws Act. **SUKHNANDAN v. PARSHADI, 11 Ind. Cas. 279.** (9 O.C. 86, 9 O.C. 331, *F.*; 21 C. 496, *R.*)

(30)—*Acquisition of footing in a village by vendee by acceptance of gift of shamilat—Gift, whether incomplete without delivery of possession—Suit for pre-emption.*—The defendant-vendee pleaded that he had acquired a footing in the village by virtue of a gift of a share in a *shamilat* from a proprietor and as such his rights were equal to those of the plaintiff-pre-emptor. The latter maintained that the gift was a trick to defeat the pre-emptor and that the same was invalid for want of delivery of possession. *Held*, (1) that the gift relied on by defendant gave him rights equal to those of the plaintiff; and that there was nothing illegal or fraudulent in the defendant's having accepted a gift, even if such acceptance was with the avowed object of obtaining a footing in the village and (2) that the gift was valid, even without delivery of possession, because the donor had done, all he could to complete the gift and had supported the donee, because the subject-matter of the gift in this particular case was incapable of physical possession and also because the question of the incompleteness of the gift was one that cropped up not between the donor and the donee but between the latter and a third person. **PARTAB SINGH v. FATTA, 45 P.R., 1906=120 P.L.R. 1906.** (45 P.R. 1901, *D.*; 21 P.L.R. 1901, 28 B. 31, 11 C. 121, *P.C.*, *F.*) [*R.*, 86 P.R. 1910; *Rel. on*, 91 P.R. 1909.]

(31)—*Pre-emption—Sale of a pre-emptional decree—No cause of action for a fresh suit—Parties—Vendor not a necessary party—Abatement of appeal—Representative of vendor not brought on record, no ground for.*—*Held*, that the sale by the decree-holder of a pre-emptional decree previously to his paying the decretal amount in Court does not give a cause of action for a suit of pre-emption, because the decree-holder sells not the property itself but merely the decree or his right to obtain the property by compliance with the conditions of the decree.

Pre-emption—continued.**—1.—General—continued.**

An appeal by the pre-emptor against a decree dismissing his suit for pre-emption does not abate by reason of representatives of the vendor not being placed upon record after his death, as the vendor is not a necessary party to the suit. **LASHKARI MAL v. ISHAR SINGH, 134 P.L.R. 1902=94 P.R. 1902.** [*R.*, 91 P.R. 1909; *Cited*, 133 P.R. 1907=84 P.W.R. 1907=88 P.L.R. 1903.]

(32)—*Suit for — Pre-emptor joining with himself as co-plaintiff one having no right of pre-emption — Joinder of parties—Civ. Pro. Code, ss. 26 and 31.*—A, who was entitled to a right of pre-emption, sued to enforce that right joining with himself as co-plaintiff K who had no such right. *Held*, that A did not thereby forfeit his right, but could maintain this suit. **ABDULLA v. WAHID-UN-NISSA, 1 O.C. 308.** (83 P.R. 1893, 94 P.R. 1895, *Select case*, No. 122, *Dissented from*). [*Diss.*, 5 O.C. 266; *R.*, 7 O.C. 22.]

(33)—*Civ. Pro. Code, s. 424—Notice to public officer—Vendor not necessary party in pre-emption suit—Dismissal of pre-emption suit for non-joinder of vendor—Objection as to want of notice under s. 424, to be taken only by Secretary of State—Money supplied for litigation in a pre-emption suit by third person—Cost of improvement—Cost of stamp paper required for sale-deed—Usufructuary mortgagee cannot plead his mortgage as a shield when he himself is purchaser—Charge, keeping alive of.*—The Deputy Commissioner, as Manager, Court of Wards, sold to the defendant certain villages one of which was previously held by him under a usufructuary mortgage, the amount of which was deducted from the sale-price. The plaintiff as under-proprietor claimed pre-emption. The defence was that the suit for pre-emption was not maintainable, because no notice under s. 424 had been given to the Deputy Commissioner, that the suit had been instituted with funds provided by a third man, the plaintiff being merely a nominal plaintiff acting on his behalf. The Deputy Commissioner raised no objection for want of notice under s. 424, *Civ. Pro. Code*. The defendant also claimed, in case plaintiff was allowed to pre-empt, certain amounts which he had spent in raising an embankment and improving the property and in purchasing the stamp paper for the sale-deed. He also contended that the plaintiff should not be allowed to get possession of the village previously held by the defendant under the usufructuary mortgage. *Held*, that the suit against the Deputy Commissioner was bad for want of notice under s. 424, *Civ. Pro. Code*, and should have been consequently dismissed as against him. But the suit was not liable to be dismissed as against the vendee, inasmuch as, under the circumstances, the vendor was not a necessary party. (25 A. 187, 3 A. 20, 25 C. 239, 9 O.C. 275, 26 A. 549, 6 A. 57, A.W.N. 1903, 239, 80 P.R. 1888, 134 P.R. 1889, *R.*) *Held*, also that the objection as the sufficiency of a notice under s. 424, *Civ. Pro. Code*, could only be

Pre-emption—continued.**—1.—General—continued.**

taken by the Secretary of State, for whose benefit the notice was intended. (1 C.L.R. 542, F.) *Held* further, that the suit was not liable to dismissal, simply because it was carried on with money supplied by a third person. *Held*, also, that the pre-emptor was not liable to pay the cost of improvements or of the stamp for the sale-deed. The only thing, which the pre-emptor could be ordered to pay, was the sale-price. *Held*, lastly, that the defendant, as purchaser of the equity of redemption, could not, in the absence of a special contract to the contrary set up his own previous mortgage as still subsisting. **BINDESHURI SINGH v. PANDIT BALRAJ SAHAI, 10 O.C. 49.** [R., 13 O.C. 241.]

(34)—*Pre-emption—Suit to enforce right of pre-emption—Parties—Vendor not a necessary party.*—*Held*, that in a suit for pre-emption the vendor is not a necessary party. **LOK SINGH v. BALWAN SINGH, A.W.N. 1903, 239.** (6 A. 57, F.)

(35)—*Vendee's representatives — Necessary parties—Limitation Act, s. 22—Dismissal.*—All the representatives of a deceased vendee and all persons in possession of his estate are necessary parties to the suit for pre-emption. Where even one representative is impleaded after time and the suit is barred as against him, it must be dismissed as against all. **SALAHU v. KAMMUN, 441 P.R. 1839.**

(36)—*Pre-emption—Mortgage by vendee after sale—Pre-emptor not bound by mortgage—Parties—Mortgagee not a necessary party in a pre-emption suit—Mortgagee bound by decree against vendee.*—*Held*, that a pre-emptor is not bound to pay anything more than the amount which is fixed in a pre-emption decree as the price at which the sale took place. A pre-emptor is not bound by a mortgage effected by the original vendee after the sale. The mortgagee in such case must look to his mortgagor alone. *Held*, also, that such a mortgagee is not a necessary party in a suit for pre-emption. As he holds the property under the vendee he is bound by a decree for pre-emption passed against the vendee. **DEO RAJ v. GOVIND PARSHAD, 55 P.W.R. 1912=91 P.L.R. 1912=13 Ind. Cas. 647.** (93 P.R. 1902, F.)

(37)—*Property sold subject to mortgage—Redemption of mortgage by vendee—Pre-emptor cannot claim to pre-empt equity of redemption only.*—Where property subject to a mortgage has been sold and the vendee has redeemed the mortgage before the institution of a suit for pre-emption, the pre-emptor cannot claim to pre-empt only the equity of redemption. He must pay the whole amount of the purchase money including the mortgage-money paid by the vendee, before he can be allowed to pre-empt the property. **SHAHBAZ KHAN v. FAZAL DIN, 74 P.W.R. 1912=43 P.R. 1912=13 Ind. Cas. 430=97 P.L.R. 1912.** (93 P.R. 1902, D.)

(38)—*Pre-emption, Suit for—Deposit of money in Court—Mortgage by pre-emptor in favour of*

Pre-emption—continued.**—1.—General—continued.**

vendee as security for payment of money.—In a suit for pre-emption the appellant obtained a decree for possession of certain property on condition that, within one month from the date of the decree, he deposited Rs. 825, and, on his failure to do so, it was ordered that his suit should stand dismissed, &c. The appellant paid no money into Court but he executed in favour of the vendee defendant a mortgage of the property as security for the payment of the Rs. 824 and the vendee notified to the Court that he had received the amount in that way. *Held*, that there was no order in the decree that the money on being deposited would be payable to the vendee. The condition was that the Rs. 825 should be deposited in Court and as no part of it was so deposited the appellant's suit was properly dismissed. **LALTA SINGH v. UMRAO SINGH, 5 O.C. 116.** [R., 8 O.C. 57.]

(39)—*Expiry of year of grace without payment of mortgage money, before Punjab Alienation of Land Act came into force—Mortgage by conditional sale—Extinguishment of mortgage.*—The subject of suit was a mortgage with a clause by way of conditional sale from a member of an agricultural tribe. The year of grace after notice of foreclosure had expired before the Punjab Land Alienation Act of 1900 came into force. *Held* s. 9 (3) of the Punjab Alienation of Land Act did not apply, the years of grace having expired before the introduction of that Act. *Held*, also that where a notice of foreclosure has been properly issued and served and all necessary rules are complied with and the money due on the mortgage is not paid within the year of grace, the title of the mortgagor becomes extinct at the expiry of the year of grace, and there is no longer any mortgage subsisting even though no suit for possession or declaration is brought. **NAHTU LAL v. JAFER, 20 P.R. 1905=77 P.L.R. 1905.** (26 P.R. 1902, 47 P.R. 1902, 38 P.R. 1904, 103 P.R. 1901, F.B., Cited & F.) [R., 20 P.R. 1905, Note, 10 P.R. 1907.] See also **MAHTEB MAL v. JEIMAL, 20 P.R. 1905, Note.**

(40)—*Pre-emption, law of—Consideration—Mortgage by conditional sale.—Law of pre-emption discussed.*—The law of pre-emption does not admit of the breaking up of the bargain of sale (6 A. 423, R.) Where pre-emption was claimed in respect of a mortgage by conditional sale, with reference to which foreclosure proceedings had been taken, a suit for possession had been instituted by the mortgagee and had ended in a compromise whereby half the property was released by the mortgagee and the other half was foreclosed for a price mentioned in the compromise, and the pre-emptive suit related to such latter half, *held* that the price payable by the pre-emptor was the amount mentioned in the compromise. **JAGAT SINGH v. RAM BAKSH, A.W.N. 1887, 233.** [Rel. on, 11 A. 164.]

(41)—*Foreclosure of mortgage — Mortgagee, amount to be paid to—Oudh Laws Act, s. 12—*

Pre-emption—continued.**—1.—General—continued.**

'Physical Possession'—*Limitation Act, sch. II, arts. 10 and 120.*—The defendant, who held a mortgage of certain properties under two deeds, obtained usufructuary possession in November 1889. The mortgage executed a deed of further charge in his favour. Subsequently the defendant obtained decrees for foreclosure in respect of the three deeds. In March 1892 he obtained possession in execution in respect of two deeds, and in November 1894 in respect of one deed. In April 1897 the plaintiff sued him for pre-emption. *Held*, that the suit fell not within art. 10 but within art. 120, sch. ii of the Limitation Act, and was not barred by time. 'Physical possession,' contemplated by art. 10, sch. ii of Act XV of 1877, is visible and tangible possession, and not merely such possession as the nature of the subject of sale allows. Under the provisions of s. 12, Oudh Laws Act, the mortgagee is entitled to be paid by the pre-emptor the costs properly incurred by him in obtaining a decree for foreclosure of the mortgage. *Held*, therefore, that the defendant was entitled to be paid the costs incurred by him in obtaining foreclosure decrees which were entered in those decrees. **RAJA RAGHURAJ SINGH v. RAJ RAGHUNATH SINGH, 3 O.C. 184.**

(42)—*Suits by two co-sharers with equal rights—Decree for a moiety in respect of each—Justice, equity and good conscience, applicability of rules of, in absence of statutory enactment.*—Where during the pendency of suit by one of two co-sharers, having equal rights of pre-emption, but before decree, the other co-sharer also brings a suit for pre-emption in respect of the same property, the Court should pass a decree for a moiety of the property in favour of each of the co-sharers in accordance with equity, justice and good conscience, the rules whereof are applicable in the absence of any statutory enactment. **SALIG RAM v. KALI SHANKER, A.W.N. 1905, 50=2 A.L.J. 690=27 A. 465. (7 A. 720, F.; A.W.N. 1886, 56, D.)**

(43)—*Sale to a stranger with the concurrence of a co-sharer—Purchase by the co-sharer concurring—Revesting—Suit for pre-emption maintainability of.*—The object of pre-emption is to keep strangers out of the co-parcenary body of a village, and to maintain the unity of the co-parcenary body. If, before pre-emption proceedings are instituted, the property has found its way into the hands of co-sharers, there is no reason for allowing pre-emption, which is, by the way, a very weak right. Where certain property was sold to a stranger, with the concurrence of two of the co-sharers, but, before the suit for pre-emption was instituted, they again purchased it, *held* that the suit could not be maintained. The fact, that the co-sharer concurring could not maintain a suit for pre-emption, does not preclude him from purchasing and setting up a revesting of the property in himself. **LIKAT HUSAIN v. RASHID-UD-**

Pre-emption—continued.**—1.—General—continued.**

DIN, 3 A.L.J. 794=A.W.N. 1906, 313=29 A. 125. (25 A. 421, R.) [Diss., 165 P.L.R. 1908=135 P.W.R. 1908.]

(44)—*Owner of plots of land in abadi, whether a co-sharer—Co-sharership, test of—Liability to be sold up for arrears of revenue—Right to pre-empt as a member of village community—Sale to a stranger without specification of shares.*—*Held* that, where a person is the owner of plots of land in the inhabited area of a village, he is to be deemed, for the purposes of pre-emption, a co-sharer in the village; as the test of co-sharership is whether the land held by him would be liable to be sold in case of a sale of arrears of Government revenue. (10 O.C. 86, Appr.; 26 A. 57, P.C., 16 A. 412; R.; 28 A. 246, Not F.) *Held*, further, that such a person could in any case be allowed to pre-empt as a member of the village-community. (7 O.C. 19, R.) *Held*, also that, where in a purchase a co-sharer associates with himself a stranger and there is no specification of the shares acquired by each of them, the co-sharer loses his preferential right to purchase and the whole property sold is liable to pre-emption. **AULA HUSAIN v. MUSAMMAT ZAINAB-UN-NISSA, 10 O.C. 225. (7 O.C. 22, F.) [R., 11 O.C. 290.]**

(45)—*Suit for—Oudh Laws Act, 1876, s. 9, cls. (2) and (3)—Revenue free land, suit for pre-emption, with respect to—Nazul or Government land held revenue free, whether constitutes a mahal with the rest of the village—Co-sharer, test of being a—Village-community, member of, claim decreed as—Estoppel, elements necessary to be proved in order to constitute.*—The respondent brought a suit for pre-emption with respect to 25 and odd bighas of revenue free land situate in mauza C. The land formed part of an area of 126 and odd bighas recorded at the first settlement as Nazul or Government land, for which no revenue was payable, and which had been sold by the Government to a private individual. After various transfers the appellant "Bank purchased the land at an auction sale held in execution of its own decree, and subsequently sold it to the appellant S without giving the respondent, a sharer in the village, notice in the manner prescribed by s. 10 of the Oudh Laws Act. The respondent claimed to pre-empt both as a sharer in the village and as a member of the village-community under second and third clauses of s. 9 of the Oudh Laws Act. The defence was that the respondent was not entitled to pre-empt the property either under the second or under the third clause of s. 9, and that he was estopped from making the claim as he had refused to purchase the property when it was offered to him by the Bank. *Held*, that, as the land in suit was not in any way responsible for the revenue assessed upon the village, the respondent and the Bank were not co-sharers of the same mahal, and, therefore, the respondent could not claim to pre-empt the property under the second clause of s. 9 of the Oudh Laws Act, but

Pre-emption—continued.**—1.—General—continued.**

that the respondent could pre-empt the property as a member of the village-community under the third clause of s. 9 and that it was not necessary that the vendor should be a member of the village-community. *Held* also, after reviewing the evidence, that no case for estoppel had been made out. **BANK OF UPPER INDIA v. MUNSHI ALOPI PRASAD**, 10 O.C. 257. (5 O.C. 395, R.)

(46)—*Grove-holder—Owner of land on which a grove stands, a co-sharer—Government revenue, non-payment of—Co-sharer, meaning of—Oudh Laws Act, s. 9.—Held*, that the owner of a plot of land in the village, on which there stands a grove, for which no Government revenue is paid, is a co-sharer, for the purposes of pre-emption, within the meaning of the Oudh Laws Act. **RAM KISHUN v. NADIR HUSEIN**, 10 O.C. 86. (7 O.C. 284, R.; 28 A. 246, Diss.) [Appr., 10 O.C. 225; R., 11 O.C. 290.]

(47)—*Pre-emption—Owner of grove land unassessed to Government revenue, whether a co-sharer.—The owner of a grove land unassessed to Government revenue is not a co-sharer and has got no right of pre-emption, although the grove land appeared in the village khewat in a khata of its own.* **AMIR SING v. AKBAR**, 11 Ind. Cas. 21. (A.W.N. 1905, 264, 2 A.L.J. 788, 28 A. 124, R.; A.W.N. 1905, 219, 2 A.L.J. 612, D.)

(48)—*Zemindari and grove—Grove not appurtenant—Separate Court-fee not paid—Dismissal of suit in respect of grove only.—Plaintiff brought a suit for pre-emption of a zemindari share and a grove, which was said to be appurtenant thereto, and paid Court-fee on five times the Government revenue on the zemindari share. The Courts below found that the grove was not appurtenant to the zemindari and dismissed the suit as insufficiently stamped, no Court-fee having been paid on the grove. Held*, that the suit should not have been dismissed *in toto*, but only in respect of the grove, if it was found that it did not appertain to the zemindari. **ROHAN SINGH v. BHAU LAL**, 4 A.L.J. 403 = A.W.N. 1907, 163.

(49)—*Pre-emption—Limitation—Oral sale—Subsequent unregistered and registered sale deeds—Oral evidence to prove unregistered deed—Oral evidence to contradict document—Indian Evidence Act, 1872, ss. 91, 92.—The plaintiff's claim for pre-emption was dismissed by the Divisional Court, as barred by limitation. It was found that previous to the registered sale deed in 1895, oral sale of the land in dispute had been effected in 1892, and the defendants had been in possession ever since. A sale deed was also executed on the 22nd July 1893 but it was not registered. Held*, that the right of pre-emption accrues as soon as a sale is complete, whether a deed is executed or not; and the suit was not barred. *Held*, further, that though the unregistered sale-deed was inadmissible in

Pre-emption—continued.**—1.—General—continued.**

evidence, the fact of the sale, though not the terms, could be proved *aliunde*, under s. 91, explanation 3, Evidence Act, 1872. The sale deed recited that the transfer was made in pursuance of a previous contract of sale; *held*, that it was competent for the defendants to show that the recital was wrong. **MUTSADDI v. DHANI RAM**, P.L.R. 1900, p. 203.

(50)—*Pre-emption—Mortgage or sale—Evidence Act (I of 1872), ss. 92 and 99—Evidence to contradict the terms of a document.—A pre-emptor is not precluded by s. 92 of the Evidence Act from showing that an ostensible mortgage was in reality a sale. Held* that transactions where the form of a mortgage appears to have been adopted with the object of evading a pre-emption claim, must be looked with great suspicion. **KHOIDAD KHAN v. NASAR KHAN**, 127 P.L.R. 1902.

(51)—*Suit for—Notice, inadmissibility of oral evidence of—U.P. Act XVIII of 1876, s. 10 (Oudh Laws Act)—Oral offer of sale—Waiver.—In a suit for pre-emption the defendant pleaded that the plaintiff was given verbal notice of the sale of the property in suit, but she refused to purchase it. Held*, that mere omission or refusal to accept an oral offer of sale does not, of itself and without some positive act of the pre-emptor by way of discharging the vendor, constitute a waiver of the right of pre-emption, or dispense with performance of the obligation to serve a written notice. *Held* further, that oral evidence of notice prescribed in s. 10, Act XVIII of 1876, is inadmissible. The doctrine of notice discussed. **MARYAM BEGAM v. TIKA**, 1 O.C. 254. (Select Case No. 305 considered.) [R., 5 O.C. 395.]

(52)—*Pre-emption, suit for—Contract of sale of property, existence of—Mortgage-deed with stringent terms no evidence of a transaction of sale.—What a plaintiff in a pre-emption suit has to make out is that there is in existence a contract for sale of property by virtue of which a third person, whose right to acquire the property is inferior to that of the plaintiff, has obtained a right to acquire. (9 O.C. 169, R.) Where the plaintiff sued to enforce his right of pre-emption, alleging that the transaction carried on between the defendants was in reality a sale and that the deed in question had been drawn up fraudulently in the form of a mortgage in order to conceal the real nature of the dealings between the parties and thereby to defeat the plaintiff's right of pre-emption, held*, that, in the absence of all evidence explaining the nature of the transaction, a Court is not justified in finding that the mortgage-deed furnished evidence of a transaction of sale, merely because its terms were so stringent, as to make it highly improbable that redemption would ever take place. **BADRI SINGH v. CHANDIKA SINGH**, 15 O.C. 1 = 14 Ind. Cas. 8 (3 O.C. 213, 145 P.R. 1906, 45 P.R. 1895, R.)

Pre-emption—continued.**—1.—General—continued.**

(53)—*Pre-emption—Construction of document—Question of law—Value at the time of sale.*—*Held*, that in a suit for pre-emption the Court is competent to enquire and find the true nature of the document, subject of the suit, and the construction of the document is a mixed question of law and fact. *Held*, further, that where the market value of the property has increased since the date of sale, the pre-emptor is not bound to pay the enhanced value if it was not due to any improvements effected by the vendee. *YUSAF v. LEKH RAM*, P.L.R. 1900, p. 462.

(54)—*Pre-emption—Wajib-ul-arz—Interpretation of document—Custom or contract.*—In a suit for pre-emption, the *wajib-ul-arz* of 1863 provided that no case of transfer by mortgage had taken place in the village, but that in future every proprietor would be competent to transfer his share either in whole or in part by way of sale or mortgage, and this was followed by the clause "*awalek dusre ke intekal kar sakta hai.*" No evidence was produced other than the *wajib-ul-arz*: *Held*, that the entry was a record of contract and not of custom. *HARDWARI MAL v. BALDEO SAHAI*, 8 A.L.J. 632. (7 A.L.J. 1040, D.; 37 I.A. 191, R.)

(55)—*Partition of village, effect of—Custom not liable to modification.*—A custom must not be merely ancient, but it must be continued, uninterrupted, uniform, certain and definite. A custom is not capable of an abrupt, automatic change and is not liable to modification by the fact of the partition of the village. A village, the *wajib-ul-arz* of which gave a right of pre-emption to the co-sharers of the village over strangers, was divided into three *mahals* and no new *wajib-ul-arz* was prepared for any *mahal*. The co-sharer in one of the *mahals*, purchased a share in the other *mahal*, in which plaintiff was a co-sharer; *held* that the plaintiff had no right of pre-emption. By partition, the custom had either ceased to exist or still prevailed. In both cases, the plaintiff could not succeed. If it ceased, there was no right of pre-emption. If it still prevailed, the defendant was entitled to pre-empt under it. *GOBIND RAM v. MASHULLA KHAN*, 4 A.L.J. 137=A.W.N. 1907, 39=29 A. 295. (22 A. 1, R.; 1 A.L.J. 33, not F.) [R., 31 A. 274=6 A.L.J. 180=2 Ind. Cas. 208, 5 Ind. Cas. 659, 7 A.L.J. 133=6 Ind. Cas. 17=32 A. 265, 7 A.L.J. 519=6 Ind. Cas. 151; D., 6 A.L.J. 958=32 A. 63=4 Ind. Cas. 138.]

(56)—*Custom—Pre-emption—Presumption—Town and village—S. 10, Act IV of 1872 (Punjab Law)—Una, Hoshiarpur Dt.*—The distinction drawn in the Act is not between agricultural land and non-agricultural land, but between land in village and land in town. In a town, even as regards assessed and cultivated land, the custom of pre-emption is not to be presumed, but must be proved. As the place Una in Hoshiarpur district was certainly a town, when it was an emporium for the trade of the hills years ago, it must be considered as

Pre-emption—continued.**—1.—General—continued.**

a town and, therefore, a custom of pre-emption must be proved to exist there. *HARJALLU MAL v. NATHU RAM*, 51 P.R. 1907=38 P.L.R. 1907. (22 P.R. 1906 and 27 P.R. 1907, R.)

(57)—*Pre-emption—Wajib-ul-arz—Evidence—Custom or contract.*—In a pre-emption suit based on custom, the plaintiff produced the *wajib-ul-arz* of 1867. This document provided for pre-emption, but in the very same clause it went on to provide for every class of transfer. It provided that the property of a deceased owner should be divided amongst his sons according to the number of wives; it further provided that, if a widow did not marry again, she should have complete power to transfer: *Held*, that this was quite insufficient to establish the custom of pre-emption set up by the plaintiff. *KHAIRATI KHAN v. UMDA*, 11 Ind. Cas. 316. (37 I.A. 191, 14 C.W.N. 770, 7 A.L.J. 764, 12 C.L.J. 36, 12 Bom. L.R. 504, 8 M.L.T. 79, 1 M.W.N. 324, 20 M.L.J. 604, 32 A. 363, 7 Ind. Cas. 787, R.)

(58)—*Pre-emption—Custom or contract—Evidence*—In the *wajib-ul-arz* of 1833, there was a mention of the right of pre-emption, but the *wajib-ul-arz* of 1860 was silent about it. The land in suit was waste in 1803. In the Settlements of 1807, 1809, 1813, the village was owned by a single proprietor. Between 1833 and 1860, the proprietors rebelled and the village was resumed by the Government: *Held*, that no custom of pre-emption existed in the village. *LALLU RAM v. RAM GHULAN SAHU*, 11 Ind. Cas. 46.

(59)—*Pre-emption—Evidence of custom—Custom need not be immemorial.*—In order that a custom of pre-emption may be held to be established, it is not necessary to show that the custom is immemorial, in the sense of the English Common Law. Hence where in a village which came into existence after 1846 there was found in 1869 evidence of a custom of pre-emption amongst the co-sharers, and further evidence of such a custom in 1885, it was *held*, that the custom was sufficiently established for the Courts to give effect to it. *LAKHRAJ BHARTHI v. ANRUDH TIWARI*, A.W.N. 1906, 80=28 A. 434. (17 A. 87, A.W.N. 1905, 266, 26 B. 666, F.)

(60)—*Pre-emption—Wajib-ul-arz—Partition of the village—Rights of co-sharer in the patti and in the village—Custom.*—A custom cannot change, but a person who is entitled to pre-empt under the custom prior to partition may lose that right as the result of the partition. Before the partition of a village, the vendor, the vendee and the pre-emptor were co-sharers in the same *patti* or *thok*, and the *wajib-ul-arz* gave a right of pre-emption, (1) to brothers who were co-sharers, (2) to co-sharers in the same *patti* or *thok*, and (3) to co-sharers in another *patti* or *thok*. After partition no new *wajib-ul-arz* was prepared. As the result of partition, the vendor and the pre-emptor became co-sharers in the same *mahal* but in a

Pre-emption—continued.**—1.—General—continued.**

different *patti*, while the vendee became a co-sharer in another *mahal*: *held*, that the plaintiff was entitled to pre-empt under the terms of the *wajib-ul-arz*. **PEM SINGH v. DHARAM SINGH, 8 A.L.J. 1013=12 Ind. Cas. 177.**

(61)—*Pre-emption—Value—Valuation committee—Wajib-ul-arz—How far evidence.*—In a suit for pre-emption, the Court should not form its own opinion of the proper price of the land; according to the terms of para 12, s. 13 of the Punjab Civil Code, the matter must be referred to a valuation committee. In the absence of special custom, the fact that the *wajib-ul-arz* only deals with the right of relations as to pre-emption does not deprive others of the community of the general right of pre-emption which vests in them under the Punjab Civil Code; and in such cases the Courts must decide which party has the best right of pre-emption according to relationship, vicinage, being of the same *thok*, and so forth. **GOOMANEE v. RUHEEMOODDEEN, 35 P.R. 1870. [Appr., 3 P.R. 1903=39 P.L.R. 1903.]**

(62)—*Wajib-ul-arz—Co-sharer—Owner of resumed muafi land.*—The pre-emptive clause of a *wajib-ul-arz* contained the following provision:—“*Minjumla malikon ke agar koi hissadar apni haqqiat bai karne chahne to awal dusre hissadar sharik haqqiat ki hath bai karega.*” This clause occurred in a chapter headed “conditions which apply to zamindars only.” *Held* that the ownership of resumed *muafi* land did not confer upon the owner a right of pre-emption as a *hissadar*. **MUNNA LAL v. NARAIN PRASAD, A.W.N. 1907, 173=4 A.L.J. 665. (20 A. 419, A.W.N. 1902, 68, A.W.N. 1904, 118, 28 A. 246, R.)**

(63)—*Wajib-ul-arz—Muhammadan Law.*—Where the right of pre-emption arises not by reason of the Muhammadan Law, but by reason of the custom or contract embodied in the *wajib-ul-arz*, it is the *wajib-ul-arz*, and not the Muhammadan Law that is to be looked into for the rules which must be observed by the pre-emptor. **GAURI SHANKAR v. KARIMA BIBI, 15 A. 413=A.W.N. 1893, 178.**

(64)—*Pre-emption—Wajib-ul-arz—Custom or contract—Variation in terms of wajib-ul-arz—What plaintiff must prove.*—In a suit for pre-emption based upon custom, the plaintiff adduced in evidence three *wajib-ul-arzes*, of the years 1839, 1863 and 1870 respectively. He alleged that he was a co-sharer with the vendor in the same *kura*, while the defendant, though a co-sharer, was not in the same *kura*. The *wajib-ul-arz* of 1839 stated that the co-sharers in the village had a right of pre-emption as against a stranger. In the second *wajib-ul-arz* the pre-emptors are divided into near co-sharers and co-sharers in other *thoks*. And in the last *wajib-ul-arz* the pre-emptors were near

Pre-emption—continued.**—1.—General—continued.**

co-sharers, co-sharers in the *thok* and co-sharers in the village. *Held*, that the variations in the terms of the *wajib-ul-arz* did not show that the right of pre-emption arose out of a contract. The real issue in the case was the existence or non-existence of a custom of pre-emption. The several *wajib-ul-arzes* could not be regarded as the custom itself; they were merely the evidence of a custom. The custom might be recorded in the latter *wajib-ul-arz* the earliest and the intermediate ones being incomplete records. The plaintiff would have to prove not merely that a custom of pre-emption existed in the village giving a right of pre-emption to a co-sharer as against a stranger, but also that he had the right as against the vendee as soon as the latter's position was ascertained. **DIP NARAIN SINGH v. BHAGWANT SINGH, 8 A.L.J. 1070=12 Ind. Cas. 179.**

(65)—*Appeal under s. 10 of the Letters Patent from a Letters Patent appeal—Whether allowed—Pre-emption—Wajib-ul-arz—Custom or contract—Partition of village—No new wajib-ul-arz framed—Hissadar deh—Meaning of—Construction of document.*—An appeal lies under s. 10 of the Letters Patent from the opinion of Judge who has differed from his colleague in an appeal under the same section. The *wajib-ul-arz* of an undivided village gave a right of pre-emption, first, to a near co-sharer (*hissadar karib*) and then to a co-sharer in the village (*hissadar deh*). Subsequently the village was divided by perfect partition into *mahals*. No new *wajib-ul-arz* was prepared. In a suit for pre-emption by the co-sharers in one of the *mahals* consequent upon a sale of property situated in another *mahal* to a stranger:—*Held*, that the right might be enforced notwithstanding the partition. Meaning of the words ‘*deh*’ and ‘*mahal*’ discussed by *Karamat Husain, J.* **JIWAN RAM v. TONDI RAM, 8 A.L.J. 1072=11 Ind. Cas. 305=34 A. 13.**

(66)—*Pre-emption—Wajib-ul-arz—Hissadar karibi—Nearness in blood—Construction—Preferential right.*—In a village there was no *thok* nor *patti* but there was only one *khata*. In the *khata*, however, there were separate groups of co-sharers whose members collected their share of the profits as a group. The *wajib-ul-arz* of the village set forth that at the time of transfer the property was first to be offered to a nearer co-sharer (*hissadar karibi*). Relying upon this document alone, the plaintiff, who was a blood relation of the vendor, brought this suit for pre-emption against the vendee who was otherwise on equal footing with him. *Held*, that the plaintiff had no preferential right to pre-empt. **JAGDATT MISRA v. DALTHAMAN, 11 Ind. Cas. 286.**

(67)—*Pre-emption—Wajib-ul-arz—Rishtadar Karibi—Connection by marriage.*—The *wajib-ul-arz* of a village gave a right of pre-emption to a *Rishtadar Karibi* who was also a sharer. The plaintiff, who was a connection by marriage of the vendor, brought this suit for pre-emption

Pre-emption—continued.**—1.—General—continued.**

against a vendor, who was no relation of the vendor. *Held*, that the relationship was too remote to give the plaintiff a right of pre-emption. **FAKHRAN BIBI v. NAGESHAR RAM**, 9 A.L.J. 84=13 Ind. Cas. 954.

(68)—*Pre-emption—Right of—Custom or contract—Wajib-ul-arzes—Question not of construction but of proof.—(Per Richards, C.J.)—*In pre-emption cases based on custom, the proper issue ought to be “does the custom alleged by the plaintiff-pre-emptor exist.” The onus lies on the plaintiff and he must establish his case by the production of sufficient evidence. The proper issue is not what is the true construction of this or that *wajib-ul-arz*. No doubt it is quite true that the Court will have to consider amongst other things the language of the *wajib-ul-arz* when that document is adduced in evidence. But the fact that the Court has to consider the language of the *wajib-ul-arz* does not make the construction of the *wajib-ul-arz* the real issue, or the equivalent of the real issue in the case. This is not a mere verbal distinction. It is a real distinction which ought to be carefully borne in mind. After considering the evidence (whether such evidence consists solely of the *wajib-ul-arz*, or partly of the *wajib-ul-arz* and partly of other evidence) it is the duty of the Court to come to a conclusion whether the fact of the existence of custom is “proved,” “disproved” or “not proved,” in the sense in which these expressions are defined in s. 3 of the Evidence Act. The more unusual a custom or usage is, the stricter ought to be the proof of its existence, and this rule applies to customs or usages of pre-emption just as much as to any other custom or usage. If the custom claimed is of a common or usual nature, the *wajib-ul-arz* may be sufficient proof and justify the Court in coming to the conclusion that the custom exists. If the particular right of pre-emption claimed is of an unusual nature, the *wajib-ul-arz* may be almost worthless as evidence or quite insufficient to prove the existence of the custom. In 1873, *mauza Suram* constituted a single *Mahal*. The *wajib-ul-arz* of that date contained the following reference to pre-emption:—“In future if any *pattidar* wishes to transfer his share by sale . . . to a stranger . . . first the sharers in the *pattikhas*, then *pattidars* in *thok*, and then “*digar pattidaran deh*” shall have the right to purchase.” In 1883, perfect partition took place and *mauza Suram* was divided into three separate *Mahals*. A copy of the *wajib-ul-arz* on partition was copied out as the *wajib-ul-arz* for each of the new *Mahals*. Plaintiffs were not co-sharers of the vendor, that is to say, they were not co-sharers in the same *Mahal*, though they were sharers in another *Mahal*. The vendees were strangers. The only evidence, excepting some oral evidence which was quite worthless, tendered in proof of the custom of pre-emption, consisted of the two *wajib-ul-arzes* of 1872 and 1883. *Held*, that the custom under which the plaintiffs claimed could not be said

Pre-emption—continued.**—1.—General—continued.**

to have been proved. The custom in 1873 was a custom for sharers in the village to pre-empt as against strangers. But in 1873 every sharer in the village must also have been a co-sharer with the vendor, because the village was the one single *Mahal*. It follows that there could never have been a custom of pre-emption in favor of persons who were not co-sharers with the vendor (22 A. 1, R.; 27 A. 602, 27 A. 614, *commented upon*). *Held* also that the plaintiffs could not rely upon the *wajib-ul-arz* of 1883 as evidence of a contract, as they were no parties to it, the *wajib-ul-arz* relating to a *mahal* in which the plaintiffs were not co-sharers and had no concern. *Per Tudball, J.* The custom as recorded in 1873 did not and could not refer to the state of affairs as they now are, when there are *pattidars* in the village who are not co-owners in a great part of the village with each other. The record of the custom in 1873 must be read in the light of the then existing state of affairs in order that its true meaning may be grasped. The object of the custom, the cause of its growth and existence, must also be kept in view. Co-ownership is ordinarily a necessary condition for the exercise of the right of pre-emption. It is, however, conceivable that a custom of pre-emption might possibly spring up among the separate owners of separate *Mahals* or villages for some special reasons. It would be an unusual, extraordinary custom, and the person alleging it would have to prove it by clear, cogent and convincing evidence. A *wajib-ul-arz* is not conclusive evidence of any custom, and where a plaintiff puts forward such an unusual custom and cannot point to a single instance of its exercise within the memory or knowledge of man, the Court will be fortified in holding that the plaintiff had not proved the custom. In the case of an unusual and extraordinary custom (other than that of pre-emption) in which no instances are proved of the exercise thereof, the Courts have hesitated to hold that a custom is proved by the bare production of one or more *wajib-ul-arzes*; and there is no reason why the same rule should not apply to the very unusual and extraordinary custom under which a plaintiff, who is not a co-sharer in the *Mahal* and is not a co-owner with the vendor in anything, claims a right to prevent a man selling his property to whomsoever he pleases. **GANGA SINGH v. CHEDI LAL**, 8 A.L.J. 996=12 Ind. Cas. 98.

(69)—*Pre-emption—Decree for—Payment of decretal amount into Court by pre-emptor—Sale declared invalid as against reversioner of vendor—Order allowing withdrawal of purchase money—Appeal—Civ. Pro. Code (Act XIV of 1882), s. 244 (c).—*The pre-emptors obtained a decree for pre-emption against the vendor and the vendee. The purchase-money directed by the decree to be paid to the vendee was deposited in Court. Subsequently a reversioner of the vendor obtained a decree declaring that the sale was without necessity, and did not affect his rights except in respect of a part of

Pre-emption—continued.**—1.—General—continued.**

the purchase-money, both the vendee and the pre-emptors applying that their names might be taken off the record. The pre-emptors then put in a petition, asking that their purchase-money should be returned to them as they no longer wished to go on with the purchase, since their decree of pre-emption had been superseded by the declaratory decree. The Court ordered refund of the money. On appeal the Divisional Judge declined to interfere, on the ground that procedure for paying money into Court in pre-emption cases was not procedure in execution of a decree, and that he had no jurisdiction to hear an appeal from such an order. On appeal to the Chief Court—*Held*, that the effect of the original Court's order was to deprive the vendee of his money which he was entitled to under a decree of Court, and the order fell within the scope of cl. (c) of s. 244 of the Civ. Pro. Code, and that an appeal lay from it as if from a decree. *Held*, also, that the vendee was entitled to a refund of the money paid over to the pre-emptors. **ABDULLA v. AMIR-UD-DIN, 113 P.L.R. 1902=76 P.R. 1902. (19 A. 256, 46 P.R. 1902=49 P.L.R. 1902, 7 A. 775, R.)**

(70)—*Chief Court "Rules and Orders" — F. XXX (3) and (4)—Pre-emption suit—Pleader's fee—Method of calculating.*—Pleader's fee in a suit for pre-emption should be calculated under cl. (4) and not under cl. (3) of r. XXX of the Chief Court "Rules and Orders," i.e., with reference either to the amount decreed, or according to the valuation of the suit, or according to such sum, not exceeding the valuation, as the Court thinks reasonable, and fixes with reference to the importance of the subject of dispute. **BALU v. MADAN GOPAL, 149 P.L.R. 1911.**

(71)—*Punjab Courts Act (XVIII of 1884), s. 70 (1) (b)—Further appeal—Pre-emption suit Jurisdiction—Value during pendency of suit.*—*Held*, that a defendant's action *pendente lite* cannot affect the value of the suit. For the purposes of jurisdictional value for an appeal in a pre-emption suit, the value of improvements effected during suit should not be included. **LAL HUSSAIN v. HASSA KHAN, 68 P.W.R. 1912=96 P.L.R. 1912=13 Ind. Cas. 428.**

(72)—*Payment of purchase-money by pre-emptor into Court—Decree in favour of pre-emptor—Withdrawal of purchase-money by vendee, effect of—Vendee's right of appeal—Punjab Courts Act, 1884, s. 70 (2) (b) IV.*—There is no provision in the Civ. Pro. Code, which would justify a dismissal of an appeal in a pre-emption suit, merely because the appellant has withdrawn the purchase money paid into Court for his benefit. The appellant (judgment debtor) having been compelled by process of Court to part with possession, if he received its equivalent as a part of the execution proceedings, it cannot even be inferred that, by withdrawing the purchase-money, he

Pre-emption—continued.**—1.—General—continued.**

acquiesced in the decree passed by the lower Court and thereby accepted its validity. Nor can the judgment-debtor be thereby intended to abandon his appeal. Where an appeal is admitted under s. 70 (b) IV of the Punjab Courts Act, 1884, the appellant is not entitled to question the validity or soundness of the findings of facts given by the lower Appellate Court. The question, whether a deed of transfer purporting to be a mortgage-deed is in reality such a deed or a sale, is a question of fact, and not of law. **SUNDER DAS v. DHANPAT RAI, 16 P.R. 1907=104 P.L.R. 1908=127 P.W.R. 1907.**

(73)—*Suit to enforce right of pre-emption—Withdrawal from suit of one of the pre-emptors—Effect—S.373, Civ.Pro. Code, 1882.*—The scope of every pre-emptive suit is necessarily co-extensive with the whole property which has been sold and is subject to the plaintiff's pre-emption. And where a suit for enforcing a right of pre-emption is brought by more than one pre-emptor, the claim is necessarily a joint one, and each pre-emptor must be taken to claim the whole jointly with the other. The withdrawal of one of such pre-emptors, plaintiffs, from such a suit cannot operate to defeat the right of the others, nor does it involve the relinquishment of pre-emption with reference to any portion of the property sued for. **UDEY RAM v. MAULA, A.W.N. 1885, 189.**

(74)—*U. P. Act XVIII of 1876, s. 9, cls. (1) and (2)—Co-sharers—Act XIX of 1873, s. 3 (N.W.P. Land Revenue Act)—Act XVIII of 1876, s. 687—Held*, that an arrangement by which the co-sharers agree to collect portions of the rent of one tenant does not amount to a "sub-division of a tenure" within the meaning of s. 9, Act XVIII of 1876. In s. 3, Act XIX of 1873, N.W.P. Land Revenue Act, "mahal" is defined as "any local area held under a separate engagement for the payment of the land-revenue and for which a separate record of rights has been framed." There is no definition of a "mahal" in Act XVIII of 1876. "Imperfect partition" is defined in s. 68 of that Act to mean "the division of any mahal, or of any portion of a mahal into two or more portions jointly responsible for the revenue assessed on the whole mahal." such portions are usually described as "*thoks and nattis*." **DURGA SINGH v. DALIP SINGH, 1 O.C. 45.**

(75)—*Right of pre-emption—Limitation—Purchase at fair price.*—A sold certain land to B, in which C claimed a right of pre-emption. B applied to the Financial Commissioner for mutation of names. Within three months and thirteen days from the date of that order, C brought the present suit claiming pre-emption. *Held* that though more than three months had elapsed from the date of the Commissioner's order, still, as C had asserted his claim on the date of the application for mutation of names, he was not barred. There was nothing to show that C refused the offer, for though he objected

Pre-emption—continued.**—1.—General—continued.**

to the price, he expressed his willingness to purchase at a fair price. **BURKUT ALI v. BIRJA, 74 P.R. 1866.** [R., 108 P.R. 1868.]

(76)—*Suit for pre-emption—Valuation for purposes of jurisdiction—Court Fees Act—Actual value of subject-matter of litigation.*—In the matter of determining the pecuniary jurisdiction of a Court, the Court Fees Act does not give any measure of value as it does for fixing the stamp, and the Courts have to be guided by the actual value of the subject matter of litigation as they determine it to be according to fact. In a pre-emption suit, it would be incorrect to say that the value of the suit is simply the value of the land or the amount decreed. In such a suit, the claim is to buy the land, not to recover it on the strength of title or any other reason. The value of such a suit is the value of the land minus the sum which the pre-emptor has to pay for it. **RAM DITTA v. MOHAMED KHAN, 62 P.R. 1875.** [R., 54 P.R. 1878.]

(77)—*Pre-emption suit—Meaning of "hissadar"—Proprietor of share by purchase.*—The meaning of the term co-parcener or 'hissadar' could not be restricted so as to exclude the proprietor of a share by purchase, since one of the objects of the custom of pre-emption, that is, the exclusion of a stranger, was secured when preference was given to a person who was a co-sharer over a stranger even if such person was not of the same brotherhood as the other co-sharers. **BIHARI LALL v. SHIBU, 42 P.R. 1880.** (4 P.R. 1869, F.) [R., 96 P.R. 1898.]

(78)—*Pre-emption on sale of house—Act IV of 1872, s. 12 (as amended by Act XII of 1878)—Relationship—Custom.*—When the rights of parties to a suit for pre-emption are governed by the express provisions of s. 12 of Act IV of 1872 (as amended by Act XII of 1878), it is only in cases falling under the provisions of cl. (b) of that section, that mere relationship gives a preferential right. As there is no express provision giving to relations such a right, other than the provision in cl. (b), it cannot be inferred from the mere mention of a relation in cl. (c) that relationship *per se*, and apart from all other considerations, is a ground for claiming pre-emption. Consequently, cl. (b) of that section is not applicable when the subject of pre-emption is a house in a *Bhyachara* village. It is the duty of Courts to make a full enquiry as to the existence of any custom by which a relation or a neighbour has a preferential right in case of a sale of house property in such a village. **NIZAM DIN v. ROSHAN, 54 P.R. 1880.** [D., 99 P.R. 1900.]

(79)—*Punjab Laws Act, s. 11, construction of—Mohulla—Pre-emption—Custom.*—A mohulla is a sub-division of a town within the meaning of s. 11 of the Punjab Laws Act, 1872, as amended by Act XII of 1878; and a person claiming to exercise a right of pre-emption in a particular Mohulla of a town is bound to prove

Pre-emption—continued.**—1.—General—continued.**

the existence of that custom in the Mohulla. **AJUDIA PERSHAD v. CHIRANJI LAL, 55 P.R. 1880.** [Appr., 17 P.R. 1895, 70 P.R. 1899, 16 P.R. 1902=15 P.L.R. 1902; R., 68 P.R. 1890; D., 29 P.R. 1888.]

(80)—*Pre-emption—Purchaser of land in village—Member of village community—Punjab Laws Act (IV of 1872), s. 14, cl. 3.*—A purchase followed by registration, possession, mutation and payment of revenue, makes the purchaser a member of the village community within the meaning of cl. 3, s. 14 of Act IV of 1872; and, consequently, such purchaser is entitled to claim pre-emption and is entitled to a decree so long as the sale to him is not cancelled and set aside. **RADHA KISHEN v. SANDAL, 76 P.R. 1880.**

(81)—*Pre-emption—Limitation—Mortgage by conditional sale—Foreclosure proceedings under Reg. XVII of 1806—Failure by mortgagor to pay within year of grace—Mortgagee's suit for declaration of absolute title—Sale of property by father—Right of pre-emption of son—Custom—Punjab Laws Act, s. 12.*—In the case of foreclosure of a mortgage by way of conditional sale, the period of limitation for a suit for pre-emption in respect of such sale should be computed from the date on which the mortgagee has completed his title by obtaining a decree of a Civil Court declaratory of his absolute right, and not from the expiry of the year of grace allowed to the mortgagor. [Diss., 103 P.R. 1901, F.B.=120 P.L.R. 1901, 20 P.R. 1905, Note.] Amongst the Sikh Jats (of the *Varaich Got*) in the Punjab, the expression "*co sharer*" in cl. (a), s. 12 of the Punjab Laws Act (as amended) cannot be held to include a son or grandson unless he has actually been associated as such by the ancestor in possession, nor could a son, merely by means of relationship and in the absence of any separate proprietary interest in the village claim pre-emption, under cl. (c) of the same section. If any special custom which recognizes a son as possessing the rights of a co-sharer in his father's lifetime or which gives him a superior claim to pre-emption as a *Karabati*, or near relation, is alleged to exist amongst such community, the parties should produce evidence to prove its existence or non-existence. **SHER SINGH v. IMAMMULLA, 82 P.R. 1880.** [Appr., 100 P.R. 1900=11 P.L.R. 1901.]

(82)—*Sale of house in town—Pre-emption—Custom.*—In all town cases, the general custom is that only the person whose house actually adjoins has a right of pre-emption, and it will require very strong evidence to prove a further custom of pre-emption by which relations can also claim the right in the order of relationship. As the right of pre-emption is a serious check on the free disposal of property, such right founded on new grounds should only be allowed on very full proof of its prevalence. There is no custom in the town of Gujrat, by which a paternal uncle's son of a vendor (a

Pre-emption—continued.**—1.—General—continued.**

Mahomedan brick-mason), whose house was divided from that sold by two intervening houses, was entitled to preference over a purchaser who was the vendor's sister's son. **NABI BAKSH v. KARM DIN, 83 P.R. 1880.**

(83)—*Pre-emption decree—Extension of time fixed in the decree.*—*Held*, that a Court cannot extend the time granted by a pre-emption decree for the payment of the purchase-money after the time fixed by the decree has expired. **BACHCHU LAL v. RAJA RAM, 16 O.C. 5=19 Ind. Cas. 347.**

(84)—*Pre-emption—Consideration—Onus on plaintiff to prove that sale consideration is fictitious.*—In a pre-emption suit, it is for the plaintiff to show in the first instance that the consideration set forth in the deed is fictitious. He should prove either what is the actual contract price or what is the market-value of the property. **SAKALRAJ DUBE v. UDIT DUBE, 14 Ind. Cas. 158. (29 A. 618, A.W.N. 1907, 202, 4 A.L.J. 531, 9 A. 471, R.)**

(85)—*Pre-emption—Right of substitution.*—The right of pre-emption is a right of substitution. A pre-emptor has the right to be substituted for the vendee, subject to all the rights and liabilities created by the terms of the sale deed. **CHEDDA LAL v. BASDEO SAHAI, 14 Ind. Cas. 266. (30 A. 130, 5 A.L.J. 112, A.W.N. 1908, 42, 3 M.L.T. 223, F.)**

(86)—*Pre-emption—Limitation—Rival pre-emptors, suits between—Pre-emptor impleaded as defendant in the suit of rival pre-emptor after the expiry of period of limitation for a suit against vendee—Punjab Pre-emption Act (II of 1905), ss. 25, 29—Limitation Act (IX of 1908), sch. I, arts. 10, 120.*—In pre-emption suits brought by rival pre-emptors in respect of the same sale, in which each pre-emptor is impleaded as a defendant in the suit instituted by the other, the period of limitation, as between the rival pre-emptors, is that prescribed by art. 120 of the Limitation Act, and not that prescribed by art. 10 of the Act or s. 29 of the Punjab Pre-emption Act (7 A. 167, 11 P.R. 1893, 20 P.R. 1903, *relied upon*.) S. 29 of the Pre-emption Act only covers the case of a contest between the original vendee and the pre-emptor; it does not contemplate a case in which, several rival pre-emptors having brought separate suits in respect of the same sale, the plaintiff in each suit is joined as a defendant in each of the other suits. A brought a suit for pre-emption against the original vendee within one year from the date on which the vendee took possession of the land in dispute. B brought a suit to pre-empt the same land against the vendee on the last day of limitation. In the former suit, B was impleaded as a defendant after the expiry of the period of limitation prescribed for a suit against the original vendee, but within six years from the date of vendee's possession: *Held*, that A's

Pre-emption—continued.**—1.—General—continued.**

suit for pre-emption was not barred by limitation as against B. **ILAH BUX v. MOHAMAD RAB NOWAZ KHAN, 14 Ind. Cas. 328=186 P.W.R. 1912=80 P.R. 1912.**

(87)—*Pre-emption—Custom or contract—Proof.*—A custom of pre-emption should, like any other custom, be proved by clear and sufficient evidence. **BIDHATA RAM v. RAM CHERI, 15 Ind. Cas. 251.**

(88)—*Pre-emption—Property sold subject to mortgage—Redemption of mortgage by vendee—Pre-emptor cannot claim to pre-empt equity of redemption only.*—Where property subject to a mortgage has been sold and the vendee has redeemed the mortgage before the institution of a suit for pre-emption, the pre-emptor cannot claim to pre-empt only the equity of redemption. He must pay the whole amount of the purchase-money, including the mortgage money paid by the vendee, before he can be allowed to pre-empt the property. **SHAHBA KHAN v. FAZAL DIN, 43 P.R. 1912=13 Ind. Cas. 430=74 P.W.R. 1912=97 P.L.R. 1912. [93 P.R. 1902, D.]**

(89)—*Pre-emption—Payment of large sum before registration of sale-deed—Consideration.*—*Held*, that, where, in the case of sale of immoveable property subject to pre-emption a large sum of money, *e.g.*, Rs 500, is alleged to have been paid probably without a receipt one day before registration of the deed of sale, a very strong evidence to prove its payment is required and mere oral testimony of witnesses especially who happen to be personal friends of the vendee is not sufficient to rebut the presumption that fictitious items are very often entered in the sale-deeds with a view to defraud the pre-emptors. **BHIKU MAL v. NANAK CHAND, 134 P.W.R. 1912=16 Ind. Cas. 495.**

(90)—*Pre-emption—Vendee drawing money deposited by pre-emptor in Court—Appeal, right of, if affected by such withdrawal—Pre-emption suit about land—Jurisdiction value less than Rs. 5,000 under rules—Decree given on payment of more than Rs. 5,000—Appeal from such decree, whether lies to the Divisional Court or to the Chief Court.*—*Held*, that a vendee-appellant in a pre-emption case is not precluded from proceeding with his appeal against the pre-emption decree, merely because he withdraws from the Court the purchase-money deposited by the pre-emptor in pursuance of the pre-emption decree. (16 P.R. 1907=127 P.W.R. 1907, F.) *Held*, also, that, in a pre-emption suit relating to land of which the value for purposes of jurisdiction under the Suits Valuation Act is less than Rs. 5,000, but in which a decree has been passed by the Court of first instance on payment of more than Rs. 5,000, an appeal lies to the Divisional Court and not to the Chief Court. **IFTIKHAR ALI v. THAKAR SINGH, 170 P.W.R. 1912=83 P.R. 1912=15 Ind. Cas. 347. (16 P.R. 1908=18 P.W.R. 1907, 58 P.R. 1902, D.)**

Pre-emption—continued.**—1.—General—continued.**

(91)—*Valuation of suit—Appeal—Jurisdiction—Pre-emption suit.*—*Held*, that, for purposes of determining the course of appeal in a pre-emption suit, the value for purposes of jurisdiction must only be looked at, and not the amount which the pre-emptors may have to pay. *GUJAR v. FATTEH JANG*, 201 P.W.R. 1912=225 P.L.R. 1912=15 Ind. Cas. 407. (170 P.W.R. 1912=15 Ind. Cas. 347, *F.*; 16 P.R. 1908=73 P.W.R. 1907, *F.B.*, 38 P.W.R. 1908, *F.B.*, *D.*)

(92)—*Pre-emption—Joint purchase—Sale when divisible—Burden of proving divisibility on vendee—Vendee joining stranger with him in sale, effect of—Punjab Pre-emption Act II of (1905), ss. 11, 12—Limitation—Lower appellate Court wrongly returning appeal for presentation to Chief Court—Appeal then presented to Chief Court—Transfer of appeal by Chief Court to its own file.*—In order that a sale may count as divisible, the mere specification in the sale deed of the shares of each vendee in the property sold is not sufficient, and a vendee who claims that the sale is divisible must show that, as a matter of fact, his purchase was a distinct and separate purchase. A vendee who joins a stranger with him in the sale cannot claim any status higher than that of his co-vendee. Where one of two rival pre-emptors is a member of an agricultural tribe, while the other is qualified under the proviso to s. 11 of the Punjab-Pre-emption Act, both are eligible to compete under s. 12 of that Act. An appeal was presented within the period of limitation to the Divisional Court. But that Court, taking a wrong view of the jurisdiction value, returned it for presentation to the Chief Court, where it was filed after the period of limitation had expired. *Held*, that, as the appeal was presented in time to the Divisional Court, it was not barred. To save further delay and trouble, the Chief Court, instead of returning the appeal for presentation to the Divisional Court, treated it as transferred from that Court to its own file. *KHOTA RAM v. MAUJ DIN*, 276 P.W.R. 1912=16 Ind. Cas. 979.

(93)—*Pre-emption—Limitation—Transferee from vendee added as defendant—Starting point of limitation—Nature of claim—Parties—Limitation Act, 1908, s. 22 sch. I, arts. 10, 120.*—*Held*, that where, in a suit for pre-emption instituted within limitation against the original vendee, a transferee from the original vendee (by assignment of a date previous to the date of the institution of the suit) is added as a defendant after limitation has expired as against the original vendee the claim as against the transferee is governed not by art. 10, Limitation Act (1908) but by art. 120, and the starting point of limitation is the date of the transfer made by the original vendee in favour of the transferee. (25 P.R. 1903, 107 P.R. 1907=99 P.W.R. 1907, *overruled*; 13 Ind. Cas. 645=9 A.L.J. 211, *F.*) *Held*, also that (1) art. 10 applies only to a suit against the original purchaser under the sale sought to be

Pre-emption—continued.**—1.—General—continued.**

impeached and takes no cognizance of the second vendee to whom the subject of the first sale has been transferred subsequently. (2) The second vendee not being a party to the sale sought to be pre-empted, no cause of action accrues to the pre-emptor as against him by reason of that sale. *Held*, further that (1) a right of pre-emption which is sought to be enforced by a pre-emptor by suit always arises in respect of a particular sale which furnishes him with a definite cause of action; the only parties against whom he has that cause of action are the parties to the sale sought to be impeached, and a subsequent transferee from the original vendee is not directly concerned in or affected by the suit for pre-emption as originally brought: (2) The suit as regards the second vendee added as a defendant cannot be regarded as a suit for pre-emption. *KARAM DAD v. ALI MUHAMMAD*, 28 P.W.R. 1913, *F.B.*=61 P.L.R. 1913=31 P.R. 1913=18 Ind. Cas. 70. (6 P.R. 1909=7 P.W.R. 1909=1 Ind. Cas. 91, 11 P.R. 1893, 84 P.R. 1911=270 P.W.R. 1911=13 Ind. Cas. 792, *R.*)

(94)—*Pre-emption—Conditional decree—Deposit in Court of the decretal amount excepting costs of the suit—Sufficient compliance.*—Where a pre-emptor deposited in Court the sum he was required to pay by the decree to the vendee, less the costs awarded to him, *held* that he had completely complied with the order of the Court. *ALI HUSAIN v. AMIN ULLAH*, 10 A.L.J. 153=15 Ind. Cas. 337=34 A. 596.

(95)—*Pre-emption—Decree ordering payment within a certain time Payment not made—Appeal whether maintainable.*—In a suit for pre-emption, the decree for possession was made conditional upon the plaintiff paying the purchase-money into Court within one month. The plaintiff appealed against the condition laid down by the first Court. The month expired during the pendency of the appeal and the money was not deposited. The appellate Court dismissed the suit on the ground that the condition had not been fulfilled: *held* that the condition itself having been the subject of appeal, the suit should not have been dismissed on that ground. *KURSHED-UN-NISSA v. ALIM-UN-NISSA*, 10 A.L.J. 421.

(96)—*Pre-emption—Pre-emptive clause—How far binding on heirs—Rule against perpetuities how far applicable to such contracts.*—A pre-emptive clause that 'in the event of my selling, I shall sell it to you' is not binding on the heirs of the covenantor. An agreement to convey is not enforceable when the option to sell is exercised by the heirs when the document says 'if I sell.' A mere personal contract cannot be questioned on the ground that it is obnoxious to the Rule of Perpetuity. But a contract which gives the promisee an executory interest in land is subject to the rule of perpetuities, even though there is no distinction in India

Pre-emption—continued.

—1.—General—continued.

between legal and equitable estates. *KOTATHU IYER v. RANGA VADHYAR*, M.W.N. 1913, 163 = 24 M.L.J. 84 = 13 M.L.T. 179 = 18 Ind. Cas. 203.

See PUN. ACT IV OF 1872, s. 9, 16 P.L.R. 1901.

Custom of, in respect to houses exists in *Taraf Ravi*, sub-division of Multan City—See PUN. ACT IV OF 1872, s. 11, 85 P.L.R. 1907.

See PUN. ACT IV OF 1872, s. 12 (a), 18 P.L.R. 1902 = 111 P.R. 1901, 103 P.L.R. 1904 = 94 P.R. 1904.

See PUN. ACT IV OF 1872, s. 12 (b), 95 P.L.R. 1904.

See PUN. ACT IV OF 1872, s. 13, 22 P.R. 1901.

See PUN. ACT XVIII OF 1884, s. 39, 88 P.L.R. 1901 = 32 P.R. 1901.

Right of, where pre-emptor and vendee are co-sharers—See PUN. ACT II OF 1905, ss. 2, cl. (3) and 14, 83 P.R. 1907.

Creation of occupancy rights—Pre-emption—See PUN. ACT II OF 1905, ss. 4, 5, 121 P.L.R. 1911.

Suit for—Member of the same agricultural tribe as vendor entitled to pre-emption over a mere "agriculturist"—See PUN. ACT II OF 1905, s. 11, 101 P.R. 1907 = 70 P.W.R. 1907 = 174 P.L.R. 1908.

Pre-emptor executing an agreement to sell his own property—Effect—See PUN. ACT II OF 1905, ss. 13 (1) Seventhly and 13 (2) (a), 93 P.W.R. 1911.

Where no right exists to sue for—Vendor having no proprietary or under-proprietary right in land occupied by the house sold—See U.P. ACT XVIII OF 1876, s. 7, 4 O.C. 26.

Suit for—See U.P. ACT XVIII OF 1876, Ch. II, s. 9, 4 O.C. 365.

Suit for—See U.P. ACT XVIII OF 1876, s. 9, cls. (1) & (2), 7 O.C. 129.

See U.P. ACT XVIII OF 1876, s. 9, cl. (3), 24 A. 420 = A.W.N. 1902, 106.

See U.P. ACT XVIII OF 1876, ss. 9, 10, 11, 13, 2 O.C. 9.

Suit for—Market-value, when necessary to determine—See U.P. ACT XVIII OF 1876, ss. 10, 11, 12, 13, 10 O.C. 179.

Suit for—Court fixing price at fair market-value if fictitious price entered in sale-deed—Price to be paid by the pre-emptor when fictitious price entered in sale-deed—See U.P. ACT XVIII OF 1876, Ch. II, s. 13, 4 O.C. 158.

See APPEAL—ORDERS, 13 A. 189, F.B., 16 A. 126 = A.W.N. 1894, 3.

Conditional pre-emption decree—See APPEAL—ORDERS, 13 A. 376, F.B.

Pre-emption—continued.

—1.—General—continued.

See APPEAL—MISCELLANEOUS, A.W.N. 1888, 22.

Sale of separate divided share in a survey number—See BERAR LAND REVENUE CODE, ss. 4 and 205, 3 N.L.R. 135.

Transfer by co-occupant of divided share in a survey number partly for cash and partly in exchange for other land—Right of pre-emption—See BERAR LAND REVENUE CODE, ss. 69, 205, 3 N.L.R. 138.

Suit for—See BERAR LAND REVENUE CODE, ss. 206, 211, sub-s. 1, cl. (a), 3 N.L.R. 84.

See BUDDHIST LAW—ANCESTRAL PROPERTY, L.B.R. 1872—1892, 39.

See CIV. PRO. CODE, 1908, s. 11, O. II, rr. 1, 2 A.W.N. 1881, 163.

Money paid on pre-emption decree—Amount increased on appeal—Suit for refund of money paid by assignee of right—See CIV. PRO. CODE, 1908, s. 47, 10 A. 354 = A.W.N. 1883, 57.

See CIV. PRO. CODE, 1908, s. 104, O. XLIII, r. 1, ss. 106, 105, 140 P.L.R. 1904 = 14 P.R. 1904.

Owner of grove land not assessed to revenue cannot resist co-sharer's suit for—See CIV. PRO. CODE, 1908, O. I, r. 8 (1), 4 A.L.J. 541 = A.W.N. 1907, 239.

See CIV. PRO. CODE, 1908, O. XIV, rr. 1, 2 and 5, A.W.N. 1887, 247.

See CIV. PRO. CODE, 1908, O. XX, r. 14, 20 M. 305, A.W.N. 1895, 13.

Suit for—Sale of property in court auction—See CIV. PRO. CODE, 1908, O. XXI, r. 80, A.W.N. 1888, 208.

Pre-emption suit—Dismissal of suit on one finding—Finding reversed by appellate Court—Decree without considering defendant's objections to other findings—Effect—Revision—See CIV. PRO. CODE, 1903, O. XLI, r. 22, 202 P.L.R. 1911.

See COSTS—SPECIAL CASES, A.W.N. 1884, 34.

Suit for pre-emption of separate plots of land not being a fractional of a revenue paying unit—See COURT FEES ACT, 1870, ss. 5, 7, ces. v (d) vi, A.W.N. 1894, 174.

Appeal by purchaser—See COURT-FEES ACT, 1870, s. 7 (1) and (VI), 6 A. 488 = A.W.N. 1884, 179.

See COURT FEES ACT, 1870, s. 7, cls. v (d) VI, 16 A. 493 = A.W.N. 1894, 124, 6 P.R. 1883.

Suit for—On transfer of equity of redemption, of house—See COURT-FEES ACT, 1870, s. 7, cl. (VI), 123 P.L.R. 1903.

See CUSTOM, 2 Agra, 120, 3 Agra, 75.

See CUSTOMS—PUNJAB—ALIENATION, 72 P.L.R. 1904.

Pre-emption—continued.—1.—**General**—continued.

See DECREE—DECREE, CONSTRUCTION OF, 1 A. 132, A.W.N. 1886, 300.

Pre-emption—Conditional decree—Civ. Pro. Code. 1877, s. 214—Computation of period specified for payment of purchase-money—period ending on a holiday—See DECREE—DECREE, CONSTRUCTION OF, 3 A. 850=A.W.N. 1881, 100.

Decree—Omission to declare effect of non-payment of price—Limitation—See DECREE—DECREE, CONSTRUCTION OF, 14 A. 529=A.W.N. 1892, 106.

Suit for—Deposit of purchase-money—Appellate Court, powers of—See DECREE—DECREE, FORM OF, 2 A. 744.

See DECREE—DECREE, FORM OF, 3 A. 753=A.W.N. 1881, 54, 6 A. 370=A.W.N. 1884, 119.

See DEED—CONSTRUCTION OF DEEDS, A.W.N. 1886, 278.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 104 P.R. 1882, 155 P.R. 1882, 131 P.R. 1890, 139 P.R. 1894.

See ESTOPPEL—MISCELLANEOUS, 121 P.R. 1889.

Proof of custom of pre-emption—See EVIDENCE—DECREES, JUDGMENTS, AND PROCEEDINGS IN SUITS, 2 Agra, 120.

Pre-emption suits—Decree in former suits—Evidence of custom—See EVIDENCE—DECREES, JUDGMENTS AND PROCEEDINGS IN SUITS, 10 A. 585=A.W.N. 1888, 242.

Authority of settlement officer to make entry as to pre-emption—Probative value of entry—See EVIDENCE ACT, 1872, s. 35, 25 A. 90=A.W.N. 1902, 207.

See EXECUTION OF DECREE—APPEAL, REVIEW ETC., EXECUTION OF DECREE AFTER, 11 A. 346=A.W.N. 1889, 127.

Pre-emptor denying *locus standi* of deceased vendee's sons to appeal—Whether he can give them a *locus standi* to execute his decree—Estoppel—See EXECUTION OF DECREE—MISCELLANEOUS, 174 P.L.R. 1911.

See HINDU LAW—WIDOW, A.W.N. 1895, 84.

Widow in possession of immoveable property by family arrangement with strict conditions against alienation—See HINDU LAW—WIDOW, A.W.N. 1895, 85.

See INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 3 A. 610, F.B.

See JOINDER OF CAUSES OF ACTION, 17 A. 274=A.W.N. 1895, 76.

See JOINDER OF PARTIES, 80 P.R. 1888, 42 P.R. 1891, 29 P.R. 1894, 102 P.R. 1894, 19 P.R. 1898.

Pre-emption—continued.—1.—**General**—continued.

Suit for, of Revenue paying land—Incompetency of Court to give decree for possession on payment of amount exceeding its pecuniary jurisdiction—See JURISDICTION OF CIVIL COURTS, 79 P.W.R. 1907.

Claim for, of revenue paying land—Powers of Court—See JURISDICTION OF CIVIL COURTS, 73 P.W.R. 1907=16 P.R. 1908=146 P.L.R. 1903.

See JUSTICE, EQUITY AND GOOD CONSCIENCE, 8 P.R. 1893.

See LANDOWNER, 7 P.R. 1896.

Suit for pre-emption—Pleader's fee—Principle of assessment—See LEGAL PRACTITIONERS—PLEADER—REMUNERATION, 1 A. 709.

Pleader's fees, how to be calculated in a suit for—Oudh Civil Digest, para 288, r. 4—Decree, amendment of—Civ. Pro. Code, s. 206—See LEGAL PRACTITIONERS—PLEADER—REMUNERATION, 7 O.C. 43.

Mortgage by way of conditional sale—See LIMITATION—GENERAL, 120 P.L.R. 1901=103 P.R. 1901.

Pre-emption, suit for—Sale by vendee to stranger—Latter not made party—Expiry of period of limitation—Effect—See LIMITATION—GENERAL, 84 P.R. 1911.

See LIMITATION ACT, 1908, s. 12, A.W.N. 1883, 4.

Suit for—Valuation—Appeal—Jurisdiction—See LIMITATION ACT, 1908, s. 14, 163 P.W.R. 1911=11 Ind. Cas. 880=244 P.L.R. 1911.

Pre-emption suit—Sale ostensibly in favour of one person—Real purchaser another person—Active concealment—Fraud—Limitation—See LIMITATION ACT, 1908, s. 18, 156 P.L.R. 1911=10 Ind. Cas. 114=186 P.W.R. 1911=89 P.R. 1911.

See LIMITATION ACT, 1908, s. 18, 120 P.R. 1883, 27 P.L.R. 1903.

Suit for pre-emption—Fraudulent concealment of sale by purchaser—Fraud—Assignment of immoveable property by husband to wife in lieu of dower—Sale—See LIMITATION ACT, 1908, s. 18, 86 P.R. 1902.

See LIMITATION ACT, 1908, s. 18, art. 10, A.W.N. 1882, 7.

See LIMITATION ACT, 1908, s. 28, art. 10, 20 M. 305.

See LIMITATION ACT, 1908, art. 120, 4 A. 414=A.W.N. 1882, 83, 5 A. 187=A.W.N. 1882, 212, 14 A. 405, F.B.=A.W.N. 1892, 108, A.W.N. 1886, 69, 7 O.C. 1.

See LIMITATION ACT, 1908, ART. 182—MISCELLANEOUS, 47 P.R. 1898.

See LISPENDENS, 102 P.R. 1888.

Pre-emption—continued.**—1.—General**—continued.

See MALABAR LAW—MORTGAGE, 5 M. 198, 13 M. 490, 15 M. 480=2 M.L.J. 231, 1 M.L.J. 485.

Suit for—Mortgage of right in the property sought to be pre-empted—Mortgagee obtains a charge—Valid mortgage—See MORTGAGE—GENERAL, 4 A.L.J. 57=A.W.N. 1907, 7=29 A. 163.

See MORTGAGE—FORECLOSURE, 6 A. 344=A.W.N. 1884, 110.

Malabar Law — Othidar's right of—See MORTGAGE—REDEMPTION, 17 M.L.J. 329=2 M.L.T. 354=30 M. 388.

See MORTGAGE—REDEMPTION, 22 A. 238=A.W.N. 1900, 49.

Suit for—Limitation—Dispute as to share sold—Amendment of plaint beyond limitation—See PLAINT—AMENDMENT OF PLAINT, 8 A.L.J. 636.

Suit for pre-emption—Error in plaint in extent of property claimed—Power of Court as to amendment—See PLAINT—AMENDMENT OF PLAINT, 17 A. 288=A.W.N. 1895, 80.

Ground of—in plaint—See PLAINT—AMENDMENT OF PLAINT, 1 B.L.R. S.N. 126=10 W.R. 189.

Suit for pre-emption—Amendment of plaint as to price at last stage—Court may refuse—See PLAINT—AMENDMENT OF PLAINT, 1 A. 591.

See PLAINT—REJECTION OF PLAINT, 12 A. 553=A.W.N. 1889, 185.

See POSSESSION—EVIDENCE OF POSSESSION AND TITLE, 4 B.L.R. App. 21.

Suits by rival pre-emptors—Final decision in one suit operates as res judicata in the other—See RES JUDICATA—ADJUDICATIONS, 104 P. L.R. 1903.

Suit for—Appeal filed beyond time owing to erroneous advice given by pleader—"Sufficient cause," for admitting appeal filed beyond time—Limitation Act, s. 5—See RES JUDICATA—ADJUDICATIONS, 5 O.C. 384.

See RES JUDICATA—MATTERS IN ISSUE, A.W.N. 1881, 47, A.W.N. 1889, 175.

Different pre-emption suits regarding sale of same property—Appeal in one suit—Res judicata—See RES JUDICATA—MISCELLANEOUS, 1 A.L.J. 466.

See RES JUDICATA—MISCELLANEOUS, 26 A. 61, F.B.=A.W.N. 1903, 196.

See REVISION—GENERAL, 179 P.L.R. 1901=21 P.R. 1902.

See SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL, 8 A. 172, F.B.=A.W.N. 1886, 35.

Pre-emption—continued.**—1.—General**—concluded.

See SUITS VALUATION ACT, 1887, s. 11, 2 O.C. 103, 173 P.L.R. 1903=74 P.R. 1903, Note.

See TRANSFER OF PROPERTY ACT, 1882, ss. 54, 60, 24 M. 449.

Suit for pre-emption—See VALUATION OF SUITS, 38 P.L.R. 1902.

Value of suit stated in plaint—Pre-emption suit—See VALUATION OF SUITS, P.L.R. 1900, 538.

Suit for pre-emption—Valuation of suit—See VALUATION OF SUITS, 3 B.L.R. App. 143=14 W.R. 230, Note.

Suit for—Valuation of suit appeal—Transfer of appeal—See VALUATION OF SUITS, 215 P. L.R. 1908.

See VENDOR AND PURCHASER—BREACH OF WARRANTY, 4 A. 357=A.W.N. 1882, 67.

See VENDOR AND PURCHASER—MISCELLANEOUS, 5 A. 324, F.B.=A.W.N. 1883, 51, 17 A. 451=A.W.N. 1895, 103.

—2.—Construction of Wajib-ul-arz.

(1)—Mahomedan law—Wajib-ul-arz.—Differing from pre-emption under the Mahomedan law, pre-emption under a *wajib-ul-arz* is most frequently stipulated to arise on occasions of temporary alienations by way of mortgage, as well as on occasions of absolute alienation. Under the ordinary *wajib-ul-arz*, the parties admit that by agreement or otherwise they have no right to alien to a stranger unless an offer has before alienation been made by the co-parcener desirous of aliening to the other co-parceners, which they have refused to accept. Under the Mahomedan law, the right does not accrue until the sale has been actually made; according to some authorities too, pre-emption under the Mahomedan law is confined to property in towns, such as houses and garden or small walled enclosures, and to such property only; while the *wajib-ul-arz* deals principally with the holdings of the agricultural community. If no clear expression is found that the parties intended that the Mahomedan right of pre-emption should be recorded as prevailing, and if, on the contrary, the records indicate a course differing from the requirements of the Mahomedan law to be pursued by the vendor and the would be purchaser, then, the stipulations of the *wajib-ul-arz* and those stipulations alone are to be regarded, and the Court must pass its decree with reference to the proof afforded that those stipulations have or have not been performed. It is a condition precedent to right to a decree in a suit for pre-emption, that the claimant makes known his intention of purchasing or making the mortgage with reasonable diligence on the conveyance becoming known to him. CHOWDHREE BRIJ LALL v. RAJAH GOOR SUHAI, Agra F.B. 128. [R., 5 A. 110, 9 A. 513, 12 A. 234, 28 A. 590=3 A.L.J. 338=A.W.N. 1906, 144.]

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

(2)—*Muhammadan law, when applicable.*—Where the *wajib-ul-arz* defines and declares what the custom is and the mode in which that custom is to be exercised and regulated, viz., that the right of pre-emption vests primarily in the co-sharer *ek-jaddi*, and secondly in the co-sharer of the village, and, as to both of them, there is the proviso that they must give the same price for the property sold as a stranger was prepared to give, *held* that a suit for pre-emption brought by an admitted co-sharer against a stranger, was to be decided according to the special custom defined in the *wajib-ul-arz* and not according to the general custom recognised by the Muhammadan law. **JASODA NAND v. KANDHAIYA LAL, 13 A. 373 = A.W.N. 1891, 136. (9 A. 513, D.)**

(3)—*Wajib-ul-arz—Construction of documents—Muhammadan law.*—The pre-emptive clauses of a *wajib-ul-arz* contained the following provision:—"The zamindar of the *khalsa* is one person; hence there is no custom of pre-emption in the *khalsa*; but among the owners of the *khalsa* and *milks* the following customs of pre-emption obtains." The *khalsa* subsequently came to have more owners than one. *Held* that no right of pre-emption was given by this *wajib-ul-arz* to the owners of the *khalsa* *inter se*, but that a sale of a share in the *khalsa* was subject to the Muhammadan law of pre-emption, and this irrespective of the fact that the vendee was a Hindu. **RAM LAL v. BAHADUR ALI, A.W.N. 1908, 153=30 A. 372=5 A. L.J. 414. (7 A. 775, 22 A. 102, 19 A. 466, R.)**

(4)—*Pre-emption—Wajib-ul-arz, suit on—Parties found to have equal rights—Mahomedan Law—Importing incidents of.*—Where pre-emption is claimed on the basis of a *wajib-ul-arz*, whether the *wajib-ul-arz* records a custom or a contract, no incidents not mentioned in the record ought to be imported into it, unless the manifest intention of the parties is that they should be so imported. Plaintiffs sued on the basis of a *wajib-ul-arz*. It was found that both parties had equal rights of purchase. The plaintiffs argued that, the parties being Mahomedans and both parties being equally entitled to purchase, they were entitled to get a decree for half the property. *Held* that, the case being a case on the basis of a *wajib-ul-arz*, no incidents of Mahomedan Law, not mentioned in it, could be taken into consideration. **MUHAMMAD SALIM v. SARDARUD-DIN BEG, 7 A.L.J. 660=7 Ind. Cas. 263.**

(5)—*Wajib-ul-arz—Custom of pre-emption—Specification in the first wajib-ul-arz—Custom mentioned in the second wajib-ul-arz without specification—Muhammadan Law.*—Where the *wajib-ul-arz* of 1864 gave a right of pre-emption to near brethern &c., and at the settlement of 1883 the *wajib-ul-arz* prepared only mentioned that the custom of pre-emption was accepted; *held*, that the custom referred to was a custom as recorded in the *wajib-ul-arz* of 1864 and not

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

a custom under the Muhammadan Law. **POKHAR SINGH v. MUHAMMAD HUSSAIN KHAN, 3 A.L.J. 451=A.W.N. 1906, 205=28 A. 679.**

(6)—*Pre-emption—Custom or contract—Interpretation of document—Wajib-ul-arz—Variation of language—Regulation VII of 1822.*—In a suit for pre-emption, *wajib-ul-arzes* of 1833 and 1869 were produced; the preamble to the former was worded thus:—"Having well understood the following matters we willingly accept them;" it then dealt with the right of pre-emption in the following terms, "mode of sale or transfer of whole or part of share," giving the right of pre-emption to co-sharers as against strangers, and concluded with the words: "therefore we write this *ikrarnama* so that it may be of use in future." The *wajib-ul-arz* of 1869 provided that "near co-sharers and other pattidars would have the right of pre-emption. Preference amongst them would be according to degrees of nearness:"—*Held* (Stanley, C.J. dissenting), the *wajib-ul-arzes* contained the record of custom and not of contract. *Per Stanley, C.J.*:—A custom to be binding must be unaltered, uniform, constant and definite. If the settlement of 1833 recorded a custom, then the co-sharers in the village at the time of the later settlement of 1869 must be deemed to have abrogated it and to have adopted by agreement the right of pre-emption which is recorded in the later *wajib-ul-arz* as more suitable to the then existing conditions. The variance in the rights as defined in the two *wajib-ul-arzes* leads to the conclusion that the right recorded in 1869 cannot be treated as a right existing by custom. *Per Knox and Chamier, JJ.*—The word *igrar* does not necessarily mean a contract. It means ratification or assent. *Per Chamier, J.*—In construing a *wajib-ul-arz*, one must have regard to the document as a whole and bear in mind the law and instructions, if any, under which, and the circumstances in which, the document was prepared. The history of the preparation of these *wajib-ul-arzes* shows that there is a strong presumption that what is entered in them regarding pre-emption is the record of a custom. There is not necessarily any contradiction between the two *wajib-ul-arzes*. The earlier gives the right of pre-emption to co-sharers, so also does the later. It is incontestable that, if the earlier *wajib-ul-arz* were the only record of the custom, oral evidence might be given to supplement it; and the later *wajib-ul-arz* being presumably more correct may be relied upon to supplement the earlier. The provisions of Regulation VII of 1822, discussed by Knox, J. **RETURAJI DUBAIN v. PAHALWAN BHAGAT, 7 A.L.J. 1040, F.B.=7 Ind. Cas. 680.**

(7)—*Pre-emption—Custom or contract—Preamble of wajib-ul-arz—Variation.*—The use of the word "agreement" in the preamble clause of a *wajib-ul-arz* and a slight variation in the pre-emptive clauses of the two successive

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*cld.***

wajib-ul-arzes are not sufficient to establish that the document records only a contract of pre-emption. **LALA NARASINGH PRASAD v. SHIVA TAHAL RAI, 7 Ind. Cas. 573.**

(8)—*Pre-emption—Wajib-ul-arz—Effect of preamble—Variation in terms—Custom or contract.*—The preamble of the *wajib-ul-arz* of a mahal for 1860 opened with the words:—"We willingly and with full understanding subscribe to what follows." The *wajib-ul-arz* then recorded: "This is our ancestral zemindari and its settlement has been made with us. Hence willingly and having understood, we write down the following clauses and shall act according to them." The right of pre-emption was thereafter given to certain co-sharers. *Held* that the record was a record of custom and not of contract, inasmuch as the rules prevailing at the time directed the Settlement Officer to record a custom which he found existing in the village. The *wajib-ul-arz* of 1833 provided as follows:—"Whoever from among us wishes to transfer either the whole or part of his share by means of sale or mortgage, it is proper that he should give information to the shareholders of the village—the sale or mortgage to be at the price appointed. In the event of a proper price not being taken or given, it is in his power to transfer to whom he likes." The terms contained in the *wajib-ul-arz* of 1860 ran as follows:—"Every shareholder is empowered to transfer his share, and at the time of transfer it will be proper that first he should give information to his near shareholders, and, in the event of their refusing, to other shareholders of the village and sell or mortgage at the proper price." *Held* that there was no real or substantial difference between the terms of the two *wajib-ul-arzes*. The record of 1833 recorded the custom in brief and general terms, the record of 1860 set out the custom in greater detail. **HUB LAL TEWARI GANGA SAHU, 7 A.L.J. 519=6 Ind. Cas. 151. [F., 6 Ind. Cas. 704, 7 Ind. Cas. 573; Appr., 7 A.L.J. 1040=7 Ind. Cas. 680; D., 6 Ind. Cas. 839.]**

(9)—*Wajib-ul-arz—Construction—Contract—Custom.*—In 1862 the co-sharers of a village filed an agreement, which was to take effect "*la miad bandobast*" and which contained a record of a right of pre-emption; but at a subsequent settlement the right of pre-emption was recorded as a prevailing custom. *Held*, that the subsequent *wajib-ul-arz* should be read together with the former and that the record of the right of pre-emption should be taken as a record of contract. **KESHO RAM v. AJUDHIA NATH, 6 A.L.J. 9=1 Ind. Cas. 82. [R., 3 Ind. Cas. 640.]**

(10)—*Pre-emption—Wajib-ul-arz—Partition—No new wajib-ul-arz—Custom or contract—Interpretation of document.*—Where, in a suit for pre-emption, the *wajib-ul-arz* of the settlement of 1863 contained the provisions as to pre-emption in the words "for the future, if any *Khewatdar* wishes to sell or mortgage,

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*cld.***

etc.," and the *wajib-ul-arz* of the settlement of 1890 contained the clause "whatever customs exist in the village they are to be found entered in the *wajib-ul-arz* prepared at the last settlement," there being no new *wajib-ul-arz* framed upon partition of the village in 1896 subsequently to the second settlement, *held*, that the provisions made at the first settlement in regard to pre-emption was the recital of a contract, and the significant silence of the latest *wajib-ul-arz* in regard to any right of pre-emption showed that the co-sharers did not wish to keep up the contract. **TOTA v. SHEO NARAIN, 6 A.L.J. 715=3 Ind. Cas. 534. [Overruled, 31 A. 533=6 A.L.J. 779=3 Ind. Cas. 2.]**

(11)—*Wajib-ul-arz—Construction of document—Custom or contract.*—The chapter of a *wajib-ul-arz* dealing, amongst other matters, with pre-emption commenced with a general heading applicable alike to relations based upon custom or upon contract, but the special heading of the clause relating to pre-emption was:—"Das-tur dar-bab haq shafa." *Held* that this imported a custom and not a contract (A.W.N. 1907, 308, D.) *Held*, also, that a custom securing to co-sharers a right of pre-emption at a fixed price per bigha, without reference to the actual price paid by a stranger, was a custom the enforcement of which, when proved, could not be refused. **HUSAIN ALI v. MUHAMMAD UMAR, A.W.N. 1908, 98. (10 A. 621, A.W.N. 1887, 76, R.)**

(12)—*Wajib-ul-arz—Construction of document—Custom or contract.*—A village *wajib-ul-arz* under the heading—"As to the transfer of property by sale, mortgage, gift or inheritance, and practice of pre-emption (*rasm shafa*)"—recorded as follows:—"At present no portion of the share of any co-sharer has been transferred by mortgage. Every co-sharer, with the exception of Musammats Jamil-un-nissa and Alim-un-nissa, whose shares are in the possession of Ahmad Husain and Barkat Ali, is at liberty to transfer the whole or part of his share in future. No pre-emption suit has as yet been brought or decided. We agree that the custom of the right of pre-emption should prevail in future (*Ayanda jari rakhna rawaj haq shafa kamanzur hai*)." *Held* that this language indicated the making of a contract amongst the co-sharers and not the keeping alive of a pre-existing custom of pre-emption. **TASADDUQ HUSAIN KHAN v. ALI HUSAIN KHAN, A.W.N. 1908, 121=5 A.L.J. 470. (A.W.N. 1905, 16, D.)**

(13)—*Wajib-ul-arz—Construction of document—Custom or contract.*—The *wajib-ul-arz*, bearing date 1872, of a village, in respect of the sale of land in which a claim for pre-emption was made, contained, under the heading "Rights amongst co-sharers based on custom or special agreement," the following provision as to the price to be paid by pre-emptors:—"If there be a difference between a seller and a pre-emptor as regards the amount of price, it

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

shall be settled as follows:—In case of sale, Re. 1 *per kachha bigha* of the culturable land, and in case of mortgage, annas eight *per kachha bigha* of the culturable land." This provision did not re-appear in the existing settlement. *Held* that the provision above set forth indicated the existence of a contract between the co-sharers, and not of a custom. JAGAN NATH SINGH v. LULAR KUNWAR, A.W.N. 1906, 308. (8 A. 102, R.)

(14)—Wajib-ul-arz—Construction of document—Custom or contract.—The zamindars of a village in the district of Saharanpur, in a *wajib-ul-arz* attested on the 8th November 1861, declared they would "be bound by and act upon the undermentioned conditions" for thirty years, until the completion of the next settlement. Amongst the "undermentioned conditions" were certain conditions relating to the right of pre-emption. A fresh settlement was commenced in 1890, and in the *wajib-ul-arz* prepared at that settlement it was provided that "as to the remaining customs in the village the record of rights prepared at the former settlement is to be looked at." *Held* that the earlier *wajib-ul-arz* recorded, not a custom, but a contract, which came to an end with the term of the settlement, and the later *wajib-ul-arz* could not be construed as the record of a custom after the lapse of only thirty years; there was therefore no right of pre-emption in the village. MARATIB HUSAIN v. ALAM ALI, A.W.N. 1907, 285. [R., 30 A. 544=A.W.N. 1908, 246.]

(15)—Wajib-ul-arz—Construction—Contract or custom.—Where the recital in a *wajib-ul-arz* does not clearly show that it is the record of a contract it must be held to be record of custom. Where a *wajib-ul-arz* provided that co-sharers wished to "record the matters entered below and that they will remain bound by it," and in matters of transfer it provided that, at the time of transfer, "it shall be necessary (*lazim hoga*)" for a co-sharer to transfer to his co-sharers, *held* that the recital was not a record of contract and that the words *lazim hoga* did not make it a record of contract. It is always dangerous to construe one *wajib-ul-arz* by another. BALDEO SAHAI v. NAGAI AHIR, 3 A.L.J. 850=A.W.N. 1907, 17. (A.W.N. 1897, 3, F). [F., 7 A.L.J. 519=6 Ind. Cas. 151; R., 7 A.L.J. 902, F.B.]

(16)—Pre-emption—Interpretation of document—Custom or contract—Three *wajib-ul-arzes*.—A custom is constant and unvarying.—Hence, where three *wajib-ul-arzes* of three different settlements were produced, each of which recorded the right of pre-emption, but in different terms, *viz.*, in the first of them the right was given to co-sharers generally, in the second, to two classes of pre-emptors without preference among co-sharers in the same *thok*, and in the third, to three classes of pre-emptors reserving preference for a *pattidar* in a *thok* in which the property sold was situate over *pattidars* of the

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

village, *held* (Banerji, J., dissenting) that the record was one of contract and not of custom. DIP NARAIN SINGH v. BHAGWAT SINGH, 8 A.L.J. 401. (7 A.L.J. 1040, D.)

(17)—Suit to enforce right of pre-emption—Co-sharers—Pre-emption based on *wajib-ul-arz*—Construction—Contract—Custom.—This was a suit to enforce a right of pre-emption by the plaintiffs, two brothers and co-sharers in a village, in respect of a sale by another co-sharer M of his share in the plaint land to the defendant, a stranger. The claim for pre-emption was based on the *wajib-ul-arz*, and the clause therein relating to pre-emption was entitled "of transfer of property and the right of pre-emption" and it also prohibited any co-sharer from alienating his share to any person except to another co-sharer. The defendant contended *inter alia* that the *wajib-ul-arz*, not having been signed by his vendor M, was not binding on M and that the custom of pre-emption did not prevail in the village. The lower appellate Court dismissed the suit, holding that the clause in the *wajib-ul-arz* relating to pre-emption was like a contract, and that it was not binding on the defendant's vendor M as it was not proved that M had caused it to be recorded or verified. From this decision, the plaintiffs preferred a second appeal to the High Court, contending that the clause in the *wajib-ul-arz* relating to pre-emption was a record of custom and that the lower appellate Court had placed a wrong construction on its terms. *Held*, reversing the lower appellate Court's decree and decreeing the claim, that, looking at the terms of the *wajib-ul-arz*, the clause in respect of pre-emption could not be regarded in the limited light of a contract which would not be binding upon any but those who were parties to it. The *wajib-ul-arz* having been prepared in accordance with the Revenue law governing such matters there was every presumption in favour of the existence of the custom of pre-emption in the village. UDEY RAM v. MAULA, A.W.N. 1885, 189.

(18)—Wajib-ul-arz—Custom—Contract—Interpretation of document.—The plaintiff sued for pre-emption, basing his suit upon the *wajib-ul-arz*, but not stating whether he relied on a custom or on a contract. The defendant objected that the plaintiff had refused to sign the *wajib-ul-arz*, and therefore could not sue upon it. The chapter of the *wajib-ul-arz*, upon which the plaintiff relied was headed:—"The private rights of the sharers and the particular customs and agreements,"—and detailed the practice in the village as to pre-emption, first, in the case of sales, and, secondly, in the case of mortgages. The defendant gave no evidence as to the non-existence of any custom of pre-emption in the village. *Held* that the recital contained in the *wajib-ul-arz* was good evidence of a custom of pre-emption prevailing in the village, and that the mere fact of the plaintiff not having signed the *wajib-ul-arz* would

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

not disentitle him from suing upon it. **MAJIDAN BIBI v. SHEIKH HAYATAN, A.W.N. 1897, 3.** [*R.*, 25 A. 90, F.B., 6 A.L.J. 779, 2 A.L.J. 790=A.W.N. 1905, 266, 3 A.L.J. 850; *F.*, 26 A. 10, A.W.N. 1907, 17, 2 A.L.J. 6=A.W.N. 1905, 16.]

(19)—**Wajib-ul-arz—Construction—Custom or contract—Silence as to right of pre-emption in wajib-ul-arz of last settlement—Duties of settlement officers when preparing record of rights.**—Where, in a suit for pre-emption, the *wajib-ul-arz* of 1833 made no mention of the right and the subsequent *wajib-ul-arz* of 1863 referred to the right of pre-emption in the following terms: "In future, everyone would be entitled to transfer, etc.," but the *wajib-ul-arz* prepared at the settlement of 1890 was silent as to any right of pre-emption existing in the village; *held*, that the record of 1863 was one of custom and that the silence of the record of rights of the latest settlement in respect to pre-emption was not a silence from which any inference opposed to the existence of the right of pre-emption could be drawn, inasmuch as the rules framed for the settlement of the district, under s. 257 of Act XIX of 1873, did not require the settlement officer to put on record any custom of pre-emption. **HARNAND v. KALLU, 6 A.L.J. 779=31 A. 533=3 Ind. Cas. 2.**

(20)—**Pre-emption—Wajib-ul-arz—Construction—Contract or custom—Absence of proof that the record is one of contract—Presumption.** The preamble of the *wajib-ul-arz* of a village in the district of Shabjahanpur contained the words '*dar bab haq shafa.*' It recited that, when a co-sharer has to sell and mortgage his *haqeat*, then at the time of transfer it will be incumbent that he should after giving information sell and mortgage for a proper price, etc., etc. *Held* that, unless it could be shown that the pre-emption clause was the embodiment of a contract, it was to be presumed to be a record of a custom. *Held* further that the words relating to pre-emption in the *wajib-ul-arz* in question recorded a custom and not a contract. *Per Stanley, C.J.*—The words "relating to a right of pre-emption" (*dar bab haq shafa*) applied equally well to a pre-emption existing by custom as to a right of pre-emption arising out of a contract. **BHIM SEN v. MOTI RAM, 7 A.L.J. 902, F.B.=7 Ind. Cas. 181.**

(21)—**Pre-emption—Wajib-ul-arz—Custom or contract—Evidence.**—Where, in support of the custom of pre-emption, no other evidence was adduced but a *wajib-ul-arz* of one settlement, and that *wajib-ul-arz*, on the face of it, dealt with a number of matters which could not be anything else than arrangements between the co-sharers adopted for the first time at the time of the settlement and binding only during the period of that particular settlement, *held*, that the custom had not been sufficiently proved. There is no class of evidence that is

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

more likely to vary in value according to circumstances than that of the *wajib-ul-arz*. **DHIAN KUNWAR v. DIWAN SINGH, 8 A.L.J. 786.** (37 I. A. 191=7 A.L.J. 704, *F.*)

(22)—**Pre-emption—Wajib-ul-arz—Construction—Custom or contract.**—The *wajib-ul-arz* of a village ran as follows:—"No suit for pre-emption had yet been brought or decided. We agree that the custom of the right of pre-emption should prevail in future." *Held*, that this was a record of a contract and not of an existing custom of pre-emption. **KALYAN RAI v. HAKIM MUHAMMED MUSTAFA ALI KHAN, 9 Ind. Cas. 562.** (A.W.N. 1908, 121, 5 A.L.J. 470, 32 A. 201, 5 Ind. Cas. 212, 7 A.L.J. 213, *F.*)

(23)—**Pre-emption—Wajib-ul-arz—Construction—Custom or contract—Variation of Wajib-ul-arz, effect of.**—The *Wajib-ul-arz* of 1833 contained the following provisions as to pre-emption: "If any of us wishes to transfer the whole or a portion of his share, he shall inform his co-sharers in the village, and shall sell or mortgage it to them at a fixed price; if any one transfers his share to a stranger without informing the co-sharers in the village, the transfer shall be invalid." The *wajib-ul-arz* of 1860 ran as follows:—"The near co-sharer of the man wishing to transfer his share shall have a right to take it and in case of his refusal the share shall be transferred to the other co-sharers in the *thok*, and in case of refusal by the latter, to a co-sharer in another *thok*." *Held*, that the *wajib-ul-arzes* were records of custom of pre-emption. **RAGHUNATH PERSHAD TEWARI v. LACHMI NARAIN TEWARI, 9 Ind. Cas. 522.** (7 Ind. Cas. 680, 7 A.L.J. 1040, F.B., *F.*)

(24)—**Pre-emption—Wajib-ul-arzes—Presumption as to custom or contract—*Kaifiat sarishta nizamat*—Rebutting evidence, sufficiency of.**—In a suit for pre-emption, the plaintiff produced two *wajib-ul-arzes* of 1833 and 1860 respectively, which *prima facie* raised a presumption in favour of the custom of pre-emption. The defendant to rebut that presumption produced a *kaifiat sarishta nizamat* which showed that, prior to the preparation of the *wajib-ul-arz* of 1833, the village was owned by a single proprietor. It, however, contained no entry as regards the settlements of 1210 and 1213 F. The columns were blank and there was nothing to show whether there was any proprietor in those two years. *Held*, that the information contained in *kaifiat sarishta nizamat* was not such as to enable the Court to hold that it rebutted the *prima facie* evidence as to custom afforded by the *wajib-ul-arz*. **CHHOTKAI CHOUDHRI v. RUDRA PRASAD TEWARI, 10 Ind. Cas. 323.**

(25)—**Pre-emption—Wajib-ul-arz—Custom or contract—Presumption—Rebutting evidence—Register of transfers, whether admissible in evidence to prove the fact of transfers—Evidence—Civ. Pro. Code (Act V of 1908), O. XLI, r. 24**

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

—*Power of Appellate Court to decide case on evidence on the record.*—A register of transfers is admissible in evidence to prove the fact of transfers entered therein. The mere entry, however, in such a register that there have been transfers of sales, is not sufficient to rebut the presumption arising out of an entry in the *wajib-ul-arz* regarding the prevalence of the custom of pre-emption in the village. (7 A.L.J. 1040, 7 Ind. Cas. 680, R.) An Appellate Court has full power, under O. XLI, r. 24 of Act V of 1908, to decide, with reference to the evidence on the record, the issues left undetermined by the lower Court, without sending back the case to the Court below. **BADRI DAS v. PAJAN, 10 Ind. Cas. 225.**

(26)—*Pre-emption—Wajib-ul-arz—Presumption—Custom or contract—Evidence rebutting presumption, sufficiency of.*—In a pre-emption suit, the plaintiff relied upon two *wajib-ul-arz* of 1833 and 1860 which were *prima facie* evidence of custom. The defendant, in order to rebut the presumption arising out of the *wajib-ul-arzes*, produced a *patwari* who deposed that he had been a *patwari* for 18 years and that he had never heard of the existence of a custom of pre-emption in the village: *Held*, that such evidence was altogether insufficient to rebut the presumption. **HARNARAIN NATH TEWARI v. TILAK DUBE, 10 Ind. Cas. 233.**

(27)—*Pre-emption—Wajib-ul-arz—Interpretation of document—Custom or contract—Abatement of suit—Share of each vendee specified in sale deed—Death of one such vendee.*—In a suit for a pre-emption based upon the *wajib-ul-arz* the plaintiff relied upon an entry in the *wajib-ul-arz* of 1870, which gave a right of pre-emption to (1) a real brother, (2) a near brother and (3) other co-sharers in the village. The defendants, on the other hand, produced the *wajib-ul-arz* of 1860, in which the right was given in these terms: "If any co-sharer wishes to transfer his proprietary rights by sale or mortgage, first let him transfer it to a real brother or a near brother or to other co-sharers, and in case these refuse or decline to pay the proper price, the owner may transfer to whomsoever he pleases." *Held*, that this being the whole of the evidence in the case, the existence of the custom was not disproved and that the later *wajib-ul-arz* explained the ambiguity in the earlier one. *Held* also that, where the sale was made to three sets of vendees, the share of each of whom was specified, and one of them died and his heirs were not brought on the record till after six months, the suit did not abate in respect of the shares of the other two sets. **HUKAM SINGH v. THAKUR DAS, 8 A.L.J. 1135.**

(28)—*Presumption—Wajib-ul-arz—Construction—Imperative mood.—Contract or custom.*—The use of the imperative mood, as "let him first sell to etc." in the pre-emptive clause of a *Wajib-ul-arz*, does not indicate a fresh contract between the co-sharers as to pre-emption, but

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

is consistent with the clause being regarded as a record of an existing custom. In the absence of other evidence to show that the clause embodied a new contract, the correct construction is to regard it as a record of custom. **LACHMAN SINGH v. RAM LAGAN SINGH, 26 A. 10=A.W.N. 1903, 162. (25 A. 90, A.W.N. 1897, p. 3. F.)**

(29)—*Wajib-ul-arz, construction of—Custom or contract—Partition—Co-sharer.*—Where a *wajib-ul-arz* opened with a declaration that the zemindars and khewatdars, agreed that up to the term of settlement and in future to the termination of the next settlement they should abide by the following conditions and act upon them, and one of the conditions related to pre-emption, *held* that the record was one of contract and not custom. Where a *wajib-ul-arz* recognised a right of pre-emption in favour of co-sharers descended from a common ancestor, and by reason of a subsequent partition, the pre-emptor, though descended from the same stock as the vendor, had ceased to hold any share in the *mahal*, portion of which was the subject of sale, *semble* if the right recorded was one existing by custom, the plaintiff would be entitled to pre-empt. **BUDH SINGH v. GOPAL RAI, 5 A.L.J. 539=A.W.N. 1908, 246=30 A. 544.**

(30)—*Pre-emption—Wajib-ul-arz—Construction—Custom or contract—Perfect partition, whether abrogates custom of pre-emption.*—The *wajib-ul-arz* of a village contained the following provisions as to pre-emption: "If any shareholder wishes to dispose of his share, he must do so in the first place to *Baradaran*, then to co-sharers in the *patti* and after that to co-sharers *patti digar*." *Held*, that it was a record of custom. *Held*, further, that a perfect partition did not, of itself and of necessity, abrogate a custom of pre-emption that prevailed in the village. **BENI v. PURAN SINGH, 7 Ind. Cas. 572.**

(31)—*Wajib-ul-arz—One mahal—Perfect partition—Custom—Contract.*—*Mauza Barauli* was sub-divided by perfect partition into three mahals; *Mahal Ali Mazhar*, *Mahal Bhairon Pershad*, *Mahal Sheo Dial Ram*. Before partition the *wajib-ul-arz* of the *Mauza* provided that a right of pre-emption existed in the following order: first to sharers descended from a common ancestor, then to co-sharers in the village, then to strangers. At the time of partition, three *wajib-ul-arzes* were prepared for the three mahals. The *wajib-ul-arz* for the mahals *Ali Mazhar* and *Bhairon Pershad*, which mahals had a sole proprietor, reproduced the wording of the *wajib-ul-arz* of the undivided village, in a chapter, the heading of which referred to the rights of sharers in the mahal. In the third mahal, which had innumerable sharers, the wording of the original *wajib-ul-arz* was modified, and it was provided that a right of pre-emption in case of a transfer by a *pattidar* would exist in the following order: first co-sharers descended from

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

a common ancestor, then pattidars, then strangers. On sale of Mahal Ali Mazbar the proprietor of Mahal Bhairon Pershad sued for pre-emption, basing his claim on the *wajib-ul-arz*. Held, that the preparation of new *wajib-ul-arzes* for three mahals abrogated the old custom of pre-emption, and that the fact that the sole properties of Mahals Ali Mazhair and Bhairon Pershad had caused to be made an entry in the *wajib-ul-arz* relating to the right of pre-emption in those mahals, did not give these proprietors any authority to control their own rights or the rights of their successors over the property. The *wajib-ul-arz* did not prove the existence of a custom of pre-emption in the mahals in question. *B. E. O'CONOR v. RAJ BHADUR*, 5 A.L.J. 79. (15 C. 20=14 I.A. 127, A.W.N. 1898. 89, 15 A 147, 27 A. 602, R.)

(31-a)—*Pre-emption—Custom or contract—Onus—Wajib-ul-arz—Evidence.*—The existence or non-existence of a custom of pre-emption must be proved in the same manner as any other question. The proper issue in the case is, does or does not the particular custom alleged by the plaintiff exist? The *onus* of proving the existence of such custom lies on the plaintiff, and if he is unable to produce evidence other than an obscure clause in a *wajib-ul-arz*, he must be held to have failed to prove the existence of the custom. A *wajib-ul-arz* is merely evidence. *BECHU SINGH v. LACHMI NARAYAN SINGH*, 15 Ind. Cas. 54. (33 A. 605, 8 A.L.J. 996, 12 Ind. Cas. 98, R.)

(31-b)—*Pre-emption—Custom or contract—Burden of proof—Wajib-ul-arz, evidentiary value of.*—The proper issue in cases in which a custom of pre-emption is alleged to exist is, "does the custom exist?" The finding on the issue does not depend solely on the construction of any of the words in any particular *wajib-ul-arz*. The Court ought to consider all the evidence adduced on both sides by the parties. It is the duty of the plaintiff to adduce proper and sufficient evidence to enable the Court to come to a conclusion as to the existence of the custom of pre-emption alleged by him. *DWARKA DAS v. DEBI DAYAL*, 14 Ind. Cas. 303. (33 A. 605, 8 A.L.J. 996, 12 Ind. Cas. 98, R.)

(31-c)—*Pre-emption—Custom or contract—Wajib-ul-arz, evidentiary value of.*—A *wajib-ul-arz* is by no means conclusive as to the existence or non-existence of a custom of pre-emption; the finding on such an issue ought not to depend upon the construction of particular words and expressions in the *wajib-ul-arz*. The existence or non-existence of a custom of pre-emption should depend upon the opinion of the Court after duly considering all the evidence adduced before it. *RAMANAND v. HARJAS*, 14 Ind. Cas. 572. (8 A.L.J. 786, 10 Ind. Cas. 558, R.)

(31-d)—*Pre-emption—Custom—Wajib-ul-arz—Construction of.*—The provisions regarding

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

pre-emption in a village were contained in paragraph 14, Ch. II of the *wajib-ul-arz*. Chapter II was headed thus,—"Mutual rights of the co-sharers, based on custom or particular contracts." Paragraph 14 was headed "Custom relating to the right of pre-emption." The clause gave a right of pre-emption first to a near co-sharer, then to a co-sharer in the *patti*, after that to a co-sharer in the *thok* and lastly to a co-sharer in the *mahal*. Held, that the terms of the *wajib-ul-arz* clearly evidenced a custom of pre-emption in respect of the *mahals* to which it related. *MATHURA PRASAD v. SHEIKH MUHAMMAD*, 17 Ind. Cas. 844, P.C. = 17 C.W. N. 98.

(31-e)—*Pre-emption—Wajib-ul-arz—Construction—Custom or contract.*—In a suit for pre-emption, two *wajib-ul-arzes*, one of 1833 and another of 1860 were produced. The *wajib-ul-arz* of 1833 recorded a custom of pre-emption. The *wajib-ul-arz* of 1860 recorded that there had never been any sale or transfer and that in future the co-sharers could sell to whom they pleased. Held, that the *wajib-ul-arz* of 1860 negatived any inference as to the existence of custom of pre-emption that might be drawn from that of 1833, and, under the circumstances, no custom of pre-emption was proved to exist in the village. *RAMHIT MISRA v. CHANDI PRASAD DUBE*, 16 Ind. Cas. 411.

(31-f)—*Pre-emption—Wajib-ul-arz—Evidence—Custom or contract—Perfect partition, effect of—Onus of proof in pre-emption suits.*—The *wajib-ul-arz* of a village contained the following provision:—"In future, every co-sharer, mortgagor or mortgagee shall, as such, be at liberty to make transfers. But he shall make transfers first in favour of his own and *ek jaddi* brothers, and after them in favour of co-sharers in the *khata patti* as well as in favour of the proprietors of the village. If none of them take the share, he shall be competent to make transfers in favour of strangers." The village was subsequently divided into several *mahals*. A co-sharer in one of the *mahals* transferred his share to another person who was a mortgagee in the same *mahal*. A co-sharer of the village, who was a co-sharer in a different *mahal*, brought a suit for pre-emption. Held, that the suit could not succeed. *Per Richards, C.J.*—In a suit for pre-emption, the *onus* lies upon the plaintiff to prove the existence of the custom of pre-emption. It is necessary for him not merely to establish the existence of some custom of pre-emption, but he has to establish the existence of particular custom which entitles him to pre-empt as against the defendant. There is no difference between the mode of proof of a custom of pre-emption and any other custom. The existence or non-existence of a custom of the pre-emption cannot be said to depend upon the construction of a *wajib-ul-arz*. The *wajib-ul-arz* is not the custom. It is merely evidence of custom, and no class of

Pre-emption—continued.**— 2.—Construction of Wajib-ul-arz—*cld.***

evidence is more likely to vary in value according to circumstances than that of the *wajib-ul-arz*. (32 A. 368=14 C.W.N. 770=37 I.A. 191, P.C.=7 A.L.J. 704=12 C.L.J. 36=12 Bom. L.R. 504=8 M.L.T. 79=6 Ind. Cas. 787=20 M.L.J. 604=13 O.C. 163=M.W.N. 1910. 324. *Rel. cn.*) The main object of the custom of pre-emption is to avoid admitting strangers into the co-parcenary body (22 A. 1, R.) The result of perfect partition is that the old co-parcenary body ceases to exist, and new co-parcenary bodies are created in each *mahal*.

AHMAD SYED KHAN v. DIGAMPAR SINGH, 16 Ind. Cas. 361.

(32)—*Pre-emption—Wajib-ul-arz—Custom—Imperfect partition, effect of*—An imperfect partition does not affect a right of pre-emption which existed prior to such partition. MAHADEO PRASHAD v. JAIPAL RAUT, 8 Ind. Cas. 867.

(33)—*Wajib-ul-arz recording custom of—Previous one giving no such right—The latest silent—The right never claimed in respect of other sales—Custom fallen into desuetude.*—Where the *wajib-ul-arzes* of a village prepared respectively, in 1860 and 1871 afforded evidence of the existence of a custom of pre-emption, but that of 1836 proved that no such custom existed and the latest *wajib-ul-arz* was silent as to such custom, there also being evidence of sales taking place in the village, without the right being ever claimed, *held*, that the lower Court was justified in holding that the custom had not been satisfactorily proved. GULAB SINGH v. JAG RAM, 3 A.L.J. 646=A.W.N. 1906, 249. [D., 31 A. 539=3 Ind. Cas. 903=6 A.L.J. 735.]

(34)—*Wajib-ul-arz, not signed by lambardar or co-sharer—Whether evidence of village custom.—Wajib-ul-arz, Construction of.*—Although a *wajib-ul-arz* was not signed by the *lambardar* or by any of the co-sharers, it was nevertheless held to afford *prima facie* evidence of the village rights and customs recorded in it, when the correctness of the *wajib-ul-arz* had been allowed to remain for every many years unchallenged. The clause relating to pre-emption in a *wajib-ul-arz* was as follows:—“When any *muafidar* in the *patti* desires to transfer his share, then, first a share-holder in the *patti* takes it; and if he does not take it, then another man who desires to take it takes it.” *Held* that this clause declared what the village custom was, and that it was not intended thereby to adopt the Muhammadan law of pre-emption. RUSTAM ALI KHAN v. ABBASI BEGAM, 13 A. 407=A.W.N. 1891, 146.

(35)—*Limitation Act (XV of 1877), sch. II, art. 10—Pre-emption—Vendee in possession of a part of the property as usufructuary mortgage—Capable of physical possession—Time to run from registration of sale-deed—Practice—Validity of an order of remand—When to be*

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*cld.***

impeaced after the passing of final decree—Civil Procedure Code (Act XIV of 1882), s. 591—*Wajib-ul-arz, construction of—Custom or contract.*—Where a part of the property sold is already mortgaged with possession to the vendee, the whole of the property is not capable of physical possession at the time of the sale, and consequently the period of limitation for a suit for pre-emption must be reckoned from the date of the registration of the sale deed. In second appeal against a decree passed after a remand under s. 562 of the Code of 1882, the appellant cannot be permitted to contest the validity of the order of remand, unless he also challenges the validity of the final decree on grounds independent of those upon which the order of remand was based. Where the incidents of the right of pre-emption, as recorded in two successive *wajib-ul-arzes*, are uniform, and the documents as they stand contain no words or expressions which definitely stamp them as records of contract, it should be presumed that the *wajib-ul-arzes* record an established custom and not a contract. RAMJAS AHIR v. BABU AMAN SAHAI, 5 Ind. Cas. 667.

(36)—*Pre-emption—Non-existence of the custom in the new abadi of Garhi Awan, a suburb of Hafizabad in Gujranwala District.*—*Held*, that, a totally new abadi added to a town should be regarded as its distinct subdivision for the purposes of pre-emption, even if no one has yet christened it as a *mohallah* and no sub-divisions have been hitherto recognised in such a town; and that custom of pre-emption cannot be presumed to exist in the new abadi, simply because it prevails in the town itself. The case is different where the limits of a town have been gradually extended by erecting house after house on its edge to meet the press of population. Found, on the above principle, that abadi Jadid of the old village of Garhi Awan, now a suburb of Hafizabad, is a distinct sub-division and that no custom of pre-emption on the ground of vicinage obtains therein. ALLAH DITTA v. MUHAMMAD NAZIR, 102 P.W.R. 1910=84 P.R. 1910=7 Ind. Cas. 716.

(37)—*Pre-emption—Wajib-ul-arz—Construction—Right to sue, when commences.*—A *wajib-ul-arz* contained the following clause as to pre-emption:—“If any co-sharer wishes to mortgage or sell conditionally or absolutely his share, he can transfer it for the price that may be offered him by others, first to a near co-sharer, next to other co-sharers in the *patti* and, in case of their refusal, to his near co-sharer in another *patti*, and should they also refuse, then to other co-sharers in the *mahal*, and lastly to a stranger. If the share of any co-sharer be mortgaged or sold conditionally to a stranger and he be unable to redeem, then any of the co-sharers in his *patti* may, if the term of the mortgage is about to expire, pay up the money and take possession, and when the mortgagor or his heir has paid the money in accordance

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

with the condition of the deed between the original mortgagor and the co-sharers entitled, he may enter into possession." A co-sharer mortgaged his property by way of conditional sale prior to the 19th of June 1907. On the 19th of June, the mortgagee obtained a decree for foreclosure on the strength of the mortgage. Subsequent to the foreclosure decree, the plaintiff, a co-sharer entitled under the *wajib-ul-arz* to pre-empt, brought this suit for pre-emption. *Held*, that the plaintiff's right to sue accrued as soon as the mortgage was made and not when the foreclosure decree was obtained. **RAJA RAM SINGH v. PARAS RAM SINGH, 11 Ind. Cas. 628. (3 A. 610, 20 A. 103, F.B., R.)**

(38)—*Wajib-ul-arz, ambiguity of—Construction—Contract—Registration—Termination of settlement.*—A contract of pre-emption recorded in a *wajib-ul-arz* does not require registration. In the absence of evidence to the contrary, such a contract will be held to last only as long as the settlement during which it is made, continues. Where the language of a *wajib-ul-arz* is obscure, it affords no basis for a right of pre-emption. **MAKHDUM BAKSH v. ALI HUSAIN KHAN, 3 A.L.J. 307 = A.W.N. 1906, 149.**

(39)—*Wajib-ul-arz, whether continues in force after expiry of term of settlement.*—If a *wajib-ul-arz* is expressly stated to be a manual for the regulation of the affairs of a village during the period of settlement alone, a right of pre-emption created by it cannot be enforced after the expiry of that period, unless a provision has been made for that purpose, or the operation of the *wajib-ul-arz* has been extended by the agreement of the parties. **RUTTUN SINGH v. OOMRAO SINGH, 4 N.W.P. 13.**

(40)—*Wajib-ul-arz—Construction—Brethren.*—Where the pre-emptive condition runs to the effect that the alienation shall be made first to brethren of a common ancestor, and if they refuse, then to the other sharers of the *puttee* and if they do not take, then, to any one else, the brethren in whose favour the first right of pre-emption is provided, must be construed to be brethren who are sharers in the *puttee*. **HUR SAHAI v. JAWALA, 2 Agra 31.**

(41)—*Wajib-ul-arz—Construction of document—Co-sharers.*—The *wajib-ul-arz* of a village gave a right of pre-emption in favour of three classes of pre-emptors, namely, (1) near co-sharers of the vendor, (2) co-sharers in another *thok*, and (3) other co-sharers in the *thok*. *Held* that these were three mutually exclusive classes of pre-emptors, and that a co-sharer in the same *khata* with the vendor took priority as a "near co-sharer" over a co-sharer in the *thok*, but not in the *khata*.

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

TIRTHI RAI v. SITLU RAI, A.W.N. 1905, 192 = 2 A.L.J. 707.

(42)—*Wajib-ul-arz—Pre-emptive right—Person under disability—Right of alienation—Construction.*—Where, in the *wajib-ul-arz* papers, there were conditions to the following effect:—"Every co-sharer is at liberty to alienate his own share, but it will be necessary for him at the time of alienation first to inform his next nearest neighbour co-sharer, and if he refuses them, etc." *Held* that the conditions did not confer on any person under disability a right to alienate which he did not otherwise enjoy. **RADHAY PANDEY v. MUNSA RAM, 2 Agra 85.**

(43)—*Wajib-ul-arz—Construction—Pre-emption.*—A condition in a *wajib-ul-arz*, that "in case it should be necessary to alienate the estate for any special purpose or for the payment of Government revenue, the same should be done with the consent of all the sharers" was held not to contain a stipulation for the existence of pre-emption. **RAM PERSHAD SAHOO v. SHEIK RUMZANEE, 2 Agra 37; GAYADIN v. RAM SAHAI, 2 Agra, Pt. II. 181; BABOO DOOBEY v. ISHREE, 3 Agra 74.**

(44)—*Pre-emption—Construction of wajib-ul-arz—Holder of "resumed revenue-free land"—Co-sharer.*—A clause of the *wajib-ul-arz* of a certain village ran as follows:—"When any co-sharer (*hissadar*) is bent upon selling or mortgaging his right (*haqqiyat*), then, first, that co-sharer who is nearest to the shater bent on transfer can take it; after that, any other person who is interested (*sharik*) in the village rank by rank can take it. If no person interested in the village takes it, then a stranger may take it." The plaintiff claimed as a co-sharer in the village for pre-emption of certain "resumed-revenue-free land" in the villages which was sold to a stranger. *Held*, that under the circumstances of the case, the plaintiff had no right of pre-emption in respect of the land claimed by him, as the vendor was not, within the meaning of the *wajib-ul-arz*, a co-sharer in the village by virtue of his possession of a portion of the "resumed revenue-free land." **KALLIAN MAL v. MADAN MOHAN, 17 A. 447 = A.W.N. 1895, 93. [F. A.W.N. 1904, 118; R., 20 A. 419, 19 A.W.N. 19, A.W.N. 1908, 59 = 5 A.L.J. 182; D., 3 O.C. 110, A.W.N. 1905, 92.]**

(45)—*Wajib-ul-arz, construction of—Co-sharers.*—The provision for pre-emption in a *wajib-ul-arz* was as follows:—"When any co-sharer wishes to make a sale or mortgage of his share, it is incumbent on him to do so first in favour of a near co-sharer, next in favour of a co-sharer of his *thok*, and lastly in favour of a co-sharer of another *thok*, at the rate of Rs. 20 per bigha of cultivated land, and Rs. 5 per bigha of waste land. If none of these take it, then he may transfer it to an outsider. If any co-sharer (i.e.,

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

any co-sharer who wishes to sell or mortgage) fail to act as above directed, another co-sharer has the right of enforcing pre-emption in respect of the property. If the term of the mortgaged share of any co-sharer is about to expire, and notice of foreclosure has been issued, and the co-sharer mortgagor has not the means to redeem, then, another co-sharer, after paying up the money, may take back the share, and when the original mortgagor has the means, he, after paying the money, may take possession of the share." *Held*, (a) in the case of a conditional sale of property to which this *wajib-ul-arz* applied, that it contemplated only two stages and not three, *viz.*, (1) the time when a contract of sale or of mortgage is about to be entered into or has been entered into, and (2) the time when the conditional vendee has brought his suit for foreclosure, and before he has obtained his order absolute on the decree for foreclosure. (b) In the first case, the Limitation Act fixes a time within which a co-sharer desiring to claim pre-emption on a sale or on a mortgage must bring his suit; and in the latter case, up to the time when that order is made absolute, the co-sharer desiring to pre-empt may, under this *wajib-ul-arz*, obtain pre-emption upon payment of the amount decreed in the suit for foreclosure. (c) When the order absolute for foreclosure is made, the co-sharer's right to pre-empt under this *wajib-ul-arz* is gone and extinguished. There is no provision as to what is to take place then, and a co-sharer not having availed himself of his right to pre-empt before the order absolute, the decree of the Civil Court must take effect and must fully vest in the vendee the rights which he obtains under his order absolute for foreclosure. At that time, the matter has reached the stage when it is beyond the scope of the custom or contract in the *wajib-ul-arz*, and the right of the decree-holder under his Civil Court decree cannot be affected. *GAYA BHARTHI v. LAKH-NATH RAI*, 20 A. 103, F.B. = A.W.N. 1897, 208. [R., 3 A.L.J. 515 = A.W.N. 1906, 247; D., 24 A. 493.]

(46)—*Pre-emption, custom of—Co-sharers in khalisa mahal—Owners of muafi lands in mahal.*—The co-sharers of the *malal* and the owners of the *muafi* plots included in the area of the *malal*, whether they may be called co-sharers or not, have, as a rule, no connection whatever with one another, and it by no means follows that the custom of pre-emption adopted by or existing among the members of the *khalisa* co-parcenary body would be applicable to the owners of the *muafi* plots. Strict evidence is always necessary to prove that the same custom is applicable to each. *NARAIN DAS v. RAM SARAN DAS*, 20 A. 419 = A.W.N. 1898, 99. (17 A. 447, R.) [F., 22 A.W.N. 68, A.W.N. 1904, 118; R., A.W.N. 1907, 173 = 4 A.L.J. 665; D., 3 O.C. 110.]

(47)—*Provisions as to—Claim by a co-sharer in lakhiraj, i.e., muafi land—Wajib-ul-arz, con-*

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

struction of.—The question in this case was, whether, under the terms of a *wajib-ul-arz*, a claim for pre-emption by a co-sharer of the vendor in *muafi* land may be advanced where the property sold is *lakhiraj*, i.e., *muafi* land. The *wajib-ul-arz* contained the following provisions as to pre-emption:—"In *khalsa*, there is only one *zemindar*; consequently, there is no custom of pre-emption; but as between *zemindars*, proprietors of resumed *mulks*, and also proprietors of *lakhiraj*, there is this usage that, if any co-sharer sells or mortgages his share, or any mortgagee sub-mortgages his mortgagee rights, it is incumbent on him to inform his near co-sharer, and in case of his refusal, other co-sharers, and sell or mortgage for a reasonable price. If they refuse or do not offer a reasonable price, he will be competent to transfer to a stranger." *Held*, that, according to the terms of the *wajib-ul-arz*, as set forth above, a right of pre-emption is given in regard to property of three descriptions therein mentioned, other than *khalsa* land, as between co-sharers of each description of property. A co-sharer in *lakhiraj*, i.e., *muafi* land, has, therefore, a right of pre-emption in the case of a sale of such land to a stranger. *HABIB-ULLAH v. KALLAN*, A.W.N. 1905, 92.

(48)—*Wajib-ul-arz—Offer to co-sharers, condition precedent—Offer to some co-sharers—Effect.*—The terms of a *wajib-ul-arz* clearly provided that the vendor should offer his share first to his co-sharers before he sells the same to a stranger. *Held* that the vendor must make the offer to each and every one of his co-sharers before sale to the stranger. It is not sufficient for him to make the offer only to some of them. *DOWLUT v. NETRAM*, 3 N.W. P. 42.

(49)—*Wajib-ul-arz—Interpretation of document—"Co sharer"—Owners of sharer in "Haqiat mutafarika."*—The pre-emptive clause of *wajib-ul-arz* provided that if any co-sharer wishes to sell or mortgage his right (*haqiat*) he is bound to inform the persons mentioned in the document. *Held* that no right of pre-emption would arise in respect of the sale of a share in an isolated plot of land in the village. *JODHA SINGH v. BHOLA NATH*, A.W.N. 1904, 118. (17 A. 447, 20 A. 419, F.) [R., A.W.N. 1907, 173 = 4 A.L.J. 665.]

(50)—*Wajib-ul-arz—Construction—Co-sharers in the village—Right to pre-empt.*—A *wajib-ul-arz* gave a right of pre-emption to own brothers and nephews, then to cousins, then to co-sharers in the *patti*, and then to co-sharers in the village. The village, which was originally divided into two *pattis*, was subsequently divided into several *malals* by perfect partition, but no new *wajib-ul-arz* was framed. *Held*, that a co-sharer in one *malal* had a right to pre-empt in respect of a sale to a stranger of a share in another *malal*.

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

JANKI NATH v. RAJA RAM PARTAB SINGH, 2 A.L.J. 833=28 A. 286=A.W.N. 1906, 2. (22 A. 1, R.) [R., A.W.N. 1906, 137=3 A.L.J. 433, 1 Ind. Cas. 504, 3 Ind. Cas. 827, 6 A.L.J. 958=32 A. 63=4 Ind. Cas. 138, 7 A.L.J. 133=6 Ind. Cas. 17, 32 A. 265=7 A.L.J. 199.]

(51)—Wajib-ul-arz—*Right of pre-emption*—*Co-sharers*.—Where a *wajib-ul-arz* provided that the share-holders should sell with the consent of brethren and co-sharers, it did not confer any right of pre-emption on co-sharers. BUBBOO DOBEY v. ISHREE, 3 Agra 74.

(51-a)—*Pre-emption—Custom—Wajib-ul-arz—Relation as well as co-sharer—Preference—Re-sale to co-sharer by vendee—Limitation*.—M sold certain zamindari property to P on 6th November, 1909. P was a stranger, and he re-sold it to S and K on 14th November, 1910. S and K were co-sharers of M, the original vendor. Plaintiff, who was a co-sharer as well as a relation of M, brought a suit for pre-emption on the 14th November, 1910. S and K, however, were impleaded on 3rd February, 1911. The evidence in support of the custom of pre-emption consisted of two *wajib-ul-arzes* of 1833 and 1860, respectively. The one of 1833 required an intending vendor to notify his co-sharer of the sale, and when he refused, right was given to sell to a stranger. The latter *wajib-ul-arz* recognized a general right of transfer, but provided that, first, a near relation who was a co-sharer, and then a co-sharer, would have the right of pre-emption as against a stranger. Held (1) that the custom which the plaintiff was putting forward was a very usual custom, and consequently the finding of the Court below that the custom was proved was justified; (2) that the suit was not barred by limitation, for it was the sale of the 16th November, 1909, which gave the plaintiff his cause of action; (3) the second set of vendees were necessary parties in this sense, that, unless they were made parties, they would not be bound by a decree against their vendors, the original vendees. SAT NARAIN v. BADRI NATH, 9 A.L.J. 211=13 Ind. Cas. 645.

(52)—Wajib-ul-arz—*Sale by co-sharer to stranger—Proof of offer and refusal—Validity of sale*.—Where the terms of the *wajib-ul-arz* recognise the right of each sharer to sell without the consent of the others but limit that right so far as to give preference or right of refusal to the co-sharers, the sale to a stranger can only be good and valid on proof of offer being made and refused by the co-sharers. PERMESHREE DASS v. RAI KOONDUN SINGH, 3 Agra 3.

(53)—Wajib-ul-arz—*Co-sharer—Owner isolated plots of land in a village*.—Held, that the owner of isolated plots of land in a village is a

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

co-sharer in the village and may, as such, possess rights of pre-emption, although he does not own a share in the zamindari of the village and his name is not recorded in the *khewat*. ALI HUSAIN KHAN v. TASADDUQ HUSAIN KHAN, A.W.N. 1905, 219=2 A.L.J. 612=28 A. 124. (12 A. 426, 16 A. 412, F.) [D., 4 A.L.J. 541; R., 28 A. 246=2 A.L.J. 788=A.W.N. 1905, 264.]

(54)—*Pre-emption—Wajib-ul-arz—Devolution of interest—Right of heir to maintain a suit—Co-sharer joining an heir of another co-sharer—Effect of*.—The object of pre-emption is to exclude from the co-parcenary body a person who does not belong to that body and is entirely outside and, in that sense, a stranger to that body. Where, therefore, a co-sharer died, before instituting a suit, and his grandson A, who succeeded him in the co-parcenary, joined W (another co-sharer), in instituting a suit, held, that A was not a stranger to the co-parcenary body and did not lose his right of pre-emption against the purchaser. (5 A. 197, A.W.N. 1893, 25, 19 A. 324, 5 A. 65, R. & Disc.) Held, per Richards and Tudball, JJ. (Banerji, J., dissenting) that, under the Muhammadan law of pre-emption, the rule that the right of pre-emption dies with the person does not apply to cases of Customary Law. In the latter cases, an heir who inherits has a right to pre-empt the sale which took place before the estate vested in him. The case of 7 A. 535 was only an authority for the rule that a person purchasing a share-holder's interest subsequently to another sale could not enforce pre-emption as his vendor might have done. Doubt expressed as to the correctness of the case. Banerji, J.—The rule of pre-emption is a rule of substitution. The person to be substituted must be a person to whom at the time of sale the property could have been offered. Where therefore a co-sharer died before instituting a suit for pre-emption and his grandson succeeded him, held, the grandson was not entitled to maintain a suit for pre-emption. The principle which applies to the case of a purchaser equally applies to a case of a devolution of interest by inheritance. WAJID ALI v. SAHABAN, 6 A.L.J. 887, F.B.=6 M.L.T. 352=3 Ind. Cas. 820=31 A. 623. (7 A. 535, F.B., F.)

(55)—*Sale by Government—Co-sharer*.—When the Government acquires land permanently, it does not become a co-sharer in the village to which the land originally appertained, and the provisions contained in the *wajib-ul-arz* dealing with sales by co-sharers do not apply. Hence the Government can sell the land to any one it pleases and the co-sharers have no right of pre-emption. GAYA SINGH v. RAJA RAM SINGH, 2 A.L.J. 787=A.W.N. 1905, 259=28 A. 235.

(56) and (57)—Wajib-ul-arz—*Construction—Cosharers in the village—Right to pre-empt*.—A *wajib-ul-arz* gave a right of pre-emption to own

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

brothers and nephews, then to cousins then to co-sharers in the *patti*, and then to co-sharers in the village. The village, which was originally divided into two *pattis*, was subsequently divided into several *mahals* by perfect partition, but no new *wajib-ul-arz* was framed. *Held*, that a co-sharer in one *mahal* had a right to pre-empt in respect of a sale to a stranger of a share in another *mahal*. JANKI NATH v. RAJA RAM PARTAB SINGH, 2 A.L.J. 833 = A.W.N. 1906, 2 = 28 A. 286. (22 A. 1, R.) [R., A.W.N. 1906, 137 = 3 A.L.J. 433, 1 Ind. Cas. 504, 3 Ind. Cas. 827, 6 A.L.J. 958 = 32 A. 63 = 4 Ind. Cas. 138, 7 A.L.J. 123 = 6 Ind. Cas. 17, 32 A. 265 = 7 A.L.J. 199.]

(58)—*Wajib-ul-arz, construction of—Brothers—Co-sharers.*—A village *wajib-ul-arz* provided that, in the case of a sale by a co-sharer the first right of pre-emption would be in the uterine brother of the vendor, and the next class of pre-emptors would be co-sharers in the village; but the same *wajib-ul-arz* further provided that a Hindu widow succeeding to her husband in the absence of male issue would have full powers of sale, but would not be competent to sell to her brother or father. *Held* that the brother of Hindu widow could not as vendee from his sister resist a claim for pre-emption brought by co-sharers in the village. KAM NIWAZ v. DAKHO, A.W.N. 1908, 59.

(59)—*Pre-emption of village lands—Construction of wajib-ul-arz.—Brothers—Nephews—Co-sharer.*—Where the *wajib-ul-arz* of a village, comprising three *thoks* and some undivided land, provided, that the right of pre-emption shall belong in the first instance, to such brothers and nephews of the vendor as were co-sharers and, on their refusal, to other owners of the *thok*, *held* on the proper construction of the *wajib-ul-arz* that in the case of a sale by the owner of one of the *thoks* of his entire interest in the village, the owners of the other *thoks* could not claim any right of pre-emption. LACHCHO v. MAYA RAM, 5 A. 158, P.C. = 10 I.A. 1.

(60)—*Pre-emption—Wajib-ul-arz—Condition of agreement—Near relative though not shareholder in same thoke, preference of—Sale to wife of vendor—Wife near relative, not stranger.*—The condition of pre-emption in the agreement recorded in the *wajib-ul-arz* of a village was that the right of purchase should first be with the real brother of the share-holder, next with the nearest relatives (*rishtadaram karib*), then, with the share-holders of the same *thoke*, and after them with the share-holders of other *thokes*. Some property had been sold to a near relative and to the wife of the vendor. *Held*, in a suit for pre-emption by a share holder of the *thoke*, that a near relative fulfilled all the required conditions and had a preferential right over sharers of the *thoke*, as it was not necessary that the near relatives referred to in

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

the *wajib-ul-arz* should own a share in the same *thoke*. Where the parties are Mahomedans, the wife of the vendor would come in as a near relative in spite of her being not a share-holder, as a wife could not be considered a stranger having no interest whatever in the family. Consequently, a person having a right of pre-emption joining the wife of his vendor with him in his purchase does not lose his right of pre-emption. SYED MAHOMED TUKEE v. SHEIK HUIJI, 5 N.W.P. 142.

(61)—*Wajib-ul-arz—"Village"—Perfect partition, effect of, on covenants contained in wajib-ul-arz Co-sharers.*—Where a village is, by perfect partition under the Land Revenue Act, 1873, divided into a number of separate *mahals*, the covenants regarding pre-emption among the co-sharers, contained in the *wajib-ul-arz*, are not affected thereby and continue to be in force after such partition. The term "village" as used in a *wajib ul-arz*, means a definite area of land with houses upon it. Everyone living in the area has a share in it, and may therefore be regarded as a "shareholder" within its meaning. Even after partition, although there may be no joint ownership in the village, there may still be some community of interests and also a considerable community of things held and used in common by all the inhabitants. GOKAL SINGH v. MANNU LAL, 7 A. 772 = A.W.N. 1885, 263. [Diss, 17 A. 226; F., 11 A. 257; Exp., 22 A. 1, F.B.; R., 9 A. 234, 11 A.W.N. 137, 27 A. 602 = 2 A.L.J. 313 = A.W.N. 1905, 115.]

(62)—*Wajib-ul-arz—Joint Hindu family—Co-sharer.*—Even where one member of an undivided Hindu family is recorded in the Collector's register as co-sharer of a *mahal*, the other members of the family are "co-sharers" for purposes of pre-emption, within the meaning of the *wajib-ul-arz*. GANDHERP SINGH v. SAHIB SINGH, 7 A. 184, F.B. = A.W.N. 1884, 326. [F., 1 O.C. 252; R., 17 A. 454, 7 O.C. 61, 3 A.L.J. 641 = A.W.N. 1906, 240.]

(63)—*Joint Hindu family—"Co-sharer"—Wajib-ul-arz.*—The *wajib-ul-arz* of a village contained the following entry regarding the right of pre-emption—"When any co-sharer, etc." *Held* that a Hindu son living jointly with his father and having no separate property of his own was not a "co-sharer" within the meaning of the *wajib-ul-arz*, and was not entitled to pre-empt the property transferred by his father. JANEK SINGH v. GENGA BISHAN, A.W.N. 1884, 13.

(64)—*Pre-emption—Wajib-ul-arz—"Transfer"—"Nearer co-sharer"—Mortgage by conditional sale—Acquiescence—Rights of conditional vendee who first forecloses.*—The term "transfer" in a *wajib-ul-arz* includes both sales and mortgages. The expression "nearer co-sharer" applies to the co-owner of a particular share in preference to the owners of other shares in a village. Where, of two conditional mortgages, simul-

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*cld.***

taneously executed by the two co-owners of a share, to two different persons, one first becomes absolute, and the mortgagee is recorded as the proprietor of half the share, he can claim to pre-empt in respect of the other half share when the mortgage on it is foreclosed, subsequently, on the ground that he is a "nearer co-sharer," for at the time of the conditional sale in respect of the second half share being foreclosed, he and the mortgagors were the only owners of the share. The right which arose at the time of the mortgage and that which arose at the time of the sale on foreclosure were different rights. The acquiescence in the mortgage could not effect the right subsequently arising under the sale. *RUP NARAIN v. AWADH PRASAD*, 7 A. 478 = A.W.N. 1885, 85. [R., 11 A.W.N. 185.]

(65)—*Custom, wajib-ul-arz — Provision for offer of sale to co-sharers on payment of price fixed by Panchayet, effect of.*—This was a suit for pre-emption. In the Administration paper it was provided that, before a sale by a co-sharer, the land must be offered to the other co-sharers and shall not be alienated by him unless the said co-sharers shall refuse to take the land for the price fixed by a Panchayet of Zemindars of neighbouring villages. The Chief Court was of opinion that it could not be held that the custom evidenced by the clause gave the pre-emptor an absolute right to an offer of purchase at such price as a Panchayet might determine; nor, as a matter of law, can it be taken that an offer made to the pre-emptor at the price at which he was willing to sell, and for which he actually did sell, was not an offer made in good faith merely because it was not accompanied by an offer to submit the price to be determined by arbitration, or because there was a refusal so to submit. The most that can be said for the pre-emptor is that, in determining the question whether the offer made was made in good faith, the circumstances that the vendor declined to have the price fixed by a Panchayet should be taken into consideration. *JALAL-UDDIN KHAN v. SANDEH KHAN*, 49 P.R. 1881. [R., 75 P.R. 1901.]

(66)—*Wajib-ul-arz—Construction of document—Co-sharers.*—The clause relating to pre-emption in a village *wajib-ul-arz* ran as follows:—"At the time of the transfer of a zamindari right a right of pre-emption will accrue against a stranger, on payment of the price paid by him, firstly, to a co-sharer who is descended from an ancestor from whom the vendor is descended: secondly, to joint sharers, and, thirdly, to sharers in the mahal."—*Held* by *Blair, J.*, that under this *wajib-ul-arz* the right of pre-emption would only arise where the sale was to a "stranger" in the sense of a person not included in any of the three classes of pre-emptors specified. *Held* by *Aikman, J.*, that under this *wajib-ul-arz* the right of pre-emption might arise also in favour of a higher class of the three classes of pre-emptors upon a

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*cld.***

sale by a member of a higher class to a member of a lower class. *ILAH BAKHSH v. GHULAM ABBAS*, A.W.N. 1898, 15. (A.W.N. 1895, 9, R.) [R., 23 A. 427, 26 A. 544.]

(67)—*Pre-emption — Wajib-ul-arz—Construction of document—Co-sharer.*—The pre-emptive clause of a *wajib-ul-arz* ran as follows:—"If in this mahal any of the co-sharers wishes to sell or mortgage his share, he shall transfer it first to his near relatives, then to the near co-sharers, and then to the other co-sharers; but if none of them is willing to take, he then can transfer it to a stranger; and if any co-sharer does not act in this way, then his near relatives and co-sharers are entitled to take by right of preemption in the order given above." *Held* on a construction of this clause, that there was no justification for reading the words "near relatives" as meaning "near relatives who are also co-sharers." *ABDUL WAHID v. WILAYAT HUSAIN*, A.W.N. 1902, 109. [R., 27 A. 553 = 2 A.L.J. 253 = A.W.N. 1905, 97.]

(68)—*Wajib-ul-arz — Construction of document—Co-sharer.*—The pre-emptive clause of *wajib-ul-arz* was drawn up in the following terms:—"In case of great necessity, each co-sharer is entitled to transfer his property as recorded in the *khewat*, and the near co-sharers and the pattidars can claim a pre-emptive right; but out of them, the one who is nearer will have a prior right to do so." *Held*, that the right of preemption only arose on a sale to a stranger. If the sale was to a co-sharer, no right of suit accrued to a nearer co-sharer. *JAI DAT v. RAM BADAL*, A.W.N. 1905, 227 = 28 A. 168.

(69)—*Wajib-ul-arz—Construction—Co sharer.*—The *wajib-ul-arz* of a village provided that a co-sharer wishing to sell his share must do so, for such price as any other person may offer him to a near co-sharer in his own patti, next, to other co-sharers in the same patti, after that to nearer co-sharers in another patti then to other co-sharers in the mahal and then to a stranger. *Held* on the construction of the *wajib-ul-arz*, that it conferred a right of pre-emption on the different classes of co-sharers therein mentioned *inter se*, and that it was wrong to construe it as conferring such right only in the case of a sale to strangers. S.A. NO. 103 OF 1902, 26 A. 546, Note.

(70)—*Wajib-ul-arz—Pre-emption—Co-sharer.*—A *wajib-ul-arz* provided that the right of pre-emption existed (1) in a near co-sharer in the same patti (2) in any other co-sharer in the patti, (3) in near co-sharers in other patties, and (4) in co-sharers in the mahal at "whatever price is obtained from another." *Held* that, under the *wajib-ul-arz*, each class of pre-emptors had a preferential right of pre-emption as against persons belonging to the next following class, if they happen to be purchasers. It conferred upon the different classes, of persons mentioned in it a right of pre-emption *inter se*. *SUKA-*

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

DEO SINGH v. BAHADUR SINGH, 26 A. 544 = 1 A.L.J. 272. [S. A. No. 103 of 1902 and Letters Patent Appeal No. 28 of 1903, F.]

(71)—Wajib-ul-arz—*Sale of land by Government—Co-sharer.*—When Government has acquired land permanently it does not become a co-sharer in the village to which the land originally appertained, and on a sale thereof the provisions contained in the village *wajib-ul-arz* which deal with sales by co-sharers in the village are not applicable. GAYA SINGH v. RAJA RAM SINGH, A.W.N. 1905, 259 = 2 A.L.J. 787.

(72)—*Pre-emption—Wajib-ul-arz—Interpretation of document—Partition—Rights of co-sharers inter se—Custom or contract.*—The *wajib-ul-arz* of a village prepared in 1863 gave a right of pre-emption to (1) the own brothers of the vendor, or nephews having a common ancestor, (2) co-sharers in the *patti*, and (3) co-sharers in another *patti*. The *wajib-ul-arz* prepared in 1873 was headed as “Rights of co-sharers *inter se*, based upon custom or special contract,” and provided for pre-emption in these terms: “If a share-holder wishes to transfer his own share, he should make the transfer to (1) his own brother, (2) near relations, and if they refused, (3) co-sharers in the *patti*; (4) co-sharers in the village.” After this the village was partitioned, and the *mahal* in which the property sold was situate belonged exclusively to the vendor. The pre-emptor was his own brother, but a co-sharer in a different *mahal*. The vendees too were co-sharers in another *mahal*: *Held*, that the plaintiff had no right of pre-emption. *Per Banerji, J.*—The chapter in the *wajib-ul-arz* (of 1873) relied upon relates to the rights of the co-sharers *inter se*. The first category of pre-emptors must, therefore, be the persons who not only fulfil the condition of being own brothers of the vendor, but must also be co-sharers of the vendor. This the plaintiff is not, he having ceased to be one after the partition. *Per Stanley, C.J.*—The *wajib-ul-arz* of 1863 and 1873, respectively, do not record the same usage as to pre-emption; consequently, as a custom must be constant and invariable, the *wajib-ul-arz* of 1873 does not record a custom. The record being a contract, and the period of settlement having expired, no right of pre-emption now exists. JWALA SINGH v. SUMER CHAND, 8 A.L.J. 515.

(73)—Wajib-ul-arz — *Variation — Custom — Right of pre-emption inter se.*—The custom of pre-emption, as recorded in the *wajib-ul-arz* of 1833, gave no right of pre-emption *inter se*, whereas, the *wajib-ul-arz* of 1862 recorded such right. There was no instance of transfer between 1833 and 1862. The plaintiff has a preferential right under the document of 1862, but had no such right under that of 1833. *Held*, that no new custom under the circumstances could have sprung up between 1833 and 1862, that the custom of 1833 still subsisted

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

and that the plaintiff had no right to pre-empt. TAPAISHA DICHHIT v. GOKUL DICHHIT, 6 Ind. Cas. 839.

(74)—*Pre-emption—Wajib-ul-arz—Construction—Right inter se.*—The terms of a *wajib-ul-arz* of a village gave a right of a first purchase to *sab se karibi rishtedar*, who was a co-sharer and then to other co-sharers. *Held* that the nearer relative had a preferential right to remoter relatives. JAGANNATH v. GOLLA, 7 A.L.J. 653 = 7 Ind. Cas. 261.

(75)—Wajib-ul-arz—*Sale on “same price as paid by stranger”*—No right *inter se* among different classes of pre-emptors.—Where a *wajib-ul-arz* recognised a right of pre-emption ‘on the same price as paid by a stranger’ (*Shakhs Ghair*) though it mentioned different categories of pre-emptors, and gave some of them a preferential right over others, *held*, that the right to pre-empt arose only in the case of a sale to a stranger. NARAIN SARAN SINGH v. SIDH NARAIN SINGH, 5 A.L.J. 655 = A.W.N. 1903, 251. (27 A. 456, R.) [D., 7 A.L.J. 610.]

(76)—*Pre-emption—Wajib-ul-arz—Construction—Right given inter se—Words “stranger” used for regulating price.*—In the *wajib-ul-arz* of a village, the right to pre-emption was recorded as follows: In case of sale or mortgage, the transferor was bound to transfer first to a co-sharer in the *patti*, then to *pattidars* of the *mahal*, then to the owners of the other *mahals*, and, in case of refusal, to an outsider, “at the same price as a stranger would be willing to give.” *Held*, that the right of pre-emption existed *inter se* between the persons mentioned in the *wajib-ul-arz*, and that the “words at the price as a stranger would be willing to give” were introduced for the purpose of regulating the price only. GUARDIAL v. MATHURA SINGH, 7 A.L.J. 610 = 6 Ind. Cas. 920.

(77)—*Interpretation of wajib-ul-arz—“Stranger.”*—Suit for pre-emption. The plaintiff, pre-emptor, was a co-sharer in the *patti*. The vendee was a co-sharer in the village, but not in the same *patti* with the vendor. Hence, the priority claimed by the plaintiff over the vendee. The language of the *wajib-ul-arz* of the village showed that the right of pre-emption would arise only when the sale was made to a ‘stranger.’ The sale in this case not being one to a ‘stranger,’ but to a co-sharer in the village, though not in the same *patti* with the vendor, *held*, no right to pre-empt accrued to the plaintiff. KHATUN BIBI v. SAYIDA BIBI, A.W.N. 1905, 45 = 2 A.L.J. 689 = 27 A. 457. (23 A. 427, R.; A.W.N. 1904, 104, D.)

(78)—*Pre-emption—Wajib-ul-arz—“Stranger.”*—Where, under the terms of a *wajib-ul-arz*, successive pre-emptive rights were given firstly to ‘own brothers,’ secondly, to ‘near cousins,’ thirdly, to ‘shareholders,’ it was *held* in a case where the parties were Mahomedans, that, in regard to a sale of land to which this *wajib-ul-arz* applied, nephew (brother’s son) of

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

the vendee was a 'stranger,' and his joinder as co-vendee would vitiate the sale and let in other persons having a right of pre-emption. **AMJAD ALI v. MUSHTAQ AHMED, 17 A. 454 = A.W.N. 1895, 95. (4 A. 259, D.) [R., 10 O. C. 225.]**

(79)—*Pre-emption—Wajib-ul-arz—"Stranger," meaning of.*—A person, who is not a member of the proprietary body amongst whom a custom of pre-emption exists, and who has no common rights and liabilities with the members of the proprietary body, is, for the purpose of pre-emption, a stranger. A person who is entitled only to a *malikana* allowance is a stranger to the co-parcenary body; and a sale made to him is subject to pre-emption. **DIRG-BIJAI SINGH v. RAM ADHIN, 7 Ind. Cas. 70.**

(80)—*Wajib-ul-arz giving preference over strangers—Acquisition by a stranger of a share other than one sought to be pre-empted—Effect of.*—The *wajib-ul-arz* of a village gave a right of pre-emption to certain co-sharers in succession over strangers. A share was transferred to a stranger, who subsequently acquired another share at an auction. In a suit for pre-emption brought to pre-empt the former sale, held, that the plaintiff was entitled to pre-empt, inasmuch as the defendant's rights were still inferior to his rights. **PARGAN SINGH v. AJKUMAR SINGH, 7 A.L.J. 77=5 Ind. Cas. 520.**

(81)—*Grove-holder whether as such a member of the village-community—Oudh Laws Act, s. 9—Pre-emption.*—Held, that a grove-holder, *i.e.*, a person owning trees, but having no interest in the land in which they are planted, is not, as such, a member of the village-community, within the meaning of s. 9 of the Oudh Laws Act, and cannot upon this basis claim a right of pre-emption in respect of the sale of a portion of the proprietary right. **GANGOLE v. SYED KAMAR ALI KHAN, 13 O. C. 202=7 Ind. Cas. 613.**

(82)—*Wajib-ul-arz—Construction—Two classes of pre-emptors—The first class of pre-emptors not claiming pre-emption—Suit by second class of pre-emptors.*—The *wajib-ul-arz* of a village gave right of pre-emption to real brothers and nephews, and after them to the person or persons who would inherit the property from the vendor in default of real brothers and nephews. The vendor had two nephews, but they did not claim the right to pre-empt. Plaintiffs, who sued for pre-emption, were entitled to succeed to the vendor's property in default of real brothers and nephews: Held, that plaintiffs were entitled to pre-empt. The *wajib-ul-arz* should be construed as providing for two classes of pre-emptors, namely, (1) real brothers or nephews, and (2) the persons who would inherit the property from the vendor in default of real brothers and nephews. If no person in the first class claims pre-emption, the

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

right devolves on any person in the second class. **RAM LAL v. RAM LAL, 7 Ind. Cas. 739.**

(83)—*Pre-emption—Wajib-ul-arz—Construction—Preferential rights between a near relation and a member of the same caste.*—A *wajib-ul-arz* provided as follows:—"The right of pre-emption is given (1) to co-sharers who are near in blood to the vendor, (2) to other co-sharers of the same caste, (3) lastly to the co-sharers of the village." Held, that under the *wajib-ul-arz* near relations had a preferential right over persons of the same caste. **BHAGWAT DIN v. SHEO DIAL, 10 Ind. Cas. 40.**

(84)—*Suit for—Wajib-ul-arz silent as to priority—Construction.*—Where a *wajib-ul-arz* is silent as to the question of priority and simply gives the right of pre-emption to a number of persons without specifying any order in which they shall be entitled to pre-empt *inter se*, the Court will not be justified in interpreting the *wajib-ul-arz* as giving the right of pre-emption to the various classes of persons named therein in the order in which they were specified. **HATTI v. KUNNA, A.W.N. 1905, 101, (23 A. 42, A.W.N. 1904, 104, D.)**

(85)—*Wajib ul-arz, Construction of—Uncle not included in the category of bhai nakiki or bhatija hakiki.*—Where a *wajib-ul-arz* gave a right of pre-emption on transfer of share, first, to *bhai bhatija hakiki*, then to *bhai chachazad* who may be a co-sharer of the vendor, then to the co-sharers of the *patti* and so on, it was held that the uncle of the vendor had no preferential right to pre-empt over the vendee, who was a first cousin of the vendor, inasmuch as he was neither a *bhai hakiki* nor a *bhatija hakiki*. *Semle*:—A reciprocal right to pre-empt is not to be implied where the document is silent. **JANKI PRASAD v. BALDEO PRASAD, 2 A.L.J. 687.**

(86)—*Suit for—By a near relative based on wajib-ul-arz—Construction of wajib-ul-arz.*—In this case, the plaintiff claimed the right of pre-emption on the ground that he was a near relative of the vendor and, as such, he was entitled to priority over the defendant, who had obtained a decree for foreclosure and an order absolute for foreclosure. He relied upon the *wajib-ul-arz* of 1864, which provided that "if a co-sharer is desirous of transferring his share, he shall transfer it, first, to his near relative, and next to co-sharers in the village, and, on their refusal, he may mortgage or sell it to any one he likes." But the defendant contended that the previous *wajib-ul-arz* was superseded by a later *wajib-ul-arz*, which provided, "Up to now there has been no suit for pre-emption, but we accept the right of pre-emption," and that this did not record a custom of pre-emption, and that the rule, which, under this *wajib-ul-arz*, would govern pre-emption, is the rule of Mahomedan Law. Held, that the custom of pre-emption recorded in the previous

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

wajib-ul-arz had not been abrogated by the subsequent *wajib-ul-arz*, although no suit for pre-emption had been brought, and when, according to the latter, the co-sharers agreed to accept the rule of pre-emption, they clearly agreed to be bound by the rule, which, at that time, prevailed, *viz.*, the custom recorded in the previous *wajib-ul-arz*; that, according to the construction of the previous *wajib-ul-arz*, there were two distinct classes of pre-emptors, the first class being near relatives whether they be co-sharers or not and the second class being co-sharers in the village; that the plaintiff, being a near relative of the vendor, was entitled to a decree in his favour. **RAM DIN v. POKHAR SINGH, A.W.N. 1905, 97=2 A.L.J. 253=27 A. 553. (A.W.N. 1902, 109, R.)**

(87)—*Pre-emption—Wajib-ul-arz—Presumption—Reg. VII of 1822—Evidence Act, s. 35—Pre-emption suit—Vendor, whether necessary party.*—According to the ordinary principles of interpretation applicable to a *wajib-ul-arz*, an entry relating to pre-emption is *prima facie* evidence of the existence of custom. (25 A. 90, *F.*) Under Reg. VII of 1822, a *wajib-ul-arz* was prepared with the object of furnishing a Court of justice with a compendious statement of the local usages connected with land tenures, and it raised a presumption of the truth of the entries contained in it even prior to the enactment of s. 91 of Act XIX of 1873. The entries are relevant evidence under s. 35 of the Evidence Act. (A.W.N. 1904, 117, *Overruled.*, 8 A. 434, *F.*) [*R.*, 3 A.L.J. 561=A.W.N. 1906, 174.] In a suit for pre-emption, the vendor is not a necessary party. **RAM SARUP v. SITAL PRASAD, 26 A. 549=1 A.L.J. 279. (6 A. 57, A.W.N. 1903, 239, *F.*) [*R.*, 10 O.C. 49, *F.B.*, 6 A.L.J. 926=6 M.L.T. 300=32 A. 14=3 Ind. Cas. 735.]**

(88)—*Suit to enforce right of pre-emption—Wajib-ul-arz—Clause in, fixing price in case of dispute between vendor and pre-emptor—Prohibition of sale to stranger.*—This was a suit by the plaintiffs to enforce their right of pre-emption in respect of certain property which had been sold by the defendant (a co-sharer with the plaintiffs) to a stranger for Rs. 150 in contravention of the terms of the *wajib-ul-arz* relating to pre-emption. The plaintiffs, in their plaint, claimed to be put in the place of the stranger vendee on payment of Rs. 23-12-0 being the value of the property according to a condition of the *wajib-ul-arz* regulating disputes in cases of pre-emption. This value was less than one sixth of the market-value of the property. The defendants (the vendor and the stranger vendee) pleaded, *inter alia*, that the clause of the *wajib-ul-arz* fixing the price at which a co-sharer should sell to a co-sharer was not applicable to the present case. *Held*, upholding the contention of the defendants, that the plaintiffs were not entitled to the relief sought. In this case, there had been a completed transfer to a stranger for a consideration

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

which was fair and honest and this suit had been brought 6 months after the sale. Moreover, the plaintiffs claimed to be entitled to avoid the contract between the vendor and the stranger vendee by payment to the latter, not of the price he had paid (Rs. 150), but of only Rs. 23-12-0, which was an abnormally low price, calculated on a principle applying to differences between vendors and co-sharer pre-emptors only, and, this, a Court of Equity could not allow. **AKBAR SINGH v. JUALA SINGH, A.W.N. 1885, 216. [*F.*, 6 Ind. Cas. 118; *D.*, 8 A. 102.]**

(89)—*Purchase-money—Calculation—Wajib-ul-arz.*—The clause in the *wajib-ul-arz* relating to pre-emption was as follows:—"Should any share-holder wish to transfer his share, he must transfer it first to the near share-holder, failing that, to the share-holder in the *thoke*, and last of all to a stranger, if no one of the above is willing to purchase. It is the custom to claim pre-emption in the case of conditional sale or mortgage, by offering an amount the interest of which at 1 per cent. may be equal to the profits, and in the case of an absolute sale, an amount yielding interest at 8 annas per cent. profits." The plaintiff brought the suit in respect of a sale by a co-sharer to a stranger. The plaintiff claimed pre-emption on payment of Rs. 69, which, he alleged, was the amount of consideration for the property sold, calculated upon the principle mentioned in the *wajib-ul-arz* and he asserted that the price stated in the sale-deed, namely, Rs. 199, was fictitious and was so stated to defeat the rights of pre-emption. The defendant did not appear to answer the suit. *Held* that, under the terms of the *wajib-ul-arz* binding on the parties, the plaintiff was entitled to buy the property in question at the rate fixed by the *wajib-ul-arz*, that the defendants did not dispute or even question that fact, making no answer to the suit, that the plaintiff adduced some evidence, which stood uncontradicted, that the price entered in the sale-deed was false and fictitious, that the plaintiff alleged that Rs. 69 represented the true price fixed on the basis of the rate supplied by the *wajib-ul-arz*, that the defendants did not deny that allegation, and that the plaintiff was therefore entitled to a decree entitling him to buy the property in question for Rs. 69. **HASRAT KHAN v. JEODADH UPADHIA, A.W.N. 1887, 76. [*R.*, 10 A. 621, 5 A.L.J. 122, Note.]**

(90)—*Construction of wajib-ul-arz—Amount payable by pre-emptor.*—Where the clause of a *wajib-ul-arz* relating to the right of pre-emption provided that such right should accrue not only in respect of sales, but also in regard to conditional sales mortgages and "*thika*" leases, *held* that under its terms the right accrued, in the case of a mortgage by conditional sale, on such sale becoming absolute. (30 A. 610, *R.*) [*R.*, 11 A.W.N. 185.] Where the right of pre-emption is claimed under the above circumstances, the pre-emptor is bound to pay, as the price of

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

the property, the entire amount due under the mortgage when the sale becomes absolute. *ASHIK ALI v. MATHURA KANDU*, 5 A. 187 = A.W.N. 1882, 212. [F., 6 A. 344; Appl., 8 A. 502.]

(91)—*Wajib-ul-arz—Construction—Pre-emption—Village site—House.*—The contract embodied in a *wajib-ul-arz* contained the following provision:—"Every co-parcener has power to sell and part with his own share, but so long as one entitled to pre-emption comes forward as purchaser, the transfer shall not be made to a stranger." Held by the Full Bench (*Mahmood, J., dissenting*) that the word "share" (*hakkiyat*) connoted exclusively the co-parcener's estate in the cultivated area of the *mahal* and that the village site with its houses and other tenements could not be governed by the contract embodied in the *wajib-ul-arz*; consequently, no suit for pre-emption lay in respect of such houses. *ISHRI v. THAKUR DIN AND SAHIB RAM v. KISHEN SINGH*, A.W.N. 1882, 192, F.B. [F., 4 A.L.J. 197, Note; R., 10 A. 553, 7 A. 626, F.B., 7 A. 633, F.B., 12 A. 426, F.B.]

(92)—*Wajib-ul-arz—Price—Power given by wajib-ul-arz to appoint arbitrator to settle price—Wajio-ul-arzunenforcible.*—Where the terms of the *wajib-ul-arz* were that, when there was a dispute with respect to the price of a property, the matter should be referred to arbitration and, if the parties, did not refer it, the Collector should have power to appoint an arbitrator; held, that the clause was incapable of enforcement and the *wajib-ul-arz* did not enable a Court to fix a substitute for the contract entered into between the vendor and the vendee a different contract with regard to the consideration for the sale. *MEHI LAL v. CHET RAM*, 3 A.L.J. 479.

(93)—*Wajib-ul-arz—Clause incapable of enforcement—Arbitrator to settle price.*—A *wajib-ul-arz* contained the following clause:—"If a co-sharer, being in collusion and concert with a stranger.....gets an improper and unreasonable price settled for the property through animosity or with the intention of causing disturbance in the village, and if there be a dispute as regards the price, the price shall be settled by an arbitrator, who shall be nominated by mutual consent. If none of the parties be willing to refer the matter to arbitration, the Collector shall have power to appoint an arbitrator on behalf of the Government and to have the price settled." Held, that the clause in question could not be enforced. The Collector has no power on behalf of Government to appoint an arbitrator and the Court is not entitled to vary the contract entered into between the vendor and vendee. It cannot fix "a reasonable price" or, indeed, any price other than that actually paid. *CHAUDHARI MEHI LAL SINGH v. LAKHPAT SINGH*, A.W. N. 1906, 218.

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

(94)—*Pre-emption—Purchase money—Interest on money prepaid by vendee to vendor—Registration Act (III of 1877), s. 17, cl. (c)—Receipt for money paid prior to sale.*—All that a pre-emptor has to pay to the vendee is the sum actually representing the purchase-money; interest chargeable on amounts prepaid by the vendee to the vendor before the date of sale cannot be levied from him. The mere fact that the pre-emptor is not legally bound to pay the interest, which is shown as part of the consideration for the sale, does not mean that the parties to the sale did not fix the price in good faith within the meaning of s. 22 of the Punjab Pre-emption Act. A receipt for money paid previous to a sale by the vendees to the vendor is not compulsorily registrable under cl. (c) of s. 17 of the Registration Act, if the sale was not completed when the money was paid. *SAYAD RUKH ABDULLA SHAH v. DAYALA MAL*, 54 P.L.R. 1910 = 8 Ind. Cas. 233.

(95)—*Pre-emption—Wajib-ul-arz, Construction of—Perfect partition of mahal under N. W P. Land Revenue Act, XIX of 1873—No new wajib-ul-arz framed for separated mahals—Hissadar deh—Applicability of old Wajib-ul-arz to newly partitioned mahals—Presumption against.*—The record as to the custom of pre-emption in the *wajib ul-arz* of a certain village was as follows:—"If any *hissadar* wishes to transfer his share (*hissa*), first he will transfer it to his own brother, then to his near relatives, thirdly to owners in the village who are partners in the same *khata*, fourthly to the *hissadaran deh*." There was a perfect partition of the village under the N.W.P. Land Revenue Act, 1873; but no new *wajib-ul-arz* for any of the new mahals was framed at or since the partition. On a certain land in one of the new mahals being sold to a stranger, a co-sharer of the vendor in the undivided mahal, but who, since the partition, owned a share only in another of the new mahals, claimed pre-emption under the old *wajib-ul-arz* as a *hissadar deh*. Held, by the Full Bench, upon the construction of the *wajib-ul-arz*, that he was not entitled to pre-empt. [F., 6 A.L.J. 958 = 32 A. 63, 1 Ind. Cas. 504, 3 Ind. Cas. 827; R., 7 A.L.J. 133; D., 28 A. 614 = A.W.N. 1906, 134.] Upon a perfect partition of a mahal under the N.W.P. Land Revenue Act, 1873, where no *wajib-ul-arz* has been framed for any of the new mahals, it is incorrect to say that the old *wajib-ul-arz* necessarily disappears or ceases to exist. Whether the pre-emption clause in a *wajib-ul-arz* constitutes a contract or is a record of custom, its operation after a perfect partition of the mahal depends in each case upon the proper construction of the particular contract or the proper interpretation of the custom recorded, in the absence of any evidence as to the intention of the co-sharers at the time of partition. But there is a strong presumption against such a claim when made by persons who are no longer co-sharers of the vendors and, where the language of the *wajib-ul-arz* is

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

ambiguous, this presumption may be decisive. **DALGANJAN SINGH v. KALKA SINGH**, 22 A. 1, F.B. = A.W.N. 1899, 111. [F., 1 A.L.J. 33, 2 A.L.J. 261, 27 A. 602 = A.W.N. 1905, 115 = 2 A.L.J. 313; R., 133 P.R. 1907, F.B. = 84 P.W. R. 1907 = 88 P.L.R. 1908, 29 A. 295 = A.W.N. 1907, 39 = 4 A.L.J. 137, 6 A.L.J. 715 = 3 Ind. Cas. 534; D., 28 A. 286 = 2 A.L.J. 833 = A.W. N. 1906, 2, 31 A. 274 = 6 A.L.J. 180 = 2 Ind. Cas. 208.]

(96)—*Possession in lieu of dower*—Wajib-ul-arz.—Where a wajib-ul-arz gives the right of pre-emption to “co-sharers” in the village in cases of transfers by other co-sharers to strangers, a person in possession in lieu of dower is not a co-sharer within the meaning of the wajib-ul-arz. **KHAIRUNNISSA BIBI v. AMIN BIBI**, A.W. N. 1887, 93. [Appr., 20 A. 19; D., 7 A.L.J. 775.]

(97)—*Suit for pre-emption — Usufructuary lease*—Wajib-ul-arz.—Where the terms of an administration paper were that in cases of transfer by “sale, etc.” a preferential claim might be raised: *Held*, that an usufructuary lease for 8 years was as much a transfer as an mortgage for the same term, as the condition of the administration paper included all transfers permanent and temporary; and co-sharers would have preferential right over a stranger, and the transfer should be offered to them in the first instance. **AHMED ALI KHAN v. AHMED**, 1 Agra 101.

(98)—Wajib-ul-arz — *Pre-emptor accepting lease of property in suit from the vendee.*—Where, in a suit, for pre-emption based upon a custom declared in the wajib-ul-arz it was found that the pre-emptor had, with knowledge of his right as pre-emptor, accepted a lease of the land claimed from the vendee, it was *held*, that this amounted to such an acquiescence in the sale as would bar the plaintiff's right of suit. **KISHAN LAL v. ISHRI**, A.W.N. 1905, 260 = 28 A. 237.

(99)—*Punjab Laws Act (IV of 1872), s. 10—Pre-emption—Mouza Mangal Kolha, District Kangra—Right of pre-emption in Kangra District different from elsewhere, and restricted to certain persons—Burden of proof—Presumption—Admissibility of wajib-ul-arz of other villages to prove custom in a particular village.*—In the Kangra District, the custom of pre-emption is different from elsewhere, and pre-emption is only recognized, where the land is ancestral and the pre-emptor is descended from the common ancestor. The presumption is that the custom of one village is similar to the custom of other villages in the Kangra District and a person setting up a contrary one is bound to prove it. **LAHRU v. NARAIN**, 1 Ind. Cas. 477 = 42 P.W.R. 1909.

(100)—Wajib-ul-arz — *Successive wajib-ul-arzes not in agreement—Custom—Evidence of Rights, inter se—Remand.*—Where the question

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

was as to the existence in a village of a custom conferring a preferential right of pre-emption upon a co-sharer in the same *thok*, and it appeared that while the later *wajib-ul-arzes* of 1862 and 1876 recognized such a custom, the earliest *wajib-ul-arz* of 1833 recorded only a custom that gave no preference *inter se* to co-sharers of the village; *held*, (*Richards, J. dubitante*) that there was legal evidence of the existence of the custom claimed (A.W.N. 1897, 3, R.) The principle of English Common Law that a custom is not proved if it is not known to have been immemorial, cannot be applied in these provinces. **GOKUL DICHIT v. MAHARAJ DICHIT**, 2 A.L.J. 790 = A.W.N. 1905, 266. (17 A. 87, R.) [R., 6 Ind. Cas. 839.]

(101)—*Pre-emption — Custom—Wajib-ul-arz—Rules of the Board of Revenue for the settlement of the Gorakhpur and Basti districts (B.E.C., 8—1, s. (33)—Evidence.*—Under the rules framed by the Board of Revenue for the settlement of the Gorakhpur and Basti districts, a settlement officer is, with regard to mehals which belong to Muhammadan proprietors, not only authorized but required to record in the memorandum of village customs a note of any custom or constitution peculiar to the mahal, including a custom of pre-emption. **RAMZAN CHAUDHRI v. ABDUL GHANI**, A.W. N. 1901, 115.

(102)—*Pre-emption — Wajib-ul-arz — Custom—Prior wajib-ul-arz recording a custom of pre-emption—Subsequent wajib-ul-arz containing an entry to the effect that the custom did not exist—Evidence.*—Upon the question whether the custom of pre-emption prevailed in certain villages a *wajib-ul-arz* of 1860 was cited, in which the custom was recorded as subsisting. On the other hand, there was a subsequent *wajib-ul-arz* of 1887, in which, under the heading of pre-emption, was recorded the entry “Nadarad.” *Held*, that this latter entry amounted to more than mere silence as to whether the custom of pre-emption did or did not exist in 1887, and an issue was referred as to the question of the existence or non-existence of the custom. **RAM LAGAN v. RAM UGRAH**, A.W.N. 1901, 29. (16 A. 40, D. 2 A. 876, R.) [Overruled., 25 A. 90, F.B.]

(103)—Wajib-ul-arz of 1866 — *Evidentiary value of entry.*—Where a *wajib-ul-arz* of 1866 produced in support of a claim for pre-emption contained an entry as to pre-emptive right opening with the words, “every co-sharer is entitled to transfer.....but the condition is that he must do so, firstly, in favour of near co-sharers, &c.,” *held* that a *wajib-ul-arz* prepared and attested according to law is *prima facie* evidence of the existence of any custom of pre-emption it records and that the opening words were indicative of a customary right and not of a right created by contract which would be determined on the expiry of the period during

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*cld.***

which that settlement lasted. *ALI NASAR KHAN v. MANIK CHAND*, 25 A. 90 = A.W.N. 1902, 207. (A.W.N. 1897, 3, 2 A. 876, 8 A. 434, R.) [R., 26 A. 10, 26 A. 549 = A.W.N. 1904, 128 = 1 A. L.J. 278.]

(104)—*Wajib-ul-arz—Pre-emption clause—Custom—New contract—Burden of proof.*—If a *wajib-ul-arz* clearly shows that a clause as to pre-emption embodies a new contract entered into by the co-sharers, at the time the *wajib-ul-arz* was prepared, it would be necessary for the plaintiff claiming pre-emption to prove that he, or some one through whom he claims, was an assenting party to the contract; but that, if the *wajib-ul-arz* does not show or otherwise prove that the pre-emption clause was thereby the embodiment of a new contract as to pre-emption, the reasonable and proper construction to place upon such a document would be that the pre-emption clause was merely the recital of a pre-emption custom in force in the village; in such a case it would be for the defendant in a pre-emption suit to prove clearly that no such custom existed and that the vendor and the plaintiff had not agreed to be bound by it. *SAVAK SINGH v. GIRJA PANDE*, 2 A. L.J. 6 = A.W.N. 1903, 16. (A.W.N. 1897, 3, F.) [R., 2 Ind. Cas. 623; D., 5 A.L.J. 470 = A.W.N. 1908, 121.]

(105)—*Wajib-ul-arz not signed by vendor—Onus.*—Where the vendee of certain property regarding which a right of pre-emption was asserted, pleaded that the *wajib-ul-arz* on which the right had been based, was not signed by the vendor, *held* that it was for the vendee to show that the vendor was no party to it, had no knowledge of its contents or had repudiated it as not binding on her. If they failed to show this, the condition of pre-emption would bind her. *BHAWANT SINGH v. SAHIB SINGH*, A.W.N. 1882, 87.

(106)—*Pre-emption—Wajib-ul-arz—Implied assent to contents by vendor.*—Where a vendor, against whom a right of pre-emption is raised based upon an agreement recorded in the *wajib-ul-arz*, did not sign the *wajib-ul-arz*, nor his authorized agent attested it on his behalf, although the vendor was present when the document was attested and did not raise any objection to its contents for ten years after the attestation, *held* that the vendor should be taken to have accepted the *wajib-ul-arz* as binding upon him. *BADAL v. RAM DIAL*, A.W.N. 1881, 26.

(107)—*Pre-emption—Wajib-ul-arz—Agreement recorded in absence of vendor.*—Where a vendor of certain lands in a village was absent from the village when an agreement was recorded in the *wajib-ul-arz* of the village in which the land was situate and it was not attested by him, and he returned to the village a short time before he sold the property, *held* that he was not bound by the agreement, and it should not be inferred from his silence on his

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*cld.***

return that he assented thereto. *JAIRAM v. BAHADUR*, A.W.N. 1881, 20.

(108)—*Wajib-ul-arz—Stipulation against alienation by one co-parcener without consent of others—Pre-emption.*—A stipulation in the *wajib-ul-arz* merely prohibiting alienation by any member of the co-parcenary body without the consent of the other sharers, does not confer a right of pre-emption on a co-sharer, and, on the basis of this stipulation, no decree for pre-emption can be given, but the co-sharer is entitled to obtain a decree cancelling the sales which have been made without his consent. *GAYADEEN v. RAMSAHAI*, 2 Agra 381.

(109)—*Wajib-ul-arz—Sir land.*—The suit was to enforce the right of pre-emption in respect of 6 'bighas' 16 'bis-was' and 4 dhurs of sir land situated in a village, the claim being based on the *wajib-ul-arz* of the village. The pre-emptive clause in the *wajib-ul-arz* was as follows:—"In the event of any special necessity, or of the accrual of the Government revenue, we have all of us the power to sell or mortgage the entire village. Should any sharer wish to transfer his own share, he must first offer it to sharers in the village. If they refuse to take it, or to give a fair price, he may then transfer it to a stranger." *Held* that the plaintiff was not entitled to pre-empt as the sale was not of a transfer of a share in the zamindari, but only of a specifically defined right, viz., the sir holding of the sharer. *HAZARI LAL v. UGRAH RAI*, A.W.N. 1884, 103. (N.W.P.H.C. 1875, 43, A.W.N. 1882, 192, R.) [Diss., 7 A. 626, F.B.; Not F., 7 A. 633; R., 12 A. 426, 3 Ind. Cas. 461.]

(110)—*Wajib-ul-arz—Co-sharers in patti—Purchaser of sir land.*—In a suit for pre-emption founded on the *wajib-ul-arz*, under which a shareholder wishing to sell or mortgage was to do so to co-sharers in the patti, where the vendee set up as a defence that he was a co-sharer in the patti and based his claim to be a co-sharer in the patti on the fact that a co-sharer in the patti had sold him some sir land, *held* that it was unsafe to generalize that a sale of sir land was equivalent to a sale of a shareholder's rights in the patti, and that to be a shareholder within the meaning of the *wajib-ul-arz*, a person must have all rights and be subject to all the obligations and liabilities attaching to the proprietary body in the mahal or patti, such as the right to the profits and the liability for the revenue, and in fact all rights and obligations, and that before deciding whether the defendant by purchasing a piece of land called sir from a shareholder in the patti, had obtained a shareholder's interest, the actual facts of the sale must be ascertained. *RAGHUNATH SINGH v. GOPAL SINGH*, A.W.N. 1886, 144. [R., 3 Ind. Cas. 461, 6 Ind. Cas. 169.]

(111)—*Pre-emption, suit for—Clause for pre-emption in wajib-ul-arz on sale of "share"—Co-sharer transferring his ex-proprietary rights in*

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

sir land—Pre-emption in respect of such transfer, if legal.—This was a suit for a declaration of plaintiffs' pre-emptive right in a certain village, in respect of which a sale of their shares was made by the defendants-vendors (co-sharers with plaintiffs) to the defendant-vendee (a stranger). The provision of the *wajib-ul-arz* relating to pre-emption was that when a co-sharer desired to sell his "share," i.e., his proprietary interest as a co-sharer, he must first offer it to his co-sharers and that he could sell it to a stranger *only* when the offer was refused by them. In this case, the defendants-vendors, in addition to disposing of their "shares" in the village, sold also to the defendant-vendee by deed on the same day their rights as ex-proprietors in the *sir-lands* of the village. The defendant vendee contended that the right of pre-emption, as created by the *wajib-ul-arz*, could not be exercised in respect of this latter transaction. *Held*, allowing the contention, that the plaintiffs had a pre-emptive right only in respect of the "shares" in the village which had been transferred to the stranger by the defendants-vendors. The *wajib-ul-arz* did not contemplate a transfer by a co-sharer of an interest which only accrued to him upon his divesting himself of his proprietary rights; that is to say, there is no right of pre-emption in respect of those ex-proprietary rights which by the law accrue to a co-sharer who sells his proprietary rights. **PARSHAD SINGH v. SADHARI LAL, A.W.N. 1885, 220.**

(112)—*Pre-emption—Wajib-ul-arz, Construction of—Partition.*—Where a *mauza* originally consisting of one *mahal* was divided by perfect partition into three *mahals* and a separate *wajib-ul-arz* was prepared for each of them in which was inserted the following clause relating to pre-emption:—"The co-sharers of the *mauza*, provided they pay the proper price, can become pre-emptors when a transfer of property is made." *Held* that the right of pre-emption was not limited to co-sharers in the *mahal* in which the property sold was situated. **MATA DIN v. MAHESH PRASAD, A.W.N. 1892, 100.** [D., 22 A. 1; R., 17 A. 226, 27 A. 604 = 2 A.L.J. 313 = A.W.N. 1905, 115.]

(113)—*Pre-emption—Wajib-ul-arz, Construction of—Effect of perfect partition on different classes of pre-emptors existing before partition.*—A village consisted of two *thoks*. It was subsequently divided into six *mahals* by perfect partition. The *wajib-ul-arz* prior to partition gave a right of pre-emption, first to the *hissadarkaribi*, then to *hissadar thok*, and then to *hissadaran* of other *thoks*. The plaintiffs would have been co-sharers in one of the *thoks* if partition had not taken place. After partition, they were co-sharers in one of the *mahals*, but not in that which was the subject of pre-emption: *Held*, that, the *thoks* having been destroyed by perfect partition, the plaintiffs were no longer co-sharers in any *thok*. Further, that they, being co-sharers in the *mahal* other than

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

that which was the subject matter of sale, had no rights of pre-emption. **BABU GOBI KISHUN v. BABU ISRI PRASAD, 1 Ind. Cas. 504.** (22 A. 1, F.B., F., 28 A. 286, D.)

(114)—*Suit for—Custom recorded in the settlement wajib-ul-arz—Partition of village into two different mahals—Wajib-ul-arz prepared at the time of partition recording the right of—Right of a share-holder in one mahal to pre-empt the share sold in another—Construction of wajib-ul-arz.*—The settlement *wajib-ul-arz* of a village provided that any co-sharer, who wishes to sell his share, must sell it first to sharers descended from a common ancestor, next to *hissidar* in the *patti*, and on their refusal, to *shurkayandeh*, that is, co-sharers in the village. Twelve years after the settlement, the village was divided into two *mahals* by perfect partition, and the *wajib-ul-arz*, prepared at the time of partition, maintained the custom regarding the right of pre-emption as recorded in the settlement *wajib-ul-arz*. The plaintiff, a sharer of one *mahal*, claims, on the basis of the settlement *wajib-ul-arz*, to pre-empt a share sold in the other *mahal* to a stranger. The question in dispute was, whether, after a partition of a village, a sharer of one *mahal* can claim to pre-empt a share sold in another *mahal* when a right of pre-emption is given under the new *wajib-ul-arz* to the co-sharers of the village. *Held*, that the *wajib-ul-arz* contemplates share-holders in an unbroken village, and not persons, who to all intents and purposes, are strangers to the *mahal* in which the property is situated. It contemplates only one class of share holders in the village, viz., those who are co-sharers. The plaintiff not being a co-sharer, is not such a share-holder in the village, as is contemplated by the settlement *wajib-ul-arz*. Hence, his suit for pre-emption fails. **MATHRA PRASAD v. NEM CHAND, 2 A.L.J. 261.** (22 A. 1, F.B., 1 A.L.J. 33, F.)

(115)—*Pre-emption—Wajib-ul-arz—Interpretation of document—Partition of village—New wajib-ul-arz, prepared after partition.*—The determination of an alleged right of pre-emption must depend upon the particular circumstances of each case and the evidence adduced in support of the pre-emptive right. The *wajib-ul-arz* of a village before partition provided for pre-emption in the following way; "Rights of co-sharers as among themselves on the basis of custom or of agreement. The custom of pre-emption obtains. In the case of sale of property by a co-sharer, another co-sharer in the *mouza* can bring a suit for pre-emption. If he offers a low price, then the vendor can sell the property to a stranger." The village was subsequently split up into three *mahals* by perfect partition. New *wajib-ul-arzes* were drawn up after partition, and the condition as to pre-emption ran as follows: "Right of co-sharers *inter se* based on custom or agreement. The custom of pre-emption prevails. In this case one co-sharer sells his share (*hakit*), another co-sharer in the

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

village (*hissedarsharik mauza*) can claim pre-emption. If he offers a smaller price, the seller can sell it to a stranger." The plaintiff pre-emptor was a co-sharer in one of the *mohals*, and the property sold was situate in another *mahal*. The vendee was a stranger to the village. The entire body of co-sharers in the village were Muhammadans of the same stock, and continued so up to the time of partition;—*Held*, upon a construction of the language of the *wajib-ul-arz* and the circumstances of the case, that the intention was to exclude strangers, and that the rule of pre-emption, as it had existed, was to prevail. *CHEPUR v. ABDUL HAKIM*, 8 A.L.J. 23.

(116)—*Pre-emption—Muhammadan law—Wajib-ul-arz—Mahals having common appurtenances.*—The *wajib-ul-arz* of a mahal to which certain *shamilat* land appertained in common with another mahal contained a provision that the right of pre-emption should be exercised according to the rules of Muhammadan law. *Held* that such provision did not give a right of pre-emption to the sharers in the second mahal in respect of land in the first, as against sharers in the first mahal, merely by virtue of their sharing in the common appurtenances. *NAZIR-UD-DIN v. KADIR BAKSH*, A.W.N. 1894, 193. [R., 17 A. 226, 7 A.L.J. 660.]

(117)—*Wajib-ul-arz—Sale whether includes an exchange—Re-transfer to vendor's widows—cause of action.*—Where a *wajib-ul-arz* provided a right of pre-emption in case of a sale and, further, that if there was a dispute in the price, it was to be settled by means of *panchait*, *held* that the words were wide enough and included transfer by way of exchange. Where the vendor died after the transfer leaving an adopted son, but before the suit for pre-emption was brought, the property was retransferred to his widows, who were not made parties to the suit, *held* that the pre-emptor had a good cause of action to maintain the suit. *BHAGWAN SINGH v. KHARAG SINGH*, 4 A.L.J. 756 = A.W.N. 1907, 280. (7 A. 626, R.)

(118)—*Wajib-ul-arz—Record of contract—Termination of contract with settlement.*—The *wajib-ul-arz* of a village of the year 1866, recited "so far there have been no sales or mortgages to strangers, but in future if any co-sharer wishes to transfer, he shall do so first to co-sharer, &c." *Held*, that this was a record of contract which came to an end with the settlement. After the settlement which terminated the contract, there was no right of pre-emption in the village. *GOPAL DAS v. TEJ SINGH*, 4 A.L.J. 191 = A.W.N. 1907, 87.

(119)—*Pre-emption—Mortgage by conditional sale without possession—Wajib-ul-arz—Transfer—Transfer of Property Act s. 58.*—Where the *wajib-ul-arz* of a village gave a right of pre-emption in respect of a "transfer" by the sharers of their rights and interests by sale and mortgage such right would arise on a mortgage by conditional sale, even though without possession, for it

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

is a transfer of an interest in immoveable property with reference to the terms of s. 58 of the Transfer of Property Act. *AZIMAN BIBI v. AMIR ALI*, 7 A. 343 = A.W.N. 1885, 46. (7 A. 258, F.B., F.)

(120)—*Interpretation of document—Suit for pre-emption—Mortgage by conditional sale—Cause of action.*—This was a suit for pre-emption. Certain property was mortgaged by way of conditional sale in favour of the appellant, who, in a suit for foreclosure, obtained a decree in his favour. The claim for pre-emption was based on the village *wajib-ul-arz*, the provisions of which as to pre-emption were as follows:—"If any co-sharer would sell his share, he must offer it to the *bira aran haqiqi shariq haqiyat*. If they refuse, then to the other co-sharers of his *patti*. If none of his *patti* will take it, then to the owners of another *patti*. If all the owners of the *khalsa* will not purchase, then the owners of *Chak Bazyaft* shall have a right to pre-emption, and if they refuse, the owner may sell to whomsoever he likes. So, too, in the sale of *Chak Bazyaft*, precedence must be given to the *Khalsawalas*. In order to decide the price, if the *shafi* offer Rs. 200 per *biswa* to the purchaser in case of sale or Rs. 150 in case of mortgage, the property cannot be transferred to an outsider (*two kul padast, ghair mantaqil na karsakega*)." *Held*, that, though the plaintiff could, under the *wajib-ul-arz* at the time when the deed of conditional sale was first executed, have claimed to take over the bargain, yet two causes of action arise, first at the time when the deed is executed, and again when the mortgage is foreclosed (3. A. 610, R.) *Held*, also that the terms of the *wajib-ul-arz*, fixing the price to be paid by the pre-emptor are of the nature of a covenant running with the land and are enforceable even against *bona fide* purchasers. *BAHADUR SINGH v. RAM SINGH*, 27 A. 12 = A.W.N. 1904, 149 = 1 A.L.J. 353. (8 A. 102, R.) [D., 7 A.L.J. 504 = 6 Ind. Cas. 118.]

(121)—*Pre-emption—Mortgage by conditional sale—Accrual of right of pre-emption, when sale becomes absolute—Wajib-ul-arz—Partition of mahal.*—The *wajib-ul-arz* of a mahal framed in 1883, when the village mahal was undivided, contained the following provision as to pre-emption—"Should a sharer of any *patti* sell his share, he will sell it first to subordinate sharers; if they refuse to take it, then to proprietors of the mahal; and in case of refusal by all the sharers before-mentioned, he shall have power to transfer it to a stranger." While this *wajib-ul-arz* was in force, namely, in 1890, certain property to which its provisions applied was mortgaged by a deed of conditional sale. In 1894, after partition of the mahal, a new *wajib-ul-arz* was framed for the mahal in which the mortgaged property was situated, which also contained a similar record of the custom of pre-emption in the following terms:—"Should a sharer sell his share, he will sell it first to his subordinate sharers, afterwards to a sharer in

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

the *mahal*, and in the case of refusal by the sharer in the *mahal*, to a sharer in the old *mahal*." Held that the record as to the right of pre-emption being in both the cases the record of a custom, and the provisions of the later *wajib-ul-arz* being capable of application to the circumstances of the case, a right of pre-emption, accrued upon the mortgage by conditional sale becoming an absolute sale in favour of a stranger. **RAM BAHADUR RAI v. PARMESHWAR BHARTI, 24 A. 493 = A.W.N. 1902, 164.** (3 A. 610, 14 A. 341, 20 A. 103, D.)

(122)—*Pre-emption—Conditional vendee, effect of subsequent village Wajib-ul-arz on the rights of.*—The terms of *wajib-ul-arz* subsequent to the effecting of a conditional sale, but before such sale becomes absolute, cannot have the effect of altering the legal and equitable rights which the conditional vendee has acquired by dint of the agreement contained in the deed of conditional sale. No subsequent village contract to which the parties to the conditional sale were not agreeing parties could affect their rights which came into existence on the execution of the deed of conditional sale. **BECHAN RAI v. NAND KISHORE RAI, 14 A. 341 = A.W.N. 1892, 18.** (A.W.N. 1891, 134, D.) [D., 24 A. 493.]

(123)—*Pre-emption—Clause in wajib-ul-arz relating to transfer of shares—Vendor acquiring property under claim of pre-emption not estopped from pleading non-execution of the right to portion of the property.*—The claimant of pre-emption in this case had in fact two rights, a right of pre-emption in the *thoke* in which he held a share superior to that enjoyed by the co-sharers of the *mahal*, whose shares lay in other *thokes*, and a right of pre-emption in the other *thokes* inferior to the right possessed by the co-sharers in those *thokes*. The question for determination therefore was whether there could be such a thing as a divided right of pre-emption, whether a shareholder can sue to obtain by right of pre-emption that portion of the property included in a deed of sale to which he had a preferential claim to the exclusion of the remaining portion of the property to which he may not have the same preferential claim or only have an equal claim with the others. The question as to the right of the plaintiff to thus claim pre-emption of a portion only of the shares sold in the village was referred for the opinion of the Full Bench which determined that, under the circumstances, the claim was maintainable. With regard to the other plea that the right of pre-emption could not extend to the bungalow and the premises originally held under lease, it was held that the right of pre-emption was only intended to extend to the ordinary rights of a zemindar in the village and to such buildings in the village as were held originally with such zemindari right, and it could not extend to such property as a bungalow for family

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

residence, a factory or a garden. **SALIG RAM v. DEBI PARSHAD, 7 N.W.P. 38, F.B. [Appr., 7 A. 720 = 5 A.W.N. 206; R., 10 A. 182 = 8 A.W.N. 55, 24 A. 218 = 22 A.W.N. 27, 6 A. 423 = 4 A.W.N. 146.]**

(124)—*Sale effected without registered instrument—Fraud—Wajib-ul-arz—Transfer of Property Act, s. 54.*—Where the *wajib-ul-arz* of a village gave a right of pre-emption in respect of the "transfer" of a share wholly or in part, by sale or mortgage, such a right arose in the case of a transaction by which one of the co-sharers transferred the possession of his share to a stranger for consideration, and had mutation of names effected in the revenue records, but in order to avoid or defeat any claim of pre-emption, omitted to execute and register a sale-deed (although it was necessary) in respect of the transfer. (By the Full Bench, *Mahmood, J., dissenting*). *Per Petheram, C.J.*—Though no transfer under the Transfer of Property Act took place, the transaction afforded grounds for a suit for specific performance by the vendee, in which he could claim and obtain a transfer of the legal estate by execution and registration of a sale-deed. The transaction was, therefore, one which, under the terms of the *wajib-ul-arz*, gave rise to the right of pre-emption. *Per Straight, J.*—Where the parties deliberately omitted to observe the necessary legal formality of a registered instrument, with the object of defeating any claim of pre-emption, it was doubtful whether a Court of equity would be justified in allowing the vendor and the vendee (defendants) to set up against the plaintiff (the pre-emptor), and in giving effect to, a defence based upon their own intentional evasion of the law. *Per Oldfield and Brodhurst, JJ.*—The failure of the parties to the sale to comply with the provisions of the Transfer of Property Act as to the manner in which the transfer should be effected did not alter the nature of the transaction, or affect the fact that a sale had been made, or the right of the pre-emptor arising from it. *Per Mahmood, J.*—A valid and perfected sale is a condition precedent to the exercise of the right of pre-emption. If the proprietary title has validly passed from the vendor to the vendee, the pre-emptive suit will lie. If it still continues in the vendor owing to the absence of a registered conveyance, the suit cannot lie. **JANKI v. GIRJADAT, 7 A. 482, F.B. A.W.N. = 1885, 97.** [R., 14 A. 333, 16 A. 344, F.B., 7 O.C. 98; D., 16 M. 464.]

(125)—*Record of rights.*—Where the greater portion of land in a village is divided into a number of *thokes*, each *thoke*, belonging to a number of sharers, the remaining land being held in common by all the co-sharers in the village, and the record-of-rights provides for a right of pre-emption among sharers of the same *thoke*, such right cannot be claimed as regards a share in one *thoke* by a share in another *thoke*, on the ground that he is a sharer in the common lands along with all the sharers in the village. **MAYA RAM v. LACHHO, 2 A. 631.**

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

(126)—Wajib-ul-arz, of 1864—*Record of custom—Subsequent wajib-ul-arz—Right only recognised—Mahomedan Law, no application of.*—In the wajib-ul-arz of 1864, it was provided that if a share-holder desired to transfer his share, "the right of pre-emption was possessed first by his near brother, secondly, by the sharers in the *patti....&c.*" In the next settlement of 1894, a new wajib-ul-arz was prepared in the following words:—"custom as to pre-emption, no case of pre-emption has yet taken place but the right of pre-emption is acknowledged." *Held*, that the wajib-ul-arz of 1864 was a record of custom and the latter wajib-ul-arz, was a recognition by the parties of the custom prevailing under the earlier wajib-ul-arz, and that the Mahomedan Law did not therefore apply. DAULAT v. MATHURA, 3 A.L.J. 207=28 A. 456=A.W.N. 1906, 92.

(127)—Wajib-ul-arz embodying contract—*Period of settlement, expiry of, after sale and institution of suit but before decree—Right to obtain decree.*—The plaintiff sued for pre-emption on the basis of a wajib-ul-arz which was a record of contract. The suit was defended, and, during the pendency of the suit, the period of settlement, and with it, the contract, came to an end. *Held*, that the plaintiff's position was not changed, and his right at the time of the decree being exactly the same right as he had at the time of the institution of the suit, he was entitled to decree. GOPAL PRASAD v. BADAL SINGH, 6 A.L.J. 51=31 A. 111=1 Ind. Cas. 819. [D., 5 N.L.R. 136.]

(128)—*Mauza Gohan in Hoshiarpur—Pre-emption in case of mortgages—Omission to bid at Court auction—Provision in wajib-ul-arz—Whether affects general law.*—The custom of pre-emption attaches to mortgages in mauza Gohan in Hoshiarpur and extends to transfer of a mortgage or a sale of mortgagee's rights in Court auction. This right would not be lost to a person entitled to it merely because he omits to bid at Court auction. If the wajib-ul-arz contains any provision with regard to pre-emption it must not be taken to mean to affect in any way the general law as regards pre-emption but in addition to it. MUHAMMAD BAKSH v. SIRDAR RAJINDAR SINGH, 121 P.R. 1888. [R., 46 P.R. 1909; Cited, 3 P.R. 1903=39 P.L.R. 1903.]

(129)—*Partition—Wajib-ul-arz—Old wajib-ul-arz copied verbatim in new wajib-ul-arz—Intention—'Gaon,' meaning of.*—A village was divided by perfect partition into several *mahals*, and wajib-ul-arzes were prepared for the several *mahals*. The wajib-ul-arzes so prepared were verbatim copies of the settlement wajib-ul-arz, which recorded a custom of pre-emption. *Held*, that the wajib-ul-arzes did not record a new contract, but the pre-existing custom, which the members of the co-parcenary body desired to perpetuate notwithstanding the disintegration of the village for fiscal purposes. (22 A. 1, 12 A.W.N. 100, F.) A village does

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

not cease to exist by reason of the sub-division of its area into separate *mahals*. Where, on a partition, several wajib-ul-arzes were prepared each giving a right of pre-emption to a co-sharer in the *gaon*, *held*, that the Court was bound to construe the words according to their plain sense and the word '*gaon*' should not be held to mean *mahal*. *Held*, further, that a co-sharer in the *gaon* (village) was a pre-emptor. AUSERI LAL v. RAM BHAIAN, A.W.N. 1905, 115=2 A.L.J. 313=27 A. 602. (7 A. 772, 17 A. 226, R.)

(130)—Wajib-ul-arz—*Rights and interests—Haqiyat—Qimat—Sale—Exchange.*—Where the wajib-ul-arz of a village gave a right of pre-emption in respect of the transfer by a co-sharer of his rights and interests (*haqiyat*), whereby his partners could claim the property at the price (*qimat*) paid by the vendee, *held*, by the Full Bench, that the right arose on an exchange by a co-sharer of one specific piece of land for another, as the transaction amounted to a transfer of *haqiyat* within the terms of the wajib-ul-arz, and that the plot of land given in exchange for the land transferred must be considered as a price (*qimat*). *Per Mahmood, J.*—In the law of pre-emption, the term "*qimat*" includes not only money, but other kinds of property capable of being valued at a definite sum of money; and in this sense, it may be taken to cover the consideration of sale as well, as of exchange as defined in ss. 54 and 118 respectively of the Transfer of Property Act. NIAMAT ALI v. ASMAT BIBI, 7 A. 626, F.B.=A.W.N. 1885, 183. (2 A.W.N. 192, R.; 4 A.W.N. 103, Diss.) [F., 4 A.L.J. 195, Note, 4 A.L.J. 756=A.W.N. 1907, 280; R., 10 A. 553, 12 A. 426, F.B.; D., 17 A. 447.]

(131)—*Pre-emption—Wajib-ul-arz—Pre-emptive rights not extending to land in the abadi—'Haqiyat,' meaning of.*—Statements contained in a wajib-ul-arz or *khewat* with reference to rights of pre-emption possessed by the co-sharers do not under ordinary circumstances have any reference to land situated within the area of the village site. JADUNATH RAI v. MAHADEO PRASAD SINGH, A.W.N. 1896, 99. (A.W.N. 1882, 192, R.)

(132)—Wajib-ul-arz—"Haqiyat"—*Meaning.*—In a suit to enforce the right of pre-emption in respect of a piece of land, where the suit was based on the wajib-ul-arz which provided that, "if any co-sharer wishes to sell or mortgage the '*haqiyat*,' he should transfer to certain persons in the village community before he transferred to strangers," and it appeared that the land in suit was virtually "*abadi*" land, *held* that the clause in the wajib-ul-arz relating to pre-emption did not apply to such land, that the word *haqiyat* did not include such land, and that the suit should be dismissed. RUP RAM v. MANGNI, A.W.N. 1886, 136. [Not F., 12 A. 426, F.B.]

(133)—Wajib-ul-arz, interpretation of—*Kimat—Usufructuary mortgage—Simple mortgage*

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

and lease.—Where, in the entry regarding pre-emption in a *wajib-ul-arz*, the words *muntakil kare* (transfer) and *kimat* (price) were used, held, that a right of pre-mortgage would arise in the event of a co-sharer making a usufructuary mortgage of his share in favour of a stranger. Having regard to the object which underlies the provisions as to pre-emption in a village administration paper, viz., the prevention thereby of intrusion of strangers into the village community, the word *kimat* should be interpreted to include the consideration given for a usufructuary mortgage with possession as well as for a sale. In this case, the plaintiff pre-emptor was allowed to prove by evidence *aliunde* that a deed of simple mortgage and a lease together represented a transaction of usufructuary mortgage. **HULAS RAI v. RAM PRASD, 3 A.L.J. 215 = A.W.N. 1906, 82 = 28 A. 454.**

(134)—*Punjab Laws Act* (IV of 1872), s. 12 (a) and (b)—*Pre-emption—Wajib-ul-arz allowing right of pre-emption in case of ancestral land—Jointness no ground of pre-emption, when land not ancestral.—‘Yakjaddi,’ meaning of—Plea not raised in Lower Courts or in grounds of appeal, but first raised in course of argument in Chief Court, tenability of.*—Where the *wajib-ul-arz* allowed a right of pre-emption only to ‘*Yakjaddis*,’ and it was not proved that the land in suit had descended from an ancestor common to the plaintiff and the vendor: *Held*, that the plaintiff could not be treated as a *Yakjaddi*, nor could plaintiff claim pre-emption on the mere ground of jointness, in the face of the express and exhaustive statement of custom in the *Wajib-ul-arz*. An appellant cannot be allowed to raise in the course of argument a plea not raised in either of the Lower Courts or in the grounds of appeal. **BISHNA v. PHULI, 1 Ind. Cas. 478 = 43 P.W.R. 1909.**

(135)—*Wajib-ul-arz—Construction of document—Meaning of the term “ek jaddi.”—Held*, that the term “*karibi ek jaddi*” used in the pre-emption clause of a *wajib-ul-arz* connotes descent through the male, and not through the female line. **PEMRAJ v. UMRAO SINGH, A.W.N. 1906, 72 = 3 A.L.J. 179. (23 A. 32, F.)**

(136)—*Pre-emption—Wajib-ul-arz—Construction—Shurkai pattai—Owner of isolated plot assessed with Government Revenue—Ek jaddi.*—The *wajib-ul-arz* provided for a right of pre-emption, first, to *Shurkai ek jaddi*, and second to *Shurkai patti*. The pre-emptor was a co-sharer in the same *patti*. The vendee had also previous to the sale become owner of an isolated plot of land in the same *patti* by way of exchange. The isolated plot was liable for the Government Revenue: *Held*, that both the pre-emptor and the vendees were *Shurkai patti*, and, therefore, the plaintiff had no preferential right to pre-empt. **MASI-HULLAH v. DAKHINI DIN, 6 Ind. Cas. 169.**

Pre-emption—continued.**—2.—Construction of Wajib ul-arz—*ctd.***

(137)—*Wajib-ul-arz—Pre-emption clauses “Ekjaddi,” meaning of.*—The term *ekjaddi*, when used in the pre-emption clauses of a *wajib-ul-arz*, is to be taken as signifying persons descended from a common ancestor through the male line. The object of the provisions in a *wajib-ul-arz* giving preferential rights to co-sharers who are *ek jaddi* with the vendors is to keep the property in the family. **CHATAR SINGH v. KALYAN SINGH, 23 A. 32 = A.W.N. 1900, 188. (N.W.P. 1870, 343, R.) [F., A.W.N. 1906, 72 = 3 A.L.J. 179.]**

(138)—*Wajib-ul-arz—Ekjaddi.*—The *wajib-ul-arz* of a village gave the persons of the same stock (*ekjaddi*) as the co-sharer desirous of selling his share, a right of pre-emption. The vendor of the land in this suit had previously sold to the plaintiff a part of his land, the plaintiff thereby becoming a co-sharer in the same *thoke* as the vendor. The defendants were co-sharers in another *thoke*. *Held* that the plaintiff was, as regards the right of pre-emption, in the same position as his vendor of the property he had previously purchased would have been, and had, therefore, under the *wajib-ul-arz*, a right to maintain the suit. **RAMDAI KUAR v. HEMRAJ, A.W.N. 1882, 72.**

(139)—*Wajib-ul-arz—“Ek jaddi”*—The pre-emption clause of a *wajib-ul-arz* gave a right of pre-emption, first to ‘brothers of the same stock’ (“*ek jaddi*”) with the vendor, and next to other co-sharers. R sold to S a share in the village and certain relatives of R sold another share to J, after which S sold to J the share originally held by R. D, who was of the same stock with R, sued for pre-emption in respect of this last sale, contending that S, though, in fact, a stranger in blood, had, by virtue of his purchase from R, stepped into R’s place, and must be treated, for the purposes of pre-emption under the *wajib-ul-arz* as a brother of the same stock with D. *Held* that this contention could not be allowed, that the plaintiff could not sue as one of the same stock with S, nor could he claim as an ordinary co-sharer, J having, by a previous sale, also become a co-sharer, and one co-sharer not being entitled under the *wajib-ul-arz* in the case, to maintain a suit for pre-emption against another, unless his rights were higher than that of the other. **DARAB v. JAI DYAL, A.W.N. 1889, 16 (A.W.N. 1882, 72, D.; A.W.N. 1886, 56, R.)**

(140)—*Pre-emption—Wajib-ul-arz—Construction of document—Ekjaddi.*—*Held* that a pre-emption clause in a *wajib-ul-arz* expressed in the following terms:—“*Pahle bhai bhatija haqiqi ya ekjaddi ke hath bai kare*”—did not give a preferential right of pre-emption to own brothers and nephews over those who were merely brothers and nephews *ekjaddi*. **MASITA v. KARIMAN, A.W.N. 1901, 129.**

(141)—*Entry in wajib-ul-arz of 1851 in favour of the Shurkayan Shikmi wa ekjaddi—Entry in later wajib-ul-arz to the effect parties were to be governed by Punjab Act IV of 1872.*—Suit for pre-emption. The question for

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

decision was, whether, in a village in the Hoshiarpur District, there was a custom of pre-emption in favour of the *Shurkayan Shikmi wa ekjaddi*. The exact entries in the *wajib-ul-arz* of 1851 and in that of the later settlement were not given, but the lower Court said in the judgment that the entry in the *wajib-ul-arz* of 1851 was in favour of *Shurkayan Shikmi wa ekjaddi*, whereas, in the later one, the entry was to the effect that the parties were governed by Act IV of 1872. *Held*, that the provisions of Act IV of 1872, s. 12, being that, in the absence of custom to the contrary, pre-emption shall lie in certain order; the entry in the later *wajib-ul-arz* cannot be taken as denying the custom alleged in the former *wajib-ul-arz*, and was not contradictory of the entry in the first *wajib-ul-arz*. The entry in the earlier *wajib-ul-arz*, being uncontradicted in the later *wajib-ul-arz*, was *prima facie* proof of the existence of the custom therein stated, and, not being rebutted by the defendant, established the plaintiff's right. *JOWAHIR v. RADHA*, 15 P.L.R. 1905 = 35 P.R. 1905. (98 P.R. 1894, 52 P.R. 1894, *F.*)

(142)—*Wajib-ul-arz—Construction of document—Bha-ek-jaddi*.—By the terms of a *wajib-ul-arz*, it was provided that "if any co-sharer for any reason wishes to part with his share, he can sell it first to a *bhai-ek-jaddi*, after him to co-sharers in the *patti* or *thok*, and after them to other co-sharers, for a reasonable price. The *bhai-ek-jaddi* will have to give the same price as offered by a stranger; but if the price appears to be fictitious, a decision can be made by mutual arrangement or by a Court or by *punchayat*." *Held* that the effect of this provision was to give a right of pre-emption to successive categories, one against the other in order. The right did not only arise when the sale was to a stranger. *RAM LAL v. NIADAR*, A.W.N. 1907, 95 = 4 A.L.J. 352. (27 A. 457, *D.*)

(143)—*Wajib-ul-arz, pre-emption clause in, construction of—Hissadars ekjaddi*.—Where in a village *wajib-ul-arz*, the clause relating to pre-emption gave a right of pre-emption against a stranger, and at the price paid by the stranger, firstly, to the "*hissadars ekjaddi*" (*i.e.*, those descended with the vendor from one common ancestor); secondly, to the *hissadars* of the same *patti*, and thirdly, to the *hissadars* of the village, such right was held to be a right against a vendee who is a stranger to the village co-parcenary body, and not against one of its members. So, in the absence of express provision to that effect, no right of pre-emption can be regarded as conferred thereby on a *hissadar* of a higher class on a sale to one of an inferior class. *SHEOBALAK SINGH v. LACHMIDHAR*, 23 A. 427 = A.W.N. 1901, 120. (A.W.N. 1895, 9, A.W.N. 1898, 15, *R.*) [*F.*, 4 A.L.J. 211, Note; *R.*, 26 A. 546-N, 27 A. 457 = A.W.N. 1905, 45 = 2 A.L.J. 689, 26 A. 544.]

(144)—*Wajib-ul-arz—Construction of document—"Hissadaran deh" not ordinarily in-*

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

clusive of muafidars.—As a general rule of construction to be applied to *wajib-ul-arzes* the co-sharers of a mahal and the owners of *muafi* plots in the mahal have no necessary connection with each other, and it does not follow that a custom adopted by, or existing among the members of the *Khalisa* co-parcenary body should be applicable to *muafidars*. *RAGHUNATH PRASAD v. KANHAYA LAL*, A.W.N. 1902, 68, (20 A. 419, *F.*) [*R.*, A.W.N. 1907, 173 = 4 A.L.J. 665.]

(145)—*Wajib-ul-arz—"Hissadaran shikmi," meaning of*.—The *wajib-ul-arz* on the basis of which this suit for pre-emption was brought, conferred the right of pre-emption on several classes of persons, each class having a preferential right over the next class following. The third class of pre-emptors were described as *hissadaran shikmi*. The co-sharers in the *patti* were ranked as the fifth in order. The plaintiff claimed as a pre-emptor of the third class and the Courts below were of opinion that by the words "*hissadaran shikmi*" were meant co-sharers in the same *khata*, and that, as the plaintiff was admittedly a co-sharer of the vendor in the same *khata*, he had a preferential right of pre-emption to that of the vendee, a co-sharer in the *patti*. The decrees of the lower Courts were set aside by the High Court, but, on appeal under the Letters Patent, the High Court restored the said decrees holding that the words "*hissadaran shikmi*" meant only co-sharers in the same *khata*, and that the plaintiff's right of pre-emption was preferential to that of any one who was not such a co-sharer. *ABDUL SHAKUR v. MENDAL*, 23 A. 260 = A.W.N. 1901, 63. [*D.*, 30 A. 77 = A.W.N. 1908, 16 = 5 A.L.J. 52.]

(146)—"*Hissadar karibi*," whether implies nearness in blood or space—Further sale of property by vendee for higher price—Pre-emptor liable to pay the price given in the first sale and not that given on further sale.—The pre-emption clause of a *wajib-ul-arz* ran as follows:—"Each individual co-sharer has a right to transfer his property by sale or mortgage, but while transferring it, he will offer it first to his brother and near co-sharers (*hissadar karibi*) and in case of refusal he will ask the other co-sharer, and if he too refuses to take the property, then he will mortgage or sell it to a stranger." *Held*, that *hissadar karibi* in the *wajib-ul-arz* meant nearness in space. A sold his property to B, a stranger for Rs. 3,000. B sold it to C for Rs. 3,500. D brought a suit for pre-emption. *Held*, that D was entitled to pre-empt on payment of Rs. 3,000, the price fixed at the first sale. *KISHAN v. RAM SAHAI*, 9 Ind. Cas. 494. (6 A.L.J. 966, 3 Ind. Cas. 782, 32 A. 45, *R.*)

(147)—*Pre-emption—Wajib-ul-arz—Construction—"Hissadar karibi," meaning of—Preferential right between relatives of the 4th and 7th degrees—Proof*.—The *wajib-ul-arz* of a

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

village provided that, on property being transferred, it should first be offered to a *hissadar karibi* and then to a *hissadar thok*. The plaintiffs were related in the 4th degree and the defendants in the 7th degree to the vendor. *Held*, that the plaintiffs had failed to prove a preferential right over the defendants. **SHEIKH ATAULLAH v. SHEIKH SHAMSUDDIN, 11 Ind. Cas. 278.**

(148)—*Right of pre-emption—Wajib-ul-arz—Hissadar-i-karibi.*—In a suit for pre-emption under the terms of a *wajib-ul-arz*, held, on a proper construction of the document, that the words "*hissadar-i-karibi*" found therein had no reference to consanguinity, but to the fact of co-sharers being in the same shoke and owning their shares jointly with the vendors of the property sold. **MAHADEO PRASAD v. SABIHA BIBI, A.W.N. 1887, 260. [R., 24 A. 119, 5 Ind. Cas. 669.]**

(149)—*Wajib-ul-arz, construction of—Hissadar karibi.*—The *wajib-ul-arz* of a village provided that pre-emption may be claimed firstly, by *hissadar karibi*, secondly, by co-sharers in the same thoke as the vendor; thirdly, by co-sharers in other thokes; and fourthly by the relations of the vendor. *Held* that the words *hissadar karibi* did not refer to the relations of the vendor, they having been provided for as a separate class; and that, having regard to the scheme of the *wajib-ul-arz*, the word *karibi* refers to co-sharers who are near to the vendor in some sense other than relationship. Accordingly, it was held that a person who was a co-sharer of the vendor in the same sub-division of the thokes was a *hissadar karibi* as compared with one who was only a co-sharer in the same thoke. **BELA BIBI v. ABKAR ALI, 24 A. 119=A.W.N. 1901, 183. [R., 2 Ind. Cas. 855.]**

(150)—*Wajib-ul-arz — Hissadar karibi—Interpretation of document.*—The pre-emption clause of the *wajib-ul-arz* of a village held under the bighadam tenure provided that if a co-sharer wished to sell or mortgage his land he was competent to do so, first, to a "*hissadar karibi*" next to a co-sharer in the mahal, and, in the event of no co-sharer taking it, to a stranger. It also provided that if a person selling or mortgaging his share failed to comply with the above conditions, the "*hissadar karibi*" in their order would have a right of pre-emption. *Held* that the term "*Hissadar karibi*" as used in the *wajib-ul-arz* did not refer to nearness in blood but to nearness as regards the holding of shares in the village. **BALZOR RAI v. MADHO RAI, A.W.N. 1895, 78, [R., 24 A. 119.]**

(151)—*Pre-emption—Wajib-ul-arz — "Hissadar karibi" means nearness in space.*—Where a *wajib-ul-arz* gave to a *Hissadar karibi* a superior right of pre-emption to any other *Hissadar* in the village: *Held* that the word

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

'*Hissadar karibi*' meant nearness in space. **MUSSAMMAT MAHARAJI v. DWARKA, 6 Ind. Cas. 702.**

(152)—*Wajib-ul-arz—Construction—"Karibi, meaning of.*—Under a pre-emptive clause in the *wajib-ul-arz* of a village giving a right of pre-emption in cases of sale by share-holders, first to a *bhai hakiki* (an own brother), after that to *karibi* (near), after that to a sharer in the same thoke as the vendor, it was held that a vendor's father's brother's widow, holding a share in the village absolutely as heir of her deceased husband, was entitled to pre-emption in preference to those who were only sharers in the same thoke as the vendor. Although *karibi* must be read in connection with the preceding word *bhai*, the words *bhai karibi* must be held to include more than cousins, viz., all near relatives both male and female. The use of the word *karibi* alone in the pre-emptive clause of a *wajib-ul-arz* is ambiguous and inadequate to express the intention of the share-holders. **KHUMAN SINGH v. HARDAI, 11 A. 41, F.B=A.W.N. 1889, 1. [F., 2 A.L.J. 346.]**

(153)—*Pre-emption—Wajib-ul-arz—"Pattidar Karibi."*—The words *pattidar karibi* in a *wajib-ul-arz* imply nothing more than nearness of relationship and not vicinity. Where the parties are all descended from a common ancestor, one may be more nearly related to the vendor than the other. But, that makes no difference. The *wajib-ul-arz* gives the right of pre-emption to a near co-sharer, but it does not lay down that a nearer co-sharer in relationship to the vendor is entitled as against one more remote. **LOK SINGH v. BALWAN SINGH, 1 A.L.J. 705.**

(154)—*Construction of wajib-ul-arz—Retention of same wajib-ul-arz after division of village into mahals—Hissadaran deh Hissadaran patti, on the same footing.*—Where a village was divided into three mahals and the new *wajib-ul-arz* which was prepared for one of them, A.M., was copied verbatim from the *wajib-ul-arz* of the village before division and clearly put *hissadaran deh* and *hissadaran patti* on the same footing, held, that a co-sharer in the mahal A.M. had no right of pre-emption in regard to property sold in A.M., as against a co-sharer who, though he had no share in the mahal A.M., was a co-sharer in one of the other mahals. **SARDARSINGH v. IJAZ HUSAIN KHAN, A.W.N. 1906, 134=28 A. 614. (22 A. 1, F.B., D.)**

(155)—*Pre-emption—Wajib-ul-arz—Construction—"Rishtadaran karibi," meaning of—Wife's half-sister, whether rishtadar karibi—Hissadaran shikmi—Co-sharer in the other half of khewat.*—The expression "*rishtadaran karibi*" means near relations by blood or by marriage. Where a husband has inherited the property from his wife, his wife's half-sister comes within the meaning of "*a rishtadaran karibi*."

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

Where a vendee is a co-sharer in one-half, and the vendor in another half of a *khewat*, the vendee is not a *shikmi hissadar* of the vendor. A co-sharer in the same half of the *khewat* is a *shikmi hissadar*. **RADHAY PERSHAD v. MUSAMMAT NANNU, 5 Ind. Cas. 669.**

(156)—*Pre-emption*—“*Hissedaran patti deh*,” meaning of.—The *wajib-ul-arz* of a village gave a right of pre-emption first to brothers or descendants from the same stock, and secondly to *hissedaran patti deh*: Held, that the expression “*hissedaran patti deh*” means co-sharers in the same *patti*. **KHUBI v. RAMJAS, 9 Ind. Cas. 856.**

(157)—*Pre-emption*—*Wajib-ul-arz*—*Construction*—“*Hissadar Sharik Mouza*,” meaning of—*Partition*.—The *wajib-ul-arz* of a village contained the following provisions as to pre-emption. “The custom of pre-emption prevails. In case one co-sharer sells his share (*Haqiat*), another co-sharer in the village (*Hissadar sharik Mouza*) can claim pre-emption. If he offers a smaller price, the seller can sell it to a stranger.” Subsequent to the preparation of the *wajib-ul-arz*, the village was partitioned into three *mahals*, but for each of the three *mahals*, the pre-emptive clause was retained practically the same as it stood before: Held, that, under the *wajib-ul-arz*, a co-sharer in the village, although he was not a co-sharer in the *mahal*, had a right to pre-empt, **CHIPHUR v. ABDUL HAKIM, 9 Ind. Cas. 23. (28 A. 286, 2 A.L.J. 833, A.W.N. 1906, 2, F.)**

(158)—*Pre-emption*—*Wajib-ul-arz*—*Construction*—“*Hissadar sharik milkait*,” meaning of.—The *wajib-ul-arz* of a village, in 1833, gave a right of pre-emption to a co-sharer in the village against strangers simply. In 1887, the right was first given to an own brother, and secondly to a *hissadar sharik milkait*: Held, that a *hissadar sharik milkait* would mean a co-sharer in the property sold. **HANSRANI v. MUHAMMAD SIDDIQ, 11 Ind. Cas. 576.**

(159)—*Wajib-ul-arz* — *Intiqal* — *Construction*.—Upon the construction of a *wajib-ul-arz*, the word *intiqal* does not only signify an absolute transfer, but also applies to usufructuary mortgage, etc. **CHUTTUR MULL v. CHUTTUR KISHORE LALL, 3 Agra 396.**

(160)—*Pre-emption*—*Wajib-ul-arz* — *Intiqal*, transfer—*Perpetual lease*—*Whether a transfer*.—The *wajib-ul-arz* of a village provided that, in case of transfer (*intiqal*), a nearer co-sharer will have a right of pre-emption, and failing him other co-sharers will have, etc. The defendant, No. 2, executed a perpetual lease in favour of defendant No. 1, reserving a nominal yearly rent. Held that the lease was in the nature of a transfer, and the plaintiff had a right of pre-emption. Where a lease purports to create a perpetual interest in the land reserving merely a nominal rent and is granted in consideration of a premium, held that the

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

transaction is in reality a sale. **LALJI MISIR v. JAGGU TIWARI, 7 A.L.J. 1022=7 Ind. Cas. 930.**

(161)—*Pre-emption*—*Wajib-ul-arz*—“*Intiqal*” whether includes a usufructuary mortgage.—The word “*intiqal*” is sufficiently wide to include a transfer by way of usufructuary mortgage. **LALA CHENDRABHAN LAL v. MALIK PANDEY, 3 Ind. Cas. 721. (A.W.N. 1908, 19, 4 A.L.J. 814, R.)**

(162)—*Pre-emption*—*Wajib-ul-arz*—*Construction of document*—*Muhammadian Law*, “*Intiqal*.”—Where in a *wajib-ul-arz* it was recorded merely that “the custom of pre-emption prevails,” it was held that, in the absence of any special custom different from, or not co-extensive with, the Muhammadan Law of pre-emption, the Muhammadan Law must be applied. (9 A. 513, F.)—The term “*intiqal*” occurring in the pre-emptive clause of a *wajib-ul-arz* covers all kinds of transfers, mortgages as well as sales. **JAGDAMSAHAI v. MAHABIR PRASAD, A.W.N. 1905, 190=2 A.L.J. 482=28 A. 60. [R., 28 A. 590=3 A.L.J. 338=A.W.N. 1906, 144.]**

(163)—*Wajib-ul-arz*—*Construction of document*.—“*Intiqal*”—“*Qimat*.”—Held that the words “*intiqal*” and “*qimat*” occurring in the pre-emption clause of a *wajib-ul-arz* did not of themselves imply that the exercise of the right of pre-emption would arise only in the case of sales, but were wide enough to include the case of mortgages also. **SITAL PRASAD RAI v. BUDDHU RAI, A.W.N. 1899, 3.**

(164)—*Wajib-ul-arz* — *Interpretation of*—*Intiqal*—*Conditional sale*.—A *wajib-ul-arz* recording a custom of pre-emption gave a right of pre-emption in case of any *Intiqal* of property in the village. Held, that a suit for pre-emption in case of a conditional sale was maintainable. **RAM NARAIN v. GANGA RAM, 4 A.L.J. 814=A.W.N. 1903, 19. [R., 3 Ind. Cas. 721.]**

(165)—*Pre-emption*—*Wajib-ul-arz*—*Construction of document*.—The pre-emption clause of a *wajib-ul-arz* ran in the following terms:—“*Ba-halat intiqal-i-haqiyat kisi hissadar-ki isteh-qag-i-khariadari shurkai mahal shakhs ghair-par baqimat munasib muqaddam samjha jawe, a.*” Held that no right of pre-emption would arise thereunder upon the making of a usufructuary mortgage in favour of a stranger, the words “*khariadari*” and “*qimat*” pointing to sales only being within the contemplation of the framers of the document. **SHEOBADAL SINGH v. AMAN SINGH, A.W.N. 1903, 16. (A.W.N. 1899, 3, R.) [R., 4 A.L.J. 814; D., A.W.N. 1908, 19.]**

(166)—*Wajib-ul-arz* — *Bhai hakiki and karibi*—*Pre-emptor being vendor's husband's brother*.—A pre-emptor, who is brother of the vendor's husband, is a near relative and has preferential right under a *wajib-ul-arz* which confers a right of pre-emption first on a *bhai*

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

hakiki (own brother), secondly, on *karibi* (near) and lastly, on co-sharers in the village. **RAMJI LAL v. GHAFUR KHAN, 2 A.L.J. 346.** (11 A. 41, F.B., F.)

(167)—**Wajib-ul-arz—Construction—Shurkay-an-i-Shikmi—Meaning of.**—Where the *Wajib-ul-arz* of a village gave a right of pre-emption first to *shurkayn-i-shikmi*, then to *shukayan-eki-jadar* and lastly to *khewatdaran*, held, that *shurkayan-i-shikimi* was intended to denote relatives by blood and not co-sharers in any sub-division of the mahal. **BAHAL SINGH v. MUBARAK-UN-NISSA, 5 A.L.J. 52=A.W.N. 1908, 16=30 A. 77.** (23 A. 260, D.) [D., 5 Ind. Cas. 669.]

(168)—**Wajib-ul-arz — Construction.**—The proper construction of the term *Shikmee shoor-kayan* in a *wajib-ul-arz* is that it gives a preference to those who are sharers in the thoke over those who are merely co-sharers in the village. **JAY MULL v. KESREE, Agra F.B. 171, Ed. 1874, 128.** [R., 30 A. 77=A.W.N. 1908, 16=5 A.L.J. 352.]

(169)—**Pre-emption—Wajib-ul-arz, construction of—Balehaz muqarbut — Pure Zemindari village.**—The *wajib-ul-arz* of a pure zemindari village contained a clause giving a preferential right of purchase to a co-sharer offering the same price as a stranger "*balehaz muqaribat*." Held, that the words "*balehaz muqaribat*" must under the circumstances have reference to propinquity in respect of relationship, not of locality. **MUHAMMAD SADI v. MUHAMMAD ABDUL RAZZAK, A.W.N. 1891, 137.** (A.W.N. 1887, 260, D.) [R., 24 A. 119.]

(170)—**Pre-emption—Custom or contract — Wajib-ul-arz — Kaifyut Mahtawai.**—In a suit for pre-emption, plaintiff produced the *wajib-ul-arz* of 1860, in proof of the custom of pre-emption. Plaintiff produced no other evidence to prove the custom. Defendant gave in evidence another part of the settlement record of 1860, which was called *Kaifyut Mahtawai*. This document gave the history of the village, and it appeared from it that up to the year 1818 the land was jungle, uncultivated, with no settlement, and there had been no transfers in the village followed by any claims of pre-emption. The *wajib-ul-arz* of 1860, recorded *inter alia* arrangements between the co-sharers which were in the nature of contracts. Held that, under these circumstances, the custom of pre-emption could not be said to have been proved, and that the entry relating to pre-emption in the *wajib-ul-arz* must be treated as a record of contract. **SARJU PRASAD RAI v. GAURI RAI, 8 A.L.J. 381=9 Ind. Cas. 485.** (7 A.L.J. 1040, F.B., R.)

(171)—**Pre-emption—Wajib-ul-arz—Interpretation of document—Apna Shafi—Mahomedan Law.**—The original meaning of the word "*shafi*" is 'conjunction.' Hence where the *wajib-ul-arz* provided that, if any co-sharer of a "*patti*" in the *khalisa* wished to sell his share, he would

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

do so paying due respect to his own pre-emptor (*apna shafi*), and if the latter refused and all the other pre-emptors of the village (*aur sab shafian deh*) refused, then he might sell to a stranger, held that the expression *apna shafi* meant nearness in space and not in blood relationship, and, therefore, where the vendor and pre-emptor were co-sharers in the same *patti*, the vendee being a co-sharer in a different *patti*, the co-sharer in the same *patti* had a preferential right. **LAKHAN SINGH v. BISHEN NATH, 8 A.L.J. 51=9 Ind. Cas. 49.**

(172)—**Pre-emption — Wajib-ul-arz — Sharik haki at — Malik—Owner of resumed muafi—Preference over co-sharer's in other khata.**—The *wajib-ul-arz* gave a right of pre-emption to *sharik hakiat*, if any, of the malikans who sold their property. Held, that an owner of resumed *muafi* (where that was resumed before the preparation of the *wajib-ul-arz*), was a *malik* within the meaning of the *wajib-ul-arz*, if he was a co-sharer in the same *khata* with the vendor and had a preferential right over a *sharik* of a different *khata*. **NARAIN PRASAD v. MUNNA LAL, 5 A.L.J. 302=A.W.N. 1908, 142=30 A. 329.** (A.W.N. 1881, 165, R.)

(173)—**Pre-emption—Wajib-ul-arz—Interpretation—Perfect partition—No new wajib-ul-arz framed—Malikan deh.**—The determination of an alleged right to pre-emption must depend upon the particular circumstances of each case and the evidence adduced in support of the pre-emptive right. A village was divided by perfect partition into several *mahals*, but no new *wajib-ul-arz* was prepared. The *wajib-ul-arz* framed before partition was headed "*rights of co-sharers inter se*" and gave the right of pre-emption (1) to co-sharers in the *khata* (2) to the proprietors of the *patti* and (3) to the proprietors of the village (*malikan deh*). Plaintiff was a co-sharer in a different *mahal* to that in which the vendor was a co-sharer. Held, that the heading of the *wajib ul arz* limited the meaning of the expression *malikan deh* to co-sharers who had a common bond with the vendor, and as the plaintiff was not a co-sharer in the same *mahal* with the vendor, she had no right of pre-emption. **SAHIB ALI v. FATIMA BIBI, 6 A.L.J. 958=32 A. 63=4 Ind. Cas. 138.** (28 A. 286, 28 A. 614, 29 A. 295, D.; 22 A. 1, F.)

(174)—**Wajib-ul-arz—Interpretation of document—"Karabatdari baid."**—Held, in a suit for pre-emption based on a *wajib-ul-arz*, that a person who was the father of the wife of a person alleged to be the brother of the vendor, or a person whose mother's sister had married the son of the vendor did not come within the category of "*Karabatdari baid*." **GOPAL SINGH v. GHULAM HUSAIN, A.W.N. 1894, 58.**

(175)—**Pre-emption—Wajib-ul-arz—Custom—Evidence—Kaifiat Serishta Nizamat, inference from.**—In a suit for pre-emption, the whole of the evidence consisted of the *wajib-ul-arzes* of

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

1833 and 1860 respectively, and the *Kaifiat Serishta Nizamat*. The latter document showed that the property in question formed part of the *Raj* of Raja Ishri Prasad, but the *wajib-ul-arz* of 1833 showed that it was the ancestral property of certain birt-holders who paid *malikana* to the said Raja and that the settlement was made with them. The *wajib-ul-arz* of 1833 gave a right of pre-emption to co-sharers in the village against a stranger, and that of 1860 introduced certain grades of pre-emptors with a right of pre-emption *inter se*. *Held*, that inference drawn from the *Kaifiat Serishta Nizamat* by the Courts below that between the years 1802 and 1862, there was only one proprietor was wrong, and that the *wajib-ul-arzes* were *prima facie* evidence of custom, the one of 1860 recording a more extensive custom than that of 1833. *SARJU RAI v. BHUMLOT MISR*, 8 A.L.J. 947. (33 A. 196, F.)

(176)—*Pre-emption—Wajib-ul-arz—Zemindari land—Nankar.*—The pre-emption clause in a *wajib-ul-arz* was to the following effect—“At the time of sale of a zemindari property, first, a sharer of the same kin, and after such sharers of the mahal, have a prior right to its purchase for a price which a stranger would give.” *Held* that *nankar* land was not affected by the pre-emption clause in the *wajib-ul-arz*, such land being, though assessed, no part of the zemindari mahal. *BADRUNISSA v. MURAD HASAN*, A.W.N. 1881, 9.

(177)—*Wajib-ul-arz—Pre-emption—Term “in the zemindari” explained—Mauza tenure.*—The phrase “in the zemindari” occurring in the *wajib-ul-arz* in this case, was used only to limit the qualification of a brother by blood, not to circumscribe the area in the mauza to be governed by the clause in the *wajib-ul-arz* relating to the right of pre-emption. The right of pre-emption extends, therefore, to the part of the village which has formerly been *mafui* in its tenure. *LALTA PRASAD v. LALTA PRASAD*, A.W.N. 1881, 165.

(178)—*Wajib-ul-arz—“Sharik.”*—In a suit for pre-emption based upon the village *wajib-ul-arz*, it was *held* that the word “*sharik*” occurring in it does not mean only lands assessed to revenue but may include revenue free lands. *INAYAT HUSAIN v. AMINUDDIN AHMAD*, A.W.N. 1888, 182. [R., 17 A. 447, 3 Ind. Cas. 461.]

(179)—*Wajib-ul-arz—“Hissa,” meaning of.*—The term “*hissa*” as it is generally used includes all and every class of interest possessed by the *hissadar* in the mahal in which the “*hissa*” is situate. It will therefore include separate parcels of land, and is not confined to the whole or a fractional part of the share of the *hissadar*. *INDAR RAI v. DAULAT RAI*, A.W.N. 1895, 8.

(180)—*Wajib-ul-arz—Interpretation of documents—“Shakhs ghair.”*—In a *Wajib-ul-arz* the following provision was entered with reference to pre-emption :—*Basurat intiqal haqui-*

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

yatt kisi hissadar kous qimat par jo shakhs ghair de istehquaq kharijadi awal shurka ekjaddi badahu Shurkamahal ka shakhs ghair per mugaddam hoga *Held* (Knox, J. dubitante) that the term “*Shakhs ghair*,” in the above contest meant merely a person not of the family of the transferor and not necessarily a person other than a co-sharer. *ALI JAN v. PHEKU*, A.W.N. 1895, 9. [R., 23 A. 427.]

(181)—*Pre-emption—Wajib-ul-arz—Interpretation of—Sharik—Perfect partition.*—The provision as to the custom of pre-emption in a village contained in the *wajib-ul-arz* ran thus : When a *hissidar* sells his share, he shall sell first to a *sharik*, who is a near relative (*aziz karib*), and afterwards to a *sharik* who is *aziz baid* or distant relative, and then to “*hissadar-an deh*.” The village was then divided by a perfect partition, and the property sold was situated in mahal No. 1, in which the plaintiff was not a sharer. The defendant was a co-sharer in mahal No. 1. The plaintiff was, however, a sharer in mahal No. III. *Held* that by reason of the perfect partition of the village, the plaintiff had ceased to be a partner with the vendor, and therefore he had no right of pre-emption against a co-sharer in the same mahal. *Sharik* means a partner or co-sharer with the vendor. *MAHESH DAT PANDE v. GOKUL NAIK*, 7 A.L.J. 415 = 6 Ind. Cas. 115. [Appl., 7 A.L.J. 1066.]

(182)—*Pre-emption—Wajib-ul-arz—Sharik-hakkiat deb—Meaning of perfect partition—Plaintiff sharer in different mahal.*—The word *sharik* means a partner, and the fact of its being used in a record of the custom of pre-emption in a *wajib-ul-arz* shows that what is intended is that the person entitled to the right of pre-emption must be a *sharik* or partner of the vendor in a *hakkiat* of the village. Where therefore a *wajib-ul-arz* gave a right of pre-emption to *shari hakkiat deh* and the village was afterwards divided into mahals by perfect partition, and the plaintiff pre-emptor was not a sharer in the mahal sold, but in another mahal, *held* that he was not a *sharik* of the vendor. The fact of a new *wajib-ul-arz* having been prepared after partition, by which the co-sharers agreed to abide by the terms of the old *wajib-ul-arz*, does not make any difference as regards the plaintiff's right. *BATASI LAL v. ARJUN SINGH*, 7 A.L.J. 1066 = 7 Ind. Cas. 777.

(183)—*Pre-emption—Wajib-ul-arz—“Pattidars”—“Chakdars.”*—Where a *wajib-ul-arz* gave a right of pre-emption to “*pattidars*” in cases of transfer, that right cannot be extended to “*chakdars*,” even within the limits of their “*chak*.” *BALWANT SINGH v. SUBHAN ALI*, 10 A. 107 = A.W.N. 1887, 290. [R., 3 O.C. 110.]

(184)—*Wajib-ul-arz—Construction—Transfer of muafi and Khalsa.*—The *wajib-ul-arz* of a village provided that, when a share in the *Khalsa* land is sold, the co-sharers in a certain

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

order will have a right of pre-emption and when *muafi* is sold to a stranger "the right of pre-emption shall arise as regards that transfer." In a suit for pre-emption of a *muafi* share, *held*, that the condition as to pre-emption in respect of the revenue-paying land governed the *muafi* land also, save that the co-sharers in general had a right to pre-empt the *muafi* land, whereas in the case of *Khalsa* land, there was a gradation among the co-sharers. **RANG LAL v. KAMTA PRASAD, 3 A.L.J. 515 = A.W.N. 1906, 247.**

(185)—*Pre-emption—Pre-mortgage*—*Wajib-ul-arz*—"Bhai-band," meaning of.—Where a *wajib-ul-arz* confers the right of first refusal in respect of mortgages as well as sales, such right can be enforced in respect of mortgages. The term "*bhai-band*" used in a *wajib-ul-arz* sometimes means, according to the context, not only kindred by blood, but also the brotherhood of the village. **HIRA LAL v. RAMJAS, 6 A. 57 = A.W.N. 1883, 206.**

(185-a)—*Pre-emption—Bhai bhatija hakiki—Sister, whether included in the term—Wajib-ul-arz.*—A sister is included in the term *bhai bhatija hakiki*. **NIJAZ FATIMA v. TAMIZ BEGAM, 15 Ind. Cas. 175.**

(186)—*Preferential rights of pre-emptors inter se classes of pre-emptors mentioned in the wajib-ul-arz "alaltartib"*—*Construction of wajib-ul-arz.*—In a *wajib-ul-arz* the different classes of pre-emptors were mentioned "*alaltartib*," i.e., one after another: *Held*, that the right of pre-emption existed between the different classes of pre-emptors *inter se*, i.e., one class of pre-emptors excluded another. **SHEOBARAN SINGH v. BANWARI LAL, 10 Ind. Cas. 442.**

(187)—*Pre-emption—Wajib-ul-arz*—"Shur kai deh," meaning of.—The words "*Shurka deh*" taken in their natural meaning imply that the pre-emptor in question must be a partner with the vendor in the same *mahal*. **GANGA NARAIN v. PARBHU KURMI, 11 Ind. Cas. 320.**

(188)—*Pre-emption—Wajib-ul-arz*—"Sharik deh," meaning of.—*Construction—Partition.*—The words "*sharik deh*" taken in their natural meaning imply that the co-sharer in question shares with the vendor in the same unit of the village. **GANGA SAHAI v. INDARJIT SINGH, 11 Ind. Cas. 290.**

(189)—*Pre-emption—Wajib-ul-arz*—"Qarabat dar qaribi," meaning of.—*Preferential right.*—The *wajib-ul-arz* of a village gave a right of pre-emption to three classes of persons; first, near relatives (*qarabatdar qaribi*), secondly, near co-sharers in the same *thok*, thirdly, co-sharers in another *thok*. Both the vendees and the pre-emptor were co-sharers in the same *thok* but the latter was nearer in blood to the vendor than the former: *Held*, that the plaintiff had no preferential right. **SADHO CHARAN v. BIRJ RAI, 11 Ind. Cas. 274.**

Pre-emption—continued.**—2.—Construction of Wajib-ul-arz—*ctd.***

(190)—*Pre-emption—Wajib-ul-arz—Custom or contract—Presumption—Kaifat shrasta Nizam—Rebutting evidence.*—In a pre-emption suit, in order to prove custom, plaintiffs relied on the *wajib-ul-arz* of 1865 and of 1883 which raised a *prima facie* presumption as to custom. In order to rebut the presumption, the defendants produced *Kaifat Shrasta Nizam* and *Kaifat Mahtawi*. From these two latter documents, it appeared that up to 1208 F., that is, until the British occupation, the village was waste and without settlement; that from 1210 F. up to 1244 F. it remained in the hands of *muafidars*, and that from 1244 F. up till 1865 A.D., there were no sales. It did not, however, appear what transfers had taken place between 1210 F. and 1244 F. *Held*, that the documents were not sufficient to rebut the presumption arising out of the entries of the *wajib-ul-arz*. *Held*, further, that the bare fact that the land was held revenue-free for some period would not prevent the growth of the custom of pre-emption during that period. **BADRI NATH TEWARI v. RAM SARAN TEWARI, 11 Ind. Cas. 238.**

(190-a) *Pre-emption—Wajib-ul-arz*—*Rishtadar Karibi—Connection by marriage.*—The *wajib-ul-arz* of a village gave a right of pre-emption to a *rishtadar Karibi* who was also a sharer. The plaintiff, who has a connection by marriage of the vendor, brought this suit for pre-emption against a vendor, who was no relation of the vendor. *Held*, that the relationship was too remote to give the plaintiff a right of pre-emption. **FAKHRAN BIBI v. NAGESHAR RAM, 9 A.L.J. 84 = 13 Ind. Cas. 954.**

(190-b)—*Pre-emption—Wajib-ul-arz—Construction—Variation—Custom or contract—'Rewaj hug shufa,' meaning of.*—Where there is variation in the terms of the pre-emptive clause in two successive *wajib-ul-arzes*, the clause records a contract and not a custom, '*Rewaj hug shufa*' means a currency of the practice of pre-emption. **AJUDHIA PRASHAD v. JODHA SINGH, 5 Ind. Cas. 659.**

(191)—*Wajib-ul-arz—Construction of document—Haki ki bhai bhatijon sharik zamindari hon*—In a village, which consisted of three *thoks*, the pre-emptive clause of the *wajib-ul-arz* gave a right of pre-emption, first, in favour of *haki ki bhai bhatijon sharik zamindari hon* and, in the second degree, to co-sharers in the second and third *thoks* of the village; *held*, on a construction of this document, that, as against a stranger, a co-sharer in the *thok*, in which the property sold was situate, had a right of pre-emption although he might not fall under the head of *haki ki bhai bhatije*. **CHUNNI LAL v. MADAN MOHAN LAL, A.W.N. 1907, 55.**

See CUSTOM — PUNJAB, ALIENATION, 47 P.R. 1882.

See DEED—CONSTRUCTION OF DEEDS, 7 A. 258, F.B = A.W.N. 1885, 8.

Pre-emption—continued.**—3.—Loss of right to pre-empt by waiver, etc.**

(1)—*Pre-emptor — Waiver of right, what amounts to.*—Where, from the evidence in the case, it was very doubtful whether the pre-emptor had ever declined the purchase, and there was nothing in the evidence to show that he gave permission to sell the property to another party, *held* that the pre-emptor had not lost his right of pre-emption. *In the matter of the petition of JEHANGIR BAKSH*, 7 B.L.R. 24, Note=11 W.R. 480. [F., 7 B.L.R. 19=15 W.R. 247.]

(2)—*Right to pre-empt, when extinguished.*—Where a plaintiff pre-emptor fails to deposit sale price within the time fixed by the decree and the suit is accordingly dismissed, the vendee becomes a co-sharer in the mahal so as to successfully resist the same plaintiff's claim with respect to a pre-mortgage of an earlier date, although, at the date of the mortgage, the defendant mortgagee was a total stranger. *RAM HIT SINGH v. NARAIN ROY*, 26 A. 389 = A.W.N. 1904, 68=1 A.L.J. 209. (21 A. 374, 21 A. 441, *Appl.*) [R., 2 N.L.R. 150, 48 P.W.R. 1907=124 P.R. 1907=3 P.L.R. 1907=11 O.C. 290, 12 O.C. 229=3 Ind. Cas. 546, 5 N.L.R. 136, 90 P.R. 1909, F.B.=159 P.W.R. 1909=147 P.L.R. 1909, 91 P.R. 1909=148 P.L.R. 1909=161 P.W.R. 1909, F.B., 31 A. 530=6 A.L.J. 699=3 Ind. Cas. 42.]

(3)—*Pre-emption—Pre-emptor attesting deed of sale—Intention to renounce claim—Waiver discharging vendor from duty to give notice to pre-emptor.*—The act of attesting a deed of sale, if it be done by a pre-emptor with the intention of relinquishing his own claim, may properly be held to be, within the meaning of the decision in 52 P.R. 1880, a positive act discharging the vendor from the obligation of giving written notice to the pre-emptor, and waiving the pre-emption right of the latter. *ABDUL RAB v. MUHAMMAD JI*, 8 P.R. 1882. (48 P. 1878, R.) [R., 25 P.R. 1903=76 P.L.R. 1903; D., 100 P.R. 1885, 22 P.R. 1901=86 P.L.R. 1901.]

(4)—*Joint Hindu family—Attestation of sale deed by father—Son's right of pre-emption.*—In a suit for pre-emption the defence was that as the plaintiff's father was a consenting party to the sale of the property in suit to the defendant (vendee) inasmuch as he had attested the deed of sale, the plaintiff could not claim pre-emption: *Held*, that mere attestation of the deed of sale by the father did not necessarily import concurrence: *Held* further, that the sons in a joint Hindu family are to be regarded as co-sharers for the purpose of pre-emption. *HAZARI SINGH v. JOOT SINGH*, 1 O. C. 252. [Rel. on, 7 O. C. 61; R., 5 O. C. 395.]

(5)—*Refusal by pre-emptor to pay money actually gives—Conditional decree.*—The pre-emptors having chosen not to pay the sum given by the purchasers and having refused to purchase at that price, cannot come into Court,

Pre-emption—continued.**—3.—Loss of right to pre-empt by waiver, etc.—continued.**

and ask for a conditional decree, which is generally given if a higher price was fraudulently alleged to have been given for the property than was actually paid for it, and the pre-emptor had offered to pay whatever sum was actually given. *KUDHARA v. KHUMAN SINGH*, 1 Agra 265.

(6)—*Refusal to purchase at vendor's price.*—A pre-emptor does not lose his right of pre-emption by refusing to purchase the property sold, when offered to him, at a price which, although it may be held, on trial in a suit brought, to be the price really paid by the vendee (defendant), he in good faith believed to be considerably in excess of the real price. He would still be entitled to a decree for the property by right of pre-emption, on condition of paying into Court the amount found to be the real price. *LAJJA PRASAD v. DEBI PRASAD*, 3 A. 236. [*Appr.*, 16 A. 247; R., 10 C. 1008, 35 C. 575.]

(7&8)—*Pre-emption—Offering less sum than sale-price bona fide.*—Where a person claiming a right of pre-emption offered a sum less than the actual price paid for the property, believing in good faith that such sum was the actual price, *held* that such person ought not on that account lose his right of pre-emption. *BHOLI BIBI v. FAHIMA BIBI*, A.W.N. 1882, 137.

(9)—*Right not lost, by objecting to price.*—A person having a right of pre-emption does not lose it by refusing to purchase the property at the price stated in the conveyance to the vendee because he believes that such price is not the actual price, when such belief is entertained and expressed in good faith. *MAWASHI v. NABI BAKHSI*, A.W.N. 1881, 21.

(10)—*Refusal to purchase, what amounts to.*—The mere circumstances that the pre-emptor declined to give the price which the vendor alleged he had obtained from the vendees, or that they were willing to pay, on the ground that he believed it was a fictitious sum, is no such refusal to buy as would estop him from afterwards asserting his right by suit. Nor would his failure to prove that the amount he alleged as the true consideration was as asserted by him, necessarily compel the Court to reject his claim. *AMIR CHAND v. ISHAR DAS*, A.W.N. 1882, 46.

(11)—*Pre-emptor in debt.*—A pre-emptor does not lose his right of pre-emption simply because he is in debt. The question whether the pre-emptor was in debt at the time when he asserted his right of pre-emption is not strictly one relevant in a suit for pre-emption, nor does the fact of his being in debt justify the inference that he could not raise or find the sum of money required for the purpose of pre-emption. *RAM KHELAWUN RAI v. SHIVA DASS*, 2 Agra 76.

(12)—*Imperfect partition—Right of pre-emption.*—Where the lands were divided but the

Pre-emption—continued.**—3.—Loss of right to pre-empt to waiver etc—continued.**

joint liability of all to the Government Revenue, remains, and the property is still one *mehal* and thus the partition is imperfect, the condition as to pre-emption is not lost. **RAM PERSHAD v. BULJEET SINGH, 2 Agra 252.** [*Appl.*, 7 A. 720; *R.*, 17 A. 226.]

(13)—*Pre-emptor opposing mutation of names—Admission of vendor as to consideration for sale—Right of pre-emptor to question it.*—A pre-emptor is not precluded from claiming a right of pre-emption by the circumstance that he had in the Registrar's office disputed the vendor's right to sell it by reason of his not being or not having been in possession of the property. The mere admission of the vendor, that an old debt mentioned in the sale-deed as having been deducted from the sale price paid to the vendor really formed a part of the consideration for the sale, is not conclusive evidence of the allegation, and the pre-emptor is perfectly competent to dispute the admission. **PEERA v. SHIM-BHOO, 2 Agra 348.**

(14)—*Inclusion of name of purchaser's sons in sale-deed—No loss of preferential right.*—A preferential right to purchase is not lost merely by the inclusion of the names of the sons of the purchaser in the sale-deed, if it be proved that the actual purchaser was the father and the names of the sons were included in accordance with the prevailing usage, without any intention to defraud the other co-sharers. **DOWLUT SINGH v. KEDAR SINGH, 3 Agra, 25.**

(15)—*Sale of property admitted by vendor—Right of pre-emption not destroyed by re-sale.*—This was a suit by one co-parcener against another in right of pre-emption. The vendor admitted the sale, but urged that it had been cancelled within a few days after the completion, and that, therefore, the right of pre-emption did not attach. The Court of first instance found that the alleged re-transfer of the property by the vendee to the vendor was fraudulent, and set up to deprive the plaintiff of his right of pre-emption. The first Appellate Judge simply observed, without giving any reasons, that there was nothing fraudulent in the defendant's conduct and reversed the first Court's decision. *Held* that, the vendor-defendant having admitted in his evidence that the re-sale by him to his co-defendant was only made subsequent to the institution of the present suit, such re-sale could not destroy the right of pre-emption of the plaintiff in the property, the sale of which has been admitted by the vendor-defendant. **PUTOORAM v. SHAM LAL SAHOO, 7 W.R. 206.**

(16)—*Partition proceedings on application of vendee—Silence of pre-emptor—Waiver.*—Where, during partition proceedings held on the application of a vendee of a share in certain property, a co-sharer who had a right of pre-emption in respect of such sale, raised no

Pre-emption—continued.**—3.—Loss of right to pre-empt to waiver etc—continued.**

objection to the partition, *held*, that such conduct did not amount to a waiver of his right, and could not estop him from claiming to pre-empt such share. **THAMMAN SINGH v. JAMAL-UD-DIN, 7 A. 442=A.W.N. 1885, 70 (N.W.P. S.D.A. Rep. 1861, 506, D. and Diss., 4 A.W. N. 216, R.)**

(17)—*Execution of decree—Sale of pre-emptional property by decree-holder before obtaining possession—Right to execute not affected.*—The plaintiff in a suit for pre-emption who has obtained a decree, does not forfeit his right to execute it, by selling the property to a stranger before obtaining possession. **RAMSA-HAI v. GAYA, 7 A. 107=A.W.N. 1884, 224,** (5 A. 180 and S.A. from Order No. 45 of 1883, decided the 21st November 1883, *D.*) [*R.*, 125 P.L.R. 1901, 24 A. 119, 94 P.R. 1902=134 P.L.R. 1902, 30 A. 28=4 A.L.J. 759=A.W.N. 1907, 280.]

(18)—*Co-sharer claiming right along with relatives not co-sharer's right.*—A co-sharer plaintiff in a suit for pre-emption does not lose his right by joining with himself his relatives who are not co-sharers in the estate. **BHUREY MAL v. NAWAL SINGH, 4 A. 259=A.W.N. 1882, 16.** (4 A. 252, *D.*) [*R.*, 29 P.R. 1894; *D.*, 17 A. 454.]

(19)—*Pre-emption—Pre-emptor joining "stranger" as co-plaintiff—Effect on pre-emptor's right—Justice, equity and good conscience.*—A pre-emptor loses his right of enforcing pre-emption, by joining in his suit a stranger, that is, a person who has no right of pre-emption. This is in accordance with the Mahomedan law on the subject based on justice, equity and good conscience. **BHAWANI PRASAD v. DAMRU, 5 A. 197=A.W.N. 1882, 217.** (N.W.P.S.D.A. Rep 1860, P. 53, N.W.P. 1870, 343, B.L.R. F.B. Rule 35, *R.*) [*Diss.*, 83 P.R. 1893, 1 O.C. 308, F.B.; *F.*, 15 C. 224; *Appl.*, 6 A. 423; *Expl.*, 8 A. 462; *R.*, 7 A. 118. 12 A. 234, F.B., 19 A. 324, 7 O.C. 22, A.W.N. 1907, 88=4 A.L.J. 210, 31 A. 623, F.B.=6 A.L.J. 887=6 M.L.T. 352=3 Ind. Cas. 820; *D.*, 5 A.W.N. 189, 29 P.R. 1894.]

(20)—*Transfer by pre-emptor to stranger of subject of pre-emption—Forfeiture of right.*—A co-sharer entitled to the right of pre-emption, who in anticipation of succeeding in his claim, transfers the subject of pre-emption to a stranger, forfeits such right. This view is in harmony with the doctrine of the Mahomedan law of pre-emption, which agrees with the principles of justice, equity and good conscience. **RAJJO v. LALMAN, 5 A. 180=A.W.N. 1882, 210.** [*R.*, 12 A. 234, F.B., 18 A. 382, 133 P.R. 1907. F.B.=84 P.W.R. 1907=88 P.L.R. 1908; *D.*, 7 A. 107, 5 A.W.N. 189. 14 A. 195, 24 A. 119.]

(21)—*Pre-emption—Suit for pre-emption based on terms of wajib-ul-arz—Previous violation of terms by plaintiff, effect of.*—A suit for pre-emption of a share in a village, based on a

Pre-emption—continued.**—3.—Loss of right to pre-empt by waiver etc.,—continued.**

clause in a *wajib-ul-arz* providing for pre-emption in case of mortgages or sales of shares by co-sharers, should not be dismissed on the mere ground that, on a previous occasion, the plaintiff himself had acted in violation of the provisions of the *wajib-ul-arz*. Such previous contravention of its provisions by him could not have the effect of depriving him of the right to claim pre-emption in case of the mortgage or sale of another share by another co-sharer in the village. *UJAGAR LAL v. JIA LAL*, 18 A. 382 = A.W.N. 1896. 112. (A.W.N. 1889, 127, F., 5 A. 180, R.)

(22)—*Pre-emption—Property in possession of Hindu widow with son—Widow a stranger and not a co-sharer for purposes of pre-emption—Joinder of widow as plaintiff in suit for pre-emption, effect of.*—The defendant in this suit for pre-emption contested the claim on the ground that the female plaintiffs were not co-sharers in the village, and had no right to pre-empt, and that the other plaintiffs, by associating themselves in the suit, had forfeited their own right of pre-emption. As regards the first point, the sons of both the ladies referred to above were alive and therefore they had no right as heirs to their husbands to share in their husband's property, and the mere circumstance that, in the revenue-records, their names had been entered along with those of their sons as co-sharers, would not have the effect of conferring on them the right of pre-emption as co-sharers. On the second point, it was held that the very fact of the other plaintiffs having joined the ladies who were strangers, i.e., persons who had not the right of pre-emption, was in itself sufficient to estop them from asserting their claim. *BHUPAL SINGH v. MOHAN SINGH*, 19 A. 324 = A.W.N. 1897, 72. (A.W.N. 1895, 84, A.W.N. 1895, 85, F., 5 A. 197, 19 A. 148, 5 A. 65, R.) [*Diss.* 1 O.C. 308; R., 31 A. 623 = 6 A.L.J. 887 = 6 M.L.T. 352 = 3 Ind. Cas. 820.]

(23)—*Pre-emption—Wajib-ul-arz — Sale to stranger—Re-sale by stranger to co-sharer before suit by another co-sharer—Effect—Mahomedan Law—Wajib-ul-arz — N.W.P.*—In a case of pre-emption based upon a *wajib-ul-arz*, where the land was sold to a stranger, and the stranger re-sold the land to one of the co-sharers, held that another co-sharer having equal rights could not enforce by suit his right of pre-emption, when the re-sale was before the institution of the suit. [F., 73 P.R. 1898, A.W.N. 1906, 215 = 3 A.L.J. 544; *Appl.*, 25 A. 421, 11 O.C. 290, 12 O.C. 229; R., 21 A. 374, 43 P.R. 1903 = 92 P.L.R. 1903, 2 N.L.R. 150, 26 P.R. 1903 = 39 P.W.R. 1908 = 145 P.L.R. 1908, 13 P. W. R. 1908, 1 Ind. Cas. 528, 31 A. 530 = 6 A.L.J. 699, 6 A.L.J. 966 = 3 Ind. Cas. 782, 7 A. L. J. 77, 91 P.R. 1909; D., 23 A. 247.] The rule of Muhammadan Law by which all persons entitled to pre-empt are entitled to a share in the pre-empted property, is not applicable in

Pre-emption—continued.**—3.—Loss of right to pre-empt by waiver etc.,—continued.**

the N.W.P. in cases of pre-emption arising under a *wajib-ul-arz*. *SERH MAL v. HUKAM SINGH*, 20 A. 100.

(24)—*Pre-emption decree, time fixed for payment of price, whether extended by mere appeal from decree—Civ. Pro. Code, s. 214.*—A plaintiff who has obtained a decree under s. 214 of the Civ. Pro. Code, can appeal within the period prescribed by the Limitation Act for his appeal, and the appellate Court, if it sees fit so to do, may extend the time within which the pre-emptive price is to be paid, and itself fix a day for the purpose. It does not, however, follow that by the mere fact of an appeal having been preferred from a decree for pre-emption, the time within which the first Court had ordered the purchase money to be paid is extended, and that the appellate Court's decree in such appeal, although it says nothing about extending the time, has the effect of giving the plaintiff, whether he is appellant or respondent, the corresponding period of time from the date of the appellate Court's decree for the payment of the pre-emptive price to that which he had from the date of the decree of the first Court. It cannot have been the intention of the Legislature that a plaintiff in a suit for pre-emption could have a power, of his own accord, to effect the stay of the execution of a decree which, by reason of the pre-emptive price not having been paid on or before the day fixed, had become a decree in favour of the defendant. *JAGGAR NATH PANDE v. JOKHU TEWARI*, 18 A. 223 = A.W.N. 1896, 43. [F., 18 A. 455; R., 11 C.P. L.R. 115, L.B.R. 1893—1900, 420, 7 O.C. 359, 48 P.R. 1906 = 104 P.L.R. 1906, 28 A. 676 = A.W.N. 1906, 198 = 3 A.L.J. 804, 31 M. 28 = 17 M.L.J. 495 = 3 M.L.T. 26; D., 8 O.C. 241.]

(25)—*Right lost after suit filed to enforce it.*—The plaintiff instituted a suit on 13th March 1883 for pre-emption in respect of the sale of a share of a *mahal* dated the 22nd February 1883, basing his claim to be a co-sharer in the *mahal* on a purchase by him, on the 22nd April 1882, of a share in the *mahal*. On the 30th May 1883, the Court of first instance gave him a decree. The defendant appealed on 26th July 1883. On the 7th September 1883, the plaintiff's purchase of a share in the *mahal* of the 22nd April 1882 was declared invalid and set aside by a decree. On the 10th September 1883, the lower appellate Court dismissed the plaintiff's suit on the ground that he could not, under the circumstances, be considered an actual co-sharer in the *mahal* at the time of the sale in respect of which he claimed. Held that the lower appellate Court's view was correct. *KHUDA BAKHSI v. RAMLAUTAN LAL*, A.W.N. 1884, 169. [R., 2 N.L.R. 150; D., 10 A. 472 = 8 A.W.N. 177.]

(26)—*Holder of a resumed muafi land, rights of—Not a co-sharer—Acceptance by pre-emptor of money due on mortgage from vendee—Waiver of pre-emptive rights.—Suit for pre-emption.*

Pre-emption—continued.**—3.—Loss of right to pre-empt by waiver etc.,—continued.**

The plaintiff's title was not disputed by the defendant. But the defendant (vendee) contended that he was also himself a co-sharer within the meaning of the *wajib-ul-arz* of the particular village. There was no evidence as to the constitution of the village to show whether the resumed *muafi* land was or was not considered by the residents or co-sharers of the village as ordinary *khalsa* land. *Held*, under the circumstances, that the defendant, the holder of a resumed *muafi* land, could not be a co-sharer for purposes of pre-emption. The receipt, by a pre-emptor, from the vendor of the sale, of money due to the former as mortgagee of the vendor cannot operate as a waiver of his (pre-emptor's) pre-emptive rights. **AHMAD ALI v. NAJAMA-UN-NISSA, 2 A.L.J. 145.** [R., 4 A.L.J. 210=A.W.N. 1907, 88, 80 P.W.R. 1908=37 P.R. 1908=39 P.L.R. 1908.]

(27)—*Pre-emption — Wajib-ul-arz—Refusal by pre-emptor to purchase—Waiver—Pre-emptor a member of joint Hindu family—Notice given by vendor to pre-emptor and his brothers—Reply sent by the brother, sufficient.*—A person having a right of pre-emption does not lose it by refusing to purchase the property at the price at which it is offered to him, because he believes that such price is in excess of the real price, where such belief is entertained and expressed in good faith. Where the pre-emptor and his brothers are members of a joint Hindu family, and the vendor addressed a notice to him and his brothers jointly to which the pre-emptor's brother sent a reply, *held* that the plaintiff pre-emptor is entitled to rely upon his reply. **KISHAN DAS SINGH v. BACHCHA PANDE, 8 A.L.J. 100.** (3 A. 236, A.W.N. 1882, 46 A.W.N. 1882, 136, 16 A. 247, F.)

(28)—*Agreement in a partition suit—Right of pre-emption.*—*Held*, that an agreement embodied in a compromise decree, passed in a partition suit relating to some joint family property whereby a right to transfer any one whom the transferor liked was conferred upon a member, did not amount to a relinquishment of the right of pre-emption. **RAMJIMAL v. CHAUDHRI RAMSARUP, 6 A.L.J. 687=3 Ind. Cas. 515.**

(29)—*Ottidar—Execution sale subject to otti—Ottidar, party to suit—Ottidar having notice of date of sale does not amount to waiver of pre-emption right.*—Where property is sold at an execution-sale subject to an otti and is purchased by a third party, and the ottidar who was a party to the suit had notice of the date of sale, that fact alone does not amount to a waiver on his part of his right of pre-emption. **KANARAN NAIR v. RAMAN NAMBIAR, 4 M.L.J. 46.** (5 M. 198, F., 15 M. 480, D.)

(30)—*Separate accruals of pre-emption in respect of some property—Pre-emptor not estopped by reason of neglect to claim pre-emption on first accrual—Wajib-ul-arz.*—The relinquish-

Pre-emption—continued.**—3.—Loss of right to pre-empt by waiver etc.,—continued.**

ment of the right of pre-emption in respect of any accrual thereof does not involve the relinquishment of the right to enforce pre-emption in respect of any other accrual subsequent to the accrual in respect of which the right has been thus relinquished. **SHEOBARAN v. MANOGRAI, A.W.N. 1891, 185.** (5 A. 187, 7 A. 479, 7 A. 258, R.)

(31)—*Pre-emption suit by pardahnashin ladies—Plaintiffs having knowledge of sale.*—In a suit by *pardahnashin* ladies for pre-emption, mere circumstance that the sale took place in the open market and with due publicity, and that it came to the knowledge of these secluded ladies would not in itself furnish any ground for depriving them of the rights which they would otherwise possess as pre-emptors of the land under the terms of the *wajib-ul-arz*. For mere knowledge of a sale, irrespective of definite refusal to purchase properly communicated, can never be held to deprive the pre-emptor of his right of pre-emption. **MAHADEO PRASAD v. SAHIB BAIBI, A.W.N. 1887, 260.**

(32)—*Right of pre-emption—Cancellation of sale—Pre-emptor's right.*—Plaintiff set up a right of pre-emption against the defendant and obtained a decree; but the defendant, after the case went against him, annulled the sale to the purchaser and refused to sell the land to any one. The question was whether the pre-emptor could compel the defendant to carry out the sale to him. *Held* that the plaintiff could not force the defendant to sell the land to him; but as the latter exercised his right to annul the sale after the case went against him, the plaintiff was entitled to the costs in the lower Court, but not in the appeal Courts, as the point was decided against him. **BAHADOOR v. MOTEE RAM, 39 P.R. 1867.**

(33)—*Right of pre-emption — Permanent transfer — Pre-emption rules applicable to usufructuary mortgages, on stipulation to that effect in wajib-ul-arz.*—As has been ruled in 87 P.R. 1867, the right on which a plaintiff's claim for pre-emption is based ordinarily attaches only to permanent transfers of land and not to mortgages, which are fettered by no such restriction. In the present case, however, the claim of the plaintiff was based, not upon the general law, but upon the *wajib-ul-arz* of the village according to which the right of the proprietor to receive the first offer was extended to mortgages as well as to sales, and effect had to be given to the plain meaning of the words used in the *Wajib-ul-arz* without regard to their real or supposed beneficial or detrimental effect in particular cases; and, consequently, plaintiff being a proprietor of the village and the defendant a stranger, the former, according to the stipulation in the *wajib-ul-arz*, had the preferential right to

Pre-emption—continued.**—3.—Loss of right to pre-empt by waiver, etc.—continued.**

the mortgage. *BUNSEE LALL v. BUNSEE AND SYED REHMUT ALI*, 4 P.R. 1869. [R., 84 P.R. 1869, 42 P.R. 1880, 103 P.R. 1885, 98 P.R. 1894.]

(34)—*Pre-emption—Mahomedan law—Abandonment of right—Prior complete agreement for sale necessary.*—The Mahomedan law requires that, before the pre-emptive right can be abandoned, there should be such a right come into existence by reason of a prior agreement for sale having been entered into. *PEAREE LALL v. AJOODHYA PERSHAD*, 74 P.R. 1869. [R., 90 P.R. 1909=147 P.L.R. 1909.]

(35)—*Pre-emption—Auction sale—Omission to attend at sale—Relinquishment.*—In a suit for pre-emption it was held that, where plaintiff had an opportunity of attending at an auction sale and there asserting his rights as pre-emptor, his omission to take advantage of it amounted to a relinquishment of his right of pre-emption. *MAHOMED BAKSH v. HIRA*, 47 P.R. 1873. [R., 46 P.R. 1909=72 P.L.R. 1909; D., 100 P.R. 1885.]

(36)—*Pre-emption—Waiver by pre-emptor in favour of stranger—Estopped as against second pre-emptor.*—When a pre-emptor had once waived his right to accept or insist upon an offer of sale, he cannot afterwards come forward and re-assert his right against another person who had claimed pre-emption in the same sale and obtained a decree transferring the property to himself, nor could he waive his right in favour of a particular person and reserve it as against all others. *NABBI BAKSH v. KAKA SINGH*, 42 P.R. 1878. [R., 106 P.R. 1880, 8 P.R. 1882, 25 P.R. 1903=74 P.L.R. 1903, 90 P.R. 1909=147 P.L.R. 1909, F.B.; D., 20 P.R. 1881, 139 P.R. 1894.]

(37)—*Effect of pre-emptor divesting himself of the proprietary right in his property.*—A plaintiff's suit for pre-emption ought to be dismissed when during the pendency of the suit he divests himself of the proprietary right in the property which gave him the right to claim pre-emption. *ATMA RAM v. DEVI DIAL*, P.L.R. 1901, 157=49 P.R. 1901. (10 A. 472 and 21 A. 441, R.) [R., 91 P.R. 1909, 12 O.C. 229, 90 P.R. 1909, 133 P.R. 1907=84 P.W.R. 1907, 88 P.L.R. 1903, 44 P.R. 1903=75 P.L.R. 1903, 32 P.R. 1902=30 P.L.R. 1902.]

(38)—*Pre-emption—Effect of pre-emptor's divesting himself of property which gave him right of pre-emption.*—Where the person entitled to claim property by right of pre-emption by reason of his being a co-sharer in it makes a gift of his share, neither he nor his donee can pre-empt any part of the property when the gift is made subsequent to the sale of the share claimed. (10 A. 472, A.W.N. 1899, 127, 21 A. 441, 7 A. 107, at p. 110, 535, 20 A. 148, 186 P.R. 1894, R.) The term *sharik* in a

Pre-emption—continued.**—3.—Loss of right to pre-empt by waiver, etc.—continued.**

wajib-ul-arz applies to male agnates only. *MUHAMMAD AYUB KHAN v. RURE KHAN*, P.L.R. 1901, 125=95 P.R. 1901. (89 P.R. 1889, F.) [R., 91 P.R. 1909, 133 P.R. 1907=84 P.W.R. 1907=88 P.L.R. 1908, 124 P.R. 1907, 48 P.W.R. 1907=3 P.L.R. 1907, 90 P.R. 1909, 44 P.R. 1903=75 P.L.R. 1903, 32 P.R. 1902=30 P.L.R. 1902, 17 P.R. 1908=18 P.W.R. 1908, 12 O.C. 229; D., 46 P.R. 1902=49 P.L.R. 1902; Cited, 133 P.R. 1907=84 P.W.R. 1907=88 P.L.R. 1908.]

(39)—*Waiver—Pre-emptor witnessing deed of sale—Vendee selling property to pre-emptor who has waived his right—Rival pre-emptors—Limitation Act (XV of 1877), s. 22, sch. II, arts. 10 and 120.* On the 4th March 1898, G.M. sold the land in suit to F.M. The deed of sale was registered on the 10th March 1898. On the 24th February 1899 the plaintiff sued for possession of the land by right of pre-emption. On the 13th March 1899, when the case came on for hearing, F.M. stated that he had, on the 23rd January 1899, sold the land to J, whereupon J was impleaded as a defendant by order of Court. J. had attested as a witness the sale-deed, dated the 4th March 1898, in favour of F.M. J. pleaded *inter alia* that the suit against him was barred by limitation under s. 22 of the Limitation Act. It was contended for the plaintiff that sale to J. was fictitious, and that J. having waived his right, the plaintiff's claim, which was not barred by limitation, must be decreed. Held, that, since a pre-emptor who has once waived his right cannot afterwards come forward and re-assert it, J. was not entitled to claim the land as against the plaintiff after having clearly waived his right by witnessing the deed in favour of F.M. Moreover, as J. had acquiesced in the purchase of F.M. he was estopped, as sub-purchaser of F.M. from asserting his waived right against the plaintiff, whose claim to pre-emption was superior to that of F.M. Held, also, that art. 10, and not 120, of the Limitation Act, was applicable to the suit as against both the vendee and his sub-purchaser, J. Under s. 22 of the Limitation Act the suit as against J. must be considered to have been instituted on the 13th March 1899, and must be held as barred unless it were established that the sale to J. was fictitious, in which case plaintiff could succeed. The Chief Court remanded the appeal under s. 562 for trial with reference to the law as laid down above. *NABI BAKSH v. FAKIR MUHAMMAD AND OTHERS*, 74 P.L.R. 1903=25 P.R. 1903. [R., 6 P.R. 1909=7 P.W.R. 1909, 106 P.R. 1907, 7 O.C. 22; D., 3 P.R. 1907.]

(40)—*Transfer by vendee after institution of suit for pre-emption against him to one having right superior to the plaintiff.*—Where before a notice of the plaintiff's suit for pre-emption was served on the vendee the latter in good faith transferred his bargain to a person having right superior to that of the plaintiff and the vendee.

Pre-emption—continued.**— 3.—Loss of right to pre-empt by waiver, etc.—continued.**

Held, that the plaintiff's suit must be dismissed. **RAMJI DAS v. RAM LAL**, 124 P.L.R. 1904. (73 P.R. 1898, 7 P.R. 1895, 27 C. 77, R.)

(41)—*Mortgage of property sold—Receipt of mortgage money by pre-emptor from vendee without protest—Waiver of right of pre-emption.*—Where property claimed by the plaintiff by right of pre-emption was mortgaged with him, and the plaintiff, without protest, accepted the mortgage money from the vendee, *held*, that the plaintiff must be deemed to have waived his right to pre-empt. **MEHTA CHANDRAS v. MALIK ITBAR KHAN**, 154 P.L.R. 1906 (138 P.R. 1888, R.) [Not Appr., 37 P.R. 1908=39 P.L.R. 1908=30 P.W.R. 1908.]

(42)—*Custom — Waiver—Pre-emptor receiving from the vendees mortgage-money due to him.*—*Held*, that a pre-emptor cannot be deemed to have waived his right of pre-emption by simply receiving from the vendee mortgage-money due to him on the security of the property subject of the sale. **FAZAL DAD KHAN v. SAWAN SINGH**, 39 P.L.R. 1908=30 P.W.R. 1908=37 P.R. 1908. [138 P.R. 1888, 154 P.L.R. 1906, 2 A.L.J. 145, 9 A. 234, 32 P.R. 1884, R.]

(43)—*Divisible sale—Deed of sale specifying each vendee's share and its price—One of the vendees assigning his share before pre-emption suit—Effect of adding the assignee as defendant after expiry of limitation—S. 22, Limitation Act (XV of 1877).*—*Held*, that, where either the share of each vendee is specified in the deed of sale, or there is a distinct specification of both the price and the shares, the sale is considered divisible. *Held*, also, that, in a case of the above description, the right of pre-emption can be exercised separately in respect of each portion of the property sold, and that, if, by some reason or other, the pre-emptor's claim becomes time-barred in respect of a portion of the property, or his right does not extend to it, his claim cannot be defeated by the vendees on either ground. **BRIJ LAL v. MASSON**, 7 P.W.R. 1909=6 P.R. 1909=23 P.L.R. 1909=1 Ind. Cas. 91. (19 A. 148, F.; 25 P.R. 1903, 94 P.R. 1895, R.; 66 P.R. 1896, D.)

(44)—*Pre-emption—Waiver—Acquiescence—Pre-emptor assisting in sale negotiations and demarcation of land—Delay in suing.*—A pre-emptor assisted in negotiating a sale, being himself present at the time; he further actively assisted when the land sold was being demarcated out of a large field of which it was a part. The suit for pre-emption was brought on the very last possible day. *Held*, that the pre-emptor must be deemed to have waived his right of pre-emption, as by his conduct he actively brought about in the vendee's mind that he was perfectly agreeable to the purchase by the vendee and did not intend to enforce his right. **FATEH CHAND v. KIRPA SINGH**, 76 P.W.R. 1912=13 Ind. Cas. 561=48 P.R. 1912=145 P.L.R. 1912. (165 P.W.R. 1910=8 Ind.

Pre-emption—continued.**— 3.—Loss of right to pre-empt by waiver, etc.—continued.**

Cas. 246, F.; 7 P.R. 1876, 7 A. 23, R.; 97 P.R. 1908=30 P.W.R. 1908, 99 P.R. 1910=164 P.W.R. 1910=8 Ind. Cas. 1155, 100 P.R. 1885, 78 P.R. 1881, 185 P.L.R. 1905, D.)

(45)—*Pre-emption—Custom—Wajib-ul-arz—Loss of right—Joining a co-sharer having an inferior right in the purchase.*—In a suit for pre-emption, the vendees who were persons having an equal right of pre-emption with the plaintiffs, were held to have lost their right as against the plaintiffs, by associating with them a co-sharer who possessed an inferior right: *Held*, also, upon a discussion of the evidence and with reference to the terms of the *wajib-ul-arzes*, that the custom existed. **GUPTESHWAR RAM v. RATI KRISHNA RAM**, 10 A.L.J. 70=15 Ind. Cas. 174=34 A. 542.

(46)—*Pre-emption—Title of the plaintiff at date of sale and at date when decree ought to have been passed—Partition after the decree of first Court, effect of.*—A plaintiff having a right to a decree in a pre-emption suit at the date of the sale and at the date upon which the decree ought to have been made by the first Court, does not lose that right because of a partition, which comes into force before the decree becomes final on appeal. **BIDYA PERSHAD RAM TEWARI v. ACHAIBER RAM**, 15 Ind. Cas. 865. (6 A.L.J. 699=3 Ind. Cas. 42=31 A. 530, *relied*; 32 A. 567=7 A.L.J. 715=6 Ind. Cas. 426, 21 A. 441, D.)

(47)—*Act XII of 1878, s. 13, notice under—Pre-emption—Verbal offer, refusal of, whether amounts to waiver of such right.*—The mere omission or refusal to accept an oral offer of a sale does not, of itself, and without some positive act of the pre-emptor by way of discharging the vendor, constitute a waiver of the right of pre-emption or dispense with performance of the obligation to serve a written notice under s. 13 of Act XII of 1878. The object of that section is to secure unimpeachable evidence of the fact that an offer was duly made; and if mere oral evidence of a verbal offer and refusal may be regarded as proof that the pre-emptor waived his right of pre-emption, or dispensed with performance of the obligation to serve written notice, the object of the Legislature in framing the new enactment on the point would be frustrated. **PHALEL v. BATA**, 52 P.R. 1880. [F., 112 P.R. 1882, 24 P.R. 1887; Appr., 100 P.R. 1885; R., 8 P.R. 1882, 22 P.R. 1901=86 P.L.R. 1901.]

(48)—*Vendee purchasing defeasible title cannot give better title to his transferee—Pre-emptor can delay suit till the last moment of limitation allowed—His only risk in being forestalled by a person of superior or equal right of pre-emption.*—A person who purchases property subject to the law of pre-emption takes a title which is defeasible in the event of a pre-emptor coming forward within the time allowed by law with a claim for pre-emption, and

Pre-emption—continued.**—3.—Loss of right to pre-empt to waiver, etc.—concluded.**

during this period he cannot give a transferee from himself a better title than he possesses. If, in such circumstances, he and his transferee choose to run the risk of dealing with the property upon the assumption that no claim to pre-emption will be preferred, they do so with their eyes open and at their peril. A pre-emptor is entitled to delay his suit for pre-emption up to the very last moment, though, of course, he does so at the risk of losing his rights, if in the interval, another person with equal or superior right has, by exercise of greater diligence, forestalled him in securing the bargain. *PALA v. MUSSAMMAT MANGLAN*, 182 P.L.R. 1913 = 132 P.W.R. 1913.

See PUN. ACT IV OF 1872, s. 18, 37 P.R. 1874.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 138 P.R. 1888.

See MORTGAGE—FORM OF MORTGAGES, 14 A. 195 = A.W.N. 1892, 42.

—4.—Necessary formalities

(1)—*Right of pre-emption — Antecedent demand—Cause of action—Wajib-ul-arz—Local custom.*—The cause of action for a pre-emptive suit is not the demand but the sale complained of. Of course, under the strict Mahomedan law, the immediate demand and the confirmatory demand are conditions precedent to the exercise of pre-emption; but this rule has been held not to be applicable to pre-emptive claims based upon the *wajib-ul-arz*, whilst, so far as customary pre-emption is concerned, the matter would depend upon the scope and incidents of the custom. *MUHAMMAD RUSTAM ALI KHAN v. NIADAR SINGH*, A.W.N. 1886, 114. [R., 13 A. 373.]

(2)—*Between Hindus in Benares city—Modification of Mahomedan Law to be applied—Performance of preliminaries necessary — Meaning and not style of the statement making a claim for pre-emption to be considered.*—In a suit for pre-emption between Hindus, in the absence of any allegation or proof as to any custom different from or not co-extensive with the Mahomedan Law, that law must be applied to the case, and the performance of the preliminaries required by that law, as conditions precedent to the perfection of that right, must be performed. According to the *Hedaya* it is the meaning and not the style of the statement making the claim that is to be considered. Held, therefore, that a claim couched in the words: "I have a claim for pre-emption on this house. If any one else purchase it, I shall be put to inconvenience. Go at this very moment and take the money from *Shoshi Bhushan Sircar* and tell *Ram Charan* and *Chakauri Devi* to return the house by taking the money," clearly evinced a desire on the part of the pre-emptor to claim the right. Where the words used are a mere statement of

Pre-emption—continued.**—4.—Necessary formalities—continued.**

the fact that the speaker had a claim for pre-emption, the requirements of the Mahomedan Law would not be satisfied. *CHAKAURI DEVI v. SUNDARI DEVI*, 3 A.L.J. 338 = A.W.N. 1906, 144 = 28 A. 590. [R., 28 A. 698 = 3 A.L.J. 467 = A.W.N. 1906, 187, 5 N.L. R. 136.]

(3)—*Mahomedan Law—Pre-emption—Talab-i-mowashibat and talab-i istishad — Unreasonable delay, a question of fact—Action for pre-emption—Claimants, co-sharers as well as mortgagees — Deposit of mortgage money in Court by purchaser—Withdrawal by claimants — Waiver of claim.*—The right of pre-emption must be exercised, and the claims necessary to give effect to it must be made with the utmost promptitude, and any unreasonable and unnecessary delay is to be construed as an election not to pre-empt. Whether there has been such delay is a question to be determined upon the facts of each particular case. The plaintiffs, in this case, claimed the right to pre-empt by reason of their having previously acquired a share in the property. They had also obtained the transfer of a *zurpeshgi* mortgage binding the share, the sale of which was the occasion of the present suit. In the course of the suit, the purchaser, defendant, deposited the mortgage amount in Court and the same was withdrawn by the plaintiff. Held, that until a decree for pre-emption was made the purchaser owned the land, and had a right to redeem, and that the taking out of the money by the plaintiffs, as mortgagees, was no recognition of anything more than that and was quite consistent with their claim to pre-empt. *BAIJNATH GAENKA v. RAMDHARI CHOWDHURY*, 12 C.W.N. 419, P.C. = 10 Bom. L.R. 253 = 7 C.L.J. 318 = 18 M. L.J. 116 = 3 M.L.T. 349 = 35 C. 402 = 35 I. A. 60.

(4)—*First demand — Talab-i mawasibat — Power of general attorney to make first demand — Pleadings—Proof that person is general attorney—Practice.*—Where the plaintiff in a pre-emption suit alleged that the first demand or *talab-i mawasibat* was made for him by his general attorney and the defendant did not deny that the person in question was the general attorney of the plaintiff, but in fact no *mukhtarnama* or copy of it was filed, the original being filed in an other appeal then pending before the lower appellate Court: Held that, looking to the pleadings, the lower appellate Court, if it had any doubt on the point, should either have examined the other record or at least have given the plaintiff an opportunity of filing the *mukhtarnama* or a copy. Held, further, that the first demand or *talab-i mawasibat* can be made by a general attorney. *MUNNA KHAN v. CHEDA SINGH*, A.W.N. 1906, 177 = 3 A.L.J. 798 = 28 A. 691. (1 A. 521, 7 A. 41, F.; W.R. 1864, 219, R.)

(5)—*Foreclosure—Persons entitled to notice — Notice, how to be given.*—A person "pro-

Pre-emption—continued.**—4.—Necessary formalities—concluded.**

posing to foreclosure" must give notice to all persons entitled to redeem the mortgage. Such notice to avoid all disputes must be given through Court. *UDE RAM v. BADHUR MAL*, 90 P.R. 1887.

(6)—*Pre-emption—Right of—Mahomedan origin—Applies to persons other than Mussalmans—In Rehar—Applicable to Hindus—Formalities to enforce the right—Disqualified heir—Manager of Court of Wards competent to comply with formalities—Court of Wards Act (Bengal Act, IX of 1879), s. 40—Test of co-parcenary to enforce pre-emption.*—The law of pre-emption was introduced into India by the Mahomedan Government. In the Province of Behar, which was an integral part of the Mahomedan Empire, the right to pre-emption is enforceable, irrespective of the persuasion of the parties concerned, and exists among the Hindus of Behar. To enforce the right of pre-emption, the Mussalman law insists that the first formality technically called "the immediate demand" should be observed by the pre-emptor or some one on his behalf immediately on receipt of the news of the sale, and the second formality, "the repetition of the demand" should be done with as little delay as possible in the presence of witnesses either before the vendor, or the vendee or on the premises. These formalities could be performed by the Manager appointed by the Court of Wards on behalf of a disqualified heir, even apart from the provisions of s. 40 of the Court of Wards Act. A joint liability for payment of Government Revenue is sufficient under the Mahomedan Law to constitute a co-parcenary to claim a right to pre-emption. *JADU LAL SAHU v. MAHARANI JANKI KOER*, M.W.N. 1912, 486, P.C.=11 M.L.T. 361=16 C.W.N. 554=15 C.L.J. 483=9 A.L.J. 525=14 Bom.L.R. 436=23 M.L.J. 28=39 C. 915=5 Ind. Cas. 659=39 I.A. 101. (B.L.R. Sup. Vol. 35, F.; 5 C. 575, affirmed.)

—5.—Purchase-money.

(1)—*Purchase-money, how to be calculated.*—The owner of a 1 biswas share of a village and the owners of a 1½ biswas share joined in selling the 2½ biswas. The pre-emptor sued the vendees and the vendors of the 1½ biswas share to enforce his right of pre-emption in respect of that share. *Held* that, in order to determine what sum the pre-emptor should pay for the 1½ biswas share, the price paid by the vendees for both shares should be ascertained, and then what was the proportionate amount of that sum chargeable for the 1½ biswas share. The value of the property sold, with reference to the full purchase money of both parties, was the proper measure of the sum to be paid by the pre-emptor. *SITA RAM v. NAND RAM*, A.W.N. 1881, 87.

(2)—*Pre-emption, suit for—Price money, meaning of—Mortgage money included in the price when so stipulated—Document—Compromise,*

Pre-emption—continued.**—5.—Purchase-money—continued.**

construction of—Rule of interpretation.—In a suit for pre-emption with respect to property which was incumbered with a mortgage-debt, a compromise was arrived at between the parties, to the effect that the amount of the mortgage-money should be included in the price fixed before pre-emption could be allowed and that each party should pay half the mortgage-money. *Held*, that the pre-emptor must deposit his half of the amount of the mortgage-money, which was included in the price of the property pre-empted. In constructing a compromise, a Court must look to the actual terms of the compromise and not to the effect thereof on the interest of the parties. The effect of the Court should be to carry out the intention of the parties. *ASHIK HUSSAIN v. MEDHI HUSSAIN*, 12 Ind. Cas. 413.

(3)—*Suit for—Market value, evidence of—Price actually paid, how far evidence of market value.*—*Held*, that, in a pre-emption suit, in the absence of any other evidence, the actual price paid is good evidence of the market value. *ABILAKH v. BABBAN SINGH*, 10 O.C. 88.

(4)—*Sale-deed—Value as evidence—Fancy price paid—Pre-emption on payment of that price*—Where, in a pre-emption suit, the pre-emptor pleads that the price of property in suit is less than what the sale-deed describes, the sale-deed should be looked upon as the ultimate agreement come to between the parties as showing the receipt of consideration and as being the evidence by which the rights of parties ought to be determined, unless the evidence afforded by it has been rebutted by other evidence the effect that the consideration mentioned in the deed had not been paid and received. It is an elementary fact in pre-emption law that if a vendee is willing to pay even a fancy price many times its value, for certain property and does pay it, the pre-emptor, who wants to take over that property, can do so only on payment of that fancy price. Rs. 35,000 was the aggregate price of 10 villages agreed to be sold, but the parties to the sale transaction agreed that a separate conveyance should be executed in respect of each of the villages showing the consideration to be paid for each village. *Held*, that there was nothing to prevent a vendor and purchaser from modifying a contract entered into between them in any way they pleased or of rescinding a contract and entering into an entirely new contract. *Held*, also, that the parties had an absolute right to arrange that the sale should be carried out by separate conveyances and to fix the price of each village at their pleasure. If the prices were fixed, as far as possible, to prevent pre-emption, there was no objection to this, provided the purchase-money, as set forth in each conveyance, was in each case actually paid. In this case, the pre-emptor was held liable to pay interest at the rate of 6 per cent per annum on the sale price mentioned in the sale-deed for the period intervening between the date of his declining to purchase it at that

Pre-emption—continued.**—5.—Purchase-money—continued.**

price and the date of actual payment under the decree. *B. E. O'CONOR v. GHULAM HAIDAR*, 3 A.L.J. 365 = A.W.N. 1906, 155 = 28 A. 617. [Not F., 29 A. 618 = 4 A.L.J. 531 = A.W.N. 1907, 202.]

(5)—*Purchase-money—Evidence.*—In a pre-emption suit, the vendee alleged that the sale-consideration was Rs. 5,000 and produced the sale-deed as well as a prior bond for Rs. 2,000 due by the vendor which the vendee alleged to have been paid off, the remaining Rs. 3,000 being alleged to be paid in cash. The pre-emptor alleged that the consideration was only Rs. 500. The lower appellate Court discredited the vendee's evidence and decided that the plaintiff should pay the market value of the properties. *Held* that the defendant's evidence should not be rejected without very good reasons and the lower Court should determine the price paid for the properties. *NUR BHARI v. GHISI*, A.W.N. 1882, 9.

(6)—*Custom—Evidence—Former proceedings admitting existence of right of pre-emption—Apportionment of purchase money, illegal.*—The issue in this case was, whether the right of pre-emption exists where one of two Mahomedan co-sharers sells to a Hindu. The evidence relied on in support of the custom happened to be proceedings in two suits where, under similar circumstances, though the exercise of the right was disputed on other grounds, the right of pre-emption was admitted to exist. *Held* that the above was evidence upon which the lower Courts could have legally acted. *Held* also that a person claiming to exercise his right of pre-emption must take the bargain as it was made, and any apportionment of the purchase-money is altogether illegal. *MADHUB CHUNDER NATH BISWAS v. TOMEE BEWAH*, 7 W.R. 210. [R., 20 B. 53.]

(7)—*Price mentioned in sale-deed alleged to be fictitious—Burden of proof—Pre-emptor not entitled to benefit of arrangements between vendor and vendee.*—In a suit for pre-emption, if the person claiming pre-emption alleges that the sale price mentioned in the sale-deed between the vendor and the vendee is fictitious, but the real price was much below, it is for him to give some evidence in support of his allegation. The plaintiff-pre-emptor is entitled to have the property at the price which was agreed upon between the vendor and the vendee, but cannot claim the benefit of an arrangement entered into between the vendor and the vendee by which the vendor allowed a certain portion of the purchase-money to remain in the hands of the vendee for paying off a mortgage. *SHEIKH GOLAM AYHYA v. JOY MUNGUL SINGH*, 13 W.R. 435. [R., 5 A. 184 = 2 A.W.N. 213.]

(8)—*Rights of pre-emptor to benefits under sale-contract.*—A pre-emptor is entitled to all the benefits which the vendee gets under the sale-contract. Accordingly, when one of the terms

Pre-emption—continued.**—5.—Purchase-money—continued.**

of the sale contract was, that the vendee should recover, for his own benefit, certain sums due on the estate to the vendor at the time of sale, and the vendee recovered such moneys, the pre-emptor could claim deduction of such sums from the amount payable by him as the price originally fixed for the property. *TAJAMMUL HUSAIN v. UDA*, 3 A. 668 = A.W.N. 1881, 44. [R., 141 P.R. 1907 = 93 P.W.R. 1907 = 57 P.L.R. 1908.]

(9)—*Pre-emption—Vendor having no title to part of property sold—Suit against pre-emptor by superior pre-emptor—Amount of purchase-money to be paid by plaintiff.*—Where a pre-emptor obtains a decree, and, after payment of purchase-money, gets possession of the property, a pre-emptor with better claims who has a proprietary title to a portion of such property, can maintain a suit for pre-emption against the former in respect of the remaining portion, and he may pay only a proportionate portion of the purchase-money, he is not bound to pay the whole of such amount. *MUHAMMAD LATIF v. GOBIND SINGH*, 5 A. 382 = A.W.N. 1883, 66. [R., 102 P.R. 1894.]

(10)—*Right of pre-emptor to claim to be put in vendor's position in regard to credit given to him.*—In a pre-emption suit, the plaintiff cannot claim to be put in the same position as the vendee with reference to all the peculiar incidents relating to the payment of purchase-money that may have been arranged between the vendor and the vendee. Where, therefore, the vendor had received part of the purchase-money in cash, and agreed to allow the vendee to execute two hypothecation-deeds securing the property for the balance, the pre-emptor cannot claim that the same credit may be allowed to him. *NIHAL SINGH v. KOKALE SINGH*, 8 A. 29 = A.W.N. 1885, 314.

(11)—*Pre-emption suits, absence of proof of true contract price—Market value taken as agreed price.*—In suits to enforce a right of pre-emption, when the Judge has come to the conclusion that the price alleged in the sale-deed is not the true contract price, and where he is not in a position to ascertain what was, in fact, the true price, he should proceed to ascertain the true market value of the property at the time of the sale in question. The plaintiff should, in such cases, be prepared with the best evidence he could obtain as to the market price at the time of the sale, and it would be doing no injustice to the vendor or vendee, who refused to disclose what the true price was, or whose evidence, for some good reason, was not worthy of belief, to treat the market value ascertained by the Judge as the probable price agreed upon between the parties. *AGAR SINGH v. RAGHU RAJ SINGH*, 9 A. 471 = A.W.N. 1887, 99. [R., 6 O.C. 327, 29 A. 618 = A.W.N. 1907, 202 = 4 A.L.J. 531.]

(12)—*Wajib-ul-arz—Clause fixing price in case of sale to co-sharer—Sale to stranger for*

Pre-emption—continued.**—5.—Purchase-money—continued.**

higher price—Rights of pre-emptor and purchaser—Agreement running with the land.—By the *wajib-ul-arz* of a village, it was agreed among the co-sharers that if any of them wished to sell his share, he should offer it to the others before selling it to a stranger, and that the price of the property, if sold to any of themselves, should be so much a share, or should be according to a certain calculation. One of the co-sharers sold his share to a stranger, without first offering it to the other co-sharers, for a price higher than that agreed upon in the *wajib-ul-arz*. *Held* that the condition in it was still binding on the land, notwithstanding the sale to stranger, and that one of the other co-sharers who claimed a right of pre-emption was entitled to get the land on payment of the price fixed in the *wajib-ul-arz*, and the purchaser could recover the excess amount paid by him from the vendor. **KARIM BAKHSH KHAN v. PULA BIBI, 8 A. 102, F. B. = A.W.N. 1886, 24. (5 A.W. N. 216, D.) [F., 27 A. 12 = A.W.N. 1904, 149 = 1 A.L.J. 353; R., 11 A. 257, 12 A. 234, F.B., A.W.N. 1906, 308 = 3 A.L.J. 830.]**

(13)—*Wajib-ul-arz — Clause fixing price in case of sale to co-sharer — Covenant running with the land—Pre-emptor's right to take property on payment of price fixed in wajib-ul-arz — Notice*—Irrespective of notice, a covenant in a *wajib-ul-arz* as to the enforcement of pre-emptive right by a co-sharer on payment of price at the current rate, was *held* to be a covenant running with the land and enforceable against *bona fide* purchasers for value, although the latter may have paid more than was payable under the *wajib-ul-arz*. **UPMANI KUAR v. RAM DIN, 10 A. 621 = A.W.N. 1888, 243. (8 A. 102, R.) [R., A.W.N. 1908, 98.]**

(14)—*Purchase-money—Offer to pay.*—The plaintiff in a pre-emption suit stated that the actual sale price of the property sold was Rs. 500, and not Rs. 800 as stated in the sale deed, and claimed pre-emption on payment of the actual amount. He did not allege in the plaint that he was ready and willing to pay whatever sum the Court might find to be the actual amount. *Held* that the pre-emptor could not be given a decree on condition of his paying Rs. 800, for that would be granting him a relief not asked for by him in his plaint. **LACHMAN SINGH v. RAM PRASAD, A.W.N. 1882, 244.**

(15)—*Conditional decree — Computation of period specified for payment of purchase-money — "Final" decree—Holiday.*—A decree for pre-emption, dated the 14th September 1882, directed that the purchase-money was to be deposited within a month from the time when the decree became final. An appeal was made from the decree, which was however dismissed on the 5th April 1883. The 6th of May 1883 was a holiday, and the purchase money was offered for deposit on the 7th of May 1883, and the next day it was actually taken in deposit by the Court. *Held* that the deposit made by

Pre-emption—continued.**—5.—Purchase-money—continued.**

the plaintiff was in time. **BISHESHAR NAIK v. SAHIBUDDIN, A.W.N. 1884, 217. (1 A. 132, 3 A. 850, N.W.P. 1870, 112, R.)**

(16)—*Pre-emption—Conditional decree—Deposit of purchase money—Appeal—Computation of time allowed for payment—Civ. Pro. Code, 1882, s. 214 (O. 20, r. 14, Civ. Pro. Code, 1909).*—In a suit for pre-emption the decree of the lower appellate Court increased the amount payable by the plaintiff, pre-emptor, and made it conditional upon payment of the increased amount before a certain date. The plaintiff appealed to the High Court, but the appeal was dismissed and the increased amount was not paid before the date fixed. No fresh period for payment was expressly allowed by the decree of the High Court. *Held*, that, as the High Court did not disturb the decree of the lower appellate Court as to the date by which payment was to be made by the pre-emptor, and as the payment was not made before that date, the suit was to be dismissed. (11 A. 346, D.) Unless the Court of last appeal makes a distinct and express order on the subject, the only intention that can be inferred or presumed is, that it did not disturb the order of the Court below as to the date upon which the payment must be made by the pre-emptor. **JAIRAM SINGH v. SRIKISHEN, A.W.N. 1890, 92. [R., 18 A. 223 = A.W.N. 1896, 43.]**

(17)—*Deposit of money as per terms of decree—Realization of costs allowed in decree from purchase money—Appellate decree requiring additional deposit—Additional deposit made in time.*—P obtained a decree awarding him the pre-emptive right and possession of the plaintiff's property on payment of a sum of Rs. 125, and the decree also awarded him the costs of the suit. The purchaser preferred an appeal from this decree. The appellate Court decreed the appeal so far as to increase the sum of Rs. 125 to Rs. 200 as consideration of the sale, and, in regard to costs, the Court directed that the parties should bear their own costs. The decree specified that the sum of Rs. 200 was to be deposited by the pre-emptor within a month of the time when that Court's decree would become final, by which it must be understood to be the date upon which the period of limitation for an appeal would expire. In the meantime, P having obtained the decree of the first Court on the 20th December 1883 deposited the sum of Rs. 125, which that decree directed him to pay, on the 15th January 1884. Subsequently by executing that decree for costs, P realized, from the purchase money so deposited by him, a sum of Rs. 39 on the 5th March 1884. Then, in obedience to the appellate decree, P deposited a sum of Rs. 75 on the 14th May 1884 in order to make up the earlier deposit of Rs. 125 to the sum of Rs. 200, as required by the appellate Court's decree. The appellate decree was dated 18th April 1884. The appellate decree was subsequently amended

Pre-emption—continued.**— 5.—Purchase-money—continued.**

considerably in respect of the order as to costs. The purchaser applied that the property might be restored to him because P had not deposited the whole amount of Rs. 200 within the period limited by the appellate decree inasmuch as he had taken away the sum of Rs. 39 as costs under the decree of the first Court dated 20th December 1883, which decree had been modified by the appellate Court as to costs. *Held* that the two deposits aggregating to Rs. 200 having been made within the time fixed in the appellate decree, the pre-emptor did not forfeit the pre-emptive rights which had been declared in his favour by that decree, and that the terms of s. 214, Civ. Pro. Code, which related to such matters, contained no provisions that under such conditions the right already established, proved, and decreed, should be vitiated simply because by an order of the Court, erroneous or not, a portion of the price deposited was returned in execution of a decree, and that it was open to the purchaser to obtain restitution of the sum of Rs. 39 which P had taken away under the order of the Court, and that such remedy could be obtained by him under the appellate decree of the 18th April, 1884, amended as it was on the 3rd February 1885. **BALMUKAND V. PANCHAM, A.W.N. 1887, 243.**

(18)—*Pre-emption decree—Appeal—No payment within time fixed—Appellate Court if competent to make direction re deposit.*—A pre-emptor obtained a decree from the first Court, which decree provided a certain time within which the sum ascertained to be the purchase-money was to be deposited; the pre-emptor appealed against the amount fixed by the first Court but failed. He did not deposit the money within the fixed time and the Judge declined to fix any further time. *Held*, that the plaintiff in appealing from the original decree could not escape from the obligation which it imposed and the lower appellate Court was not bound by law to insert in its decree any special direction concerning such deposit unless the occasion called for it, although it was competent to have done so. **SHEO PERSHAD LALL V. THAKOOR RAI, 3 Agra 254. [F., 2 A. 744; Appl., 1 A. 132, 13 A. 376; R., 24 M. 449]**

(19)—*Pre-emption decree reversed on appeal—Refund of money deposited—Interest.*—Plaintiff obtained a decree for pre-emption conditional on his paying a certain sum of money to the credit of the defendants. The money was accordingly paid in by him and drawn out by defendants. The decree, however, having been subsequently reversed on appeal, he applied under s. 583 of the Civ. Pro. Code, for restitution of the above amount, it was held that he was entitled to get the money paid in by him refunded with interest not merely up to the date of the reversal of the pre-emption decree but up to the date of the actual refund of the amount. **BHAGWAN SINGH V. UMMAT-UL HASMAIN,**

Pre-emption—continued.**— 5.—Purchase-money—continued.**

18 A. 262 = A.W.N. 1896, 42. (3 A. 475, F.; 7 A. 432, R.; A.W.N. 1888, 287, Diss.) [R., 20 A. 430.]

(20)—*Decree for pre-emption—Amount paid into Court by decree-holder not withdrawable by decree-holder of his creditor.*—When a person holding a decree for the pre-emption pays the pre-emption price into Court in compliance with such decree it is not competent to the Court to pay out any portion of it, to any one other than the person entitled to it under the decree, so as to prejudice the rights of the decree-holder to possession. So, where a creditor of such a decree-holder who applied for the attachment of such money was allowed to withdraw a portion of it and the decree-holder subsequently applied for possession of the property, it was held, that he had sufficiently complied with the decree for pre-emption, that it was not his fault but the fault of the Court that it had allowed a person other than the defendant in the suit to withdraw the money out of Court and that the decree-holder was therefore entitled to possession of the property pre-empted. Money paid into Court in a suit cannot be taken out of Court by any creditor of the man who pays it in, so long as the suit is pending, or unless the result is that the person who paid it in is held entitled to withdraw the money or some part of it and then the creditor of such person can only have execution against so much of that money as his judgment-debtor would be entitled to take out of Court. **ABDUS SALAM V. WILAYAT ALI KHAN, 19 A. 256 = A.W.N. 1897, 31. [F., 21 P.R. 1902 = 179 P.L.R. 1901; R., 93 P.R. 1902, 76 P.R. 1902 = 113 P.L.R. 1902.]**

(21)—*Partition—Covenant for pre-emption—Covenant whether binding on heir—Decree for possession on depositing value of property.*—Four brothers, on making a partition of their joint property, entered into a covenant with one another that, if any one of them or their heirs had to sell his share, he should offer to sell the same to any one of them, co-sharers, and that if any co-sharer consented to purchase on payment of the proper value, then the party selling should not be competent to sell the same to any person but the said co-sharer. One of the brothers having died, his widow sold his share which she had inherited to a stranger for Rs. 95 without having made any offer of it to the three surviving brothers. Thereupon the three brought this suit against the widow and her vendee to have possession of the property delivered to them upon payment of Rs. 27 which they alleged to be the value of the property. The Munsif held the sale to be invalid, but found the value of the property to be Rs. 95, and set aside the sale without giving possession. The lower Appellate Court made an order that, if the plaintiffs deposited in Court Rs. 95 within a certain time, the appeal would be decreed. The plaintiffs deposited the amount accordingly, and a decree for possession was given to them. *Held* that neither of the Courts

Pre-emption—continued.**—5.—Purchase-money—continued.**

below had power to make the decrees which they did; and the order of the Lower Appellate Court to the plaintiffs to deposit the money was not binding on the plaintiffs; and they had no right, under this contract, to an election after the value had been ascertained, whether they would purchase at that price or not. *Quære*:—Whether such a covenant can be enforced after the death of the owner who entered into it? **SREEMUTTY TRIPOORA SOONDUREE v. JAGGUR NATH DUTT**, 24 W.R. 321. [F., 24 M. 449; R., 5 C.W.N. 343, 13 Bom. L.R. 240 = 35 B. 258, 1913 M.W.N. 163 = 24 M.L.J. 84, 10 C.L.J. 626.]

(22)—*Admission of vendor in sale-deed and written statement as to part payment of price by vendee—Decision of question as to payment of price between vendor and vendee in a suit by pre-emptor.*—Held, that in a suit for pre-emption where there is a dispute between the vendor and the vendees, the defendants in the case, as to the amount to be paid by the plaintiff and as to the terms on which he is entitled to a decree and the Court decides the amount to be paid by him and how much out of it to each of the defendants, it is as much a decision between the defendants, as between the plaintiff and the defendants and is thenceforth binding on both the defendants. **RAJA RAMPAL SINGH v. MUSSAMMAT HAFIZA**, 9 O. C. 308. (8 O.C. 283, R.)

(23)—C. P. C., 1882, ss. 214 (= O. XX, r. 14) 583 (= s. 144 (1), new Code)—*Pre-emption suit—Purchase money fixed by lower Court's decree paid—Costs awarded to pre-emptor realized—Appellate Court increasing amount of purchase-money—Payment of difference without costs, if sufficient compliance*—Where a pre-emptor, in whose favour a decree was passed, paid the purchase-money as directed, but drew out therefrom a portion in execution of the decree on account of the costs awarded to him, and on appeal the purchase-money was increased and each party was ordered to bear his own costs, held by *Straight, J.*, that the payment, within the time fixed of the difference without the costs previously realized, was a sufficient compliance with the Appellate Court's decree, subject to the judgment debtor's right to recover the costs previously realized from him. Held, by *Tyrrel, J.*, (contra) that as the pre-emptor had not at any moment of time, from the date of the institution of the suit, had a credit in any Court for the sum fixed by the appellate decree, he had failed to fulfil the condition essential to his possession of the vendee's estate under the decree in the suit. **BALMUKAND v. PANCHAM**, 10 A. 400 = A.W.N. 1898, 74.

(24)—*Omission to pay costs—Effect.*—A decree-holder who omits to pay the costs in time and thus violates the conditions of his decree loses the benefit of his decree even though he might have deposited the purchase-money in Court before time. **TEHL SINGH v. RULDU**, 96 P. R. 1884. [F., 106 P.R. 1900]

Pre-emption—continued.**—5.—Purchase-money—continued.**

(25)—*Right of pre-emption—Actual price to be fixed in suit—Act VIII of 1859—Ss. 55, 57—Substituted service.*—In a suit for pre-emption, either the vendor or the purchaser can insist upon the Court fixing the actual price of the properties sold, in the suit for pre-emption itself, so as to enable the plaintiff to make the purchase himself, and the purchaser to take advantage of any default which the plaintiff may commit in regard to it. They should not be referred to a separate suit. By ss. 55 and 57 of the Civ. Pro. Code, 1859, substituted service by fixing a copy upon the door of the defendant's house is permitted only when the defendant is dwelling in the house at the time and could not be found, or has only left the house for the purpose of avoiding service of summons. **LEKH RAJ v. DAVEE CHUND**, 35 P.R. 1868.

(26)—*Pre-emption—Value of land sold how to be ascertained.*—The general law of pre-emption, based on the Mahomedan law, requires that the pre-emptor should pay for the property bought the original price for which it was bona fide agreed to be sold before pre-emption was claimed. This is altered by the Punjab Civil Code, which, in s. 13, cl. 12, directs the Court to fix the price with the aid of a valuation committee composed of three arbitrators, two appointed by the parties (one by each) and one by the Court. This procedure, being in substitution of the previously subsisting rule of law, must be followed with a reasonable degree of exactness. **MT. HUMEEDOOLNISSA v. MOHOMED AKBAR**, 83 P.R. 1868.

(27)—*Value—Valuation Committee—Wajib-ul-arz how for evidence.*—In a suit for pre-emption the Court should not form its own opinion of the proper price of the land; according to the terms of part 12, s. 13 the Punjab Civil Code, the matter must be referred to a valuation committee. In the absence of special custom, the fact that the *wajib-ul-arz* only deals with the right of relations as to pre-emption does not deprive others of the community of the general right of pre-emption which vests in them under the Punjab Civil Code, and in such cases the Courts must decide which party has the best right of pre-emption according to relationship, vicinage, being of the same thok, and so forth. **GOOMANEE v. RUHEEMOODDEEN**, 35 P.R. 1870. [Appr., 3 P.R. 1903 = 39 P.L.R. 1906.]

(28)—*Suit for pre-emption—Refusal before sale—Value of land.*—If, in a suit for enforcing the right of pre-emption it was found that plaintiff had not refused to buy before sale was effected, then it would be necessary to consider the value of the land sold and the value of the rights and interests in the common land which the purchaser as owner of the land acquired. It is not sufficient to value the land alone. Its value with all rights and interests attached thereto must be considered. **DARBARA SINGH v. UTAM SINGH**, 12 P.R. 1873.

(29)—*Suit for pre-emption—Sum paid by the vendee to the vendor, measure of "market value" at the time of the sale.*—In suits for

Pre-emption—continued.**—5.—Purchase-money—continued.**

pre-emption, the Court should carefully determine the market value of the land. As the law works hardly upon the vendor, every indulgence should be shown to him. Many circumstances may tend to enhance the value of the property sold and, so far as possible, the Courts should hold the actual sum that has passed to the vendor from the vendee to be the fair and reasonable market rate at the time when the sale took place. *BHUP SING v. KHARAK SING*, 29 P.R. 1875.

(30)—*Suit for pre-emption—Market value to be fixed as at commencement of action.*—In estimating the value of property the subject of pre-emption, that is the price at which the defendant in a pre-emption suit has to sell to the plaintiff, the market value at the time of the action should always be determined. *SUNDAR DAS v. SHAM SINGH*, 74 P.R. 1875. [R., 161 P.R. 1883, 91 P.R. 1892; D., 462 P.L.R. 1900.]

(31)—*Purchase of land subject to pre-emption—Decree for pre-emption—Vendee when entitled to recover deficiency between price paid and that decreed to be paid by pre-emptor.*—When land subject to the right of pre-emption is sold by the owner to a person not having the right of pre-emption, the interest of the vendor passes to the purchaser, but is liable to be again transferred to the pre-emptor upon his demand by suit. When both parties to the sale are aware of this contingency, in the absence of any contract to the contrary, the original purchaser has no right to recover from the vendor any deficiency between the price paid by him and the price decreed to be paid by the pre-emptor for the property. *WAZIRA v. SHADI KHAN*, 67 P.R. 1881. [R., 32 P.R. 1884, 80 P.R. 1888, 93 P.R. 1902, F.B.; D., 111 P.R. 1908 = 4 Ind. Cas. 690.]

(32)—*Decree for pre-emption—Failure to deposit but tender made within time fixed in decree—Refusal to accept tender, effect of.*—A decree-holder is to be deemed to have complied with the terms of his decree for pre-emption when he has tendered the amount of the decree at the proper Court within the time fixed, and the decree does not become void. The mere fact that the Tahsil officials refused to receive it in the absence of the Tahsildar whose absence was unexpected and could not have been foreseen by the decree-holder, could not be held to affect the rights acquired by him under the decree. *AHMAD DIN v. RIHAN*, 69 P.R. 1881.

(33)—*Holder of pre-emption decree—Tender of decree amount within time fixed for payment—Non-acceptance by Court—Effect—Act IV of 1872, s. 18.*—Plaintiff held a decree for pre-emption passed on condition of paying its amount by the 4th July, 1880. He offered the amount on the 6th October, alleging that he had once offered it before on the 13th June but had been directed to take it back and pay it again after the decision of an appeal in which

Pre-emption—continued.**—5.—Purchase-money—continued.**

the question was to be decided whether the amount was to be paid to the defendant or to the seller. *Held* that, if the plaintiff did offer the amount as stated, and was directed by the Court to take it back and retain it till the decision of the appeal, he should be deemed to have in fact paid the amount into Court, before the day fixed, within the intent and meaning of s. 18 of Act IV of 1872. *MIR ZAMAN v. PYAO*, 79 P.R. 1881.

(34)—*Suit for pre-emption—Allegation that price mentioned in sale-deed was not bona fide—Plea of private notice—Fair market value.*—In this suit for pre-emption, the plaintiff alleged that the sale had been made without notice and that the actual sale-price was less than that mentioned in the deeds. Both sets of defendants, purchaser and the vendees, pleaded private notice and that the sum mentioned in the deed had actually been paid. The first Court omitted to fix the proper issue, *viz.*, whether the price mentioned in the deed was or was not fixed in good faith. Upon that point, on which there was no evidence, it was material to ascertain what price had actually been paid. It was only in the event of a finding in the negative on the above issue, that it would be necessary to determine the issue fixed as to the market value of the property, although such value would be important evidence upon the question whether the price stated in the deed was done so in good faith. But, however, a price higher than the market value is not necessarily a price fixed in bad faith, as the difference might be satisfactorily explained. As the said necessary and proper issue had not been raised in the first Court, the Commissioner, who raised it himself, should have allowed the defendants opportunity of giving evidence. *NANDA v. CHANDA SINGH*, 69 P.R. 1882. [R., 10 P.R. 1884.]

(35)—*Claim for pre-emption—Price offered found less than sum actually paid to vendee—Decree of first Court conditioned on payment of full price, validity of—Claimant not bound to express willingness at any sum fixed by Court.*—In this suit for pre-emption of a house sold to the defendant nominally for Rs. 900, but the outside market value of which the plaintiff alleged was not more than Rs. 400, plaintiff asked for a decree for pre-emption at the market value. The first Court gave the plaintiff a decree conditional on payment of Rs. 700, as it considered that the purchaser had actually paid that sum for the property. The appellate Court dismissed the plaintiff's suit *in toto*, on the ground that, as the plaintiff had claimed in his plaint to purchase the house for Rs. 400, without expressing his willingness to pay any higher sum that might be fixed by the Court as the market value, he was not entitled to maintain his suit when it was ascertained that the price *bona fide* paid was more than the sum mentioned in the plaint. *Held*, considering the stage which the litigation had reached, and the fact that the plaintiff had

Pre-emption—continued.**— 5.—Purchase-money—continued.**

shewn his willingness to preserve his right of pre-emption by paying up the amount fixed by the first Court within the period stated in the decree, although he still contended that the amount so fixed was excessive, that the lower appellate Court did not exercise a wise or reasonable discretion in reversing that decree of the first Court and in dismissing the suit simply because certain words expressive of the plaintiff's willingness to pay a higher sum than Rs. 400 were not added in the plaint. In a suit for pre-emption, equity requires that the Court should endeavour to put an end to useless litigation by determining once for all the conditions under which the plaintiff is entitled to exercise the right claimed, instead of leaving the parties to fight the whole matter out again in a fresh suit, simply because it turns out at the close of the investigation that the value of the property exceeded the sum mentioned in the plaint and because the plaintiff did not add to his prayer a willingness to abide by any valuation which the Court might adopt. **PRI-TAM DAS v. HIRA NAND, 178 P.R. 1882.**

(36)—*Pre-emption in respect of building by plaintiff claiming to be owner of site—Decree for pre-emption on payment for both site and building—Appeal without payment for site, if maintainable.*—The plaintiff claiming himself to be the owner of a site and to exercise a right of pre-emption in respect of the building thereon, sued to be put in possession both of the building and of the site, on payment for the building alone. The first Court found in plaintiff's favour as regards both the claims and decreed pre-emption on payment of Rs. 142 which it found to be the value of the materials. The Judicial Assistant on appeal held that he must pay for the right of the vendors in the site as well as for the building and increased the sum to be paid for pre-emption to Rs. 413. The plaintiff without paying the difference between this sum and the amount fixed by the first Court, appealed to the Commissioner, who dismissed the appeal on the ground that the appellant had lost the right of pre-emption by non-payment of the increased sum. *Held* that by not paying the amount fixed by the Judicial Assistant the plaintiff gave up his right to buy for Rs. 413 in case the Appellate Court should find that he was bound to pay for the site as well as for the building, but he did not give up his right of pre-emption in respect of the building, if the Appellate Court should hold that the decision of the first Court, that he had nothing to pay for the site was correct; the object of the appeal was not to establish his right to buy the site for a smaller sum, but to establish his right to possession of the site on paying the value of the building only, and he was entitled to a decision on this point. *Held also*, that if the plaintiff succeeded in showing that he was not liable to pay for the site, he should be required to pay the market value of the house as a building, and not merely the value of the

Pre-emption—continued.**—5.—Purchase-money—continued.**

materials of which it was constructed. **RAI BASANT SINGH v. NIADAR MAL, 101 P.R. 1883.**

(37)—*Non-payment of amount—Lapse of decree—Second suit—Whether barred.*—Where a person allowed a pre-emption decree to lapse by non-payment of the amount in Court, and his father brought a second suit with regard to the same property, held the first suit is no bar. **TAHIR KHAN v. MEGHA KHAN, 1 P.R. 1885.**

(38)—*Price entered in the deed—Not bona fide—Market-value—Price actually paid.*—Where in a suit for pre-emption it is found that the price entered in the deed or alleged by the parties is notified in good faith, the plaintiff can claim pre-emption for the market value. **MEHTAB KHAN v. MUSTAFA BEG, 101 P.R. 1887.**

(39)—*Decree for pre-emption subject to payment of a price—Awarding of costs—Right to deduct.*—Where a decree for pre-emption is passed in favour of the plaintiffs subject to the payment of a certain sum within a certain time and the plaintiff is also awarded costs, the plaintiffs would be entitled to deduct the costs from the said amount and deposit the rest in Court, even though there is no such direction in the decree. **BAHADUR v. JALAL, 70 P.R. 1888.**

(40)—*Payment of $\frac{2}{3}$ of the money in Court—Depositing a receipt for the balance—S. 18, Punjab Laws Act.*—A plaintiff in whose favour a decree for pre-emption was passed under which he was directed to pay the amount before a certain day into Court deposited $\frac{2}{3}$ of the money and filed a receipt for the balance which was admitted by the vendee. *Held* this was a payment within the meaning of s. 18 of the Punjab Laws Act. **SHER SHAH v. SHER JANG, 21 P.R. 1889. [R., 10 P.R. 1895.]**

(41)—*Sale—Consideration—Pre-emption—Purchase-money—Market-value.*—Where the defendants agreed that if the 2nd defendant brought a suit for 1st defendant and recovered certain land, the latter would transfer half the land in consideration for such services, *held* that in a suit for pre-emption of such land by plaintiff, the transaction could not be regarded as anything but a sale, affording a claim for pre-emption. In this case as it could not be said that any particular price was fixed, the plaintiff had to pay the market value of the property. **HAJI MUHAMMAD v. MUSSAMMAT, BAKHTO, 54 P.R. 1889. [R., 2 P.R. 1903=53 P.L.R. 1903, 23 P.R. 1906, 29 P.R. 1893.]**

(42)—*Ss. 17 and 18 Punjab Laws Act and O. 20, r. 14, Civ. Pro. Code—Deposit of Government Promissory notes.*—The deposit of Government Promissory notes is not payment of money and not a sufficient compliance with a decree for pre-emption directing the pre-emption to pay money into Court. The non-compliance with the decree is not fatal to the further prose-

Pre-emption—continued.**—5.—Purchase-money—continued.**

cution of appeal. Ss. 17 and 18, Punjab Laws Act do not extend to an appellate Court as regards suits for pre-emption on a sale. S. 214 (O. 20, r. 14) Civ. Pro. Code applies to an appellate decree passed in an appeal by the defendant for increasing the amount of money payable by the pre-emptor. *THAKUR DAS v. TULSI DAS*, 70 P.R. 1890, F.B. [R., 10 P.R. 1895, 48 P.R. 1906=104 P.L.R. 1906; D., 67 P.R. 1892, 161 P.R. 1890.]

(43)—*Deposit of money in Court—Attachment by creditors—Payment of money to purchaser.*—Where money was deposited by pre-emptor in Court and it was attached by his creditor he could not claim delivery of possession unless and until he paid the purchase money to the defendant over again as the sum deposited had come to his own benefit. *SANDHA KHAN v. JHANDU KHAN*, 61 P.R. 1890. [Diss., 21 P.R. 1902=179 P.L.R. 1901.]

(44)—*Price stated in the deed—Onus of proving good faith—Price actually paid.*—Where the plaintiff alleges and the defendant denies that the price entered in the deed was not fixed in good faith, the vendee must prove that the price entered was actually paid and then the onus lies upon the plaintiff to show that it was not fixed in good faith. If the price actually paid is less, it is evidence of bad faith. But generally the price actually paid is the best evidence of the market value at the time of sale. *GULAB v. RAMSINGH*, 102 P.R. 1890.

(45)—*Power to require payment into Court—Time—S. 16-A. Punjab Laws Act.*—The latest stage in pre-emption cases at which the Court can, under s. 16-A, Punjab Laws Act, order payment of price into Court is the time of the settlement of issues and not afterwards. The power of rejecting the plaint under the said section is supplementary to the provisions of Civ. Pro. Code and must be read with the Code. *GOBIND v. KISHEN CHAND*, 52 P.R. 1891.

(46)—*Notice—Calculation of time.*—A person having a right of pre-emption may pay or tender the price to the vendor or the amount due to the mortgagee within 3 months of the notice. In reckoning the said period, the day on which the notice is given is to be excluded. *JOTI PERSHAD v. GAJJU*, 114 P.R. 1891.

(47)—*Separate suits by equal claimants—Duty of Court.*—Where several separate suits are launched by persons having equal claims for pre-emption, each claimant will be entitled to a decree for a proportionate share of the property on payment of a proportionate share of the purchase money. *GOCAL AND JAWAHIR v. BHOLA*, 29 P.R. 1892. [D., 43 P.R. 1903=92 P.L.R. 1903.]

(48)—*Improvement by original purchaser—Compensation—Form of decree.*—Court may award compensation for improvements to a vendee who has made them in good faith and who

Pre-emption—continued.**—5.—Purchase-money—continued.**

is entitled to it in equity. In such cases the decree should provide separately for the payment of purchase-money and for that of compensation and the payment of purchase-money within the fixed time must save the decree from forfeiture though compensation may not be paid within that time. *AZIZ DIN v. SHAM DAS*, 91 P.R. 1892.

(49)—*Payment of money into Court—Failure—Effect of decree.*—The effect of failure to pay money into Court within a fixed time is to make the decree null and void. The terms of the decree can be altered by a competent Court setting it aside. If money is not paid into Court within the fixed time, there is no decree remaining in force for the appellate Court to alter. *SARAB DIAL v. NATHU*, 137 P.R. 1894.

(50)—*Decree not providing any fixed period for payment of money—Limitation for execution—Non-payment within fixed time—Objection not taken in appeal—Effect.*—If a decree for pre-emption does not fix any time for the payment of the purchase-money, the pre-emptor can enforce the decree within the period fixed for the execution of decrees by the Limitation Act. If the objection that money was not paid within the time fixed in the decree is not taken in appeal, it cannot be urged against the appellate decree in execution of the same. *CHAKAR DAR v. GHAPILA*, 10 P.R. 1895. (11 A. 267, 346, 21 P.R. 1889, 71 P.R. 1890, R.) [Cons. & D., 48 P.R. 1906=104 P.L.R. 1906.]

(51)—*Pre-emption decree—Non-payment of money into Court—Effect on the right of appeal—S. 214 (O. 20, r. 14)—Civ. Pro. Code, and s. 18, Punjab Laws Act, meaning of.*—The object of s. 214 (O. 20, r. 14), Civ. Pro. Code, and s. 18, Punjab Laws Act, is not to preclude a right of appeal in the event of non-payment of purchase money into Court within the time fixed in the pre-emption decree but to provide a penalty for disobedience to the terms of the decree as to deposit only if accepted as correct by both parties or declared to be so after appeal. Its object is not to exclude a plaintiff from appealing in a just claim merely because poverty or other natural cause prevented him from raising, even though temporarily, a sum largely in excess of the true market value of the property. *MALIK AKBAR ALI v. HASSAN ALI*, 67 P.R. 1895. [F., 48 P.R. 1906=104 P.L.R. 1906.]

(52)—*Pre-emption decree—Appeal—Dismissal—Time for payment of money.*—Where the original decree had fixed one month for payment of the purchase-money into Court and an appeal from that decree is dismissed without allowing any fresh period for payment, the appellate decree must be taken to have incorporated the terms of the original decree and the said period of one month must be calculated from the date of the appellate decree. *MOTI RAM v. KAMMON*, 88 P.R. 1898. [R., 92 P.R. 1900; Overruled, 48 P.R. 1906=104 P.L.R. 1906.]

Pre-emption—continued.**—5.—Purchase-money—continued.**

(53)—*Purchase of property in payment of previous debts—Market-value—Good faith.*—In a case for pre-emption where the transfer was in satisfaction of old debts if the market value of the property does not appear to differ very materially from the amount of the debts due from the vendor, and the price actually paid is the cancellation of all the liabilities mentioned in the deed, the price so paid may be held to have been fixed in good faith; but where the disparity between the market value of the property and the sum in satisfaction of which it has been accepted is very great and the debtor is clearly insolvent and the property in question taken in satisfaction was practically the debtor's only asset, the market-value of the property is the proper test of the value of the consideration paid and not the nominal amount of the debts due. *VIR BHAN v. MATTU SHAH*, 77 P.R. 1901. [R., 22 P.R. 1906, 47 P.R. 1909; Cons. & D., 56 P.R. 1907.]

(54)—*Pre-emption—Joint decree in favour of several plaintiffs—Purchase-money provided by some only of them—Rights of others—Onus probandi—Question of law.*—When a decree for pre-emption on payment of a certain sum of money is passed in favour of several persons, and some only of them provide all the money, it lies upon the others to show that they have not given up their rights under the decree, and that they are entitled to claim their share of the bargain from those who provided the whole money. They should not be allowed at a subsequent time, if they see the bargain a profitable one, to come in and claim their share. (52 P.R. 1882, D.) When a question arises as to the admissibility of such a claim, the question is a question of law on which a further appeal may lie. *NIJABAT v. AHMAD*, 67 P.L.R. 1902.

(55)—*Purchase-money actually paid—Good faith—Market value.*—Held, that market value is no test of what should be paid by the pre-emptors until the price mentioned in the sale-deed is shown not to have been fixed in good faith. The price actually paid by the vendees may be far above the real market value, and no objection can be taken by a pre-emptor to a price actually and genuinely paid, on the ground that it is a fancy price. *NANAK CHAND v. RAM CHAND*, 99 P.L.R. 1902=68 P.R. 1902. (75 P.R. 1901=123 P.L.R. 1901, R.) [Diss., 22 P.R. 1906; F., 56 P.R. 1907.]

(56)—*Market value—Price actually paid by vendee.*—The price actually paid by the vendee is in general the best evidence of market value at the time of the sale. *AKHUND ABDUL KHALIK KHAN v. RUP CHAND*, 54 P.L.R. 1904 (102 P.R. 1890, R.)

(57)—*Appeal by purchaser from a decree for pre-emption—Lower Court's decree confirmed on appeal—Time for payment of purchase-money whether appellate Court bound to fix—Omission*

Pre-emption—continued.**—5.—Purchase-money—continued.**

to fix such time in appellate decree, effect of.—In deciding an appeal by a purchaser from a decree for pre-emption and dismissing the appeal in confirmation of the lower Court's decree, it is not obligatory on the appellate Court to fix a period subsequent to the date of its decree within which the price fixed by the Court below is to be paid. It is settled by the weight of authority that when a decree has been confirmed, reversed or modified by the Court of appeal, it is the appellate decree that is the subsisting decree capable of execution. Where the appellate decree confirming the original decree for pre-emption does not fix any period of time for the payment of the pre-emptive money, the true meaning of the appellate decree is that the terms of the decree confirmed thereby are approved and maintained intact, and among them the provision in the original fixing the date or time for payment of the pre-emptive money. When a decree is under appeal, the matter disposed of by it is re-opened and it remains in abeyance, but the confirmation of such decree in appeal restores its provisions just as they stood when it was passed. To hold, therefore, in case like the present that the time for payment fixed by the lower Court is to be attached to the decree passed on appeal confirming the decree of the lower Court involves a contradiction in terms the confirmation of the decree really resulting in the alteration of it and especially where the appeal has been dismissed under s. 551, Civ. Pro. Code, the result of such action would be that without hearing or even giving notice to the respondent the appellant would have his case altered in his favour to the prejudice of the respondent, a result entirely opposed to the provisions of the Civ. Pro. Code and to the dictates of natural justice. So where no fresh period is fixed for payment by the appellate decree, the time fixed by the lower Court stands, and where such time is a period, no fresh period is to be taken as given by the appellate Court and such time must be calculated from the date of the original, and not that of the appellate decree. From the simple proposition that, in the case of appeals, the appellate Court's decree is the only one that subsists, it does not in any way follow that fresh time equal to that fixed in the first decree must necessarily be allowed to the pre-emptor from the date of the appellate decree dismissing his appeal. Where the appellate Court itself fixes fresh time, however short, no difficulty arises and in such a case, the original decree is not confirmed but varied *pro tanto*. *WASAWA SINGH v. LAL SINGH*, 48 P.R. 1906, F.B.=104 P.L.R. 1906. (88 P.R. 1898, Overruled; 11 A. 340, Diss.; 67 P.R. 1895, 18 A. 223, 18 A. 455, 10 P.R. 1895, 11 A. 267, 11 B. 172, 13 C. 13, 22 C. 467, 15 M. 170, R.)

(58)—*Decree for pre-emption — Execution Court declining to accept payment of pre-emption money made within period fixed—Decree not void by reason of such refusal.*—Where the

Pre-emption—continued.**—5.—Purchase-money—concluded.**

pre-emption money decreed by the Commissioner was duly tendered by the decree-holder within the period fixed by the Commissioner's order to the Court executing the decree, but was not accepted by the Court, as it was not aware of the terms of the Commissioner's decree which had not been communicated to it, *held* that the defendant was not entitled to have the decree for pre-emption declared void, since the default was on the part of the Court and not of the decree-holder. **NATHU v. IMAMDIN, 31 P.R. 1880.**

(59)—*Act XII of 1878, s. 18—Decree for pre-emption—Deposit of money after time—Agreement to postpone deposit—Lapse of right of pre-emptor.*—Where a decree in a suit for pre-emption fixed the time within which the pre-emptor should pay the money, the time for payment could not be extended even by mutual agreement in variation of the terms of the decree, and deposit of money after the time fixed entails lapse of the pre-emptor's right. **MYA DAS v. FUTTEH KHAN, 98 P.R. 1880.**

(60)—*Pre-emption—Paying one anna less than the pre-emption money by mistake—Incompetency of Court to receive deficiency—S. 151 and O. XX, r. 14, Civ. Pro. Code (1908).*—*Held*, that, it is the duty of the decree-holder in the pre-emption case to take all precautions to make sure that the requirements of the decree are strictly complied with. So, where, after the pre-emptor had obtained possession of the property in execution of the decree, it was found that he had, by mistake, paid one anna less than the amount required to be deposited into the Court within certain time, he was made to restore the property to the vendee judgment-debtor and was not allowed, to make up the deficiency. *Held*, also that s. 151, Civ. Pro. Code, 1908, is not applicable in such a case. **KANHAYA LAL v. MOHAMMUD SHAFI KHAN, 3 P.W.R. 1913=141 P.L.R. 1913=18 Ind. Cas. 600. (56 P.R. 1910=166 P.W.R. 1910, 10 A. 400, D.)**

See CIV. PRO. CODE, 1908, O. XX, r. 14, 167 P.L.R. 1903=53 P.R. 1903.

See DECREE—DECREE, CONSTRUCTION OF, 6 N.W.P. 46.

Pre-emption—Unregistered receipt for purchase money—Evidence, admissibility of—See EVIDENCE—MISCELLANEOUS, A.W.N. 1881, 2.

See INTEREST—SPECIAL CASES, 111 P.R. 1892.

Money due upon mortgage not allowed in pre-emption-suit—Price—*See TRANSFER OF PROPERTY ACT, s. 101, 9 A.L.J. 226.*

—6.—Right to Pre-empt.

(1)—*Custom—Shia Law.*—Where a suit for pre-emption was founded on the Muhammadan Law and the *wajib-ul-arz*, which provided,

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

among other things, "custom of pre-emption; the custom of pre-emption prevails," *held* that the *Wajib-ul-arz* was binding, that, as the parties were Muhammadans, the conditions of that law for enforcing pre-emption were to be applied, and that the contention that, under the Shia Law, the right could not be asserted in respect of property in which there were more than two partners was untenable. **TAFAZZUL HUSAIN v. HADI HASAN, A.W.N. 1886, 139. [Diss., 12 A. 229.]**

(2)—*Pre-emption, varieties of.*—The right of pre-emption may be founded on Muhammadan law, or, as is more generally the case, where it affects the Hindus, on long-established custom having the force of law, or on special contract between the share-holders; and the *Wajib-ul-arz* may record the practice of pre-emption as based on any of these grounds; and the entry may be evidence either of custom or of the contract. **ISRI SINGH v. GANGA, 2 A. 876, F.B.**

(3)—*Act XXIII of 1861, s. 14—Pre-emption—Pre-emptor's claim disallowed—Suit for possession by right of pre-emption, unmaintainable as premature.*—Defendant took execution of a decree held by him and himself purchased a fourth part of the property in question in auction. Plaintiff deposited the sale money and asserted, under s. 14 of Act XXIII of 1861, a right of pre-emption in respect of the property sold. But the sale to the defendant was confirmed. In execution of another decree, the entire property was put up for sale and purchased by the defendant. Plaintiff now sued for possession of the one fourth, alleging that he had claimed his pre-emptive right in respect thereof at the first sale, and that the claim should be allowed. The lower appellate Court's decree dismissing the suit was confirmed by the High Court on the ground that the suit for possession of the property as brought, was premature and unmaintainable. Plaintiff should have sued to set aside the order of the Court by which the sale was confirmed in favour of the defendant and to have himself declared entitled to the pre-emption of the property and to be substituted for the defendant as its purchaser. **SHIB SAHAI v. THIKA RAM, 7 N.W.P. 97.**

(4)—*Conditional sale—Claim of pre-emption to be made on expiry of year of grace in notice of foreclosure.*—The party alleging a right by pre-emption relating to property under a conditional sale is bound to set forth his claim immediately after the close of the year of grace mentioned in the notice of foreclosure. That notice declares that, after the expiry of the year of grace, the conditions on which the transaction was regarded as one of mortgage not having been fulfilled, the conditional character of the deed of sale then ceases, and it becomes, from failure of fulfilment of the conditions, an absolute deed of sale, transferring entirely to the mortgagee the mortgagor's proprietary rights preserved till then. Further, in this

*Pre-emption—continued.**—6.—Right to pre-empt—continued.*

case, the plaintiff pre emptor was aware of the notice of foreclosure and thus, upon that notice, without waiting for any possible contingencies, he was bound to take action promptly, such prompt action being the very essence of the Mahomedan law of pre-emption. *MOONSHEE SYED AMEER ALI v. BHABO SOONDUREE DEBIA*, 6 W.R. 116. [F., 14 A. 405, F.B.; R., 3 A. 610, F.B.]

(5)—*Conditional sale—Pre-emption—Cause of action—Agreement for pre-emption subsequent to date of conditional sale.*—(Per Pearson and Straight, JJ. *Spankie, J.*, dissenting).—The cause of action for a suit for pre-emption, for property the subject of a conditional sale, arises on the date of such conditional sale, and not when the sale becomes absolute. A clause in a *Wajib-ul-arz* containing an agreement for pre-emption can refer only to future and not to past transactions. Therefore a claim for pre-emption, in the case of property transferred by a deed of conditional sale, is not maintainable when such claim is based on a *wajib-ul-arz* that came into existence subsequent to such conditional sale. *LACHMAN PRASAD v. BAHADUR SINGH*, 2 A. 884. [R., 3 A. 610, F.B., 14 C. 761.]

(6)—*Suit for pre-emption—Conditional sale—Mortgage—Cause of action.*—Where the terms of a *Wajib-ul-arz* are wide enough to suggest, that a right of pre-emption may arise not only on a sale, but also on any other kind of transfer, the cause of action for a suit for pre-emption, in the case of a conditional sale, would arise when such mortgage is foreclosed. (*Pearson, J.* dissenting)—and also when the property is mortgaged by way of conditional sale (*Stuart, C.J.* dissenting). *ALU PRASAD v. SUKHAN*, 3 A. 610, F.B. [F., 5 A. 187, 24 A. 493; R., 27 A. 12=A.W.N. 1904, 149=1 A.L.J. 353; D., 103 P.R. 1901=120 P.L.R. 1901, F.B.]

(7)—*Mortgage by conditional sale—Pre-emption—Time at which right of pre-emption accrues—Wajib-ul-arz.*—In the case of a mortgage by conditional sale, there is no room for the exercise of the right of pre-emption until the conditional sale becomes absolute. Where, therefore, mortgage by conditional sale has been executed before, but the sale has not become absolute until after, the preparation of the *wajib-ul-arz* of the village in which the mortgaged property is situated, on the sale becoming absolute, the rights of the parties will be subject to the provisions of the pre-emptive clause of such *wajib-ul-arz*. *RAGHUBIR SINGH v. NANDU SINGH*, A.W.N. 1891, 134.

(8)—*Mahomedan Law—Pre-emption—Mortgage—Conditional sale.*—No right of pre-emption arises on a mere conditional sale or mortgage while any right of redemption remains in the mortgagor. A mere declaration of an intention to exercise a right not yet accrued is not a claim of a right of pre-emption. It is immaterial whether a formal demand of pre-emption is made at any other time than after

*Pre-emption—continued.**—6.—Right to pre-empt—continued.*

the sale became absolute. (*Dissentiente, Bayle, J.*) *GURDIAL MUNDAR v. RAJA TEKNA-RAYAN SINGH*, B.L.R. Sup. 166, F.B.=2 W.R. 315. [R., 10 W.R. 246, 3 A. 610=A.W.N. 1881, 31, 16 A. 344, F.B.=14 A.W.N. 101.]

(9)—*Wajib-ul-arz—Mortgage—Hypothecation by pre-emptor to stranger—Pre-emptive right not forfeited.*—Where in a suit for pre-emption under the *Wajib-ul-arz* of a village it appeared that the plaintiff had at some time or another made a simple mortgage of a portion of his share in favour of strangers,—held that he was not thereby disqualified from asserting his pre-emptive right. *GOKAL CHAND v. RAM PRASAD*, A.W.N. 1889, 127. [Appr., 18 A. 382.]

(10)—*Joint mortgage of two properties—Wajib-ul-arz relating to pre-emption—Suit for pre-emption in respect of both properties—Claim is divisible—Decree if can be given in respect of one property only.*—In a suit to enforce a right of pre-emption in respect of two properties which had been mortgaged by the mortgagor-defendant to the mortgagee-defendant, it having been found that the *wajib-ul-arz* relating to one property restricted the exercise of the right of pre-emption to transfers by absolute sale only and that that relating to the other property allowed pre-emption in all cases of sales (including mortgages), held that the plaintiff was not entitled to get a decree enforcing his right of pre-emption in respect of this latter property only. The plaintiff having brought the suit for enforcing his pre-emptive right in respect of both the properties on payment of a certain sum (in this case Rs. 200) to the mortgagee-defendant, the Court cannot alter his claim so as to make it a claim to take a part only of the jointly mortgaged estate in payment of a different sum from Rs. 200, apart from the wishes and action of the original contracting parties. *ABDUL RAHIM v. SUCHIT MISRA*, A.W.N. 1885, 243.

(11)—*Pre-emption, Right of—Right of substitution—Vendee's rights to mortgage for sale consideration—Enforcement of mortgage—Pre-emptor's right to take property as it stood at the date of sale.*—A purchased certain property and mortgaged a portion of it to the vendor. K instituted a suit for pre-emption making vendor and vendee parties, and paid the whole of the pre-emption money which was taken away by the vendee. In a suit for sale upon the mortgage, held, that the mortgage could not be enforced, as the mortgagor's right to the property was subject to the pre-emptor's right of pre-emption. Held, further, that the right of pre-emption is not a right of re-purchase, but a right to be substituted for the vendee as he stood at the date of sale. Held, also that the vendee's right as a purchaser is subject to the pre-emptor's right of pre-emption, and that the vendee cannot defeat the pre-emptive right, by subsequently mortgaging the

Pre-emption—continued.—6.—**Right to pre-empt**—continued.

property, so as to force him to take the property subject to the mortgage. *KAMTA PRASAD v. MOHAN BHAGAT*, 6 A.L.J. 966=32 A. 45=3 Ind. Cas. 782. (20 A. 100, 23 A. 247, 8 A. 502, D.; 7 A. 755, R.)

(12)—**Sale in execution of decree—Pre-emption**—Civ. Pro. Code, 1877, s. 310.—The provisions of s. 310 of the Civ. Pro. Code, 1877, relating to the right of pre-emption of co-sharers in undivided immoveable property to a share in such property sold in execution of a decree, do not apply where the property sold is not a share in such property, but the rights and interests of a mortgagee of such a share. *JAIRAM DAS v. BENI PRASAD*, 3 A. 15. (2 A. 850, R.)

(13)—**Pre-emption—Execution of decree—Sale in execution**—Civ. Pro. Code, s. 310—A sale of immoveable property by order of Court in execution of a decree does not give rise to any rights of pre-emption. *MAHABAL SINGH v. ABDUL MAJIB KHAN*, A.W.N. 1898, 115.

(14)—**Sale in execution of decree—Pre-emption**—Civ. Pro. Code, 1877, s. 310.—In the case of a share of undivided immoveable property sold in execution of a decree, a co-sharer entitled to pre-emption in respect of it, cannot acquire such right as against a stranger bidding for it, unless he also bids for it, and for the same price as such stranger; mere assertion of his title, and payment of earnest money and of the balance of the purchase-money within fifteen days, will not do. Nor can he, under such circumstances, maintain a suit for pre-emption against the purchaser. *TEJ SINGH v. GOBIND SINGH*, 2 A. 850. [F., 3 A. 827 = A.W.N. 1881, 86; D., 3 A. 15.]

(15)—**Pre-emption**—Civ. Pro. Code, 1877, s. 310.—Where a share of undivided immoveable property is put up for sale in execution of a decree, and a co-sharer in such property who claims a right of pre-emption with respect to such share offers, before the property is knocked down to the highest bidder to pay the amount of the highest bid she does not satisfy the requirement of s. 310 of the Civ. Pro. Code, and cannot claim to have the sale confirmed in his favour. He must make a distinct bid like other bidders in the ordinary manner of offering bids. *HIRA v. UNAS ALI KHAN*, 3 A. 827. (2 A. 850, F.)

(16)—**Act XXIII of 1861, s. 14—Mortgagee or auction purchaser of share not entitled to right of pre-emption**.—An usufructuary mortgage of a share in a *pattidari* estate gives no right of pre-emption to the mortgagee as against a purchaser who was a co-sharer in the estate, nor could an auction-purchase, of such a share by a person who was not a co-sharer but only a bidder to whom the share had been knocked down, give the purchaser the right of pre-emption under s. 14 of Act XXIII of 1861, which could be claimed only by those who were co-sharers or members of the co-parcenary at the

Pre-emption—continued.—6.—**Right to pre-empt**—continued.

time the auction-sale took place. *DWARKA PARSHAD SUKUL v. RAM AUTAR SUKUL*, 7 N.W.P. 281.

(17)—**Act XXIII of 1861, s. 14—Act I of 1840, ss. 2, 4—Share in village sold in execution of decree to stranger—Right of pre-emption of co-sharer—Wajib-ul-arz**.—A village was divided according to *puttees* amongst the co-sharers. Every co-sharer possessed his share separately, collected its rent himself and granted receipts to cultivators. Power of alienation was also enjoyed by the co-sharers, and, in case of sale or mortgage, the nearest co-sharer had the right of pre-emption. A share in such village belonging to a co-sharer which had been sold in execution of decree, was bought by a stranger. The claim of a co-sharer for enforcing his right of pre-emption was disallowed by the Collector. He sued to establish his right. The Court of first instance while holding that the plaintiff was entitled to his right, dismissed the suit as he had not deposited the whole of the purchase-money on the day of the sale. On appeal, the lower Appellate Court decreed the claim. The High Court, on special appeal, though expressing itself unable to hold that the description of the tenure in the *wajib-ul-arz* came within the definition contained in s. 2, Act I of 1841, held that the claimant of pre-emption was not bound to deposit the whole amount of purchase money on the day of the sale and that it was sufficient if it was paid within the time prescribed by law. *RAM AUTAR v. SHEO DUTT*, 6 N.W. P. 243.

(18)—**Act XXIII of 1861, s. 14—Pre-emption**.—The right of pre-emption cannot be preferred at a sale in execution of a decree of a Revenue Court. The provisions of s. 14 of Act XXIII of 1861 are, therefore, inapplicable in the case of lands sold in execution of decrees of Revenue Courts. *NARAIN SINGH v. MUHAMMAD FARUK*, 1 A. 277.

(19)—**Act XXIII of 1861, s. 14—Execution of decree—Sale of share of putteedaree estate—Deposit of sale money by co-sharer by right of pre-emption—Sale set aside on auction-purchases—Failure to deposit balance of purchase money—Second sale—Suit to enforce right of pre-emption**.—If the conditions of sale respecting deposit of the purchase-money are fulfilled by a person claiming pre-emption, the sale cannot be held void merely by the failure of the person to whose bid the property was knocked down to complete the deposit also. The condition of pre-emption under the Mahomedan law do not apply to a claim brought under s. 14, Act XXIII of 1861. All that a claimant under that section is bound to do is to establish that he is a *putteedar* within the meaning of the section in the estate of which the property sold forms part, and that he has fulfilled the conditions of the sale. If he succeeds in establishing that, the sale must be confirmed in his favour unless it is shown that there was some such irregularity

Pre-emption—continued.—6.—**Right to pre-empt**—*continued*.

in publishing or conducting it as would justify the setting aside of the sale. **DABEE PERSHAD v. BISHESHUR PERSHAD SINGH, 6 N.W.P. 289.**

(20)—**Wajib-ul-arz**—*Fulfilment of conditions*—*Custom of shoofa*.—If any person in whose favour a preferential right of purchase is stipulated for, on having the offer made to him assents to it without unreasonable delay, or if without unreasonable delay, after he hears that a sale has been made without any tender to him comes forward and claims his right, he is entitled to have it decreed, although he may not have proved specifically that he has fulfilled all the conditions required in the case of a claim of pre-emption under the Mahomedan custom of *shoofa*. **KOULA PUT v. MAHARAJ DOOBEY, 1 Agra 278.**

(21)—*Act I of 1841, s. 2—Act VIII of 1859, ss. 254, 256—Act XXIII of 1861, s. 14—Putteedari estate—Sale in execution of decree—Right of pre-emption—Payment of whole purchase-money by co-sharer—Default by decree-holder—Re-sale—Suit by co-sharer for possession*.—It is clearly incumbent on an officer conducting a sale in execution of a decree, of land which is a share in a *putteedari* estate paying revenue to Government as defined in s. 2, Act I of 1841, to take notice of a claim of pre-emption by a *putteedar* under s. 14 of Act XXIII of 1861, and to receive the purchase-money as a fulfilment of the conditions of the sale, subject of course to any question which may be raised by any party interested in the sale as to the claimant's title to advance the claim. When the full amount of the purchase-money has been duly paid by a claimant qualified to claim under the provisions of s. 14, Act XXIII of 1861, the requirements of s. 254 of the Civ. Pro. Code, have been sufficiently complied with to enable the claimant to insist that, so far as he is concerned, the condition has been fulfilled, and that the sale is not defeasible by the failure of the bidder to complete the deposit of the purchase-money. **TASADUCK ALI v. MUKSUD ALI, 6 N.W.P. 272.**

(22)—*Act XXIII of 1861, s. 14—Pre-emption—Co-sharer—Stranger—Pattidari Estate—Suit for possession by disallowed auction purchaser—Maintainability*.—With respect to the right of pre-emption, the co-sharers of one *patti* in a *pattidari* estate, are not "strangers" with reference to co-sharers in another *patti* of the same estate, within the meaning of s. 14, Act XXIII of 1861; and the section gives no preferential right of pre-emption among themselves, between co-sharers in the same *patti* and sharers in other *pattis*, who come under the denomination of members of the co-parcenary. [*D.*, 14 C. 761.] Where, in an execution sale of a share in a *pattidari* estate, an auction purchaser's claim to pre-emption is disallowed, under s. 14, Act XXIII of 1861, he cannot maintain a suit for possession against the successful pre-emptor; he can only sue for a

Pre-emption—continued.—6.—**Right to pre-empt**—*continued*.

declaration that the latter has no right of pre-emption against him and that the sale to him is invalid. He cannot obtain possession until the sale to him has been confirmed and made absolute,—a remedy to be sought in the Court, which executed the decree. **FARZAND ALI v. ALIMULLAH, 1 A 272.**

(23)—*Family arrangement against separation—Forfeiture—Pre-emption—Execution sale*.—During the minority of two out of four brothers J, G, A, and M, an *ikrarnamah* was entered into between the brothers, the terms of which were that they were to continue to live jointly, that no separation was to take place without the consent of all, that, if one of the brothers did separate without such consent, he was to forfeit his share of the family property, and that, if any one wished to dispose of his share, he was to give his brothers the preference. It appeared that defendant F purchased in the first place at a private sale M's share in the property. On this, A and J brought a suit against F to set the sale aside, on the ground that it had been made contrary to the terms of *ikrarnamah*, and that they were entitled to pre-emption. The suit was decreed against F, the decree stipulating that the purchase money should be paid back to the purchaser. The money was not paid back, and F brought a suit against M to recover it. He got a decree, and in execution put up for sale the rights and interests of M in the family estate, bought them himself, and took possession. The present suit was brought to recover possession from him, on the ground that M had no rights and interests left which could be sold in execution. It was found that M did never separate from the rest of his brothers. *Held* that there could be no forfeiture of M's share even if the *ikrar* was an instrument which could be supported on grounds of public policy. There being no forfeiture, the only other privilege which the brothers had left to them under the *ikrar* was the right to become the purchasers by pre-emption of M's share in the event of M selling; but this right of pre-emption could not be exercised in this case, inasmuch as M had not sold his share, the sale having been the act of the Court. **SHAIKH FERASUT ALI v. ASHOOTOSH ROY SINGH, 15 W.R. 455.**

(24)—*Pre-emption, right of, suit to enforce—Suit, if maintainable, and when—"Proper sale price," meaning of—Agreement to sell to a co-sharer, if enforceable—Sale to another, if invalid*.—Where the plaintiff and the defendants purchased a property, and for their own convenience partitioned the property and entered into an agreement in the following terms: "Any of the parties desirous of selling the lands allotted to his share shall sell the same to the other party willing to buy the same to the proper sale price. Sale to anybody else shall be invalid. But, if the parties do not purchase at the proper sale price, the

Pre-emption—continued.—6.—**Right to pre-empt**—continued.

other party shall be entitled to sell to others. Let it be known that the value of the partitioned property is (or will be) Rs. 600." *Held* that the covenant is valid in law against the covenantor, and a suit to enforce the right of pre-emption is maintainable, especially when, as in the present case, the third party purchaser from one of the parties to the covenant had notice of the covenant contained in the agreement, when he made the purchase. (5 C.W.N. 343, 24 W.R. 321, *Expl. & D.*; 2 C.W.N. 575, 22 A. 238, *R.*). The words "proper sale price" in the covenant mean the market price, and not the share of the seller in the purchase money, which the plaintiff and his co-owners paid for the property when they bought it. If the plaintiff desires to exercise his right of pre-emption in the case, he must pay the purchase money mentioned in the deed of sale of the third party purchaser. **KALIMADDIN BHUYA v. REAZUDDIN AHAMED**, 10 C.L.J. 626=14 C.W.N. 295=4 Ind. Cas. 743.

(25)—**Pre-emption**—Haquiet mutfarika, owner of—Hissadar in the village—Sale of an isolated plot—Pre-emptive right of co-sharer in village.—A certain haquiet mutfarika, which was assessed to Government Revenue, and the names of the owners thereof were entered into the khewat of the village, was sold. *Held*, that the owners of this isolated plot were hissadars in the village, and the sale was subject to pre-emption by the co-sharers in the village according to the wajib-ul-arz. **BHUKARI DAS v. SHIB LAL**, 3 Ind. Cas. 91. (A.W.N. 1904, 118, *D.*; A.W.N. 1895, 93, A.W.N. 1895, 185, 12 A. 426, *R.*)

(26 & 27)—**Two successive purchases by same vendee**—Claim to be co-sharer, at date of suit on first purchase in virtue of second purchase.—Where, in a suit for pre-emption, it appeared that the vendee had, prior to the date of the suit, made a second purchase in regard to which no suit had been filed prior to the date of the institution of the suit in regard to the first purchase, but limitation had not expired in regard to the second purchase; *held*, that the vendee could not be considered, by virtue of his second purchase, to have been a co-sharer at the date of the institution of the suit on the first purchase. **KALESHAR RAI v. NABIHAN BIBI**, A.W.N. 1906, 164=3 A.L.J. 426=28 A. 642. (25 A. 421, *D.*)

(28)—**Purchaser of a grove**—Co-sharer—Wajib-ul-arz.—Purchaser of a grove not being liable to payment of Government revenue, is not a co-sharer in the village and is not entitled to pre-empt. **MUHAMMAD ALI v. THAN SINGH**, 2 A.L.J. 788=A.W.N. 1905, 264=28 A. 246. (2 A.L.J. 612, *Appl.*; 16 A. 412, *D.*) [*Not F.*, 10 O.C. 86, 10 O.C. 225; *R.*, 4 A.L.J. 665=A.W.N. 1907, 173.]

(29)—**Oudh Laws Act** (XVIII of 1876), s. 9—Co-sharer paying revenue through lambardar

Pre-emption—continued.—6.—**Right to pre-empt**—continued.

—Co-sharer in possession of separate chak—Non-resident co-sharer—Oudh Land Revenue Act (XVII of 1876), ss. 108, 112 and 121.—Every proprietor, who, by the combined operation of ss. 108 and 112 of the Oudh Land Revenue Act (XVII of 1876), is liable for the revenue assessed on the whole mahal, is a co-sharer within the meaning of s. 9 of the Oudh Laws' Act (XVIII of 1876) and is entitled to a right of pre-emption, notwithstanding the fact that he has to pay the revenue through the lambardars of the village, by virtue of the settlement under which he holds and that he is not a resident of the village. Nor does the fact of the share of the plaintiff being a separate chak make him the less a co-sharer. **MUNNU LAL v. MAULWI SAIYID MUHAMMAD ISMAIL**, 9 C.W.N. 129, P.C.=2 A.L.J. 769=26 A. 574=31 I.A. 212=6 Bom. L.R. 761=8 Sar. 670.

(30)—**Village divided into several Mahals**—Right of pre-emption given to co-sharers in the village—Right among co-sharers of Thoks.—The wajib-ul-arz of a village gave rights of pre-emption to share-holders in a patti, then to those in a mahal, and lastly, to those in the village. The village was divided into several thoks. One of the thoks, viz., Jaraoli was subsequently sub-divided into several mahals and under the new arrangement the thoks were done away with. A share was sold in the thok so sub divided and was purchased by a co-sharer in one of the old thoks. A co-sharer in one of mahals of Jaoroli sued for pre-emption. *Held*, that, the vendee being a co-sharer in the village, the plaintiff had no preferential right of pre-emption, inasmuch as the old pattis and thoks had been done away with. **DARIA v. HARKHIAL**, 6 A.L.J. 180=31 A. 274=2 Ind. Cas. 208. (22 A. 1, *D.*)

(31)—**Right of—Refusal of a co-sharer to purchase**—Definite agreement with stranger to be communicated to pre-emptor—Duties of Receiver—Sale by Receiver.—In order to debar a party, entitled to pre-empt a sale, from exercising his right of pre-emption, an opportunity to purchase must be given, when a definite agreement to purchase at a fixed price has been entered into with a stranger. It is not enough to offer property to a person entitled to pre-empt before an agreement to purchase has been entered into with a third party. An order appointing a Receiver vests in the Receiver all the insolvent's property with the exception specified in the first proviso to s. 266 of the Code of Civil Procedure, and it is the duty of the Receiver to convert, under the directions of the Court, that property into money; when the Receiver sells the property, he cannot do so in derogation of the rights of third parties. (13 A. 228, *R.*) Hence, where a Receiver sells property by private sale, the person who, in the case of an ordinary sale, would be entitled to pre-empt, does not lose his right of pre-emption. **KANHAI LAL v. KALKA PRASAD**, A.W.N. 1905, 149=2 A.L.J. 390=27 A. 670.

Pre-emption—continued.—6.—Right to pre empt—*continued.*

(32)—*Wajib-ul-arz*—"Hissadari karibi"—*Co-sharers.*—*Held* that one of the three co-sharers in a *mahal* did not by purchase of one moiety of the share of another co-sharer acquire a preferential right of pre-emption over the third co-sharer in respect of the remaining moiety of the said share. *MANIK RAJ KUARI v. AMINA BIBI, A.W.N. 1895, 5.*

(33)—*Pre-emption—Custom—Wajib-ul-arz—Relation as well as co-sharer—Preference—Resale to co-sharer by vendee—Limitation.*—M sold certain zemindari property to P on 16th November, 1909. P was a stranger, and he re-sold it to S and K on 14th November, 1910. S and K were co-sharers of M, the original vendor. Plaintiff, who was a co-sharer as well as a relation of M, brought a suit for pre-emption on the 14th November, 1910. S and K, however, were impleaded on 3rd February, 1911. The evidence in support of the custom of pre-emption consisted of two *wajib-ul-arzes* of 1833 and 1860, respectively. The one of 1833 required an intending vendor to notify his co-sharer of the sale, and when he refused, right was given to sell to a stranger. The latter *wajib-ul-arz* recognised a general right of transfer, but provided that, first, a near relation who was a co-sharer, and then a co-sharer, would have the right of pre-emption as against a stranger. *Held* (1) that the custom which the plaintiff was putting forward was a very usual custom, and consequently the finding of the Court below that the custom was proved was justified; (2) that the suit was not barred by limitation, for it was the sale of the 16th November, 1909, which gave the plaintiff his cause of action; (3) the second set of vendees were necessary parties in this sense, that, unless they were made parties, they would not be bound by a decree against their vendors, the original vendees. *SAT NARAIN v. BADRI NATH, 9 A.L.J. 211.*

(34)—*Hindu Law—Joint family—Right of pre-emption—Other members co-sharers for purposes of pre-emption—Wajib-ul-arz.*—Members of a joint Hindu family, other than the member who is recorded in the Collector's books as a sharer in the *mahal*, are co-sharers for the purposes of the pre-emption, within the meaning of the *wajib-ul-arz*. (7 A. 184. R.) The *wajib-ul-arz* of a village provided: "when a share of any *lambardar* is to be sold or mortgaged, then the members of his family can first claim pre-emption, and in case of their refusal, other co-sharers may do so." *Held* that, where a vendor who was also the *lambardar*, lived jointly with his son, the latter could claim pre-emption in view of the terms of *wajib-ul-arz*. *RAGHU NATH v. MUSSAMMAT RAHAT BEGAM, 3 A.L.J. 641=A.W.N. 1906, 240.*

(35)—*Pre-emption, rights of—"Village community"*—*Ss. 10, 12, Punjab Laws Act (XII of 1878).*—*Occupancy tenants, position of.*—The expression "Village communities" in Act XII

Pre-emption—continued.—6.—Right to pre empt—*continued.*

of 1878 (Punjab Laws) is not used to denote a village community of the typical sort, consisting of members of one family or one clan, holding the village lands in common, and dividing between them the agricultural lands according to the custom of the village. It is used in a popular sense to denote a body of persons bound together by the tie of residence in one and the same village, amenable to the village customs and subject to the administrative control of the village officers. A village community is not confined to the land-owners of the village. Occupancy tenants are members of a village community within the meaning of the Act, and so are all persons in an inferior position who belong to the village, though they may be unconnected with the land, and not entitled to any right of pre-emption under the Act of 1878. *RAHIMUDDIN v. REWAL, 30 C. 635, P.C.=30 I A. 89=7 C.W.N. 498=66 P.R. 1903=90 P.L.R. 1903. [R., 7 O.C. 275, 21 P.R. 1906=110 P.L.R. 1906, 12 O.C. 1.]*

(36)—*Pre-emption among village communities in India.*—Observations by Mahmood, J., on the manner in which the Muhammadan idea of pre-emption has been developed and modified among village communities in India. *SHEORATAN KUAR v. MAHIPAL KUAR, 7 A. 258, F.B.=A.W.N. 1885, 8. [R., 7 A. 775, F.B., 12 A. 234, F.B.]*

(37)—*Gujarat—Pre-emption among Hindus.*—Among the Hindus of Gujarat, the custom of pre-emption prevails. The custom being the Mahomedan law right of pre-emption, it is regulated by the rules and restrictions of that law. *GORDHANDAS GIRDHARBHAI v. PRANKOR, 6 B.H.C.A.C. 263. [R., 12 A. 234, F.B., 4 Bom. L.R. 811, 5 N.L.R. 136.]*

(38)—*Behari Hindus.*—Pre-emption obtains among the Hindus of Behar. *MUSSAMUT JOY KOER v. SUROOP NARAIN THAKOOR, W.R. 1864, 259.*

(39)—*Customary law of Hindus in Behar—Claim by a non-resident—Validity—Sham sale—Right of suit.*—Although there may be a custom of pre-emption amongst the Hindus of Behar, it cannot be availed of by persons who are neither natives of, nor domiciled in, the district in which the property is situate. A native of Balia in the North Western Provinces cannot claim the right of pre-emption in respect of properties situate in the District of Chapra. Where the sale is not a *bona fide* one but a sham transaction, no right of pre-emption arises. *PARSASTH NATH TEWARI v. DHANAI OJHA, 9 C.W.N. 874=32 C. 988.*

(40)—*Hindus in Jessore.*—The law of pre-emption applies to transactions as between Hindus in Jessore, only if there is any local custom to that effect. *MADHUB CHUNDER NATH BISWAS v. TAMEE BEWAH, 5 W.R. 279. [R., 4 B.L.R. F.B. 134=13 W.R. F.B., 21.]*

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

(41)—*Sylhet Hindus—Mahomedan plaintiff—Hindu defendant.*—Where the plaintiff, a Mahomedan, sues the defendant, a Hindu, in the Civil Court of Sylhet to enforce against him a right of pre-emption, held that unless the plaintiff can show that the custom relied upon by him is undoubted and invariable, he is not entitled to a decree. *JAMEELAH KHATOON v. PAGUL RAM*, 1 W.R. 250.

(42)—*Mahomedan Law—Pre-emption—Right of Mahomedan against Hindu—Custom in Tipperah.*—A right for pre-emption by a Mahomedan as against a Hindu purchaser can only be enforced after proof of the right or custom of pre-emption, existing generally in cases in which Mahomedans are not or only partially concerned in the zillah of Tipperah. *DEWAN MUNWAR ALI v. SYUD AZHUROOD-DEEN MAHOMED*, 5 W.R. 270. [Discussed, 13 W.R. F.B., 21=4 B.L.R. F.B. 134.]

(43)—*Near co-sharer—Hindu and Muhammadan co-sharers—Wajib-ul-arz.*—A Muhammadan who had become a co-sharer by purchase, could not be considered a "near co-sharer" of a Hindu co-sharer. *SARABSUKH LAL v. MAJBHULLAH*, A.W.N. 1882, 167. [R., 5 Ind. Cas. 669.]

(44)—*Wajib-ul-arz—Rules of the Muhammadan law of pre-emption inapplicable to Hindu parties claiming under a wajib-ul-arz.*—The rule of the Muhammadan law of pre-emption, that when a vendee is also a person who is entitled to pre-empt, he must share the purchased property with any other person entitled, and who has qualified himself to pre-empt, is totally inapplicable where the parties are Hindus claiming under the terms of a village wajib-ul-arz. *PAYAG SINGH v. DEONANDAN SINGH*, A.W.N. 1900, 193. (20 A. 466, R.)

(45)—*Pre-emption—Right of manager of Hindu temple.*—The manager of a Hindu temple who, as such, possesses zemindari property on behalf of the temple, has the same rights of pre-emption and pre-mortgage under the *wajib-ul-arz*, as any other zemindar in the village. *LEKHRAJ v. GURDAT*, 26 A. 212.

(46)—*Co sharers entitled to pre-emption—Association with strangers in purchase, effect of—Such purchasers to be regarded in the light of total strangers.*—This was a suit to enforce the plaintiff's right of pre-emption in respect of certain shares in three villages and to set aside the deed of sale of the shares in question executed by some of the defendants in favour of the other defendants. The sale-deed conveyed the rights and interests of the vendors in the several estates, to the extent respectively specified in the deed, to the vendees collectively for a sum of Rs. 3,000. Plaintiffs, as sharers in all the three villages, claimed their right both under the provisions of the Mahomedan law, and the special conditions of the *wajib-ul-arz* of the villages. The High Court accepted their

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

contention that they had fulfilled all the requirements of the law in demanding the purchase from the vendors, which was refused, and that, although two of the vendees were share-holders in two of the three villages, they had yet no interest in the third village, and the other vendees being strangers altogether, they had, by associating them in the purchase, forfeited any right which they might otherwise have had as sharers in the two villages and were to be regarded in the light of total strangers in respect of the whole property included in the sale deeds, so that the question of preferential right between them and the plaintiffs did not arise. It was, however, urged that by reason of a specification at foot of the sale deed of the interests severally purchased by each of the vendees, the two defendants-appellants were entitled to retain the shares respectively purchased by them. But the High Court did not accept this plea on the ground that the entry of the detail was manifestly made solely for the convenience and by agreement of the vendees *inter se*; it was no part of the contract of sale between them and the vendors and in no way concerned the latter. *GUNESSEE LAL v. ZARAUT ALI*, 2 N.W.P. 343. [F., 4 A. 252=A.W.N. 1881, 151; R., 5 A. 197=A.W.N. 1882, 217. 6 A. 423; D., 19 A. 148, 23 A. 32=A.W.N. 1900, 188.]

(47)—*Purchase by stranger of property subject to pre-emption—Re-sale to co-sharer entitled to pre-emption, effect of.*—When a stranger has wrongly purchased property from a co-sharer contrary to the provisions of the *Wajib-ul-arz* there remains to him a *locus penitentiae* by transferring that property to a co-sharer, but this must be done before a suit is brought by a co-sharer entitled to pre-empt. In the present case, however, such a suit had been instituted, and it was apparently to avoid the consequences of that suit that the stranger vendee transferred the pre-empted share to a person entitled to purchase under the *Wajib ul-arz*. By such a transfer, therefore, the stranger vendee could not defeat the right of pre-emption in the co-sharer plaintiff. *NARAIN SINGH v. PARBAT SINGH*, 23 A. 247=A.W.N. 1901, 66. (20 A. 100, D.: A.W.N. 1899, 126, R.) [R., 2 N.L.R. 150, 31 A. 530=6 A.L.J. 699=3 Ind. Cas. 42. 5 N.L.R. 136. 7 P.R. 1910=14 P.W.R. 1910, 1 Ind. Cas. 528; D., 27 A. 544=A.W.N. 1905, 94=2 A.L.J. 28, 32 A. 45=6 A.L.J. 966=3 Ind. Cas. 782.]

(48)—*Joint purchase by co-sharer and strangers—Specification of interests taken by purchasers.*—A co-sharer, who associates strangers with himself in the purchase of a share in an estate, stands in neither a better nor a worse position than they do as against a pre-emptor. And the mere mention of the proportion in which the vendees are to take the property, cannot alter the joint nature of the sale, nor permit of its being broken up and treated as involving separate contracts, so as to enable such co-sharer to resist a suit for pre-emption so

Pre-emption—continued.

—6.—Right to pre-empt—continued.

far as his share of the property is concerned. **MANNA SINGH v. RAMADHIN SINGH**, 4 A. 252 = A.W.N. 1881, 151. [Diss., 8 A. 462; F., 15 C. 224; R., 7 A. 118, 19 A. 148, 7 O.C. 22; D., 4 A. 259.]

(49)—*Pre-emption suit*—Wajib-ul-arz, construction of—Preference over strangers.—Plaintiff sued for pre-emption based upon the *wajib-ul-arz* of a village. The document provided that in case of dispute as to price, it was to be settled by appointment of arbitrators before the *hakim*, and that if the co-sharers did not take the amount fixed at by the arbitrators, then the vendor might transfer it to a stranger. The vendee was a stranger. Held that the plaintiffs, though not of common descent from the vendor, were entitled to pre-emption after own brothers and co-sharers *et juddi*, and to have preference over strangers. **SABIR ALI v. YAD RAM**, 9 A. 660 = A.W.N. 1887, 226. (N.W.P. 1870, p. 343, F.)

(50)—*Suit for pre-emption*—Sale by auction—Stranger—Act XXIII of 1861, s. 14—The rights and interests of a judgment-debtor were sold at an auction in execution of a decree and bid for by his son who gave the name of his father-in-law as the actual purchaser and the property was knocked down to the father-in-law. The sale was confirmed in the name of the judgment-debtor in whose favour the father-in-law waived his own claims as auction-purchaser. In a suit for pre-emption by the plaintiff it was held that the father-in-law was not a co-parcener in the estate which was putnee-daree and therefore, in the words used in s. 14, Act XXIII of 1861, a stranger, and that plaintiff was entitled to the right claimed, as he made his claim on the day of the sale in strict conformity with the provisions of the Act and fulfilled all the conditions of the sale. **GUNGA RAM v. MOOLA**, 2 N.W.P. 200.

(51)—*Pre-emption under wajib-ul-arz*—Transferee of proprietor's lands without mutation of names, right of, to pre-empt as a co-sharer—Parting of proprietary rights by dedication to public charity—Onus of proof. A person who has purchased lands in the mahal which were not merely the *sir* of a co-sharer and which were not grove lands held by a licensee, but where lands belonging to the zemindar and in his occupation, becomes a proprietor in the mahal responsible for the revenue assessed thereupon, notwithstanding that he had never obtained mutation of the names in his favour. The mere fact that such a person has built a temple and made a grove upon the land is not sufficient to raise the presumption that he has parted with the proprietary rights in the land. It is for those who allege that the owner has divested himself of his private proprietary rights by making the land endowed land to prove such a dedication. **DAKHNI DIN v. RAHIM-UN-NISSA**, 16 A. 412 = A.W.N. 1894, 134. [F., 28 A. 124 = A.W.N. 1905, 219 = 2 A.L.J. 612; R.,

Pre-emption—continued.

—6.—Right to pre-empt—continued.

28 A. 246 = A.W.N. 1905, 264 = 2 A.L.J. 788, 129 P.R. 1906 = 84 P.L.R. 1907, 10 O.C. 225, 3 Ind. Cas. 461.]

(52)—Wajib-ul-arz—Right of pre-emption to co-sharer—Whether right enforceable against one who had already become co-sharer by purchase of isolated plots and *sir* lands in mahal.—Where the *wajib-ul-arz* of a village gave a right of pre-emption to "co-sharers in the mahal," and one of the co-sharers brought a pre-emption suit against a person who had already become, apart from the present purchase, a co-sharer in the mahal, having purchased some isolated plots and *sir* lands therein, held that the plaintiff had no preferential right of pre-emption. **SAF-DAR ALI v. DOST MUHAMMAD**, 12 A. 426 = A.W.N. 1890, 117, F.B. [F., 28 A. 124 = A.W.N. 1905, 219 = 2 A.L.J. 612; R., 3 O.C. 110.]

(53)—Act XVIII of 1876 (*Oudh Laws*), ss. 9 to 13—Pre-emption among co-sharers—Pre-emptor denying other's title and setting up exclusive title in himself—Effect—Inconsistency of rights.—The *Oudh Laws Act*, 1876, which gives a right of pre-emption to a co-sharer is not applicable, where the person, who would be entitled to a pre-emption, derives the title of the person who proposes to sell, and alleges that he is not a co-sharer, but sets up a title to the whole property in himself. In a suit by one of two co-sharers against the other, who had taken possession of the whole of the property, to recover possession of her share with mesne profits, the defence was, first, that there was a relinquishment by the plaintiff of her interest in the estate in favour of the defendant, and, secondly, that the defendant, as a co-sharer, had also a right of pre-emption. It was held that the position taken up by the defendant in the first place was altogether inconsistent with claiming a right of pre-emption. **ABDOOL WAHID KHAN v. SHALUKA BIBI**, 21 C. 496, P.C. = 21 I.A. 26. [F., 26 C. 9; R., 1 O.C. 174, 7 O.C. 61, 9 O.C. 86, 9 O.C. 331, 10 O.C. 273, 19 M.L.J. 489.]

(54)—Pre-emption—Putteedaree village.—Sharer in such puttee—In an imperfect as in a perfect putteedaree village, the sharers in each puttee have the preferential claim to the right of pre-emption in that puttee. **MAHARAJ SINGH v. BHECHOOK LALL**, 1 W.R. 233.

(55)—Wajib-ul-arz—Conditions precedent to claim—Offer—Notification of sale.—In order to entitle a co-sharer to assert the right of pre-emption based on the *wajib-ul-arz*, two conditions must be satisfied: (1) a sale of a share, already negotiated with a stranger; and (2) a price fixed. The only mode in which such a claim can be defeated is by proof (1) of a distinct intimation to the co-sharer claiming pre-emption, (2) of the price agreed to be paid by the stranger, (3) of an offer to him (the pre-emptor) at such price, and (4) of his refusal to purchase. A notification by the Collector, as Manager under the Court of Wards, to all the sharers to

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

the effect that certain shares were for sale, and that offers would be received, is not a sufficiently distinct and definite notice of a negotiated and intended sale, and a failure to make an offer in response to it could not stop a sharer from subsequently asserting his pre-emptive rights. *SUBHAGI v. MUHAMMAD ISHAK*, 6 A. 463 = A.W.N. 1884, 174. [R., 7 A. 442, 1 O.C. 254, 4 A.L.J. 144, Note.]

(56)—*Act I of 1841, s. 2—Act XXIII of 1861, s. 14—Rent free land in zemindari tenure—Court sale—Claim of preferential purchase—Putteedaree estate.*—Where the mahal, in which the plot of land in suit, formerly held rent free is included is a pure zemindari tenure, a claim under s. 14, Act XXIII of 1861, to a preferential right of purchasing any portion of it at auction sale cannot be maintained, as the estate is not a putteedaree estate within the meaning of s. 2, Act I of 1841. *GHOOROO SINGH v. DAIBEE DYAL*, 2 Agra 280.

(57)—*Act I of 1841, ss. 2, 3—Putteedaree estate—Pre-emption.*—A resumed *maafee* estate consisting of three separate *puttees* was dealt with as one estate under the settlement and was assessed in a lump sum to be paid by the co sharers in proportion to their holdings to the *lumbardars* of the *adaee mahal*, who were empowered on non-payment of the amount to enforce payment summarily or to oust the defaulters from their holdings. The *lumbardars* alone were responsible to Government for the revenue and the estates of the former were liable to be sold in case of default in payment of revenue. Held under the above circumstances that the three *puttees* comprised in the resumed *maafee* estate were not putteedaree estates within the meaning of s. 2 of Act I of 1841, and that the right of pre-emption given by the Act to co-sharers cannot attach to those lands; that no putteedaree estate could be held to be such as was contemplated by s. 2 of Act I of 1841 unless it not only came within the express terms of that section, but was also liable to the same incidents which attached to the estates described in that section by the other provisions of the same Act. *SALIG RAM v. PURSIDH RAM*, 1 Agra 186.

(58)—*Pre-emption—Wajib-ul-arz—Partition of mahal—Effect on pre-emptive right—Rival suits—Mode of division of property.*—Where a mahal, consisting of a number of *pattis* or *thokes*, becomes the subject of perfect partition under the Land Revenue Act (No. XIX of 1873), and one of these *pattis* is constituted a separate mahal subject to a separate *wajib-ul-arz*, a right of pre-emption exerciseable under the *wajib-ul-arz* as framed for the original unpartitioned mahal can be exercised only by the co-sharers in the remaining *pattis*, only in respect of sales of shares therein; and conversely, the same right cannot be claimed under the new *wajib ul-arz*, except in respect of sales of shares in the new mahal, and except by co-sharers in such mahal. Therefore, when, prior

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

to the partition, a proprietor of land, both in the *pattis* which remained in the old mahal, and in the *patti* which formed the new mahal, sold lands in both of them, a co-sharer in the former could, after the partition, claim pre-emption in respect of the land sold therein (though only a part of the property sold), and the objection to the suit that it related only to a portion of the property sold was not sustainable. (6 A. 370, 423, 455, N.W.P. S.D.A. Rep 1861, p. 506, N.W.P. 1867, p. 252, N.W.P. Rep 1865, p. 173, N.W.P. 1875, p. 38, R.) [Expl., 22 A. 1, F.B.; R., 11 A. 257, 15 A. 410, 17 A. 226.] Where there are rival suits for pre-emption based on the *wajib ul-arz* in respect of the same property, and there is nothing to show that the rival pre-emptors are not equally entitled, the rule of Muhammadan law that their rights are to be taken as *per capita* according to the number of pre-emptors, and not according to the number of shares which each of them owns in the property in virtue of which they claim the right—must be followed, as it is one based on the principles of justice, equity and good conscience. *JAI RAM v. MAHABIR RAI*, 7 A. 720 = A.W.N. 1885, 206. [F., 11 A. 164, 27 A. 465 = 2 A.L.J. 690 = A.W.N. 1905, 50.]

(59)—*Rival suits filed together, but decided by separate decrees—One decree allowing pre-emption only on condition of default by other pre-emptor—Unconditional decree becoming final, appeal not being made—Appeal by inferior pre-emptor in his own suit—Superior pre-emptor's right cannot be affected.*—Two rival pre-emption suits, where each pre-emptor was made a defendant in the other suit, having been tried together and upon the same evidence, were decided by a single judgment; but separate decrees were passed. The decree in one of the suits was in terms of s. 214 of the Civ. Pro. Code, while that in the other was subject to the condition of the first pre-emptor's failure to execute his decree. The former, not having been appealed from, became final; and on appeal from the latter decree to get rid of the decision regarding the first pre-emptor's preferential right, it was held that the appeal should have been against the first pre-emptor's decree; and that having become final, the question between the two pre-emptors could not be re-opened in the present appeal. *CHAJJU v. SHEO SAHAI*, 10 A. 123 = A.W.N. 1887, 301. [F., A.W.N. 1908, 211 = 4 M.L.T. 172; R., 5 O.C. 394, 151 P.L.R. 1905 = 85 P.R. 1905, F.B., 33 C. 1101 = 10 C.W.N. 934 = 4 C.L.J. 149.]

(60)—*Village constituting single mahal under wajib-ul-arz—Record of rights prepared on partition—Effect on prior rights of pre-emption.*—Plaintiffs based their claim to enforce a right of pre-emption over the property in question, not upon the record of the village customs and rights prepared at and after the partition thereof, but upon the entry relating to such customs

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

found in the village *wajib-ul-arz* prepared at the previous settlement at the time when the entire village consisted of one single mahal. Held that the later record of rights prepared on the partition of the village was a valid and binding document and there were no rights of pre-emption in favour of the co-sharers in any one mahal in respect of land situated in any other mahal. (A.W.N. 1894, 193, 7 A. 772, Diss.) *Per Aikman, J.*—Except in cases where at the time of the perfect partition of a village constituting a single mahal into two or more mahals, a right of pre-emption is specifically reserved by the co-sharers in respect of lands outside a particular mahal, such right could not be presumed from the mere fact that, when the village was a single mahal, the co-sharers had had pre-emptive rights against each other. *GHURE v. MAN SINGH*. 17 A. 226 = A.W.N. 1885, 70 (N.W.P. 1861, Vol. II. 506, 2 A. 720, R.) [F., 20 A. 92; R., 15 A.W.N. 233, 22 A. 1, F.B., 27 A. 602 = A.W.N. 1905, 115 = 2 A.L.J. 313]

(61)—*N.W.P. Land Revenue Act (XIX of 1873). s. 107—Partition of mahal—Separate record of rights—Pre-emption—Provision in old wajib-ul-arz, whether applicable to new mahal.*—On a true construction of the Act, it is the duty of the Collector or Assistant Collector on making a perfect partition of any mahal, to frame a separate record of right for each of the new mahals. Where such separate records of rights have not been framed on partition, unless there is very strong evidence to the contrary, a sharer in one of the new mahals cannot claim under the old *wajib-ul-arz* a right of pre-emption as regards any land situate in any other of the new mahals. *ABDUL HAI v. NAIN SINGH*. 20 A. 92 = A.W.N. 1897, 202 (17 A. 226, R.) [R., 22 A. 1, 7 A.L.J. 133.]

(62)—*Pre-emption—Wajib-ul-arz—Perfect partition—No new wajib-ul-arz framed for new mahals—Applicability of old wajib-ul-arz—Right and cause of action in pre-emption suit to subsist at time of suit.*—The pre-emption clause in the *wajib-ul-arz* of a village gave the right (1) to certain relatives of the vendor, (2) to co-owners in the parcel sold, (3) to co-sharers in the patti and (4) to co-sharers in the *thoke*. During the pendency of partition proceedings in respect of the village, which consisted of several *thokes*, the defendant sold property situated in a particular *thoke* to a stranger. After the sale, the partition was completed and the particular *thoke* in question was divided into several separate mahals. No new *wajib-ul-arz* was framed for any of the new mahals, and the plaintiff who was a co-sharer with the defendant in that particular *thoke*, was no longer a co-sharer in the new mahals in which the property sold was included. The plaintiff claimed as one of the fourth class of pre-emptors, mentioned in the old *wajib-ul-arz* brought a suit for pre-emption. Held that (i) the *wajib-ul-arz* was not abrogated by the perfect partition;

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

but (ii) the effect of the perfect partition being to destroy the *thokes* into which the village had been divided, the particular *thoke* in respect of which the pre-emption was claimed at the date when the suit was brought ceased to exist; and (iii) the plaintiff, since the partition, not being a co-sharer in the new mahals in which the property sold was included, could not claim pre-emption. [Appl., 26 A. 389 = 24 A.W.N. 69 = 1 A.L.J. 209; R., 2 N.L.R. 150.17 P.R. 1908 = 18 P.W.R. 1908 = 153 P.J.R. 1908, F.B.; D., 31 A. 111 = 6 A.L.J. 51 = 1 Ind. Cas. 819.] Held further in the above mentioned suit, that to maintain a suit for pre-emption, the plaintiff must show not only that the sale gave him a cause of action, but also that the cause of action still subsisted at the date of the institution of the suit. Therefore, even assuming that the plaintiff at the time of sale obtained a good cause of action, he was deprived of it by the completion of the partition before the institution of the suit. *JANKI PRASAD v. ISHAR DAS*. 21 A. 374 = A.W.N. 1899, 126. (A.W.N. 1899, 111, R.) [R., 30 P.L.R. 1902 = 32 P.R. 1902, 7 O.C. 61, 48 P.W.R. 1907 = 124 P.R. 1907 = 3 P.L.R. 1907, 11 O.C. 290, 31 A. 530 = 6 A.L.J. 699 = 3 Ind. Cas. 42, 32 A. 45 = 3 Ind. Cas. 782 = 6 A.L.J. 966, 90 P.R. 1909, F.B. = 159 P.W.R. 1909 = 147 P.L.R. 1909 = 4 Ind. Cas. 179, 91 P.R. 1909, F.B., 12 O.C. 229 = 3 Ind. Cas. 546, 5 N.L.R. 136, 1 Ind. Cas. 528.]

(63)—*Pre-emption—Partition of village into separate mahals—New wajib-ul-arz framed for each mahal—Suit on one of them—Wajib-ul-arz of whole village to apply where no new ones drawn up for separated mahals.*—There was a perfect partition of a village, into two separate mahals, for each of which a *wajib-ul-arz* was framed. A suit was brought on one of these *wajib-ul-arz* by a co-sharer in the mahal, though not in the patti of the mahal in which the property sold was situate. The question was whether, according to the pre-emption clause, such a co-sharer was entitled to preference over the vendee who was a co-sharer in a patti of the other mahal, and judgment was based on the terms of the *wajib-ul-arz*. [R., 7 Bom. L.R. 622, 17 A. 226.] Where no new *wajib-ul-arz* was drawn up for the separate mahals, the decision in the present case would not prevent the *wajib-ul-arz* for the whole village area from applying to the new mahals: for pre-emptive right runs with the land, and the division of that land for the purposes of revenue in no way affects any covenant or agreement existing between the co-sharers. *KUAR DAT PRASAD SINGH v. NAHAR SINGH*. 11 A. 257 = A.W.N. 1889, 79 (7 A. 772, 720, R.) [R., 17 A. 226; Expl., 22 A. 1.]

(64)—*Co-sharers under common wajib-ul-arz—Partition, effect of, on subsistence of wajib-ul-arz—Land Revenue Act (XIX of 1873). s. 191—Acquiescence, when amounts to estoppel.*—Some years before the sale sought to be impeached by the plaintiff in this case, he was a co-sharer

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

with the vendors in several villages, but his shares in those villages had since been made the subject of a perfect partition, and divided into a distinct *mahal* of which he became the sole proprietor. On the question arising in respect of the present sale after the partition, whether the conditions of the *wajib-ul-arz* which subsisted prior to the partition, and not replaced by another, were still effectual and binding on all the persons who were originally co-sharers in the villages, it was held that, despite the partition of the village into separate mahals, the existing *wajib-ul-arz* at the time of the partition must be presumed to subsist and govern the separate mahals, until it is shown that a new one has been made. This view is also supported by the terms of the second paragraph of s. 191 of the Land Revenue Act (XIX of 1873). (7 A. 722, R.) With regard to the contention that the plaintiff was equitably estopped from setting forth his pre-emptive right on account of his alleged acquiescence in the sale of one of the villages, it was held that, in the absence of any proof that it was offered to him and that he refused to purchase it, he should not be regarded as being equitably estopped by acquiescence in the sale, and that his omission, to set up any right of pre-emption in a suit that had been previously brought against him for redemption of the mortgage, could not make any difference. **SHIAM SUNDAR v. AMANANT BEGUM, 9 A. 234 = A.W.N. 1887, 24.** [Cons., 22 A. 1; R., A.W.N. 1907, 88 = 4 A.L.J. 210, 37 P.R. 1908 = 39 P.L.R. 1908 = 30 P.W.R. 1908; D., 17 A. 226.]

(65) — *Wajib-ul-arz—Partition of village into separate mahals—No fresh wajib-ul-arz prepared—Suit for pre-emption on old wajib-ul-arz maintainable—Purchase money—Burden of proof.*—The *wajib-ul-arz* of a village contained a covenant between the co-sharers giving rights of pre-emption. The village was, for revenue purposes, divided into two separate mahals, but no fresh *wajib-ul-arz* was prepared. Subsequent to the division, a suit for pre-emption was brought by the owner of property situate in one of the mahals in respect of a sale of property situate in the other. *Held*, that the covenant in the *wajib-ul-arz* giving the right of pre-emption attached to and ran with the land, and was not put an end to by the division of the village for revenue purposes into two areas, and that the suit was maintainable upon the *wajib-ul-arz*. In suits for pre-emption, where the plaintiff alleges that the consideration stated in the deed-of-sale has been fraudulently overstated, he is bound to give *prima facie* proof at least of such over-statement. **RAM-JIAWAN SAHU v. RATURAJ SINGH, A.W.N. 1889, 81.**

(66) — *Wajib-ul-arz—Partition of village without new wajib-ul-arzes being framed—Custom—Act No. XIX of 1873 (N.W.P. Land Revenue Act), s. 3, sub-s. (1).*—A village, the *wajib-ul-arz* of which contained a record of a custom of

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

pre-emption amongst the co-sharers was divided by perfect partition into two mahals of 15 biswas and 5 biswas, respectively, but no new *wajib-ul-arzes* were framed for the new mahals. *Held* that under these circumstances no right of pre-emption would subsist in respect of a sale of a share in the 5 biswa mahal in favour of a person who was a co-sharer only in the 15 biswa mahal, and whose sole connection with 5 biswa mahal was that he owned a certain amount of rent-free land in that mahal, and was described in the *wajib-ul-arz* as an inferior proprietor. **MITHU LAL v. MUHAMMAD AHMAD SAID KHAN, A.W.N. 1899, 19.** (17 A. 447, R.) [R., 22 A. 1, F.B.]

(67) — *Village, originally one, divided by perfect partition into several mahals—Right of pre-emption as to mahals in which claimant is not a co-sharer.*—Where a village originally forming one mahal is divided by perfect partition into two or more separate mahals, unless at the time of partition a right of pre-emption is specifically reserved by the co-sharers in respect of land lying in other mahals, such right of pre-emption is not to be presumed from the fact that when the village formed but one mahal the co-sharers had pre-emptive rights against each other. **ABDUL AZIZ KHAN v. HUSEN ALI KHAN, A.W.N. 1895, 233.** (17 A. 226, F.)

(68) — *Share of undivided zemindari, sale of—Pre-emption—Limitation.*—Where an undivided share of a zemindari estate was conveyed by a registered conveyance of a certain date, but the name of the purchaser was entered in the revenue register of proprietors some months later on, *held*, that a suit for pre-emption in respect of such a share would begin to run from the date when the instrument of sale was registered, and not from the date of the entry of the purchaser's name in the revenue register. **SHIB LAL v. BHAWANI DAS, A.W.N. 1881, 146.**

(69) *Pre-emption—Partnership—Vicinity—Evidence.*—Where the plaintiff seeks to establish his right of pre-emption on the ground of partnership, he cannot properly get a decree on the ground of vicinity. **SHIU SUHAI MULLICK v. LALA HARI SUHAI SINGH, 3 B.L.R. App. 142 (a).** (1 B.L.R. S.N. 12, F.)

(70) — *N.W.P. Land Revenue Act, XIX of 1873, ss. 166, 168, 188—N.W.P. Rent Act (XII of 1881), s. 177—"Patti," meaning of—Pre-emption—Interpretation of statutes—Pre-emption, Object of—Whether right applies to compulsory sales.*—Where a decree under the Rent Act (XII of 1881, N.W.P.) has been passed against the owner of a share in an imperfect *pattidari* estate, and execution of such decree has been had by the sale, under s. 177 of the Act, of the defaulter's share in the *mahal* (not being the property on which the arrear accrued), *held* that no right of pre-emption accrued in respect of such sale; and, consequently, neither

Pre-emption—continued.—6.—Right to pre-empt—*continued.*

a co-sharer in the same *patti*, and much less a co-sharer in another *patti* of the same *mahal*, was entitled to pre-empt. The provisions of s. 177 of the Rent Act, XII of 1881, refer to and must be read with the provisions of the Land Revenue Act, XIX of 1873, relating to sales for arrears of revenue. The expression "*patti* of a *mahal*" in s. 188 of the Act is not intended to include the share of a co-sharer in a *patti* of an imperfect *pattidari mahal*. It refers to a division of a *mahal*, distinct from the share of an individual co-sharer. S. 188 of the Land Revenue Act has no applicability to sales under s. 168 of the Act. [*R.*, 46 P.R. 1909 = 72 P.L.R. 1909; *D*, 27 A. 670 = A.W.N. 1905, 149 = 2 A.L.J. 390] *Per Mahmood, J., contra*:—A compulsory sale such as a sale in execution of decree or a sale, under an authoritative order of the revenue authorities for arrears of Government revenue, does not render pre-emption enforceable, whether such right is claimed under Muhammadan Law, under the terms of the *wajib-ul-ars*, or on the ground of local custom or private contract. But such compulsory sales being the creation of statute law do furnish occasion for the exercise of pre-emptive right where such right is provided, subject to the rules and restrictions prescribed by those legislative enactments themselves. (*Vide* s. 188). The pre-emption provided by s. 188 applies also to sales under s. 168; for, all the incidents of sales under s. 166 including pre-emption, are applicable to sales under s. 168, with the exception of what is provided in the proviso, *viz.*, that only the defaulter's interest passes, "and no incumbrances created or contracts entered into by him in good faith shall be rendered invalid by such proceedings." The whole policy and object of the right of pre-emption is to prevent the intrusion of strangers in co-parcenary villages such as *pattidari* estates, and where the sale of an entire *patti* would give the right of pre-emption to the owners of other *pattis*, it follows *a fortiori* that the sale of the lands of a co-*pattidar* should entitle his co-*pattidars* in the same *patti*, to exercise pre-emption for the purpose of excluding strangers from that *patti*. It is a sound rule of interpreting statutes that words must be understood in their ordinary and natural meaning unless there is clear reason to the contrary. *Patti* is a Hindustani word, and in that language it means the share in a *pattidari* estate, *i.e.*, the share of a *pattidar*. This is the proper meaning to be given to the word in s. 188, although the same broad sense cannot be adopted in some other sections of the Act, *e.g.*, ss. 150, 158, 166. The rule that a word used in a statute is to be understood in the same sense throughout, is only a rule of presumption, by no means inflexible, and certainly not of such character as to be irrebuttable by other rules of interpretation founded upon the especial context of statutory words or reasons and objects wherefore any special section is enacted. There exist enough reasons for interpreting the word *patti* in

Pre-emption—continued.—6.—Right to pre-empt—*continued.*

s. 188 in a sense other than that in which it occurs in some other parts of the Act. To interpret the word in the section otherwise than as meaning 'the share of a *pattidar*,' would be to frustrate the policy of the legislature in framing that section, and would be repugnant to the very notion of pre-emption. *BAIJNATH v SITAL SINGH*, 13 A. 224 = 11 A.W.N. 68. [*R.*, 4 N.L.R. 78 = 8 Cr.L.J. 18.]

(71)—*Pre-emption—Hindu widow with property obtained as share on partition—Interest whether sufficient to support suit for pre-emption.*—So far as pre-emption is concerned, a Hindu widow obtaining a share on partition no more acquires a right to claim pre-emption in the village than if she had been allowed to have possession of a particular share for maintenance without partition, that is to say, she does not obtain, by reason of getting a share on partition, such an interest as would support a suit for pre-emption. *PHOPI RAM v. RUKMIN KUAR*, 19 A. 327; *Note* = A.W.N. 1895, 84. [*F.*, 19 A. 329, *Note* = A.W.N. 1895, 85, 19 A. 324.]

(72)—*Possession of share by Hindu widow in lieu of maintenance*—The possession for life, by a Hindu widow, of a share in a village, in lieu of maintenance, does not invest her with any such interest in the land itself, as entitles her to assert a right of pre-emption in respect of another share which is sold. *DILA KUARI v. JAGARNATH KUARI*, 6 A. 17 = A.W.N. 1883, 177. [*F.*, 3 O.C. 306; *R.*, 4 O.C. 397.]

(73)—*Hindu widow—Joinder of plaintiffs one of whom had no right—Amendment of plaint.*—A Hindu woman, the widow of a co-sharer, who is entitled only to maintenance out of the estate of her deceased husband, cannot be regarded as a co-sharer in the village, and cannot, therefore, claim a right of pre-emption. [*R.*, 3 O.C. 306.] Where, in a suit for pre-emption claimed by two persons jointly, one of the plaintiffs has no right to pre-empt, the other plaintiff cannot claim the right entirely on his own account without amending the plaint, but this could not be permitted in appeal. *KARAN SINGH v. MUHAMMAD ISMAIL KHAN*, 7 A. 860 = A.W.N. 1885, 247. (7 A. 79, *R.*) [*R.*, 8 A. 462.]

(74)—*Partition by a Hindu father—Claim for pre-emption in father's life-time.*—In this case a Hindu father made a partition of his property among his sons, reserving to himself an interest in one village which upon his death was to be divided among his sons. *Held* that no son in the father's life-time could claim pre-emption in respect of the village so reserved, as all that the sons had in the village was a reversionary right which might or might not become a right in possession. *RAM ADHEEN PANDEY v. GHOORDIAL PANDEY*, 2 N.W.P. 434.

(75)—*Transfer of Property Act (IV of 1882), s. 3—Covenant for pre-emption in vendor's*

Pre-emption—continued.—6.—**Right to pre-empt**—continued.

family partition deed—Reference in the sale deed to deed of partition—Constructive notice to purchaser—Notice of a deed is notice of its contents.—The subject of the sale to a defendant in this case was a portion of a house which had fallen to the share of his vendor under a partition deed between him and his half brother, the plaintiff. The partition deed contained a clause providing for the right of pre-emption to either of the parties thereto, whenever the other should arrange for a sale of his share of the house. The sale deed to the defendant referred to the house as comprised in the deed of partition. The defendant purchaser was, under the circumstances, imputed with constructive notice of the covenant for pre-emption contained in the partition deed. His attention having been drawn by the sale deed to the deed of partition, his omission to ascertain the contents of the latter must be construed as wilful abstention from an inquiry which he ought to have made. **RAJARAM v. KRISHNASAMI, 16 M. 301.** [R., 6 C.L.J. 134, 27 B. 452.]

(76)—*Pre-emption—Wajib-ul-arz—Devolution or relinquishment of estate to next heir after accrual of right, effect of.*—On general principles, the period within which pre-emptive rights can be exercised is not limited by a devolution of the estate from one co-sharer to another co-sharer. In the case of a *wajib-ul-arz*, the expression excluding such a right must be clear and imperative before so important an incident of proprietary possession could be lost by such devolution. A widow holding a life-estate, and not merely holding land in lieu of maintenance, voluntarily relinquished her life-estate in favour of her daughter, who herself would have had plenary proprietary rights on the determination of the life-estate. Certain lands as to which the widow had the right of pre-emption were sold before her relinquishment, and the widow took no steps to exercise her right of pre-emption. Held that the daughter could sue for pre-emption within the period of limitation and that the mere abstinence of the widow from suing for some brief time before the relinquishment, did not amount to an abandonment of the right on her part. **MUHAMMAD YUSUF ALI KHAN v. DAL KUAR, 20 A. 148.** (7 A. 536, D.), [F., 7 O.C. 158, 28 A. 424=3 A.L.J. 191=A.W.N. 1906, 73; R., 31 A. 623=6 A.L.J. 887, F.B.=6 M.L.T. 352=3 Ind. Cas. 820; D., 125 P.L.R. 1901.]

(77)—*Mortgage—Right of pre-emption reserved to mortgagee—Covenant—Validity.*—An agreement by the mortgagor reserving to the mortgagee a right of pre-emption in case of sale, is not contrary to public policy, and is valid and can be enforced against a purchaser with notice of the same. **HARIS PAIK v. JAHURUDDI GAZI, 2 C.W.N. 575.** [R., 24 M. 449.]

(78)—*Wajib ul-arz—Purchase of share subsequent to sale—Purchaser's right of pre-emp-*

Pre-emption—continued. *Vakil High Court,*—6.—**Right to pre-empt**—continued. *RAJARAM (Kash)*

tion.—Where there is a right of pre-emption under the *wajib-ul-arz* which a share-holder could claim and enforce in respect of a sale of property, a person purchasing the said share-holder's interest in the village subsequently to the sale, cannot claim and enforce pre-emption as his vendor might have done. **SHEO NARAIN v. HIRA, 7 A. 535, F.B.=A.W.N. 1885, 142.** [R., 125 P.L.R. 1901, 26 A. 389, 17 P.R. 1908=18 P.W.R. 1908=153 P.L.R. 1903, F.B., 133 P.R. 1907=84 P.W.R. 1907=88 P.L.R. 1908, F.B., 31 A. 623=6 A.L.J. 887=6 M.L.T. 352=3 Ind. Cas. 820; D., 20 A. 148, 7 O.C. 158.]

(79)—*Sale under the same deed to a stranger along with a co-sharer—Distinct specification of the shares sold—Right of the co-sharer vendee to pre-empt.*—The rule as to denying the right of pre-emption except as to the whole property sold, being founded on the principle, that, by breaking up the bargain, the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee, should be limited only to those transactions which, while contained in one deed, cannot be broken up or separated. Where, however, the sale deed contains an exact specification of the shares purchased and the price paid by the vendees, a co-sharer and a stranger, and the sale to the stranger is distinct and divisible, although contained in one deed, the reason of the rule does not exist. For, where the share of each purchaser and the price which he had paid for it are distinctly specified in the sale-deed, there is really no breaking up of the bargain, as understood in the law of pre-emption, if the purchaser is ousted from the specific share which he has individually purchased along with others under the same deed of sale. **SHEOBAROS RAI v. JIACH RAI, 8 A. 462=A.W.N. 1886, 214.** (5 A. 197, N.W.P. 1863, 53, N.W.P. 1870, 343, 4 A. 252, Diss.) [Appr., 19 A. 148.]

(80)—*Purchase by co-sharer of village land subject to pre-emption—Joining of stranger with co-sharer vendee, effect of, on rights of pre-emptor.*—Where in purchasing lands in a village subjected to rights of pre-emption, a co-sharer of the village associates with himself, in the purchase, a stranger to the village, in cases where from the sale-deed itself, it is possible to ascertain what is the share, area of the property or interest in the village, which the stranger has purchased, that share, area or interest alone can be the object of pre-emption in the suit by the pre-emptor. Where, however, the sale-deed does not, on the face of it, disclose the particular share or interest purchased by the co-sharer vendee on his own behalf, as distinct from the share or interest purchased by the stranger, then, the rule of pre-emption can only be enforced by treating the co-sharer vendee as if he were in the same position as the stranger in decreeing pre-emption against him. In such a case, the bargain made between the vendees and the vendor is one joint in all its incidents. **RAM NATH v. BADRI NARAIN,**

Pre-emption—continued.**— 6.—Right to pre-empt continued.**

19 A. 148 = A.W.N. 1897, 20. (8 A. 462, *Appr.*; N.W.P. 1860, 53, N.W.P. 1870, 343, 4 A. 252, *R.*) [*Diss.*, 48 P.R. 1907 = 81 P.L.R. 1908 = 107 P.W.R. 1907; *F.*, 19 A. 311; *R.*, 19 A. 324, 7 O.C. 22, 6 P.R. 1909 = 23 P.L.R. 1909 = 7 P.W.R. 1909.]

(81)—*Pre-emption—Nephew of co-sharer-vendee, a stranger under wajib-ul-arz—Joinder of nephew as co-vendee, effect of.*—A Muhammadan son not taking a vested interest in ancestral property on his birth, as a Hindu son does, the son of a Muhammadan co-sharer in the village would not, merely in virtue of his birth, become a co-sharer, within the meaning of the pre-emptive clause in the village *wajib-ul-arz*. He is only a "stranger" and his joinder as a co-vendee would vitiate a sale and let in other claimants for pre-emption. *MUSHTAQ AHMED v. AHMJAD ALI*, 19 A. 311 = A.W.N. 1897, 121. [*R.*, 25 C. 432.]

(82)—*Profits of property accruing between purchase and transfer to pre-emptor.*—The pre-emptive right which is declared in favour of a pre-emptor must be held to have existed and to have taken effect, from the date of the sale in respect of which the pre-emptive claim arose, and therefore, the person entitled to the profits of the property (the subject of pre-emption) from the date of sale to that on which it is transferred to the pre-emptor, is the pre-emptor and not the vendee. The vendee, therefore, cannot maintain a suit against the lambardar for such profits. *AJUDHIA v. BALDEO SINGH*, 7 A. 674 = A.W.N. 1885, 177. [*Not F.*, 8 A. 502; *Disappr.*, 12 A. 234, F.B.]

(83)—*Pre-emption, pre-emptor entitled to profits subsequent to his payment of price—Original vendee in possession not a trespasser till substitution by pre-emptor.*—A successful pre-emptor becomes substituted for the original transferee, and thus becomes entitled to the benefits of the transfer. So, such benefits cannot be claimed for any period antecedent to such substitution itself. The original vendee cannot, whilst he is in possession, be regarded as a trespasser, who would have no right to enjoy the usufruct of the property which he has purchased, nor would it be equitable to hold that the pre-emptor, before he has actually paid the price, should be entitled to the profits of the property, which he can take only upon duly making such payment. *DEO DAT v. RAM AUTAR*, 8 A. 502 = A.W.N. 1886, 149. [*Appl.*, 12 A. 234; *D.*, 32 A. 45 = 6 A.L.J. 966 = 3 Ind. Cas. 782.]

(84)—*Claim for pre-emption based on custom—Evidentiary value of old village wajib-ul-arz, how far affected by new revision of settlement.*—The absence of any mention, in respect of a custom of pre-emption, from the "memorandum of the village customs" prepared at a new settlement cannot be taken as establishing that such custom recorded in the old village *wajib-ul-arz* has either been abrogated or cancelled, or that

Pre-emption—continued.**— 6.—Right to pre-empt—continued.**

it has fallen into disuse. The inference—which might be drawn from one of the older *wajib-ul-arzes* being silent as to the existence of the custom of pre-emption—that the custom did not exist, or it would have been recorded, cannot be drawn from the mere omission to record such a custom in the memorandum made at a recent revision of settlement. *SADHU SAHU v. RAJA RAM*, 16 A. 40, F.B. = A.W.N. 1893, 200. [*R.*, 21 A.W.N. 29, A.W.N. 1905, 16 = 2 A.L.J. 6; *D.*, 25 A. 90.]

(85)—*Pre-emption suit—Wajib-ul-arz—Plaintiff ceasing to be co-sharer during pendency of suit—Effect.*—In a suit for pre-emption, if, after the institution of the suit and before decree, the plaintiff has, by virtue of a perfect partition of the mahal, ceased to be a co-sharer with the vendor in the mahal to which the property in suit appertains, his claim for pre-emption must be dismissed. *RAM GOPAL v. PIARI LAL*, 21 A. 441 = A.W.N. 1899, 63. (10 A. 472, *D.*) [*Appl.*, 26 A. 389 = 24 A.W.N. 68 = 1 A.L.J. 209; *R.*, 30 P.L.R. 1902 = 32 P.R. 1902, 125 P.L.R. 1901, 49 P.R. 1901 = 157 P.L.R. 1901, 24 A. 119, 25 A. 421, 7 O.C. 61, 2 N.L.R. 150, 48 P.W.R. 1907 = 124 P.R. 1907 = 3 P.L.R. 1907, 5 N.L.R. 136, 12 O.C. 229 = 3 Ind. Cas. 546, 91 P.R. 1909, F.B.; *D.*, 31 A. 111 = 6 A.L.J. 51 = 1 Ind. Cas. 819, 31 A. 530 = 6 A.L.J. 699.]

(86)—*Mortgage by conditional sale—Reg. XVII of 1806, record of foreclosure under—Suit for possession by mortgagee—Compromise and decree thereon—Mortgagee relinquishing part of property in suit—Suit for pre-emption—Right to sue, when arises—Price to be paid by pre-emptor.*—A mortgagee under a conditional sale took foreclosure proceedings under Reg. XVII of 1806, and the year of grace required by that Regulation having expired, a foreclosure proceeding was recorded, declaring the mortgage to have been foreclosed. Nearly three years afterwards, the mortgagee instituted a suit for the possession of the mortgaged property, which suit was however compromised, the mortgagee accepting a part of the property, and relinquishing the remainder, and a decree was given in terms of the compromise. Subsequently, a suit was brought against the mortgagor and the mortgagee to enforce pre-emption in respect of the whole of the mortgaged property, including the portion relinquished under the compromise. *Held* that, although on the expiration of the year of grace, the ownership of the mortgaged property vests absolutely in the mortgagee, even though he might not have obtained a decree establishing or declaring his right, and the date at which the conditional sale thus becomes absolute is the period of the accrual of pre-emption, yet foreclosure proceedings under the Regulation being of a purely ministerial character, are not conclusive or even *prima facie* evidence of foreclosure having been duly effected; that strict observances of the requirements of the Regulation are conditions precedent to the right of

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

foreclosure; that, in the present case, the plaintiff not having asserted or proved that all those requirements have been duly fulfilled, no foreclosure was shown to have taken place prior to the compromise; and that the plaintiff's right of pre-emption, thus accruing only from the date of the compromise, could extend only to the property to which the compromise related. (4 B.L.R. A.C. 219, 6 A. 344, D.; 5 I.A. 18, N.W.P. 1864, 624, 11 I.A. 186, 8 A. 388, R.) [Appl., 14 A. 405; R., 134 P.R. 1889, 63 P.L.R. 1902=48 P.R. 1902.] In the above case, the price payable by the pre-emptor was held to be the amount mentioned in the compromise. **AJAIB NATH v. MATHURA PRASAD**, 11 A. 164=A.W.N. 1889, 48. (A.W.N. 1887, 233, R.; 6 A. 344, D.)

(87)—*Pre-emption—Its legal character—Substitution and not re-purchase.*—The right of pre-emption is not a right of re-purchase from the vendor or from the vendee involving a new contract of sale. It is a right of substitution, the effect of which is to place the pre-emptor in the place of the vendee, in consequence of a legal incident of the sale itself, so as to entitle him to all the rights and subject him to all the obligations arising from the sale which gave rise to the right of pre-emption (*Mahmood, J.*). [F., 7 C.P.L.R. 117; Cons., 12 A. 234, F.B.; R., 8 A. 502, 49 P.L.R. 1902, 93 P.R. 1902, F.B., 76 P.R. 1902=113 P.L.R. 1902, 46 P.R. 1902, 8 O.C. 186, 141 P.R. 1907=93 P.W.R. 1907=57 P.L.R. 1908, 6 A.L.J. 966=3 Ind. Cas. 782=32 A. 45.] The history and nature of the right of pre-emption discussed by *Mahmood, J.* **GOBIND DAYAL v. INAYAT-ULLAH**, 7 A. 775, F.B.=A.W.N. 1885, 228. (N.W.P. 1874, 2, 28, N.W.P. 1875, 147, 1 A. 564, R.) [R., 9 A. 513, 12 A. 234, F.B.]

(88)—*Participator in appendages, neighbour—Support, right of.*—The owner of a servient tenement which has to receive and carry off the water from the roof of the disputed house has a right of pre-emption preferable to a neighbour whose house has to support the disputed house. The right of support is not an appendage to the property, but is included in the incident of neighbourhood. **RANCHODAS v. JUGALDAS**, 2 Bom. L.R. 41=24 B. 414.

(89)—*Price of the property and conditions of sale—Identical offer.*—The pre-emptor must be ready to pay the same price for the property and to give the same terms as the purchaser is shown to have given; this is not a mere formality but an essential going to the very root of the right of pre-emption. **BAI REWA v. DULABHDAS**, 4 Bom. L.R. 811.

(90)—*Suit for pre-emption based on decree for pre-emption in another suit.*—In order to claim a pre-emptive right, a person has to show that there has been an effective alienation of property in which he is interested. A right of pre-emption does not arise upon the transfer of property by virtue of a decree in a suit for pre-emption. The right is a right to step into

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

the shoes of a less qualified vendee or transferee, and, therefore, there must be such a person acquiring property by a contractual relation of such a transfer. **ABDUR RAZAQ v. MUMTAZ HUSAIN**, 25 A. 334=A.W.N. 1903, 63. [F., 1 A.L.J. 247; D., 7 O.C. 1, 7 A.L.J. 259.]

(91)—*Pre-emption—Right of—Wajib-ul-arz.*—Two joint owners of a certain zamindari share and sir land made a grant of the sir land to their step-mother for her maintenance for life, to revert to them after her death. Subsequently, the right of one of them in the zamindari except the rights in the sir, was sold in auction. After the death of the grantee, the sir land reverted to and was taken possession of by the son of that joint owner whose share was sold in auction. The latter sold a portion of it. Held that such a sale did not give rise to a right of pre-emption, as the vendor was not a co-sharer in the village, but merely a subordinate owner. **HUSAIN BAKHSI v. DAMAR SINGH**, 26 A. 547.

(92)—*Right of re-purchase, provided in conveyance—Covenant, personal or running with land—Rule of perpetuities.*—In a conveyance executed by plaintiffs in favour of first defendant's father, it was provided that in case he sold the property subsequently he would be bound to give preference to the plaintiffs, i.e., his vendors, to purchase the same for a certain sum, and on their refusal to accept the offer, he would be at liberty to sell the same to others. After his father's death, defendant No. 1, without offering to sell the land to the plaintiffs, though they were willing to purchase it, sold the same to defendants Nos. 2, 3 and 4, who had notice of the contract. Held, that the covenant was purely a personal covenant and could not bind the heirs of the person covenanting, and therefore the sale to defendants Nos. 2, 3 and 4 was not liable to be set aside. Held also that even assuming that the covenant was intended to be binding upon the heirs of the original covenantor, it was void in law for remoteness, inasmuch as it was not limited to any specific period (20 Ch. Div. 562, 16 Beav. 165, 53 Law Times 853, R.). **NOBIN CHANDRA SOOT v. NABAB ALI SARKAR**, 5 C.W.N. 343. (24 W.R. 321, R.) [R., 24 M. 449.]

(93)—*Transfer by decree—Right of pre-emption.*—A right of pre-emption does not arise upon a transfer effected by virtue of a decree, though the decree is passed upon a compromise. **INTIZAR HUSSAIN v. JAMNA PRASAD**, 1 A.L.J. 247. (25 A. 334, F.)

(94)—*Custom—Contract—Fresh settlement.*—Held, that, if a right of pre-emption was based on contract, it would cease, unless specially renewed, at a fresh settlement, but if based on custom, the burden of proof would be on the defendants to show that a custom proved to have once existed had come to an end. Mere purchase by strangers once or twice unopposed

Pre-emption—continued.—6.—Right to pre-empt—*continued.*

was insufficient. *BIRJANANDAN LAL v. MUSAMMAT KUNWARI*. A.W.N. 1906, 174=3 A.L.J. 561. (A.W.N. 1904, 128, R.)

(95)—*Pre-emption, suit for*—*Suit instituted after decrees in favour of other pre-emptors—Plaintiff no party to former suits—Suit maintainable—Nature of right of.*—Where a suit for pre-emption based upon the plaintiff's superior right of pre-emption is brought within limitation, after decrees have been made in favour of other pre-emptors, the plaintiff not being a party to those former suits, *held* that the suit is maintainable. The right of pre-emption is not a right of re-purchase, but a right of substitution for the original vendee. *RAJ NARAIN RAI v. DUNIYA PANDE*, 7 A.L.J. 259=5 Ind. Cas. 527=32 A. 340.

(96)—*Wajib-ul-arz, record of contract of pre-emption in, evidentiary value of*—*N.W.P. Land Revenue Act (XIX of 1873), s. 91.*—This suit was based on contract and custom as evidenced by a *wajib-ul-arz*, and the lower Court dismissed it on the ground that the contract in the document was not binding on the vendor defendant, as it did not bear his signature. Having reference to the public character of the document and the accuracy of its preparation, it was held that all share-holders, whether signing it or not, must be presumed to have assented to its terms. The record of the existence of a custom of pre-emption, made in a *wajib-ul-arz*, is sufficiently strong evidence to cast the burden of proving the contrary on those denying such custom; and, in the same manner, when it records a contract of pre-emption between the share-holders, there is a presumption that it is binding on all the share-holders, whether they happened to sign such entry or not. *MUHAMMAD HASAN v. MUNNA LAL*, 8 A. 434=A.W.N. 1886, 166. (2 A. 876, R.) [Not F., 4 O.C. 71; Appl., 12 A. 234; R., 25 A. 90=22 A.W.N. 207, 26 A. 549=A.W.N. 1904, 128.]

(97)—*Right of pre-emption as ground of claim and of defence*—*Civ. Pro. Code, 1877, s. 13, expl. II—Res judicata.*—Where the right of pre-emption, though available as a defence, was not pleaded in a former suit, a subsequent suit between the same parties to enforce such right would be barred under s. 13 of the Civ. Pro. Code, expl. II. (1 A. 75 and 1 A. 316, F., but doubted.) *NARAIN DAT v. BHAIRU BUKSHPAL*, 3 A. 189. [Overruled, 26 A. 61, F.B.=A.W.N. 1903, 106; R., 14 B. 31.]

(98)—*Rights of minor—Wajib-ul-arz.*—Although at the time of the preparation of a *wajib-ul-arz*, a co-sharer is a minor, and that document is not attested on his behalf by his guardian, he cannot be excluded from the benefit, of its provisions relating to pre-emption, the very object of which was to prevent the introduction of strangers. *LAL BAHADUR SINGH v. DURGA SINGH*, 3 A. 437.

Pre-emption—continued.—6.—Right to pre-empt—*continued.*

(99)—*Minority—Suspension of right until majority.*—A right of pre-emption accruing during minority cannot be kept suspended until the minor attains the age of majority. *MEER MURTAZA v. LALLA NURSINGH SUHAE*, 7 W.R. 86.

(100)—*Minor—Refusal of guardian to exercise right of pre-emption on behalf of minor—Effect of refusal on minor's rights.*—The guardian of a minor being fully competent to assert a right of pre-emption, and to refuse or accept an offer of a share in pursuance of such right so as to bind the minor, the guardian's acquiescence in the sale, if in good faith, and in the minor's interest, would be equally binding on the minor, since such an acquiescence would stand on the same footing as an express refusal to accept the property in pursuance of the pre-emptive right. *UMRAO SINGH v. DALIP SINGH*, 23 A. 129=A.W.N. 1901, 18. (3 A. 437, R.) [R., 35 C. 575.]

(101)—*Pre-emption—S. 13, Part I, Punjab Civil Code—Evidence.*—Where a mortgagor preferred to sell his property to one of the two putteedars who own lands adjoining the mortgaged properties, such a preference given by him cannot be questioned by the other putteedar, though of the same caste as the mortgagor. The decision of the lower Court was not opposed either to para 11, s. 13, Part I of the Punjab Civil Code or to the *Ikarnamah* of the Settlement. *BOLA v. MAHOMED BUKHSH*, 41 P.R. 1866

(102)—*Right of pre-emption—Permanent transfer—Pre-emption rules applicable to usufructuary mortgages, on stipulation to that effect in wajib-ul-arz.*—As has been ruled in 87 P. R. 1867, the right on which a plaintiff's claim for pre-emption is based ordinarily attaches only to permanent transfers of land and not to mortgages, which are fettered by no such restriction. In the present case, however, the claim of the plaintiff was based, not upon the general law, but upon the *wajib-ul-arz* of the village according to which the right of the proprietor to receive the first offer was extended to mortgages as well as to sales, and effect had to be given to the plain meaning of the words used in the *wajib-ul-arz* without regard to their real or supposed beneficial or detrimental effect in particular cases; and, consequently, plaintiff being a proprietor of the village and the defendant a stranger, the former, according to the stipulation in the *wajib-ul-arz* had the preferential right to the mortgage. *BUNSEE LALL v. BUNSEE AND SYED REHMUT ALI*, 4 P.R. 1869. [R., 84 P.R. 1869, 42 P.R. 1880, 103 P.R. 1885, 98 P.R. 1894.]

(103)—*Preferential right—Chukdaree tenure.*—In Mooltan while the *zemindar* is owner of the soil, the *chukdar* is owner of the well, and enjoys the right of arranging for the cultivation; and to the latter only belongs the right of

Pre-emption—continued.—6.—**Right to pre-empt**—continued.

repairing the old wall or replacing it by a new one. **NAWAB MAHOMED SURFURAZ KHAN v. DEWA MULL, 34 P.R. 1868.**

(104)—*Chukdars—General proprietor.*—Suit for pre-emption by co-sharers in a well in Mooltan District. *Held* that the right should be given to those having the mere immediate interest in the rights to be disposed of, and that regard being had to the nature of the tenure of Chukdars in the case of a share in a well have a preferential right of pre-emption over the general proprietor of the village who has no share in the well but merely the right of receiving a quit rent (*thuq zemindari*) for the whole well. **RUCKDOOM SHAH ALI MOHOMED v. COMUR ALI, 44 P.R. 1870. [D., 59 P.R. 1870]**

(105)—*Share-holders—Ground of preference—Possession of larger share.*—In a suit for pre-emption between two co-sharers of a well, the first Court decided that one of them had the preferential right on the ground of his being the largest share in the well. On appeal, it was held that, where both parties were share-holders, the fact of one being already a larger share-holder did not give him a preferential right over his fellow. **UMUR ALI v. MUKH DUM SHAH ALI MOHOMED, 59 P.R. 1870**

(106)—*Suit for pre-emption—Minor plaintiff Right claimed eight years after sale—Acquiescence by guardian—Punjab Civil Code, how far had the force of law.*—Where the right of pre-emption on the part of a minor was not asserted and no steps were taken to establish such claim till eight years after the sale when the plaintiff, being 12 years old, sued for the right, it was held that the suit was barred, as the silence of the legal guardian, the mother, in respect of this claim, for eight years, annulled the right. The Punjab Civil Code had not the force of law. It merely indicated the law and custom. **SADHU WAHAB v. ALADAD KHAN, 1 P.R. 1873.**

(107)—*Sale in execution—Claim for pre-emption—Division at instance of auction-purchasers—Plaintiff's claim not affected—Compensation to vendee making improvements in good faith.*—The claim for pre-emption in this case was made in May 1874, the sale of the property in execution having been held in June 1873. *Held* that a renunciation of the right to pre-empt cannot be inferred from the mere fact that the pre-emptor stood by from the sale in 1873 till 1874. The law allows to the pre-emptor the period of a year, and, although in other Provinces, he must pay in the money when an auction-sale of land has taken place in execution of a decree, making his claim on the day of the auction-sale, such law does not obtain in the Punjab. It was also held that nothing turned on the fact that the property was purchased as an undivided share but had since been divided off. For it was identically the same, and in one shape or other remained the subject as to which, within

Pre-emption—continued.—6.—**Right to pre-empt**—continued.

the year of limitation, a claim for pre-emption was made. Even where a claim for pre-emption is made out, it is open to the Court to award to the defendant vendee compensation for improvements made in good faith; in the above case, the lower Court was directed to find, *inter alia*, the expense of partition, costs of partition suits, etc. **FAIZ BAKHSH v. RAMJI DAS, 34 P.R. 1875. [R., 91 P.R. 1892.]**

(108)—*Suit for pre-emption—Purchaser and pre-emptor equally related to vendor—Act IV of 1872—Custom.*—In this suit for pre-emption, plaintiff, the purchaser, and defendant, the pre-emptor, were equally distant relatives of the vendor of the land and were also share-holders of the village in which the land lay. S. 14, cl. I of Act IV of 1872 had no application because that clause enacts that the right of pre-emption rests with co-sharers in the village in order of their relationship to the vendor. And, so far as such relationship went, the present plaintiff and defendant had an equal claim. The rules of pre-emption in villages must be taken from Act IV of 1872 and from that Act alone, unless a custom in variation of that Act be shown to exist and, in the present case, no such custom was proved. The law of pre-emption should not be deemed to be a general peculiar law and broad principle but, in all respects, to be peculiar to Muhammadan law and to village custom, and, in a case where both are inapplicable, no rule can be invoked to extend its application or rather to invent an additional rule for it. *Held* therefore that the plaintiff had no superior rights as against the purchaser, and as they were equally related to the vendor, the sale could not be cancelled at the suit of the plaintiff who had no superior right. **GAMI v. SABIB, 91 P.R. 1875. [R., 94 P.R. 1877; D., 111 P.R. 1901 = 18 P.L.R. 1902.]**

(109)—*Act IV of 1872, s. 13—Pre-emption—"Offer"—Notice of sale—Pre-emptor being judgment-debtor's muktear—Estoppel.*—A person who has been the muktear of the judgment-debtor and has been present at the sale of his property by public auction, is estopped from subsequently asserting his right of pre-emption as the notice of sale is a virtual offer within the meaning of s. 13, Act IV of 1872. **RULIA MALL v. DULO MAL, 7 P.R. 1876.**

(110)—*Act IV of 1872, s. 9—Huk biswadari, whether subject to right of pre-emption—Sale of huk biswadari to stranger—Right of pre-emption to relation.*—A *huk biswadari*, (an allowance payable at a fixed percentage upon the assessed revenue of village lands) can be considered "immoveable property" within the definition of the words given in s. 2, cl. 5, Act I of 1868, and consequently the right of pre-emption under s. 9, Act IV of 1872, extends to it. Where the plaintiff pre-emptor and the defendant vendee are both share-holders in the village, the relationship of the plaintiff to the

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

vendor of the *huk biswadari* gives him a right of pre-emption, in preference to the vendee who is not a relation. *GANGA RAM v. NAGIB KHAN*, 61 P.R. 1876. [*D.*, 40 P.R. 1904.]

(111)—*Sale by sharer to co-sharer in Khata—Right of superior proprietor Act IV of 1872, s. 14, cl. (2).*—Persons who hold and cultivate lands in the same *khata*, though they are not of the proprietary body of the village, are “landowners of the same subdivision of the village” within the meaning of cl. 2, s. 14 of Act IV of 1872, and a sale by a sharer of a *khata* of a portion of his lands in it to his co-sharer in the same *Khata* does not give the superior proprietor who receives a certain percentage of the *malikana*, any right of pre-emption, as the co-sharer who has a distinct proprietary right in the sub-division has a preferential right to that of the superior proprietor. *SOUDAGAR v. ILLAHI BAKSH KHAN*, 11 P.R. 1877.

(112)—*Punjab Laws Act (IV of 1872), s. 14, cl. 2—Sale of land in a patti—Joint right of pre-emption—Suit for pre-emption by some of several pattidars, maintainability of.*—The question in this case was as to the true construction of cl. 2 and of s. 14 of the Punjab Laws Act (IV of 1872), which provides that “if the property to be sold is situated within a village, the right to accept such offer belongs to the landholders of the patti of the village in which the property is situated jointly.” *Held* that in the right of accepting the offer which belongs to the pattidars jointly, there is involved a right on the part of every pattidar to accept the offer, and that the joint right thus regarded is not lost or destroyed by the refusal or omission of some of the pattidars to join the rest in the acquisition of the land offered: Where a land-owner in patti A in a village, having given notice under s. 13 of Act IV of 1872, to the other pattidars in the patti, sells his land in the patti to proprietors of another patti who are not relatives of the vendor, then a suit for pre-emption by some of the pattidars in patti A, who have not rejected the offer involved in the notice under s. 13, is maintainable under cl. 2 of s. 14. *Quære*—Whether, if a majority of the pattidars by some positive act assume to relinquish the right on behalf of all, the act of the majority can take effect so as to bind all to the prejudice of any one of those for whose joint benefit the provision of the law (cl. 2 of s. 14 exists.)? *RODEE v. KAKA*, 94 P.R. 1877. [*R.*, 17 P.R. 1884.]

(113)—*Custom—Pre-emption—Act IV of 1872—Suburbs of Delhi—Rights of second purchaser subject to those of pre-emptor.*—The custom of pre-emption was in this case found to prevail in the suburbs of Delhi. When the customary right of pre-emption described in Act IV of 1872 prevails, the second purchaser of property which is subject to the right of pre-emption takes a title from his vendor which is liable to

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

be defeated by a successful claim for pre-emption against the first vendor and purchaser; and the pre-emptor is entitled to follow the property into his hands without being bound to pay him the sum he may have paid as purchase money in excess of the original price. The compensation of the second purchaser is a matter to be settled between the second purchaser and his vendor, and not between him and the pre-emptor. *MUSSAMMAT SHAKRO v. MOLAR MAL*, 68 P.R. 1879. [*R.*, 146 P.R. 1883, 165 P.R. 1888, 103 P.R. 1889, 93 P.R. 1902, F.B., 120 P.R. 1906=55 P.L.R. 1907, 3 P.R. 1907=3 P.L.R. 1908; *D.*, 20 P.R. 1897, 73 P.R. 1898.]

(114)—*Act X of 1877, s. 32—Misjoinder—Proprietors without joint right of pre-emption—Single suit not maintainable by, as co-plaintiffs—Procedure.*—Single suit for pre-emption by two proprietors in a village. Each of them was entitled to claim pre-emption on the sale in question, but they had distinct causes of action and had no joint right of pre-emption so as to enable them to institute a single action as co-plaintiffs. *Held*, however, that the suit ought not to have been dismissed for that reason. The proper course would have been for the first Court, when the error in the frame of the suit was brought to its notice, to order the name of one of the plaintiffs to be struck out under s. 32 of the Code, instead of proceeding to investigate the case upon its merits. *BARU MUL v. RADHA KISHEN*, 3 P.R. 1881. [*F.*, 29 P.R. 1894; *R.*, 29 P.R. 1892; 102 P.R. 1894.]

(115)—*Pre-emption—Undivided property—Co-sharers with equal rights—Wajib-ul-arz, construction—Custom—Preference of relatives.*—The property to which this suit for pre-emption related was admitted jointly undivided property in which the claimant and the purchaser, as co-sharers, had an equal right under cl. (a), s. 12 of the Punjab Laws Act. Plaintiff however, as a near relative of the sellers, claimed the right by reason of a special custom which gave relatives a preferential claim. In evidence of the above custom, plaintiff relied on an agreement in the Administration paper that any one who wishes to sell a share in a well must offer it to a co-sharer, and, if the near co-sharer (*hissadar karib shurka*) does not purchase, he must then offer it to the sharers in other wells. He contended that the introduction of the word *karib* proved the preferential right of the relatives. *Held* that the contention was unsustainable. *SUKHA v. MURAD*, 16 P.R. 1881. [*R.*, 94 P.R. 1904=103 P.L.R. 1904; *D.*, 17 P.R. 1905.]

(116)—*Right of pre-emption—Rival claimants—Rival suits—Waiver—Estoppel—Shares to be allotted to claimants—Act IV of 1872, s. 12—Act XII of 1878—Election by vendor.*—A previous suit for pre-emption had been brought by the defendants in the present case, four days before the institution of the present suit

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

against them. The present plaintiffs were two sons of one U by one of his wives while the the plaintiffs in the former case were three sons of the same father by another wife. They claimed by pre-emption as being co-proprietors in the village with the vendor. With regard to the plea that the plaintiffs had forfeited their right to pre-emption by acquiescence in the sale, they contended that there had been no waiver of their right of pre-emption as against the purchaser and nothing in their conduct to estop them from enforcing it. *Held*, that mere willingness to acquiesce in a sale, unaccompanied by any waiver or any conduct which would operate as an estoppel, would not bar a claim to pre-emption. In this case all that was shown was that both sets of plaintiffs were aware of the sale, and that the present plaintiffs probably would not have come forward to claim pre-emption had not their brothers first done so, but brought their suit immediately after they learnt that the other suit had been instituted. Nor had any facts been found by the first Court which could be construed as amounting either to a waiver or an estoppel. On the question as to share to which the present plaintiffs were entitled, the Chief Court held that, because, of the five brothers, two sued in the present and three in the other suit, the correct principle would be to give each brother who was a party to either of the suits an equal share, just as would have been the case if all the five had brought separate suits. On this principle, the plaintiffs' share would be two fifths unless their right of pre-emption could be established to be superior to that of their brothers. It was also contended that the plaintiffs' right was superior because, under the last clause but one of s. 12 of the Punjab Laws Act, as amended by Act XII of 1878, the vendor had the right to determine, between two persons equally entitled to pre-emption, which of them shall exercise the right, and he had preferred the plaintiffs under such right. *Held*, that, though the clause above-mentioned would have enabled the vendor, before the sale was completed to determine which of two persons claiming pre-emption on the same grounds and with equal rights should be allowed to purchase, it cannot be properly construed as giving him any right after he has parted with the property, to elect between two competing claimants to pre-emption. **KARIM BAKSH v. KHUDA BUKSH, 20 P.R. 1881. [R., 82 P.R. 1884; 29 P.R. 1892; D., 102 P.R. 1881, 111 P.R. 1901=18 P.L.R. 1902, 43 P.R. 1903=92 P.L.R. 1903.]**

(117)—*Suit for pre-emption—Mortgage of land in suit to pre-emptor by defendant-purchaser for paying purchase-money—Plaintiff's right not reserved—Waiver—Estoppel.*—In this suit for pre-emption, the defendant vendee pleaded that he had mortgaged the land in suit to the plaintiff for the very purpose of paying the purchase-money to the vendor. The Chief Court was of opinion that the above

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

mortgage deed *prima facie* estopped the plaintiff from demanding pre-emption. He had accepted the document as a valid mortgage of the property of the defendant and that, in the absence of any reservation at the time of the acceptance of the deed, he must be held to have waived his right of pre-emption. Plaintiff, however, urged that there was evidence that he did expressly give notice to the defendant that, in entering into the mortgage transaction, he did not abandon his own right of pre-emption. Unable to record any finding as to the truth of the plaintiff's assertion, the Chief Court reversed the decision of the lower Court and remanded the case, directing that, on taking further evidence, if any, that Court will determine the issue whether, at the execution of the deed of mortgage, plaintiff gave notice to the defendant that he reserved his right to claim pre-emption of the land thereby mortgaged. **ABDULLA v. BISHEN DAS, 22 P.R. 1881.**

(118)—*Steps by mortgagee for foreclosure under Reg. XVII of 1806—'Proposing to foreclose'—Act IV of 1872, ss. 13, 14—Notice under s. 14—Person having right of pre-emption if entitled to notice.*—In a case to which Act IV of 1872 applies, a mortgagee taking measures under Reg. XVII of 1806 towards foreclosure, should be deemed to be "proposing to foreclose a mortgage", within the meaning of s. 13 of that Act, and is bound to give notice of the amount due under the mortgage to the person having the right to redeem, under s. 14. It is not necessary that notice of the foreclosure proceedings should be served upon the person having the right of pre-emption, although, if, being aware of the fact that the mortgagee was engaged in foreclosure proceedings, and having had such notice from the mortgagee, he refused to avail himself of the implied offer of redemption, he could not afterwards maintain a suit against the mortgagee to enforce his right of pre-emption. **HANSRAJ v. SAIDA, 35 P.R. 1881. [R., 155 P.R. 1882.]**

(119)—*Application for revision dismissed for default—Petition for re-hearing not correct procedure—Fresh application for revision—Order passed prior to Act XII of 1879—Appeal filed after Act.*—This application was for the re-hearing of an application for revision, which had been dismissed for default, and, such an application was held to be not the correct mode of procedure, a fresh application for revision being the proper course. The order of which revision had been asked for was an order refusing to hear an appeal against an order refusing to allow the re-hearing of a case decided *ex parte*. The Commissioner considered that no appeal lay to his Court as the order was passed before the commencement of the Amending Act (XII of 1879) under which an appeal was allowed. *Held* that the law governing an appeal is the law in force when it was instituted, and, as at

Pre-emption--continued.**—6.—Right to pre-empt**--continued.

its institution, the present appeal was admissible, the Commissioner was bound to hear and dispose of it. **COURT OF WARDS v. FATTEH SINGH**, 75 P.R. 1881. [F., 34 P.R. 1885, 121 P.R. 1885; R., 12 P.R. 1900, 54 P.R. 1901, 97 P.R. 1907=3 M.L.T. 199, 121 P.R. 1907, 46 P.R. 1909, 1 O.C. 254.]

(120)—*Pre-emption—Rival claimants with equal rights—Separate suits—Decree obtained by plaintiff against purchaser and defendant—Decree obtained by defendant against purchaser alone—Superior diligence—Claim to equal shares.*—A and B had equal rights of pre-emption in respect of the sale of a house to C. A obtained a decree for pre-emption in respect of the whole house against B and C. During the pendency of this suit, B brought a suit for pre-emption against C alone, and also obtained a decree for the whole house. B then claimed an equal share with A in the house in suit, on the ground that each of them was found to have, as neighbours, equal rights of pre-emption as against C. *Held*, that A was entitled to the whole house, even assuming the rights of A and B to have been, in the first instance, equal in respect of the purchase of the whole house. There was not even an allegation that any custom prevailed in the locality under which rival claimants to pre-emption of a house are entitled to demand equal division of the property between them. A by superior diligence in asserting his right, got a decree against C and B for the whole house, whereas, as against A, B's decree against C alone could be of no avail, and there was therefore no ground for giving B half of the house. **MOKHAM DIN v. KARIM-ULLAH**, 102 P.R. 1881. [F., 83 P.R. 1888; R., 43 P.R. 1903, 88 P.R. 1908=4 Ind. Cas. 920=28 P.L.R. 1909=154 P.W.R. 1903, 90 P.R. 1909=159 P.W.R. 1908=4 Ind. Cas. 179; D., 29 P.R. 1892, 139 P.R. 1894.]

(121)—*Suit for pre-emption—Special custom—Full proprietor's claim to pre-emption if superior to that of Malik habza—Land owner in the patti comprising land sold, preferential right of.*—The question in this case was whether, among the Rajputs in the Rawalpindi District, one of the original superior proprietors can sell his land to a kamin holding land as a *malik kabza* or whether the other Rajputs, original proprietors, have a right of pre-emption. In this case, plaintiff was urging his claim throughout on the ground that he was one of the superior proprietors and defendant only a *malik kabza*, but it was held that he would be entitled to a right of pre-emption on the above grounds only on some well established custom. It was found that there were no instances where the claim to pre-emption of a full proprietor was held to be superior to that of a *malik kabza*, but, that, in the absence of evidence to the contrary, the custom of the village in respect to pre-emption may be taken to be that described in the provisions of the *wajib-ul-arz*, according to which the plaintiff had a superior

Pre-emption--continued.**—6.—Right to pre-empt**--continued.

right to the vendees in the present case, inasmuch as he was a land owner in the patti in which the land in dispute was situated, whereas the vendees were land owners of a different patti. **LAL KHAN v. NAJIB ULLA**, 14 P.R. 1882. [R., 13 P.R. 1885.]

(122)—*Pre-emption—Custom—Kanakbandi suburb of Amritsar*—In the Kanakbandi subdivision of the City of Amritsar, the custom of pre-emption does not exist. **LABHU SINGH v. GURDITTA**, 46 P.R. 1882 [R., 140 P.R. 1906=95 P.L.R. 1907; 9 P.R. 1909=19 P.W.R. 1909=1 Ind. Cas. 438, 13 P.R. 1907.]

(123)—*Undivided holding, part being joint property of pre-emptor and purchaser—Joint right of pre-emption—Act IV of 1872, s. 12.*—This was a suit for pre-emption. The first Court found that the sale was of one fourth share in an undivided holding half of which was joint property of the plaintiffs and the purchaser. The right of pre-emption was therefore a joint right of the plaintiffs and the purchaser, and, by buying a share the purchaser exercised their rights as well as his own. The last clause of s. 12 of the Punjab Laws Act as amended by Act XII of 1878 was, under the circumstances, inapplicable. The plaintiffs were therefore entitled to treat the purchase as made for themselves and the purchaser jointly, and to claim half on payment to him of half the price. **AHMED DIN v. MUSST. HASSO**, 54 P.R. 1882. [Overruled, 94 P.R. 1904, F.B.; R., 87 P.R. 1894, 111 P.R. 190=18 P.L.R. 1902, 83 P.R. 1907=10 P.L.R. 1907; D., 17 P.R. 1884, 69 P.R. 1893.]

(124)—*Custom of pre-emption—Claimants related to vendor, right of pre-emption of preferential to that of purchaser not related to vendor.*—Found on the evidence that there was a custom which gave the plaintiffs, on the ground of relationship to the vendor, a preferential right of pre-emption as against a purchaser who, although a joint-owner in the joint Khata, was not related to the vendor, **NIHAL SINGH v. IWAN SINGH**, 56 P.R. 1882. [R., 13 P.R. 1885.]

(125)—*Transferable right of occupancy, right of pre-emption claimable on—Punjab Laws Act, s. 12—Order in which right of pre-emption is claimable—Tenancy Act, s. 34, landlord not exercising right conferred on him by persons entitled to claim pre-emption, on.*—The question raised by this appeal was whether, on the sale of a transferable right of occupancy, the right of pre-emption can be claimed by any one not belonging to the classes specified in the last clause of s. 12 of the Punjab Laws Act. *Held* that, whilst the last clause of s. 12 gives a preference, in case the landlord does not exercise the right conferred on him by s. 34 of the Punjab Tenancy Act to persons belonging to the 6th and 7th of the classes mentioned in s. 12 over all others, it does not wholly exclude the operation of the earlier part of the section

Pre-emption - continued.**—6.—Right to pre-empt—continued.**

which states the order in which, in the absence of custom to the contrary, the right of pre-emption shall be claimable. There are no words in the section to indicate that, in default of a claim by the landlord, only persons belonging to the 6th and 7th classes above specified and no others will be entitled to claim pre-emption. **HAZARI v. ISA, 106 P.R. 1882.** [R., 43 P.R. 1892, 87 P.R. 1901=146 P.L.R. 1901.]

(126)—*Suit for pre-emption—Act XII of 1878, s. 13—Written notice—Plea of verbal offer and refusal—Waiver.*—This was a suit for pre-emption with respect to a sale subject to the provisions of Act XII of 1878. Admittedly no written notice such as that required by s. 13 of the Act was given to the plaintiffs, but it was pleaded that a verbal offer was made to them which they refused. The Courts below finding the offer and refusal proved, dismissed the suit. *Held* that, in the absence of some positive act of waiver on the part of the pre-emptor discharging the vendor from the obligation, imposed on him by the law, of giving the pre-emptor formal written notice of the intended sale, the mere refusal to accept an oral offer would not constitute a sufficient defence to an action by the pre-emptor to enforce his legal rights. **KARM KHAN v. JANG BAZ KHAN, 112 P.R. 1882.** (52 P.R. 1880, F.) [R., 100 P.R. 1885, 24 P.R. 1887, 1 O.C. 254, 22 P.R. 1901=86 P.L.R. 1901.]

(127)—*House property in town of Guzarat—Right of pre-emption—Relationship—Custom.*—In this case, it was held that though there was reason to believe that the plaintiff pre-emptor was distantly related to the vendor in the male line, there was no proof of any custom by which relationship would confer a right of pre-emption in respect of house-property in the town of Guzarat. **NURDIN v. NIZAMDIN, 113 P.R. 1881.** (83 P.R. 1880, R.)

(128)—*Suit for pre-emption—Custom—Wajib-ul-arz—Biradaran Hakiki, meaning of.*—The wajib-ul-arz in this case showed that the right of pre-emption according to the custom prevailing in Mouza Hissar accrued in the first instance to own brothers (Biradaran Hakiki), of the vendor and, in default of them, to the proprietors in the village. The first Court was therefore right in having disposed of the case with reference to the custom correctly described in the *wajib-ul-arz*, and s. 12, Act IV of 1872, lays down that the subordinate clauses of that section are only applicable in the absence of custom. It was contended for the respondents that, though they were not own brothers of the vendor, they were nevertheless collaterals, and that, under the right construction of the expression *Biradaran Hakiki*, collaterals should be included, but it was held that the plaintiffs were not shown to come within the description of *Biradaran Hakiki*, as used in the *wajib-ul-arz* and had no preferential claim to pre-emption over the vendee. **SOHAN LAL v. MULA, 114 P.R. 1882.**

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

(129)—*Act IV of 1872, s. 12 (b)—‘Order of relationship’, meaning of—More remote collaterals not on equal footing with those in nearer degree—Objection raised for first time in special appeal.*—In this case the plaintiff had obtained a decree for pre-emption in the lower appellate Court on the ground that he being the first cousin of the vendor, was nearer in the order of relationship than the purchaser, the son of a first cousin, and that he had therefore a superior claim under the Punjab Laws Act. In appeal it was urged that the purchaser and the plaintiff must be regarded as equally related to the vendor, because by custom, they would succeed to his inheritance in equal shares. No custom as to pre-emption had been pleaded which would make the right of pre-emption devolve otherwise than in the manner prescribed by s. 12. *Held* that the lower appellate Court was right. (65 P.R. 1878, F.) It was however urged at the hearing that s. 12 would not apply as the village was not shown to be “held on ancestral shares.” This point, however, was not raised by the defendant in either of the Courts below, nor set forth in his memo of appeal, and could not therefore be entertained. **JAWAHIR SINGH v. NAND SINGH, 117 P.R. 1882.** [Overruled, 74 P.R. 1906.]

(130)—*Katra Parja in Amritsar—Custom of pre-emption—“Sub-division,” meaning of, in Act IV of 1872.*—The word “sub-division,” as used in s. 11 of Act IV of 1872 is intended to refer to main divisions or quarters of the town or city well-known and recognised, and not merely to lanes or streets therein. The term would include what is known as *muhulla* and a *katra* in Amritsar which is a sub-division in the city within the meaning of s. 11 of Act IV of 1872. On the question whether the right of pre-emption existed in the sub-division of the city of Amritsar in which the property purchased by the appellant was situate, the Chief Court, upon a consideration of the whole of the evidence, came to the conclusion that the right of pre-emption existed in the *katra* where the house in dispute was situate. **SOHAVA MAL v. CHATTU MAL, 154 P.R. 1882.** [R., 29 P.R. 1888, 44 P.R. 1903=75 P.L.R. 1903, 99 P.R. 1906=130 P.L.R. 1906, 140 P.R. 1906=95 P.L.R. 1907, 6 P.R. 1907, 9 P.R. 1909=1 Ind. Cas. 438.]

(131) — *Pre-emption — Pre-emptor’s house being opposite to house sold—Custom—Burden of proof.*—The house of the plaintiff in this suit for pre-emption was separated from the house sold by a blind lane, and faced it, while one of the purchaser’s houses adjoined the plaintiff’s on the same side of the lane. Plaintiff based his right of pre-emption upon the fact that his house faced the one sold. Under the provisions of s. 11 of Act IV of 1872, the plaintiff not only had to prove the existence of the right of pre-emption in the sub-division of the city in which the property was situate, but he had likewise to prove that, according to the conditions in

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

which such right was customarily exercisable, he had a preferential claim. *Held* that, assuming that the right of pre-emption prevailed generally in the mohulla where the house in dispute was situate, the plaintiff had failed to prove any such special custom as was set up by him, having regard to the relative positions of the plaintiff's and purchaser's houses. **MEH-TAB ROY v. AMIR CHAND, 189 P.R. 1882.** [R., 103 P.R. 1889, 17 P.R. 1903=70 P.L.R. 1903, 6 P.R. 1905=19 P.L.R. 1905, 68 P.R. 1906=123 P.L.R. 1906, 47 P.R. 1907=68 P.L.R. 1908.]

(132)—*Pre-emption—Presumption—Punjab Laws Act, s. 10—Deed of sale purporting to transfer right of occupancy—Right of occupancy created by contract—Act XXVIII of 1868, s. 5—Agreement between landlord and tenant excluding operation of s. 5*—In this case, the proprietor of the land in suit transferred, by way of sale, a right of occupancy to the defendant who was then cultivating the land as a tenant-at-will. The plaintiff, a proprietor and *lambardar* in the village brought the present suit to enforce his right of pre-emption in respect of the right of occupancy sold. The main question for decision was whether the transaction was of such a nature as to give a right of pre-emption. This depended on whether the deed which purported to be a sale to the tenant at will of a right of occupancy in the land was a conveyance of a transferable right of occupancy. The deed simply purported to give him a right of occupancy and was silent as to whether that right was transferable or not, and to determine the latter question it was necessary to refer to the provisions of the Punjab Tenancy Act, s. 34, and as a right of occupancy created by a contract is not a right of occupancy under s. 5 of that Act, the case was held to be governed by the last clause of that section. A tenant falling under that clause could not transfer his right, whatever that may be, without the previous consent of his landlord, and if he attempts to do so, the transaction is, as against the proprietor, void, and conveys no rights to the transferee as against the proprietor. Such a tenant, therefore, in the absence of an agreement between him and the landlord excluding the operation of s. 34, can have no transferable right, i.e., he cannot effect a transfer as of right, but only with his landlord's previous consent. No presumption in favour of the right of pre-emptor, therefore, arose under s. 10 of the Punjab Laws Act, and as no custom giving such right in a case like the present had been proved, the suit was dismissed. **JEHANA v. CHOWDRI JIWAN KHAN, 196 P.R. 1882.** (55 P.R. 1879, R.) [R., 120 P.R. 1883, 179 P.R. 1888, 43 P.R. 1892, 136 P.R. 1907, 37 P.R. 1911=10 Ind. Cas. 4=104 P.W.R. 1911=121 P.L.R. 1911.]

(133)—*Pre-emption on ground of relationship—Custom of Jalandhar City.*—Relationship is by custom, a ground for claiming pre-emption in the City of Jalandhar, and takes prece-

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

dence of other grounds such as vicinage, &c. **ATA MAHAMMAD v. HARDIT MAL, 12 P.R. 1883.** [R., 70 P.R. 1902=117 P.L.R. 1902; D., 53 P.R. 1888.]

(134)—*Pre-emption—Houses on village site—Custom—Relationship whether ground for claiming such right.*—Found that there was a right of pre-emption by custom in regard to houses on the village site (of Naushahrab Panwan) held on a *bhaiachara* tenure, and that by custom relationship formed a ground for claiming such right of pre-emption. **PIRBU v. SAWAN, 40 P.R. 1883.** [Appr., 69 P.R. 1885.]

(135)—*Pre-emption—Custom—Wajib-ul-arz—Sales of land without assertion of right of pre-emption—Effect*—Where the *wajib-ul-arz* prepared at the settlement (some 12 or 14 years ago) recorded that the custom of pre-emption existed in a village, it was not enough to show that some sales had taken place which were not objected to, for it was discretionary with the co-proprietors to object or not, and their mere acquiescence in previous sales did not imply that the custom which would have entitled them to object to the sales and to claim the benefit for themselves had been abrogated. **SAMAND KHAN v. MAHTABA, 48 P.R. 1883.** [Appl., 16 P.R. 1901=78 P.L.R. 1901.]

(136)—*Sale of land to pre-emptor and strangers—Suit by another pre-emptor to set aside sale to strangers.*—The principle that the pre-emptor is bound to take up the whole bargain is a principle which may be admitted to the extent that the pre-emptor cannot omit to claim any portion of the property comprised in the bargain to which his right of pre-emption extends, but it cannot, consistently with the provisions of Act IV of 1872, be held to oblige him to claim the whole property sold when his right of pre-emption extends over only a portion of such property. A sold certain land by a single conveyance to three different sets of people, viz., to K, the three sons of I, and two sons of G, in equal shares. Plaintiffs, the collaterals of the vendor, sued for pre-emption in respect of two-thirds of the land sold, stating that they and the sons of G had equal rights of pre-emption, and that the other two sets of purchasers were strangers. *Held*, that as it was not shown that the plaintiffs had waived any rights which they possessed or acted otherwise than in good faith, they had a right to set aside the sale of the two-thirds of the land which had been purchased by the two sets of purchasers K and the sons of I. **KAIM v. AMBIA, 44 P.R. 1883.** (107 P.R. 1882, R.)

(137)—*Act IV of 1882, s. 14 (as amended by Act XII of 1878)—Payment or tender—Expression of willingness to pay fair price whether equivalent to tender.*—The mere fact that in a plaint instituted by the pre-emptors before a final sale was completed by the vendor, there was an expression of their willingness to pay

Pre-emption—continued.—6.—**Right to pre-empt**—continued.

a fair price, cannot save the plaintiff (the purchaser of their rights of pre-emption) from the loss of his pre-emptive right, unless he can show that he himself or the persons through whom he claims, made an actual payment, tender, or deposit within three months of the notice served upon him, as such expression of willingness cannot be regarded as equivalent to either *payment* or *tender* within the meaning of s. 14 of Act IV of 1872; for in order to constitute a *tender*, there must be actual production of the money, unless the production is dispensed with by an express declaration or equivalent act of the creditor. **ALLAH BAKSH v. RAHIM BAKSH, 46 P.R. 1883.**

(138)—**Pre-emption—Sale to one of two persons equally entitled to pre-emption—Assertion of right by the other—Custom—Act IV of 1872 (Amended by Act XII of 1878), s. 12.**—The last clause but one of s. 12 of Act IV of 1872 (as amended by Act XII of 1878), which definitely lays down that when it has been decided, whether by custom or law, that two persons are equally entitled to pre-emption, the seller is entitled by law to choose which shall exercise the right, is not governed by the words "in the absence of a custom to the contrary" which occur in the first sentence in s. 12. *Held*, therefore, that where a land was sold to one of two persons who are equally entitled to pre-emption, the other could not claim pre-emption by urging that there was a custom in the village to divide amongst the pre-emptors the land in regard to which the right of pre-emption arose. **JOHAR SINGH v. MANGAL SINGH, 117 P.R. 1883.** [*R.*, 94 P.R. 1904=103 P.L.R. 1904; *D.*, 111 P.R. 1901=18 P.R. 1902.]

(139)—**Decree for pre-emption in respect of prior sale—Subsequent sale by purchasers at that sale to third party—Suit for pre-emption in respect of second sale.**—When a decree for pre-emption has been obtained in respect of prior sale, and has become final, a suit for pre-emption cannot be maintained in respect to a subsequent sale by the purchasers at the prior sale to a third party. **KARIM BAKSH v. GHULAM MUSTAFA, 146 P.R. 1883.** (68 P.R. 1879, *cited*.)

(140)—**Punjab Laws Act, s. 9—Adhlapi tenure—Sale—Whether subject to right of pre-emption.**—The transfer of half a well, with the land attached thereto, in *Adhlapi* tenure, i.e., in proprietary right in consideration of the transferee restoring a ruined well and paying a premium in cash, is a sale within the meaning of s. 9 of the Punjab Laws Act, so as to be subject to the rights of pre-emption, when the clause in the *Rivaj-i-am* contemplates claims to pre-emption with respect to contracts creating the *adhlapi* tenure; and a pre-emptor undertaking to carry out all the terms of the contract is entitled to a decree, putting him in the place of the *adhlapidar*. **MUL CHAND v. MANSA RAM, 157 P.R. 1883.** [*R.*, 111 P.R. 1885; *D.*, 88 P.R. 1901=145 P.R. 1901.]

Pre-emption—continued.—6.—**Right to pre-empt**—continued.

(141)—**Punjab Laws Act, s. 9—Adhlapi transaction—Pre-emption.**—An *adhlapi* transaction is a transfer which comes under the definition of a sale, when the meaning of the clause in the *riwaj-i-am* is that a suit for pre-emption would lie in the case of an *Adhlapi* transaction just as much as it would in the case of an ordinary sale, provided that the persons claiming pre-emption are willing to take up the *adhlapi* bargain on the same terms as has been agreed on between the co-sharer who has offered the bargain and the outsider who has taken it up. **GAMAN KHAN v. GHOLAM HUSAIN KHAN, 157 P.R. 1883, Note.**

(142)—**Pre-emption—Share holder of village and share holder of patti, rival claims of—Custom contrary to s. 12 of Punjab Laws Act.**—Found that a custom overriding the provisions of s. 12 of the Punjab Laws Act in regard to the order in which persons entitled to pre-emption may seek to enforce that right, exists in the village (of Baragon), which entitles a person who has purchased land in one patti, as a share-holder in the village, to resist a claim for pre-emption brought by share holder in another patti in which the land sold is situate. **NAWAB MUHAMMAD ALI KHAN v. MIRAN BAKSH, 189 P.R. 1883.**

(143)—**Purchase of land by pre-emptor and stranger jointly—Effect—Right of another pre-emptor as against joint vendees—Fixing of price in good faith—Market value.**—Where a proprietor in the same patti has joined in the purchase of land with a person who has no right of pre-emption, he cannot be allowed to rely on his own right to defeat the claim of another pre-emptor to purchase it, as he is entitled to no superior position, when the right is asserted, to that of his co-purchaser. [*F.*, 94 P.R. 1895, 48 P.R. 1907=81 P.L.R. 1908; *Appr.*, 100 P.R. 1900=11 P.L.R. 1901; *R.*, 69 P.R. 1893; *Cons.*, 69 P.R. 1898; *D.*, 83 P.R. 1893, 29 P.R. 1894.] If the payment by the vendee was no mere pretence, but was actually made, there being no arrangement that the money should be handed back out of Court or that the vendor should receive credit for it in any other way than as payment of the price of the land, it is impossible to hold that the price was not fixed in good faith simply because the Court thinks the land worthless, and it is only in case the price was not fixed in good faith that any question as to the market value of the land arises. Where the price fixed in a sale deed was fixed in good faith and actually paid, it is unnecessary for the Court to determine the market value of the land sold in that case. **IMAM-UD-DIN v. NURKHAN, 10 P.R. 1884.** [*F.*, 75 P.R. 1901=123 P.L.R. 1901; *Appr.*, 68 P.R. 1902=99 P.L.R. 1902.]

(144)—**Pre-emption—Mauza Karbans in Panipat—Special custom—Pre-emption in favour of near collaterals.**—In this suit for pre-emption in land situated in Mauza Karbans in the Panipat tahsil, the plaintiffs' claim was

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

based on their being more nearly related to the sellers than the purchasers. But it was found that there was no evidence of a customary right of pre-emption in favour of near relations over others who were not so nearly related. **DEBA v. RAM NATH, 11 P.R. 1884.**

(145)—*Punjab Laws Act (IV of 1872), s. 9—Exchange of one land for another, whether a sale giving rise to pre-emption.*—An exchange of one plot land for another cannot be regarded as a sale, so as to give rise to a right of pre-emption under s. 9 of the Punjab Laws Act as amended by Act XII of 1879. The result of holding that a right of pre-emption arises under that Act in respect of an exchange would be, not to transfer the bargain to another person willing to pay the same price, but to expose each party to the exchange to the risk of being obliged to enter into a contract quite different from what he intended. **UDE RAM v. BAKH-SHI, 12 P.R. 1884.** [*F.*, 111 P.R. 1885; *R.*, 29 P.R. 1893, 98 P.R. 1894, *F.B.*; *D.*, 54 P.R. 1889.]

(146)—*Punjab Laws Act (IV of 1872), s. 12 cls. (c) and (d)—Claim for pre-emption—Plaintiff and vendee equally entitled—Absence of joint claim on part of all shareholders—Plaintiff's individual claim unsustainable.*—In this suit for pre-emption both the lower Courts held that as the plaintiff and the vendee had equal rights in the putti in which the land sold was situate, the plaintiff, under cl. (c), s. 12, Act IV of 1872, was entitled to purchase the land jointly with the vendee. It appeared that there was not joint claim on the part of the share holders. The rest of the share holders had stood aside and the present claim was brought by one share holder only asserting his individual right, no claim having been brought by the share-holders jointly. Held under the circumstances, that the plaintiff's claim did not fall under cl. (c) but under cl. (d), giving a separate right to each landowner to accept an offer of sale, provided that no joint claim was made by the landowners. Consequently, the penultimate paragraph of s. 12 took effect and, as the vendor had elected to sell to defendant, plaintiff was not entitled to claim. **BHAG v. MUHAMMAD YAR, 17 P. R. 1884.** (94 P.R. 1877, 54 P.R. 1882, *R.*) [*R.*, 69 P.R. 1898; *D.*, 111 P. R. 1901=18 P.L.R. 1902.]

(147)—*Sale and gift—Pre-emption.*—Sales and gifts do not stand on the same footing. Because a man can gift away his land to his daughter to the prejudice of collaterals, it does not follow that he might dispose of it by sale. **LALU v. MUSSAMMAT LAL BIBI, 114 P.R. 1884.**

(148)—*Purchase by pre-emptor from purchaser—Right of inferior pre-emptor.*—Where a pre-emptor purchases the subject of pre-emption from the purchaser of the same who had purchased it from the owner, a pre-emptor with the inferior rights cannot enforce his right by suit against the said pre-emptor-purchaser on the ground that his

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

purchase was private. **AMIRULLAH SHAH v. TABE HUSSEIN, 138 P.R. 1884.** (106 P.R. 1880, *D.*) [*R.*, 26 P.R. 1908, 124 P.R. 1907=48 P.W.R. 1907=3 P.L.R. 1907, 91 P.R. 1909, 90 P.R. 1909; *F.*, 73 P.R. 1898.]

(149)—*Right of mosque to claim pre-emption.*—A mosque, as an institution has proprietary rights which it exercises through its guardians and as such it has a right to claim pre-emption on the ground of vicinage. **SHANKAR DAS v. SAID AHMAD, 153 P.R. 1884.** [*R.*, 10 P.R. 1886, 42 P.R. 1903=89 P.L.R. 1903; *Cited*, 100 P.R. 1885.]

(150)—*Bhular Jats of Kasur tahsil—Mortgage.*—There is no right of pre-emption regarding mortgages among Bhular Jats of Kasur tahsil. **NIHAL SINGH v. UTTAM CHAND, 20 P.R. 1885.**

(151)—*Next-door neighbour—Right to pre-empt—Sufficiency of ground—Onus.*—A next-door neighbour has a right of pre-emption and he who asserts the contrary and pleads a special custom, must prove it. **SHEIKH SHAHR YAR v. IMAM-UD-DIN, 33 P.R. 1885.** [*Cited*, 83 P.R. 1888, 53 P.R. 1888; *R.*, 7 P.R. 1907, 107 P.R. 1900.]

(152)—*Coverture—Malik gabza—Custom—“Ek juddi.”*—Where the plaintiff is a Mahomedan and vendor a Sikh, the plaintiff's family having been converted from Hinduism several generations back, the families being thus widely separated long ago, the plaintiff could not succeed as the “ek juddi” of the vendor. A malik gabza is for purposes of pre-emption a landholder under Act IV of 1872. **DESU v. JOWALA, 13 P.R. 1885.** (14 P.R. 1882, *cited and F.*; 56 P.R. 1882, *R.*)

(153)—*Adjoining house owner—Right—Jalalpur.*—There is a custom in Jalalpur, in Gujranwala District, by which an adjoining house owner has a right superior to that of others whose houses stand across the lane. **THAKUR DAS v. DIWAN CHAND, 56 P.R. 1885.** [*R.*, 109 P.R. 1900.]

(154)—*Wajib-ul-arz—Provision—Relations—Better right.*—If there is a provision in the *wajib-ul-arz* that where a land is disposed of, it must be first offered to near relations, the latter will have a preferential right of pre-emption. **NAJAF ALI v. KUTBU, 58 P.R. 1885.** [*Cited*, 17 P.R. 1905; *Overruled*, 74 P.R. 1906]

(155)—*“Sharkayan”—“Yak judi”—Proprietor and non-proprietor.*—In the absence of any custom a sharer in a village has a right of pre-emption as against a non-proprietor. “Sharkayan” means sharers, proprietors in the village “Yak judi” means the same. **DEVI DAS v. MOHKAM DIN, 69 P.R. 1885.** (40 P. R. 1883, *R.*)

(156)—*Proprietor of Dharmasalah—Right to pre-empt by—Drafting of a deed of sale by pre-emptor—No waiver.*—The proprietors of a

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

dharmasalah are not prevented from claiming pre-emption. The mere fact of a deed of sale being drafted by the pre-emptor, a professional petition-writer would not amount to waiver of his rights. **SHAH BODHRAJ v. SUNDAR SINGH, 100 P.R. 1885.** (153 P.R. 1884, 47 P.R. 1873, 52 P.R. 1880, 8 P.R. 1882, 112 P.R. 1892, *Cited.*) [R., 1 O.C. 254.]

(157)—*S. 9, Punjab Laws Act—Exchange—Right to pre-empt.*—In the absence of a custom to the contrary, exchange does not give rise to pre-emption under s. 9, Punjab Laws Act. **KHAIRULLA v. MIR HAMZA, 111 P.R. 1885.** (157 P.R. 1883, *Cited*; 12 P.R. 1884, *F.*) [R., 29 P.R. 1893.]

(158)—*Mohalla Dhilan, Peshawar—Custom of pre-emption—A resident of same village.*—Under the custom among the residents of Mohalla Dhilan, Peshawar, a resident of the Mohalla has a preferential right of pre-emption over a purchaser residing in another district who is also a mortgagee of the house in question. **GOBIND RAM v. SAYAD AHMAD, 10 P.R. 1886.** (153 P.R. 1884, *R.*) [*Cited*, 29 P.R. 1888; *R.*, 107 P.R. 1900, 68 P.R. 1906, 42 P.R. 1903=89 P.L.R. 1903.]

(159)—*Pre-emption extending to part only—Claiming right to whole—Objection, when to be taken.*—Where a plaintiff entitled to pre-empt in respect of a part only of the property claims pre-emption in respect of the whole transaction the defendant should urge his objection at the earliest opportunity. Else, the plaintiff will be allowed to succeed. **WARIAM v. DESU, 64 P.R. 1886.** (107 P.R. 1882, *F.B.*, *R.*) [*Not F.*, 89 P.R. 1905.]

(160)—*Kucha Sathan, Lahore—Mortgage—Pre-emption.*—Custom of pre-emption in favour of mortgages does not exist in Kucha Sathan, Lahore. **LAKHU MISSAR v. NARAIN DAS, 72 P.R. 1886.**

(161)—*Gurudaspur—Vicinage—Right.*—Vicinage is one of the chief grounds for pre-emption in Gurudaspur. **RALLA RAM v. KALLAN KHAN, 108 P.R. 1886.** (97 P.R. 1880, *F.*) [*Cited*, 83 P.R. 1888; *R.*, 107 P.R. 1900, 109 P.R. 1900, 68 P.R. 1906, 47 P.R. 1907.]

(162)—*Vicinage—Custom—Paniput—Preference amongst neighbours*—In Paniput a custom of pre-emption resting upon vicinage exists. Under this custom a neighbour through whose gateway or over whose land the land sold is approached has a preference to one the back of whose house adjoins the land sold the approach being from a different side. **MUHAMMAD SALAMAT-UL-LAH v. JALAL-UD-DIN, 24 P.R. 1887.** [R., 1 O.C. 254, 71 P.R. 1905=9 P.L.R. 1905, 68 P.R. 1906, 47 P.R. 1907, 107 P.R. 1900; *Not Appr.*, 17 P.R. 1903; *Cited*, 83 P.R. 1888.]

(163)—*Co-sharer—Relation—Preference.*—A co-sharer in a well to which the land in dispute is attached has a superior right of pre-emption to an owner in the vendor's village who

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

is his relation. **KAHAN SINGH v. BARA SINGH, 30 P.R. 1887.** (103 P.R. 1885, *R.*) [R., 96 P.R. 1892.]

(164)—*Sale of "katras" in Naia Buzaar—Delhi—Custom.*—A claim for pre-emption on the sale of a "Katra" by reason of the house being contiguous in front to part of the katra sold will fail if a local custom attaching a right of pre-emption to sales of "Katras" is not proved. **NANNI MAL v. SHEO NATH, 64 P.R. 1887.** [*Diss*, 42 P.R. 1903=89 P.L.R. 1903; *R.*, 111 P.R. 1906, 120 P.R. 1906, 48 P.R. 1888, 17 P.R. 1895, 68 P.R. 1890, 116 P.R. 1908, 16 P.R. 1902=15 P.L.R. 1902; *Expt.*, 108 P.R. 1895; *Cited*, 29 P.R. 1888.]

(165)—*Jullunahur—Relationship—Neighbourhood—Reference.*—Even a near collateral as such has no preferential or even equal right of pre-emption to that of a neighbour. **SARBO-LAND KHAN v. ISMAIL, 53 P.R. 1888.** (12 P.R. 1883, 33 P.R. 1885, *R.*)

(166)—*Two suits for pre-emption—Vendee's status decided in one—His status in the later sale.*—Where two suits for pre-emption by different persons were brought in respect in two sales to a person and both were tried together, in one suit the defendant was not able to maintain the status claimed by him; he was not allowed to show in the other suit that his status was at least equal to that of the claimant as the decision in the first suit had gone to the root of his status and the plaintiff was allowed to take advantage of the benefit of that decision. **ZAHAR KHAN v. MUSTAJAB KHAN, 55 P.R. 1899.** [R., 141 P.R. 1907=57 P.L.R. 1908=93 P.W.R. 1907, 93 P.L.R. 1902, *F.B.*]

(167)—*Mortgage—Allegation that it is sale—Evidence—Proof.*—A mortgage was made by 1st defendant in favour of defendants 2 and 3. The plaintiff brought a suit for pre-emption on the allegation that the transaction was really a sale and the mortgage was drawn to conceal the real nature of the transaction and to defeat his rights of pre-emption. It was admitted that pre-emption did not attach to mortgages. *Held*, when the terms of the document do not satisfy its being treated as a sale, the plaintiff can only succeed by showing that prior to the mortgage, a sale had already been made and on the date of mortgage the mortgagor had no right to deal with the property at all. **CHOWDHRI ASA NAND v. MAMUN, 64 P.R. 1888.**

(168)—*Mooltan—Preference between front and back neighbours.*—There is no custom giving the owner of the house in front a preference over the owner of the house at the back. As between two rival claimants, one claiming superior right must show that he is so entitled by custom; in the absence of any such proof the claims would be regarded as equal, even though there may be considerations of equity and convenience in the one case more than in

Pre-emption—continued.**— 6.—Right to pre-empt—continued.**

the other. The procedure to be adopted in case of rival claimants explained. CHOWDHRI KHEM SINGH v. MUSSAMMAT TAJ BIBI, 83 P.R. 1888. (64 P.R. 1888, 97 P.R. 1880, 102 P.R. 1881, 33 P.R. 1885, 108 P.R. 1886, 24 P.R. 1887, R.) [*Appr. & F.*, 109 P.R. 1900; R., 26 P.R. 1907, 42 P.R. 1906, 47 P.R. 1907, 68 P.R. 1906, 85 P.R. 1905=151 P.L.R. 1905, 88 P.R. 1908, 107 P.R. 1900; F., 20 P.R. 1908, 67 P.R. 1906; Cited, 8 P.R. 1904, 17 P.R. 1903, 43 P.R. 1903=92 P.L.R. 1903, 44 P.R. 1903=75 P.L.R. 1903, 192 P.R. 1888; Disc., 88 P.R. 1905=179 P.L.R. 1905.]

(169)—*Right of a purchaser of a small site in the abadi—Meaning of "land holder" or "landowner" in s. 12, Punjab Laws Act.*—A servant with a right of occupancy does not by the purchase of a small site in the abadi become one of the village proprietors or a landholder within the meaning of s. 12, Punjab Laws Act, so as to claim pre-emption. Under s. 12, those entitled to pre-emption are those proprietors, generally tribesmen forming the proprietary body or *khewatdar*, men entered in the revenue records as assessed with a quota of the revenue and jointly and severally responsible to Government for the whole. PHALLU v. MUKARRAB, 153 P.R. 1888. [*F.*, 96 P.R. 1898.]

(170)—*Ludhiana—Vicinage—Owner of the house adjoining at the back and one having a common lane with vendor—Preference.*—There is no custom in Ludhiana by which an owner of a house opening into a lane, the private property of himself and the vendor, access to which place had been granted by the vendor to the vendee through his own house has a preferential claim to a person whose house adjoined the house sold at the back only. MUHAMMAD AZIM KHAN v. NABIR, 192 P.R. 1888. (83 P.R. 1888, R.) [R., 23 P.R. 1906; Cited, 17 P.R. 1903.]

(171)—*Contact between to houses at the back—Owning house in the street—Preference.*—There is no custom by which an owner of house in another street, whose contact with the house sold arose from their being back to back can be said to have a preferential claim to the vendee owning a house in the same street. JHANDU v. UMAR DIN, 17 P.R. 1889. [R., 12 P.R. 1904; D., 43 P.R. 1903=92 P.L.R. 1903.]

(172)—*Mouza Jamramwala—Village.*—Where both the vendee and the plaintiff are proprietors in *Mauza Jamramwala* in Mooltan, the plaintiff cannot be said to have a right of pre-emption because he owns lands adjoining the land sold unless and until a custom to that effect is proved to exist. SWAN MAL v. WASU RAM, 45 P.R. 1889. [*F.*, 77 P.R. 1906.]

(173)—*Mauza Gohana—Relationship and living in the same time, no grounds for pre-emption.*—The fact that the plaintiff is a relative of the vendee or has a house in the same street or lane is no ground for claiming

Pre-emption—continued.**— 6.—Right to pre-empt—continued.**

pre-emption. RUR SINGH v. TANSUKH RAI, 82 P.R. 1889. [D., 104 P.R. 1900; Cited, 43 P.R. 1903=92 P.L.R. 1903, 44 P.R. 1903=75 P.L.R. 1903.]

(174)—*Owning land in shamilat and owning land in the same taraf.*—In cases of pre-emption a person owning land in the same taraf in which the land sold was situated will be preferred to one who owns land in *shamilat*. BHAGAT HIBANAND v. LAL KHAN, 169 P.R. 1889.

(175)—*House adjoining at the back but opening into another mohalla—Batala—Vicinage custom of pre-emption.*—The custom of pre-emption by vicinages exists in Batala and an owner of a house adjoining the household at the back can claim pre-emption though it opened into a different mohalla. KARAM ILAHI v. ALI BAKHSH, 199 P.R. 1889. [Cited, 43 P.R. 1903=92 P.L.R. 1903.]

(176)—*Mortgage—Allegation that it is sale—Right to prove—Claim for pre-emption.*—Where a document purports to be a deed of gift or mortgage it is open to a person claiming pre-emption to prove that the transaction was in reality a sale and that the document was executed in order to conceal the real nature of the transaction and to defraud his rights of pre-emption. TARACHAND v. BALDEO, 117 P.R. 1890. [R., 78 P.R. 1904.]

(177)—*Pre-emption—P.L. Act—Transferable right—Occupancy right—Perpetual lease—"Transferable" defined.*—According to s. 10, P. Laws Act, the right of pre-emption will be presumed to exist in all village communities and to extend to all transferable rights of occupancy affecting such lands. This right applies to sales by occupancy tenants as well as to transactions under which proprietors create a right of occupancy in another for a consideration. A right of occupancy may be transferable either under a power to transfer given by the Tenancy Act or under agreement between landlord and tenant. *Semble*:—A perpetual lease does not give rise to a right of pre-emption merely on the ground that it amounts to a sale. NIHAL CHAND v. RAI SINGH, 43 P.R. 1892. [R., 8 O.C. 121; Cited., 136 P.R. 1907]

(178)—*Bhainazdiki—Collateral's widow—Wajib-ul-arz—Property once forming a portion of joint property.*—The widow of a deceased collateral does not come under the heading "*bhai na-diki*" who under the terms of the *wajib-ul-arz* are entitled to pre-emption. The circumstance that the property in question was a portion of what once formed a joint estate will not infer any prior right of pre-emption. BODI AND KALU v. MUSSAMMAT MAHTAB, 131 P.R. 1892. [R., 32 P.R. 1902=30 P.L.R. 1902, 44 P.R. 1900, 129 P.R. 1906.]

(179)—*Relationship, no ground for claiming pre-emption.*—Relationship to the vendor is no

Pre-emption—continued.**— 6. — Right to pre-empt—continued.**

ground for claiming a superior right of pre-emption in Mauza Bhopa Rai in Ludhiana District. *GAJJAN v. BHOPA*, 27 P.R. 1893. [Cited & F., 74 P.R. 1906; R., 44 P.R. 1907.]

(180)—“*Thullas*”—Subdivisions of the village—S. 12 (c) & (d) of Punjab Laws Act.—A person owning land in the same *thulla* in which the land sold was situate has a superior right of pre-emption to one not owning land in the same *thulla* but owning land in another *thulla* of the same patti, as “*thullas*” are subdivisions within the meaning of s. 12, cl. (c) & (d) of Punjab Laws Act. *UTTAM v. BUTA*, 69 P.R. 1893. (10 P.R. 1884, 44 P.R. 1892, R.) [Cited, 3 P.R. 1903=39 P.L.R. 1903.]

(181)—Non-proprietor—Right by vicinage—Onus.—Where a non-proprietary resident claims pre-emption of a house in the *abadi* on the ground of vicinage, he must prove affirmatively that he is so entitled by custom. *FAKIR CHAND v. SANGAT SINGH*, 85 P.R. 1893.

(182)—Land owners in patti and in *thulla*—Sub-divisions of a village.—Where a patti of a village is sub-divided into *thullas*, a *thulla* may be a sub-division of the village within the meaning of s. 12 (d) of Punjab Laws Act. *SUDDA v. MAJJA SINGH*, 76 P.R. 1894.

(183)—Size of property, nothing to do with right of pre-emption—Change of *tawda* into *Katra* or *Serai*—No plea.—The mere largeness in size of property in dispute or the smallness of the property owned by the plaintiff is not of itself a ground for refusing the right of pre-emption. In a suit for pre-emption, the plea that the property though originally *tawda* having a right of pre-emption attached to it has now been changed into *Katra* or *Serai* to which the right did not attach cannot prevail unless it is proved that there has been structural alteration to change it to a *Katra* and prolonged unmistakeable user of it as such. *MUSSAMMAT NUR JAHAN v. AZIZ-UD-DIN*, 108 P.R. 1895. [R., 2 P.R. 1903=53 P.L.R. 1903, 32 P.R. 1909, 120 P.R. 1906, 21 P.R. 1907, 96 P.R. 1910, 111 P.R. 1906.]

(184)—Construction of deed—Onus—Duty of Court.—Where a plaintiff sues for pre-emption on the ground that the transaction though a mortgage in form was in reality a sale, the Court must decide its real nature with all the available materials, and the onus of proving its real nature lies upon the plaintiff who must prove beyond any reasonable doubt that the transaction was intended to be other than what it purports to be. The circumstance that the conditions of the mortgage are so onerous as to exclude any possibility of redemption does not raise any presumption in plaintiff's favour. *JAGDISH v. MAN SINGH*, 100 P.R. 1895. [R., 78 P.R. 1904, 19 P.R. 1905=78 P.L.R. 1905; D., 145 P.R. 1906.]

(185)—“*Shikmiwa Jaddi*”—Proof by plaintiffs—Relationship.—Under the provisions of

Pre-emption—continued.**— 6.—Right to pre-empt—continued.**

wajib-ul-arz of a village, “*Shikmiwa jaddi*” were entitled to pre-emption. The onus in such a case lies upon the plaintiffs to show that they were *shikmi shariks* as well as *jaddis* of the vendor. Persons related to the vendor and descended from a common ancestor, the land being ancestral, have a preferential right of pre-emption to other land owners in the village but not related to him. *MOULVI ILAHI BAKSH v. KAKI*, 87 P.R. 1895. [R., 12 P.R. 1908; F., 89 P.R. 1905, 44 P.R. 1900.]

(186)—Purchase by persons with equal and inferior rights of pre-emption—Suit by pre-emptor.—Where certain vendees with rights of pre-emption equal to the plaintiff's right joined with themselves certain others having inferior rights in purchasing an undivided share of a village, held that the Punjab Laws Act 1872, recognises no equal or superior rights in a pre-emptor joining with a stranger in a joint sale, the plaintiff's right was superior to that of the vendees collectively. A sale of an undivided share in which the only specification is as regards the proportions in which the general vendees should be regarded as joint owners is bad in its entirety. *MURAD v. MINE KHAN*, 94 P.R. 1895. [R., 7 O.C. 22, 6 P.R. 1909=7 P.W.R. 1909; F., 48 P.R. 1907, 100 P.R. 1900.]

(187)—Persons entitled to enforce a pre-emption—Widow—Reversioners—Motive immaterial.—The person who can exercise the rights of pre-emption is the holder of the land for the time being even if that person be a widow with a life-interest. The motives which may actuate a plaintiff to claim pre-emption are immaterial. *AHSANULLA v. JOWAHIR LAL*, 87 P.R. 1896. [Cited, 10 P.R. 1902=172 P.L.R. 1901.]

(188)—S. 12, Punjab Laws Act, 1872—Object of “*Village Community*” in s. 10.—Meaning of s. 12 of Punjab Laws Act applies to the whole village as well as to parts of them. Its object is to declare the precedence of pre-emptors *inter se* and not in any way to restrict their right to the pre-emption of the sales of parts of, and shares in, villages. The word “*village community*” in s. 10 not only includes members of the proprietary body but also those dwelling within the village limits and whose rights and duties are as clearly defined as those of the proprietors. In such a community, the right of pre-emption can be exercised by all the members referred to in s. 12 of Punjab Laws Act. *HIRA LAL v. KHUDA BAKSH*, 27 P.R. 1897. [R., 21 P.R. 1906.]

(189)—Notice of proposal to sell to pre-emptor—Right of pre-emptor—Effect of notice.—An owner of land gave notice to the pre-emptor of his intention to sell at a certain price. The pre-emptor refused to accept it at that price but tendered a price which he considered to be the market value. On this tender being rejected by the owner he brought a suit to enforce a sale at the value tendered by him. Held, no suit

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

would lie, as there was no complete sale but merely a proposal liable to be revoked by the proposer at any time before acceptance. The effect of a notice of an owner's intention to sell is to reduce the period of limitation or to extinguish the pre-emptor's right if he refuses to buy at the stated price fixed in good faith but not to deprive himself of his right to realise for his property any price which the vendee is prepared in good faith to pay. **DEWAN CHAND V. GHULAM HUSSAIN, 30 P. R. 1897.**

(190)—*Kinds of vicinage—Burden of proof.*—Though vicinage confers a right of pre-emption there are different kinds of vicinage, one being superior to the other. A plaintiff who asserts that he has a superior vicinage, must prove his claim or allegation and the burden will in no way be shifted because the plaintiff denies the defendant's claim while the defendant admits the plaintiff's right but denies his superior right. **NAWAB MUHAMMAD MUMTAZ ALI V. KHAN ALI, 36 P. R. 1897.** [R., 47 P. R. 1907, 67 P. R. 1906; Cited, 43 P. R. 1903=92 P. L. R. 1903, 44 P. R. 1903=75 P. L. R. 1903, 17 P. R. 1903; D., 109 P. R. 1900.]

(191)—*Saini and Jat proprietors—Sub-divisions—S. 12, P. L. Act.*—Saini and Jat proprietors do not represent two distinct pattis or recognised sub-divisions within the meaning of s. 12, Punjab Laws Act, clauses (b) (c) & (d) of s. 12 in Punjab Laws Act, explained. **BIJA V. BISHEN SINGH, 45 P. R. 1897.**

(192)—*Sale of adna rights to ala proprietor taluqdar—Claim of adna proprietor of another patti.*—In cases of pre-emption for adna right in the patti, an adna proprietor of another patti will be preferred to a taluqdar whose sole interest in the village is the percentage on the income fixed as his due in the Settlement record. **SETH LAKSHMI CHAND V. NAWAB HAFIZ MUHAMMAD, 72 P. R. 1897.** [D., 40 P. R. 1904.]

(193)—*Agreement to sell—Pre-emption—S. 51, T. P. Act, 1882.*—A claim for pre-emption will not lie where there is only a contract to sell and not a sale. Under s. 51 of the Transfer of Property Act, 1882, a contract for sale of immoveable property does not of itself create any interest in or charge upon such property. **SHANKER DAS V. KAILASH CHANDER, 65 P. R. 1898.**

(194)—*Sale to two co-sharers and a stranger—Subsequent acquisition of stranger's right by a third—Suit for pre-emption by a fourth.*—Where two co-sharers and a stranger jointly purchased a property and the stranger's share was subsequently acquired by a third co-sharer a fourth co-sharer cannot succeed in a suit for pre-emption on the ground that at one stage a stranger had a share in the bargain and therefore the right of the three persons was vitiated. **MUGHAL V. JALAL, 69 P. R. 1898.** [R., 12 O. C. 229, 94 P. R. 1904=103 P. L. R. 1904; D., 111 P. R. 1901=18 P. L. R. 1902; Rel. on, 91 P. R. 1909.]

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

(195)—*Parties with equal rights—One of them purchasing from the vendee—Whether liable to be defeated by the other with equal rights.*—Where one of two persons having equal rights of pre-emption manages to purchase the property from the vendee himself, and thus asserts his pre-emptive title, his bargain will be secured to him as against any one not having a superior right of pre-emption. **MAHTAB-UD-DIN V. KARAM ILAHI, 73 P. R. 1898.** [R., 5 N. L. R. 136, 12 O. C. 229, 26 P. R. 1908, 90 P. R. 1909, 91 P. R. 1909, 124 P. R. 1907=48 P. W. R. 1907=3 P. L. R. 1907; D., 43 P. R. 1903=92 P. L. R. 1903.]

(196)—*Mortgage—Allegation that it is a sale—Ss. 92, 99, Indian Evidence Act, 1872.*—In a case of pre-emption in which it is alleged that an alleged mortgage was really a sale, ss. 92 and 99 do not in any way prohibit the right of a third party to show that the contract in writing is not a real contract between them. It is not necessary in such cases that the deed should contain onerous conditions as the parties will be careful to conceal the real nature of the transaction, and as such conditions may betray their secret understanding. **PARMANAND V. AIRAPAT RAM, 20 P. R. 1899.** [R., 19 P. R. 1905=78 P. L. R. 1905; Rel. on, 145 P. R. 1906; Diss., 78 P. R. 1904.]

(197)—*"Question of law"—Question of custom raised in appeal—Construction of document.*—Where a deed on the face of it purports to be a mortgage and it is alleged that the transaction is really a sale the question that arises is not one of construction of the deed but an inference to be drawn from the deed and other materials as regards the intention of the parties to the transfer and this is a question of fact and not of law. A plea that a customary right of pre-emption attached to mortgages cannot be raised for the first time in appeal when it is opposed to the allegations in the plaint and the pleadings in the lower Court. **BUDHA MAL V. GULAB, 36 P. R. 1899.**

(198)—*Pre-emption—Suit by a female holding land given to her by her father by way of gift—Shikmi sharik.*—In this case the plaintiff was a married woman of the Arain caste of Lahore District, holding land granted to her by her father by way of gift, against the vendor who was her real brother. Held that her claim could not be enforced; a married woman holding land in virtue of a gift cannot exercise the rights of an ordinary full proprietor, so as to claim a right of pre-emption on the ground of being shikmi shikan and yak judde. **MUSSAMMAT BEGAM V. KADIR BAKHSI, 13 P. L. R. 1900, Notes of judgments.**

(199)—*Co-sharer in a well—Preferential right—Major portion of land divided—The remainder whether joint property.*—The mere fact that the plaintiff is a co-sharer in the well from which land in dispute is irrigated, is no ground for his claiming any superior right of

Pre-emption—continued.**—6.—Right to pre empt—continued.**

pre-emption. Where land is divided as far as possible the remaining joint portion is a mere appendage or adjunct not coming under the meaning of "joint immoveable property" within the meaning of s. 12, Punjab Laws Act. **SHAHU v. HAKU, 44 P.R. 1900.** (87 P.R. 1895. 131 P.R. 1893, *F.*) [*F.*, 89 P.R. 1905.]

(200)—*Son whether a co-sharer—Purchase by two brothers, one only having a right—S. 12, Punjab Laws Act, 1872.*—A son as such is not a co sharer of his father within the meaning of s. 12, Punjab Laws Act, 1872. One brother joining with himself in a purchase another brother having no right of pre-emption places himself in no better position than the other. **RUKAN DIN v. ILAM DIN, 100 P.R. 1900.** (82 P.R. 1880, 10 P.R. 1884, 91 P.R. 1895, *F.*) [*Cited*, 133 P.R. 1907=84 P.W.R. 1907=88 P.L.R. 1908.]

(201)—*Sameness of caste and neighbourhood—Degree of necessity for proof in cases of pre-emption.*—In mohalla Bhaoran in Nakolar, there is no custom of pre-emption based on sameness of caste or vicinity. He who sets up such a custom must prove it. The right of pre-emption being a right of special kind having a tendency to transfer free disposition of property, must be clearly and unequivocally proved to exist before it can be enforced though considerations of equity, convenience, privacy, exclusion of strangers may under the principle of pre-emption. **MELA RAM v. PREMA, 109 P.R. 1900.** (83 P.R. 1888, 100 P.R. 1892, 17 P.R. 1895, 70 P.R. 1899, 56 P.R. 1885, 108 P.R. 1886, 17 P.R. 1889, *R.*; 68 P.R. 1890, 36 P.R. 1897, *D.*) [*R.*, 71 P.R. 1905=129 P.L.R. 1905, 68 P.R. 1906, 47 P.R. 1907; *F.*, 47 P.R. 1907; *Cited*, 17 P.R. 1903, 43 P.R. 1903=92 P.L.R. 1903.]

(202)—*Pre-emption—Suit by a female holding land given to her by her father by way of gift—Shikmi Sarik.*—In this case the plaintiff was a married woman of the *Arain* caste of Lahore District, holding land granted to her by her father by way of gift, against the vendor who was her real brother. *Held*, that her claim could not be enforced; a married woman holding land in virtue of a gift cannot exercise the rights of an ordinary full proprietor, so as to claim a right of pre-emption on the ground of being *shikmi sharik* and *yak judde*. **MUSSAMMAT BEGAM v. KADIR BAKHSH, P.L.R. 1900, p. 184.**

(203)—*Pre-emption—Sale for a special object—Bona fide transaction.*—Where land was *bona fide* sold for the purpose of erecting a *dharamsala* and the sale deed recited that the sale shall be set aside in case the purpose for which the land was sold, *i.e.*, the erection of a *dharamsala*, was not carried out. *Held*, that the pre-emptor could not be allowed a decree for pre-emption. The Court observed "We are by no means prepared to say that if a vendee, especially anxious to secure certain property says your price is so much, but in order to

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

obviate pre-emptive claim I am prepared *bona fide* to add a certain sum, and pay it *bona fide* as the price of any preference so that pre-emptive claims may be rendered less likely and actually does so, a pre-emptor would be entitled to oust the vendee for any less sum than that actually paid," and further "The right of pre-emption is one to be interpreted strictly. It is not one which gives a pre-emptor a right to force a transfer from a vendor on terms which are quite unacceptable to the vendor, and, in general, a pre-emptor must abide by the terms which have been *bona fide* offered to, and accepted by, the vendee who he wishes to oust. **BALDEO DAS v. PIARE LAL, 27 P.L.R. 1901=24 P.R. 1901.** [*R.*, 109 P.R. 1901, 141 P.R. 1907=57 P.L.R. 1908=93 P.W.R. 1907; *Not Appr.*, 33 P.R. 1910.]

(204)—*Pre-emption—Punjab Laws Act, 1872, s. 12—Punjab Tenancy Act, 1887, ss. 53, and 111—Sale of occupancy rights.*—When the seller of occupancy rights is an old tenant who has full power of alienation under the *wajib-ul-arz* the operation of s. 53 of the Punjab Tenancy Act is excluded by s. 111, the entry in the *wajib-ul-arz* being tantamount to an agreement under s. 112. The last clause of s. 12 of the Punjab Laws Act only applies when s. 53 of the Tenancy Act is applicable, the first part being intended to save the rights of the landlord under the latter section. The rights of the two other classes only arise where the landlord refuses or neglects to exercise that right and on no other contingency. When the landlord cannot exercise the right, the rights of the other under the last clause of s. 12 of the Punjab Law Act do not come into existence or in other words, the whole clause is inoperative. The parties then are relegated to the position under the first part of s. 12, and possess rights of pre-emption in the order provided therein. **SUNDAR MAL v. SAWAN SINGH, 146 P.L.R. 1901=87 P.R. 1901.**

(205)—*Pre-emption—Transfer of property in lieu of dower.*—There is no right of pre-emption in respect of an ostensible sale of property by a husband to his wife in lieu of dower when the value of the property far exceeds the amount of dower the transaction being to a great extent a gift of the property transferred. **MIR ZAMAN KHAN v. MUSSAMMAT GHULAM FATIMA, 145 P.L.R. 1901=88 P.R. 1901.** (5 A. 65, *Dist.*) [*R.*, 23 P.R. 1906; *F.*, 86 P.R. 1902; *Cited*, 86 P.R. 1902.]

(206)—*Pre-emption—Suit by the sister of the vendor—Shikmi Sharikhan and yak-jaddi—Arains of the Lahore District.*—*Held*, that a married *Arain* woman, who has merely received a portion of her father's land as a gift, and not by succession, cannot be held to have a preferential right of pre-emption over another *Arain* proprietor in the village, on the ground that she comes within the term *yak-jaddi shikmi sharikhan* as regards her brother's

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

property which that brother holds in right of succession. *MUSSAMMAT BEGAM v. QADIR BAKHSI*, 39 P.R. 1902.

(207)—*Pre-emption—Right of re-purchase—Right of substitution.*—The right of pre-emption is not a right of re-purchase, either from the vendor or from the vendee, involving any new contract of sale: But it is simply a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. *HAKAM SINGH v. INDAR*, 49 P.L.R. 1902=46 P.R. 1902. [R., 25 P.R. 1908, 141 P.R. 1907=57 P.L.R. 1908=93 P.W.R. 1907, 106 P.R. 1907; Cited, 76 P.R. 1902=113 P.L.R. 1902.]

(208)—*Custom—Pre-emption—Thoola Norsan, Panna Jaunpal, in Bhiwani, District Hissar, Punjab Laws Act, 1872, s. 11.*—Found, that the custom of pre-emption was not proved to exist in *Thoola Norsan, Panna Jaunpal* in the town of Bhiwani. *SIDHA v. PIRBHU LAL*, 71 P.R. 1902. (16 P.R. 1902, R.)

(209)—*Pre-emption—Assignment of immovable property by husband to wife in lieu of dower—Sale.*—Held, that a transfer of immovable property by a husband to his wife in consideration of her dower must be regarded as a gift by the husband to the wife and not a sale subject to pre-emption. *GHULAM RAZA v. SARDAR KHAN*, 86 P.R. 1902. (88 P.R. 1901, F.)

(210)—*Custom—Right to vicinage.*—Case in which it was found that a right to pre-emption based on vicinage in *Mohulla Mohilyan*, a sub-division of the city of Lahore, was not established. *GOKAL CHAND v. MOHAN LAL*, 6 P.R. 1905=19 P.L.R. 1905. (189 P.R. 1882, 42 P.R. 1891, 3 P.R. 1893, 17 P.R. 1895, 83 P.R. 1901, 42 P.R. 1903, 44 P.R. 1903, 52 P.R. 1903, R.) [D., 6 P.R. 1907; R., 138 P.R. 1907.]

(211)—*Sale by an agriculturist to an agriculturist—Right of pre-emption possessed by a co-sharer in the village but non-agriculturist—Effect of Punjab Alienation of Land Act on such right.*—The plaintiffs were co-sharers in a land sold by the 1st defendant to the 2nd defendant, who was not a proprietor in the village in which the land was situated. Plaintiffs based their claim on the fact that the 2nd defendant was not a proprietor in the village. The defendants contended that they belonged to one of the agricultural tribes notified under the Punjab Alienation of Land Act and that, the plaintiffs not having belonged to any such tribe and not being agriculturists, were not competent to buy the property under the Act, though they were land-owners in the village. Held, reading together s. 3 (1), sub-s. 2 of the same section and s. 14 of the Punjab Alienation of Land Act, it was not competent for the 1st

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

defendant who belonged to an agricultural tribe, to sell her land to the plaintiffs, non-agriculturists, without the Deputy Commissioner's sanction. If defendant could not sell, the result is the plaintiffs could not buy without such sanction not by virtue of any prohibition being imposed against their buying, but because of the sale to them being declared infructuous as a sale. The obligation to sell to the plaintiffs, which was imposed by the pre-emption law having been abrogated by the Alienation of Land Act, which prohibits such sale except on certain conditions which were not fulfilled in this case, the plaintiffs could not maintain the suit. *PARMA NAND v. GHULAM FATIMA*, 15 P.R. 1905=23 P.L.R. 1905. [F., 7 P.R. 1910.]

(212)—*Custom—Sale of occupancy and mukararidari rights—Right of co-sharer to pre-empt—Punjab Laws Act, s. 12.*—Suit for pre-emption. Plaintiff was the brother and co-sharer of the vendor. The sale was of lands in two villages, P and D. The purchasers were recorded proprietors in village P, but not in village D. The price was fixed at a lump sum without distinction as to the amount charged on the land in each village separately. A part only of the holding in village P was held by the vendor and the plaintiff in occupancy right. In the remainder in that village and also in the village D, the status of the vendor and the plaintiff was that of *mukararidars*, a special tenure of the District of Rawalpindi. Held, as regards village P, that the sale having been made to the proprietors of the holding, who have a statutory right of purchase under chapter V of the Tenancy Act, cannot be contested in respect of the occupancy land by a co-sharer in the tenancy; while for the *mukararidari* portion, according to the custom proved in the case, the landlord has the first right of pre-emption. Plaintiff, therefore, failed as regards village P. Held, as regards village D, that plaintiff, having rights superior to that of an occupancy tenant, cannot, as a co-sharer with the vendor, be placed in a worse position than he would be under cl. (f) of s. 12 of the Punjab Laws Act read with last clause of that section and must be given a preferential right over outside vendees, who have no immediate connection with the holding. Plaintiff's claim was dismissed as far as it concerned village P and allowed as far as it concerned village D. *GOUHRA v. HAR BHAI*, 16 P. R. 1905=41 P.L.R. 1905. (10 P.R. 1896, Rev., R.)

(213)—*Riwaj-i-am of Tuman Khosa—Right of pre-emption among collaterals—The nearer exclude the more remote.*—The *Riwaj-i-am* of Tuman Khosa, where the land in dispute is situated, provided that the right of pre-emption first accrued to collaterals, then to sub-co-sharers, &c. In this case, the vendor, the vendee and the pre-emptors were all Hindus. It was contended for the defence that the *Riwaj-i-am* was not applicable to Hindus and

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

that it was intended to apply only to Mahomedans. No custom excluding, from the provisions of the *Riwaji-am*, lands held by Hindus having been established, the contention was overruled. Plaintiffs were one degree more nearly related to the vendor than the vendee. *Held*, that, where collaterals have prior right of pre-emption, the nearer exclude the more remote. *KHOTA v. ALU*, 17 P.R. 1905 = 43 P.L.R. 1905. (58 P.R. 1885, 28 P.R. 1899, *F.*) [*Overruled*, 74 P.R. 1906.]

(214)—*Sale of shops in Darshani Darwazar in Amritsar*.—Case in which it was held that a mortgage, which was alleged to be a sale in reality, was not proved. It was also *held*, in this case, that a custom as to pre-emption in respect of sale of shops on the ground of vicinage was not established, whether the subject of dispute in the case be held to be situated in *Guru-ka-paza* or *Bazarmai-sewan* or whether *Darshani Darwaza* be held to be a separate sub-division of Amritsar for purposes of s. 11 of the Punjab Laws Act. *BISHEN SINGH v. MUSSAMMAT PARO*, 19 P.R. 1905 = 78 P.L.R. 1905.

(215)—*Custom — Sayads of Bal Sayadan, Rawalpindi District—Relations of vendor—Prior right to pre-empt*.—Among the Saydas of Mauza Bal Sayadan in the Rawalpindi District, the first cousins of the vendor have, by custom, a right of pre-emption superior to that of a *Khattee* proprietor in the village. *KARAM SHAH v. TARA SHAW*, 87 P. R. 1905 = 43 P. L. R. 1906. (35 P. R. 1905, *R.*) [*R.*, 44 P. R. 1907.]

(216)—*Sale together of several properties—Right of pre-emption as to some only—Pre-emptor's right as to the others*.—A pre-emptor cannot claim to acquire properties in respect of which he has no preferential right on the ground that they are included in the same bargain with lands as to which his right of pre-emption is undeniable. Of the properties comprised in the sale, he can only claim to acquire those over which he possesses the pre-emptor's preferential right of purchase. *RAM RAKHA MAL v. DEVI DAS*, 89 P. R. 1905. (87 P. R. 1895, 44 P. R. 1900, *F.*)

(217)—*Sale by occupancy tenant of his mill on the site, right of pre-emption in favour of proprietor on*.—The claim in this case was for possession by pre-emption of a watermill, on the sale of the same by its owner, who was an occupancy tenant on the site belonging to the claimant, a proprietor in the village. The vendee pleaded *inter alia* that the sale was of occupancy rights and there was no custom of pre-emption in regard to such rights and that, in any case, plaintiff's rights were not superior to his. The first Court held that the vendors had a transferable interest in the land, that both by law and by local custom, rights of pre-emption do arise in connection with the sales of mills (*jandars*) and of the occupancy rights, which the vendors enjoyed in the sites of the same,

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

and that plaintiff was and the vendee was not a proprietor in the village and, therefore, plaintiff's right to purchase is the better one. The lower Appellate Court, however, dismissed the suit, accepting the appeal, holding that the property sold were the *jandars* and not the sites of the same and that no local custom has been proved to exist under which a right of pre-emption arises in connection with the sales of *jandars*. *Held*, reversing the decision of the lower appellate Court, upon the sale of the mill in question by its owner, a right of pre-emption must be presumed to arise, because the sale of the structure of the mill cannot be separated from the sale of the occupancy rights in the site. As regards the price to be paid, *held*, further that where the market value of the property sold is conspicuously below the price stated in the sale-deed and a large part of the consideration consists of old debts due to the vendee, the amount of the old debts cannot be taken to be the real value of that part of the consideration, such debts having to be valued as claims not as cash. *HAIDER v. ISHWAR DAS*, 22 P.R. 1906 = 115 P.L.R. 1906. (75 P.R. 1901, 77 P.R. 1901, *R.*, 68 P. R. 1902, *D.*) [*R.*, 27 P. R. 1907, 51 P.R. 1907.]

(218)—*Transfer of land for natural love and affection and for past services constitutes sale giving rise to the right of pre-emption*.—A transfer of immovable property, where the transferor was the maternal uncle of the transferee and the consideration was found to be natural love and affection, past services, payment of part of a debt due by the transferor and a promise to pay the balance, was *held* to be a sale within s. 9 of the Punjab Laws Act so as to give rise to the right of pre-emption. The fact that part of the consideration was money paid and to be paid by the transferee for the use of the transferor, and the addition of past services and natural love and affection affects merely the question of the price at which the pre-emptor is to take. *ALI BAKSH v. SOBHA SINGH*, 23 P.R. 1906 = 107 P.L.R. 1906. (54 P. R. 1889, 188 P.R. 1889, 2 P.R. 1903, 11 A. 1, 23 M. 70, *R.*)

(219)—*Sale of equity of redemption in favour of mortgage—Extinguishment of mortgage—Right of pre-emption is right of complete substitution*.—In the absence of any intention to keep the mortgage security alive, the sale of equity of redemption to the mortgagee extinguishes the mortgage, and the person having right to claim property by right of pre-emption, on a sale of the property, is entitled to recover its possession on the sale of equity of redemption to the mortgage, when the intention to keep the mortgage-security alive is negatived. A right of pre-emption is not merely a right of re-purchase, but a right of complete substitution in the place of the vendee. A pre-emptor, by reason of pre-emptive right, is entitled not merely to have the sale transferred to him, but also to be vested with all bene-

Pre-emption—continued.**— 6.—Right to pre-empt—continued.**

fits which legally flow from the sale. **AHMAD SHAH v. WALIDAD KHAN, 83 P.L.R. 1906 = 98 P.R. 1906.**

(220)—*Right of, by reason of vicinage, with respect to mercantile property.*—The point to be determined in this case was whether the custom of pre-emption obtained with respect to the property in question, which was essentially a block of shops or mercantile property on the whole. *Held*, it is a well recognised rule that, in the absence of a special custom to the contrary pre-emption does not extend to shops. (17 P. R. 1895, 58 P. R. 1900, *F.*, 64 P. R. 1887, 108 P. R. 1895, 2 P. R. 1903, *R.*) and, the plaintiff, in this case, not having proved any special custom, the property in question, which was mercantile property on the whole, must be held to be not subject to pre-emption. The fact that some portion of the property consisted of residential quarters could not make any difference in the mercantile nature of it as a whole. **BAGWAN v. HAR PRASAD, 111 P.R. 1906.**

(221)—*By right of vicinage, in respect of house property, whether obtains in Delhi—Pre-emption Act, 1905, s. 6.*—The question really in issue between the parties to this suit was whether or not a custom to pre-empt by right of vicinage prevailed in Kucha Aqual Khan, Delhi, where the house in question was situate. *Held*, the plaintiff having succeeded in proving that the custom obtains generally in Delhi, he was entitled to claim that he has shown it to exist in the particular locality within Delhi, and, also, on a review of authorities and precedents, it was clear that such a custom obtained very generally in the City of Delhi, a Muhammadan City of Muhammadan origin. *Held*, further, that, for proving the existence of a custom of pre-emption within any specified area forming a sub-division, within the meaning of s. 6 of the Pre-emption Act of 1905, instances of its exercise within that area must be produced, but instances in other neighbouring sub-divisions, and in the city including the area are relevant and useful to strengthen the evidence of the existence of such custom. **ABDULLA BEG v. WALAITI BEGUM, 120 P.R. 1906 = 55 P.L.R. 1907. (81 P.R. 1906, 64 P.R. 1887, 17 P.R. 1903, 108 P.R. 1895, *R.*, 68 P.R. 1879, 21 P.R. 1900, *D.*) [R., 2 P. R. 1908, 35 P.R. 1908, 116 P.R. 1908.]**

(222)—*Sale by joint owner of his share—Subsequent "mortgage" of the remaining property by the other joint owner—Mortgage really a sale—Whether latter joint owner has right to pre-emption.*—Where two persons were equal joint owners of a certain property, and one of them sold his share and, subsequently, the other alienated his share, under a transaction, which was alleged to be a mortgage, but was in reality a sale, and there were no circumstances contemplating redemption, the latter joint owner cannot afterwards sue the former for pre-emption, as the plaintiff (latter) is no

Pre-emption—continued.**— 6.—Right to pre-empt—continued.**

longer a co-sharer at the date of suit. **ANWAR HASAN v. UMATUL KARIM, 145 P.R. 1906 = 109 P.L.R. 1907. (100 P.R. 1895, 78 P.R. 1904, *D.*)**

(223)—*Simultaneous sale of two adjoining houses—Right of pre-emptor and vendee.*—A purchase by a person of one of two adjoining houses cannot give him a right of pre-emption as regards the simultaneously purchased other house. Nor can he defeat the right of pre-emption of the next door neighbour of the second house. A person whose right of pre-emption extends over only a part of the property, which is a distinct part, could obtain a decree for that part. **UTTAM CHAND v. LAHORI MAL, 112 P.R. 1907 = 75 P.W.R. 1907. [Appr., 90 P.R. 1909.]**

(224)—*Cause of action accruing in father's life-time—Son's right to claim on death of father—Voluntary transfers—Right of pre-emption over property previously sold.*—A right to sue for pre-emption, which had accrued to a person in his life-time, passes, at his death, to his successors, on their inheriting his land. But a voluntary transfer will not pass a right of pre-emption as regards property previously sold. **FAQIR ALI SHAH v. RAM KISHEN, 133 P.R. 1907, F.B. = 81 P.W.R. 1907 = 88 P.L.R. 1908. (49 P.R. 1901, 95 P.R. 1901, 7 A. 535, *R.*) [R., 91 P.R. 1909.]**

(225.—*Sale of agricultural land prior to 11th May, 1905—Right of vendee superior under the old Act but inferior under the new Act of pre-emption—Priorities under both Acts—Act IV of 1872, ss. 12 and 14—Act II of 1905, ss. 2, 3, 4, 11, 12 and 18—General Clauses Act, I of 1898, s. 4 (c).*—On the 12th December, 1904, vendor, a Mahajan and not agriculturist, sold his half share in a joint *khata* to his first cousin. The new Pre-emption Act II of 1905 came into force on 11th May, 1905. The pre-emption suit was instituted on 16th March, 1906. *Held* by a majority of two Judges of the Full Bench of three, that the priorities given by s. 12 of the Punjab Pre-emption Act II of 1905 are applicable to a claim to the right of pre-emption with reference to a sale executed before the commencement of the Act. (22 P.R. 1908, 30 P.R. 1907, *F.*; 95 P.R. 1901, 32 P.R. 1902, 44 P.R. 1903, 87 P.R. 1906, 7 A. 535, *F.B.* 21 A. 374, *R.*) *Held*, also, that where the vendee had a superior right of pre-emption under the Punjab Laws Act IV of 1872, to the pre-emptor, the saving clause of s. 2(3) of Act II of 1905 protects him against that pre-emptor who has superior rights under the Act of 1905. **SURTA v. FATEH CHAND, 18 P.W.R. 1908, F.B. = 17 P.R. 1908 = 153 P.L.R. 1908. [R., 74 P.R. 1909, Cited, 90 P.R. 1908.]**

(226)—*Pre-emptor entitled to purchase entire property—Right of such pre-emptor to purchase part of it—Plaint—Amendment—S. 13, Punjab Pre-emption Act.*—Where a pre-emptor, having a right to purchase the entire property liable to

Pre-emption—continued.

—6.—Right to pre-empt—continued.

pre-emption and being entitled to pre-empt under more than one clause of s. 13, Punjab Pre-emption Act, sues for pre-emption of property falling under one clause and omits to sue for other property falling under a different clause but included in the same sale, he offends against the vital canon of pre-emption law, which prescribes that he must acquire the entire bargain as far as his right extends, and he consequently loses his rights altogether. If, in such a case, in spite of the defendant's plea to the contrary that the plaintiff had not sued for all that he was entitled to pre-empt, he persists in his suit as laid, he cannot claim amendment of his plaint. *BANARSI DAS v. HAJI ABDUL GHANI*, 10 P.R. 1909=24 P.L.R. 1909=1 Ind. Cas. 397. (6 A. 423, 11 A. 108, R.)

(227)—*Custom—Pre-emption—Right by reason of relationship*—(Act IV of 1872), s. 12 (a)—*Punjab Pre-emption Act* (II of 1905), ss. 28, 29—*Limitation Act* (XV of 1877), sch. II, arts. 10, 120.—The plaintiffs brought 15 suits of pre-emption on 18th April 1906 and claimed preferential right of pre-emption by reason of their relationship to the vendor. The sales, it was alleged, took place in all cases save one in December 1900, when mutation of names was effected in favour of the vendees. In one case mutation was not effected till February 1903. It was pleaded that the plaintiffs had no preferential right, and if they had, the suits were barred by limitation. *Held*, that the right of the plaintiffs, who were remote collaterals of the vendors, (9 to 11 degrees removed) to inherit the property within the meaning of s. 12 (a) of the Punjab Laws Act, must be enquired into. *Held*, also, that, as the plaintiffs had a right to sue before the commencement of the Punjab Pre-emption Act, 1905, within the meaning of s. 28, their suits could not be held time-barred under s. 29. The orders of mutation were passed in December 1900 and February 1903, but there was no finding whether the sales were effected at an earlier date. If the sales were effected before 11th May, 1899, that is, more than six years before the Pre-emption Act came into force, the suits had become time barred under art 120. Limitation Act, and plaintiffs could not avail themselves of the special extension of time for one year given by s. 28 of the Act. *GUL MOHAMMAD v. SARDAR FAQUIR MUHAMMAD KHAN*, 98 P.L.R. 1909=91 P.W.R. 1909. (143 P.R. 1907=135 P.L.R. 1908, F.; 22 P.R. 1903=122 P.L.R. 1903, Not F.; 17 P.R. 1903, F.B., 153 P.L.R. 1903, F.B., R.)

(228)—*Pre-emption—Vendee acquiring equal status subsequent to the institution of the suit by the pre-emptor, but prior to the pre-emption decree, ineffectual*.—*Held*, by the Full Bench (*Rattigan, J., dissenting*):—In a suit for pre-emption, based on the ground that at the date of sale the plaintiff pre-emptor was a proprietor in the village in which the property is situate, and the vendee was not, the vendee cannot, by

Pre-emption—continued.

—6.—Right to pre-empt—continued.

becoming a proprietor in that village whether by gift or otherwise, after the date of the institution of the suit, but before the passing of the pre-emption decree, defeat the plaintiff's claim. (90 P.R. 1909, F.B., F.; 124 P.R. 1907, Diss.) *Per Rattigan, J.*—It is essential for a claimant for pre-emption to show that he possesses the right, to which he lays claim, up to the date of the decree. (25 A. 121, 26 A. 389, 124 P.R. 1907, F.) The following propositions are well established: (1) That the right of pre-emption is a right of a most exceptional and burdensome nature, and that, as it infringes upon the owner's ordinary rights of dealing with his property, it should not be decreed unless and until the claimant has conclusively established his right thereto; (2) that this so called right is not a right in property (*jus in re aliena*), but merely a right to acquire property in certain defined circumstances (*jus ad rem acquirendum*) (136 P.R. 1894, 95 P.R. 1901, 94 P.R. 1902, R.); (3) that the claimant for pre-emption has no right, title or interest in the property sought to be pre-empted, until he pays the amount which the Court decrees to be payable by him for its purchase. (4) That, at any time prior to decree, the claimant for pre-emption may lose his so-called right of pre-emption, either because he has himself parted with the property by reason of the possession of which he claimed that right, or because the original vendee has transferred the property claimed to a person, who has rights of pre-emption in respect thereof either equal to or superior to those of the claimant. (49 P.R. 1901, 95 P.R. 1901, 32 P.R. 1902, 26 P.R. 1908, R.) (5) That the right of pre-emption is in reality a right which the claimant has to substitute himself for the original vendee, and (6) that the right of pre-emption is a right to acquire property in preference to another person (S. 4, Punjab Pre-emption Act, 1905). *DHANNA SINGH v. GURBAKSH SINGH*, 91 P.R. 1909, F.B.

(229)—*Exchange of land, pending suit—Right of pre-emption possessed by person making the exchange, barred—Invalidity of exchange—Lis pendens*.—A sold land to B. K. sued to pre-empt on 20th January, 1908. On 1-2-1908, C took the land in dispute in exchange for other land. C was impleaded as a defendant in K's suit. C had in himself a right of pre-emption superior to that of K, but allowed it to become barred even before he had taken the land in exchange. *Held*, that, under the circumstances, C's exchange was a voluntary one, and not a transaction in which he was seeking to enforce his right of pre-emption (76 P.R. 1898, Civ. D.) and that the exchange was invalid as offending the rule of *Lis pendens*. *KARAM ALI v. SULTAN*, 30 P.R. 1911.

(230)—*Custom—Pre-emption—Houses—Towns Mohalla Acharjan in Gumti Bazar, Lahore City*.—*Held*, that the plaintiff had failed to prove that the custom of pre-emption prevailed in Mohalla Acharjan which is part of the recognised sub-division of Bazar Gumti in

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

Lahore City. *Held*, also, that cases, in which vendees admit the existence of the custom of pre-emption, are as valuable as cases in which the Court finds the existence of the custom established. But between such cases and these cases in which the vendee, after denying the existence of the custom, eventually is induced to come to terms with the pre-emptor and to compromise the dispute, there is a very substantial distinction. **MUSSAMMAT DURGA DEVI v. RAMZAN, 127 P.L.R. 1911.**

(231)—*Lis pendens*—A person having equal or superior right to pre-emptor buying property during pendency of suit—Application of the doctrine of *lis pendens*—*Punjab Pre-emption Act* (II of 1905), s. 14, application of.—The doctrine of *lis pendens* does not apply to a case where a person having an equal or superior right to a plaintiff pre-emptor asserts that right out of Court, while the plaintiff's claim is pending in Court and the vendee-defendant resells the property to the former by a private sale in recognition of that right. S. 14 of the *Punjab Pre-emption Act* applies only to cases in which several pre-emptors in respect of one particular case are found by the Court to be equally entitled to the right of pre-emption. It does not apply to a case in which a pre-emptor is claiming to enforce his right of pre-emption by suit against an original vendee or a second vendee who has an equal right of pre-emption with such pre-emptor. A sold some land to B on 12th June 1906. B sold it to C on 17th June 1907. On 9th June 1908 D sued to pre-empt in sale in favour of C; on 11th June 1908 C resold the land to A in recognition of A's right of pre-emption. A and D had equal rights to pre-empt the sale to C. A was impleaded as defendant in D's suit. *Held*, (1) that, as A's right of pre-emption existed prior to the institution of D's suit, and as the resale in A's favour was effected in recognition of that right, the rule of *lis pendens* had no application (26 P.R. 1908 = 145 P.L.R. 1908, 7 P.R. 1910 = 49 P.L.R. 1910 = 5 Ind. Cas. 249, *F.*; 30 A. 467, *Not F.*) (2) That, as there was only one pre-emptor D before the Court, s. 14 of the *Pre-emption Act* did not apply. **SUNDER SINGH v. SAJJAN SINGH, 164 P.L.R. 1911.**

(232) — *Village community, meaning of—Inhabited sites not necessary for existence of village community—Oudh Laws Act, ss. 7 and 8.—Per Piggott, A.J.C.—Held*, that a village community under the *Oudh Laws Act* consists of the whole body of persons possessing rights as proprietors, under-proprietors or heritable lessees in the village lands, and that the existence of an inhabited site in the village is not necessary to the establishment thereof. *Held* further, that the exclusion laid down in s. 8 of the *Oudh Laws Act* applies to the situation of lands and not to the residence of the village community. *Per Chamier, J.C.—Held*, that all persons who have an interest in the village estates whether as proprietors or under-proprietors are members of the village community.

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

Held further, that the existence of an inhabited site is not necessary for the establishment of a village community. *Per Evans, A.J.C.—Held*, that a village community presupposes the existence of some body of persons bound together by a tie of residence in the village. There can be no village community where not a single member of the community resides on the land with respect to which the right of pre-emption is claimed. *Held* also, that ss. 7 and 8 of the *Oudh Laws Act* are not exhaustive of all areas of land. **RAM DAYAL v. CHAUDHRI MUHAMMAD ABDUL BASIT, 12 O.C. 1 = Ind. Cas. 7.** (7 O.C. 74, 7 O.C. 275, 30, C. 635, 5 O.C. 266, *R.*) [*F. & R.*, 13 O.C. 202.]

(233)—*Right of pre-emption in grove when a seller has neither a proprietary nor under-proprietary interest in the land thereof—Act XVIII of 1876 (Oudh Laws Act).*—A right of pre-emption, under the *Oudh Laws Act*, can be claimed only by a member of the proprietary or under proprietary body or by one of the holders of a heritable non-transferable lease: *Held* that a sale of his rights by one of the joint owners of scattered trees or of a grove (when the seller has neither a proprietary nor under-proprietary interest in the land thereof) does not give rise to a right of pre-emption under the *Oudh Laws Act*. **RAMESHUR BAKHSH v. BAKHTA, 1 O.C. 284.** [*Cons.*, 4 O.C. 26; *R.*, 13 O.C. 202.]

(234) — *Mortgage, redemption of which unlikely—Sale.*—In a suit for pre-emption the contention of the plaintiff was, that the mortgage of the property in suit executed by the mortgagors in favour of the mortgagees was intended to be a sale, but had been put in the form of a mortgage to defeat claims for pre-emption. The deed provided that the mortgage was not redeemable for 55 years, and then only if the mortgagors, on the expiration of the 54 years, gave notice in writing to the mortgagees of their desire to redeem, and, on the very day the term of 55 years expired, paid the mortgage money, and that if the mortgagors failed to give such notice, or, if having given such notice, they failed to pay the mortgage-money on such day, the mortgagors would not be entitled to redeem for a further term of 55 years. *Held*, that the fact, that the terms of the mortgage were such that redemption would be unlikely, could not alter the real nature of the transaction and convert what was, and what was intended to be, a mortgage, though one of which redemption was most unlikely, into a sale; and therefore the plaintiff's suit was not maintainable. **DHAN SINGH v. BODH SINGH, 3 O.C. 213.** [*R.*, 9 O.C. 169.]

(235)—*Fictitious sale-deed.*—In a suit for pre-emption of an under-proprietary holding by the proprietor of the village, the finding of the Court of first appeal was that the deed of sale by the vendor passed no title to the vendee. *Held*, that the suit was not maintainable. **MOHAMMAD IHTISHAM ALI v. MUSAMMAT MADHA, 3 O.C. 260.**

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

(236)—*Limited ownership.*—Where a woman is in possession of a share in a village and can remain so only so long as she observes certain conditions, such possession does not give her such an interest in the share as to entitle her to enforce the right of pre-emption on the sale of another share of the village. *BIBAN v. GOURI SHANKER*, 3 O.C. 306.

(237)—*Pre-emption, suit for—Hiba-bil-ewaz—Sale—Oudh Laws Act, (XVIII of 1876), chap. ii.*—*Held*, that a *hiba-bil-ewaz*, when it purports to be a genuine exchange, is not a sale within the meaning given to the latter word in Act XVIII of 1876 and confers no right of pre-emption. *RAJ KISHORE v. RAGHU NATH PERSHAD*, 4 O.C. 169.

(238)—*Pre-emption—Rival pre-emptors, suits between—Conditional decree for pre-emption to claimant with inferior rights—Pre-emption of part of property sold—wife, position of, in the order of relationship—Act XVIII of 1876, s. 9—Suit for immoveable property situate in different districts—Cause of action—Jurisdiction—Civil Procedure Code, s. 19.*—Z and his wife executed two deeds of sale of certain villages in Kheri and Hardoi districts for certain sums of money. The plaintiff No. 1, cousin, and plaintiff No. 2, another wife of Z brought separate suits for pre-emption in the Court of the Subordinate Judge of Hardoi. The Subordinate Judge found that neither plaintiff was a co-sharer in the village in Hardoi district, but that he had jurisdiction to try the suits as to the land in Kheri under s. 19, Civil Procedure Code, as part of the property, the subject of the subject of the suit, was in the Hardoi district. He also found that plaintiffs were entitled to pre-empt the lands in the Hardoi district also, because they were included in the same deeds of sale, with lump sums as consideration, as the lands in the Kheri district, over which plaintiffs had pre-emptive rights. He also found that plaintiff No. 2 was not nearer in relationship to Z (within the meaning of s. 9, Act XVIII of 1876), than plaintiff No. 1. He gave plaintiff No. 1 a decree for pre-emption for all the lands specified in each deed on payment of the sums stated therein within a certain period. He gave a similar decree to plaintiff No. 2 to be operative only in the event of plaintiff No. 1 making default in payment within the stipulated time. *Held*, that the Subordinate Judge had jurisdiction to try the suits notwithstanding the finding that the plaintiffs had no pre-emptive rights in the land in the Hardoi district. His jurisdiction did not depend upon his finding as to the existence or otherwise of any of the causes of action stated in the plaint, but on the allegation made in the plaint as to the causes of action and subject matter of the suit. There must be *prima facie* a cause of action common to the portions of the property, the subject matter of the suit in both districts (or all the districts); the mere assertion of a claim respecting property in the district selected as the venue would

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

not suffice, unless the claim arise out of the same cause of action (or cognate one which could legally be joined with it, as the claim to the property in the other district (or districts). *Held* that, when the plaintiff has a right of pre-emption as to a part only of the property conveyed by a deed, he can only obtain a decree for pre-emption of that part; but, when the consideration for the whole is a lump sum, he is entitled to such decree on payment of a proportionate part of the consideration. *Held* further, that plaintiff No. 2 as wife of one vendor and co-wife of the other did not come within the "order of relationship" referred to in s. 9, Act XVIII of 1876, which relates to consanguinity from a common stock. *Held* further, that in suits between rival pre-emptors the claimant with inferior right should be granted a decree conditional on the claimant with superior right failing to avail himself of his decree. *KARAM HUSSAIN v. RAGHUBAR DAYAL*, 4 O.C. 397. [R., 7 O.C. 6.]

(239) — *Pre-emption — Act XVIII of 1876 (Oudh Laws Act), chap. ii, ss. 7 and 9, cl. (3) — "Member of the village community" — Under-proprietor — "Hard case circular", decree for land passed under an under-proprietary decree — Financial Commissioner's Book Circular No. 4 of 1867.*—The property to which a suit for pre-emption related was a mahal called patti sabal shah, and formed part of the estate of Ramnagar, which was under the superintendence of the Court of Wards. The Court of Wards sold the patti to R. The plaintiff sued the seller and the purchaser to enforce his right of pre-emption. The two points in dispute were, *first*, whether the land in the mahal owned by the plaintiff was owned by him as a proprietor or as an under proprietor; and *secondly*, whether, if the land was owned by him as an under-proprietor, he had a right of pre-emption. The land came into the possession of the plaintiff's predecessor in title in the following manner. He sued the proprietor of the Ramnagar estate for a sub-settlement of the village of which patti sabal shah formed part. The settlement Officer dismissed the suit but passed a decree in his favour for land yielding a profit of one-tenth of the *nikasi* of the patti. He appealed and the final order passed by the Financial Commissioner was: "There are no grounds for a second appeal in this case; but 15 per cent. *sir rent-free* under the 'Hard Case Rules' is decreed, etc." The predecessor in title of the plaintiff accordingly obtained the land now owned by the plaintiff. *Held* (*per Spankie A.J.C. and Scott J.C.*), that when under the 'Hard Case Circular' (the Financial Commissioner's Book Circular, No. 4 of 1867) *sir-land* was awarded the person to whom it was awarded acquired the same as an under-proprietor, and not as a proprietor, and that the plaintiff therefore owned the land in question as an under-proprietor and not as proprietor. *Held*, (*per Spankie, A.J.C.*) that the property sold being a proprietary tenure, the plaintiff was not,

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

by reason that he had under-proprietary right in the mahal, a member of the village community within the meaning of cl. (3), s. 9, Act, XVIII of 1876, and was not entitled to pre-emption in respect of the land in suit. *Held*, (per Scott, J.C.) that the plaintiff was a member of the village community and, as such, had a right of pre-emption in respect of the land in suit under clause (3) s. 9 of Act XVIII of 1876. On a reference being made by the Court under s. 9, Oudh Courts Act (XIV of 1891) as amended by Act XVI of 1897 to the High Court of Judicature, N.W.P. *Held* that, under clause (3) of s. 9 of the Oudh Laws Act, 1876, a person holding an under-proprietary interest in a portion of a mahal sold by the Court of Wards on behalf of the proprietor of the mahal was entitled to pre-emption in respect of such mahal as against the purchaser. **DRIGBIJAI SINGH v. COURT OF WARDS, RAMNAGAR ESTATE, DISTRICT GONDA AND RAM RUP, 5 O.C. 266.** [*Diss.*, 7 O.C. 1; *Not F.*, 7 O.C. 19; *Expressed*, 7 O.C. 206; *Rel. on*, 7 O.C. 275; *R.*, 9 O.C. 271, 10 O.C. 49, 12 O.C. 1, 13 O.C. 202.]

(240)—*Pre-emption, Suit for—Relationship of vendee and vendor, plea of—Oudh Laws Act, s. 9.*—In a suit for pre-emption the plaintiff alleged that she, the vendor and the vendee held shares in the same mahal and that she and the vendee were both equally entitled to pre-empt. The vendee-defendant's answer was that he was related to the vendor and the plaintiff was not, and that therefore he the vendee had a preferential right of pre-emption. The vendor was the widow of one R whose father was a first cousin of the vendee. *Held*, that the vendee had no preferential right to pre-empt as against the plaintiff. The kind of relationship contemplated by s. 9, Oudh Laws Act of 1876 is consanguinity from a common stock. **MUSAMMAT JAFRI BEGAM v. MUSAMMAT GULAB KUAR, 7 O.C. 6.**

(241)—*Pre-emption, suit for—Co-sharers in a grove, position of, after partition—Member of village community not residing in the village in which he has rights in land—Oudh Laws Act s. 9 cl. (5).*—The plaintiff, the defendants and other persons jointly owned a grove; but there was a partition and the plaintiff acquired a distinct and separate part of the grove, and the defendants did the same. The defendants sold their share whereupon the plaintiff brought a suit for pre-emption, and alleged in his plaint that he wanted his right of pre-emption enforced because he had a share in the grove and the defendants also had a share in it which they had sold. The plaintiff did not reside in the village in which the grove was situated. *Held*, that the plaintiff and the defendants were not co-sharers in the grove at the time of the sale, but that the plaintiff was a member of the village community within the meaning of s. 9, cl. (4) of the Oudh Laws Act although he did not reside in the village to

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

which the grove in suit belonged, and that he was entitled to a decree on that ground. **SYED RASHID-UD-DIN v. WALI JAN BEG, 7 O.C. 19.** [*R.*, 7 O.C. 275, 10 O.C. 225].

(242)—*Pre-emption, suit for—Sale to co-sharer and stranger with specification in the deed of each Vendee's share in property sold.*—C sold his share in a village to R a co-sharer and S a stranger. The deed of sale stated that the property was sold for Rs. 600 to R and S in equal shares. The plaintiff a co-sharer in the village claimed pre-emption against R and S. *Held*, that the shares of the vendees were specified in the sale-deed and that therefore the plaintiff was not entitled to a decree for pre-emption against R who was a co-sharer. **WAJID KHAN v. RATAN, 7 O.C. 22.** [*F.*, 10 O.C. 225.]

(243)—*Pre-emption, suit for—Sale deed relinquishing claim to property in return for benefit previously received from transferee—Oudh Laws Act, 1876, Chapter II.*—B mortgaged certain lands with possession to N, father of the defendant No. 1 in 1856 for a certain sum of money and after B's death, H his widow sold it to N in April 1864 for Rs. 1,574-7-9 receiving Rs. 1,135-3-9 in cash, the balance being deducted on account of the mortgage money. H died in April 1900 and in January 1901 the second defendant who was B's cousin and the next reversioner executed a deed in favour of the first defendant, relinquishing all claims to the property in return for some benefits which H and himself had received from N and the first defendant. The plaintiff sued the defendants for pre-emption on the allegation that the deed of 1901 amounted to a sale of the property within the meaning of Chapter II of the Oudh Laws Act, 1876. *Held*, that the deed of January 1901 did not amount to a deed of sale within the meaning of Chapter II of the Oudh Laws Act, 1876. **KALKA SINGH v. KUNWAR GAJRAJ SINGH, 7 O.C. 31.**

(244)—*Pre-emption, suit for—Sons not separately recorded as co-sharers claiming pre-emption in respect of property sold by their father.*—R and four other co-sharers sold a certain property to B, a stranger and the appellant claimed pre-emption. He filed his suit on the 5th February 1902 and on the 6th February the respondents, sons of R but not separately recorded as co-sharers, also filed a suit claiming pre-emption in respect of the same property. The respondents were accordingly added as defendants in the appellant's suit and the appellant was added as a defendant in their suit. *Held*, that the respondents could not be treated as co-sharers and had no right of pre-emption as against the appellant. If the sale was a valid one then any interest they had in the property before the sale was lost to them on the sale taking place and they had no subsisting title at the date of the institution of the suit; while if they denied that their father had power to transfer their interest

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

they were precluded from claiming pre-emption. **RAM DAYAL v. BHAIJU LAL, 7 O.C. 61.**

(245)—*Pre-emption, Suit for—Hindu widow's right of pre-emption in respect of property held as widow's estate as well as under a will executed by her husband.*—The plaintiff who was the widow of one brought a suit for pre-emption in respect of her husband's share in a village. The sale in dispute took place on the 15th October 1901 and P died in July 1902. The plaintiff held not merely the widow's estate in the property of P but also as a devisee under the will executed by him. *Held*, that the plaintiff was entitled to a decree for pre-emption. **MUSAMMAT MUNA KUER v. ABDHUT SINGH, 7 O.C. 158.**

(246)—*Pre-emption, Suit for—Proprietor in one mahal to pre-empt land in another mahal when there has been perfect partition, right of—Act XVIII of 1876, s. 9.*—That having regard to the provisions of s. 9 of Act XVIII of 1876, where there has been a perfect partition in a village, a proprietor in one mahal has a right to pre-empt property in another mahal as against a person who has nothing to do with the village. **ALI RAZA KHAN v. GANGA DIN, 7 O.C. 206.** [R., 7 O.C. 275.]

(247)—*Pre-emption, Suit for—Perfect partition—Right of owner of one mahal to pre-empt as against vendee of another mahal—Member of village community—Residence in village—Oudh Laws Act, 1876, s. 9.*—A village was by perfect partition divided into four mahals. One of these mahals was the property of B and was placed under the management of the Court of Wards which sold it to the respondents. Thereupon the appellant who was the owner of another mahal brought a suit for pre-emption. It was conceded on behalf of the appellant that he had no right of pre-emption unless he was a "member of the village community" within the meaning of s. 9 of the Oudh Laws Act. It was also admitted that the appellant did not reside in the village. *Held*, that in the village in suit there was only one village community, perfect partition notwithstanding; that residence in the village is not a necessary qualification for membership of a village community for the purposes of s. 9 of the Oudh Laws Act; and that the appellant was a member of the village community within the meaning of that section. **NARENDRA BHADUR SINGH v. BALKARAN SINGH, 7 O.C. 275.** [R., 12 O.C. 1, 13 O.C. 202.]

(248)—*Pre-emption, Suit for—Owner of separate chak in mahal, right of, to pre-empt—Co-sharer of mahal—Non-resident co sharer—Oudh Laws Act, 1876, s. 9—Oudh Revenue Act (XVII of 1876), ss. 108 and 112, 121.*—In a suit for pre-emption, there was no question about the relationship of the plaintiff, and the only dispute was whether his connection with the village in suit was such as to give him the right of pre-emption. The material facts were

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

that he was owner of a *chak* of 33 acres in the village, and, by the settlement under which he held, he paid his share of the revenue through the lambardars of the village; but he did not reside in the village. *Held*, that the plaintiff was a co-sharer of the whole mahal in the sense of s. 9 of the Oudh Laws Act, 1876; and that having regard to ss. 108, 112 and 121 of Act XVII of 1876 (Oudh Land Revenue Act), the fact that the share of the plaintiff in the mahal consisted of a separate *chak* but did not make him the less a co-sharer in the sense of this Act, and the circumstance of his being non-resident did not make any difference. **MUNNU LAL v. MAULVI SAIYID MUHAMMAD ISMAIL, 7 O.C. 284.** [Rel. on, 10 O.C. 86; R., 10 O.C. 225.]

(249)—*Pre-emption, Suit for—Extension of time for payment of price by Court of appeal—Application by appellant for extension of time for payment of price—Appeal.*—A plaintiff in a pre-emption case cannot merely by filing an appeal obtain extension of the time fixed for payment of the price. A Court of appeal has power to extend the time, but in practice it does not do so except for some special reason. An appellant in a pre-emption case who wishes to have the time for payment of the price extended is not bound to put in a separate written application to that effect but may make the request at the hearing. **RAM DIAL v. MUSAMMAT JAFRI BEGAM, 7 O.C. 359.**

(250)—*Right of—Creation and sale of birt tenures—Oudh Laws' Act, s. 7.*—A sale-deed, purporting to create and convey a *birt* tenure, was executed by defendant No. 1 to defendant No. 2. The sale was subject to the payment, annually, by the latter to the former, of 8 annas. Plaintiff claimed a right of pre-emption. Defendant No. 2 contended that the transaction did not amount to a sale of a transferable right, and therefore could not give rise to a right of pre-emption. It was, however, conceded by him that this deed conferred on him a permanent heritable and transferable right in the land subject only to the payment, annually, of eight annas to the vendor. *Held*, that, within the meaning of s. 7 of the Oudh Laws' Act, the transaction was a sale, notwithstanding the use of the word *birt*, the mere use of which word does not necessarily convert the transaction into one other than what it purports to be (i.e.) a sale. (6 I.A. 145, P.C., R.) *Held*, also, that s. 7 of the Act, applies to transactions by which proprietors create transferable rights of occupancy in another for a consideration. **RAM FAQIR v. SHEO RATAN, 8 O.C. 121.** (43 P.R. 1892, R.)

(251)—*Pre-emptor, right of—Decree passed in favour of the vendee, right to execute by the pre-emptor—Civ. Pro. Code, s. 273.*—One S K, a Zemindar of a certain village, brought a suit against the appellants for possession of a house and land situate in the village alleging them to

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

be trespassers. During the pendency of the suit, S K. sold the village to A and A's name was entered on the record in place of S K. The decree for possession of the house and land was passed in favour of A. Before execution of the decree, the respondent brought a suit for pre-emption against A and got a decree. He then applied for execution of the decree passed in favour of A. It was contended on behalf of the appellants that the respondent had no right to execute the decree. *Held*, that the respondent could execute the decree passed in favour of A inasmuch as a pre-emptor stands in the shoes of the vendee in respect of all the rights and obligations arising from the sale, under which he has derived his title, and by reason of the sale and the decree for pre-emption he is the representative in interest of the original vendor. **RAM RATAN v. JUGRAJ, 8 O.C. 186. (7 A. 775, F.B., R.)**

(252)—*Auction purchaser, right of to pre-empt property sold to another person prior to confirmation of sale—Civ. Pro. Code, s. 316.*—On the 20th March, 1902, the plaintiff purchased at public auction a share in a certain village. His sale was not confirmed till the 26th April, 1902. In the interval, on March 26th, 1902, the defendant, K, purchased the said share, whereupon, the plaintiff brought a suit for pre-emption. *Held*, that the plaintiff had not acquired a perfected title by the confirmation of his sale and the grant of a sale certificate at the time the property in dispute changed hands and therefore had no right of pre-emption. **LALA GAYA PARSHAD v. MISRA SIDH GOPAL, 8 O.C. 202. [R., 10 O.C. 273.]**

(253)—*Sale, when complete—Limitation—Cause of action—Agreement to purchase—Conditional sale, effect of.*—A sale-deed was executed in favour of the appellant on the 4th February, 1897. On the 16th March, 1897, an agreement was entered into between the appellant and the vendors to the effect that, if the purchase money was paid back till the 11th May, 1903, the vendors would be entitled to get back their property. The money was not paid up by vendors till the date fixed by the agreement. On the 26th April, 1904, the present suit was instituted for pre-emption within one year from the date of the expiration of the period fixed in the agreement of March, 1897. The defendant contended that the suit was barred by limitation. The first Court dismissed the suit but the lower appellate Court held that the right of pre-emption did not attach to a conditional sale until it was rendered absolute by the entire cessation of all the rights on the part of the vendors and as this suit was brought within a year from the 11th May, 1903, it was not barred by limitation. On second appeal, it was *held* that the suit was barred by limitation, the cause of action having arisen on the date of the sale. The effect of the agreement of March, 1897, was not to make the completed sale incomplete but only to add a condition that, up to a

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

certain time, the deed of sale, if so chosen by the vendors, could be revoked. The plaintiff ought to have brought his suit for pre-emption within a year after the contract of sale dated 4th February, 1897, and would have then taken the property subject to the vendee's liability to restore it to the vendors if, till May, 1903, the vendors wished to purchase it back. *Held*, further, that, if the effect of the agreement of March, 1897, could be supposed to make the sale, a mortgage by conditional sale, the plaintiff could not bring a suit for pre-emption until there had been a decree for foreclosure. **DOCTOR SHIAM SABAL v. SHARAI BEG, 8 O.C. 275 (B.) (20 W.R. 216, R.)**

(254)—*Proposal to sell—Oudh Laws Act, ss. 10 and 11.*—A mere proposal to sell property does not entitle any one to claim pre-emption: but under the Oudh Laws Act there must be a complete contract for sale before a suit for pre-emption can be maintained. **SHANKAR PARSHAD v. HAMID ALI KHAN, 9 O.C. 169 (B.) (3 O.C. 213, 2 O.C. 7, R.) [R., 10 O.C. 273; D., 13 O.C. 219.]**

(255)—*Perpetual lease, no suit for pre-emption in case of—Lease not a sale—Oudh Laws Act, s. 9.*—*Held*, that no right of pre-emption can be claimed in respect of a perpetual lease, as such a lease is not a sale within the meaning of Oudh Laws Act. **BABU BALDEO PRASAD v. SHEIKH ALI HUSAIN, 10 O.C. 348. (8 O.C. 21, D.)**

(256)—*Pre-emptor must show a valid title on date of decree—Imperfect partition, date of its effect so as to alter the relationship between the shareholders—Act III of 1901, s. 131—Oudh Laws Act, ss. 9 and 11.*—*Held*, that the principle recognized by the Allahabad High Court can be applied to the statute law in Oudh and a plaintiff pre-emption is bound to show a valid title on the date the decree of the Court of first instance was passed. Where an imperfect partition had taken place between the co sharers and had been confirmed prior to the institution of the pre-emption suit, *held*, that the relationship between the shareholders of the village *inter se* was not, under s. 131 of U.P. Act III of 1901, altered, until it took effect on the 1st July following. **AMIR HASAN v. MUSAMMAT SARDAR BEGAM AND OTHERS, 12 O.C. 229 = 3 Ind. Cas. 546. (20 A. 100, 21 A. 374, 21 A. 441, 25 A. 421, 26 A. 389, 11 O.C. 290, 69 P.R. 1898, 73 P.R. 1898, 49 P.R. 1901, R.)**

(257)—*Right of pre-emption, meaning of—Right of pre-emption, condition essential for enforcement of—Oudh Laws Act, s. 10, notice issued under—Tender made subsequent to notice, refusal of—Conditional agreement for sale, whether it gives right to sue for pre-emption—Oudh Laws Act, ss. 6, 9, 11, 12, and 13.*—A right of pre-emption is a right to the benefit of a contract or a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. The right of pre-emption is not an absolute right to acquire immovable property, but only a relative right to acquire it in preference to all other persons, and in this respect it differs essentially from the right which has its origin in proposal and acceptance. In all cases a violation of the right is an essential condition to the bringing of a suit for enforcement of the right of pre-emption. *Held*, therefore, that a person being entitled to a right of pre-emption is not entitled to claim a decree merely on the ground that the owner of the property has issued a notice under s.10, Oudh Laws Act, and that a tender made subsequent to the receipt of notice has been refused. Where a conditional agreement for sale had been entered into, but had subsequently been superseded by agreement of the parties, *held* that it could not give the plaintiff a right to sue for pre-emption; for it could not be said that the agreement was evidence of a complete contract to sell. **JAGAN NATH v. SHEO RATAN SINGH, 13 O.C. 219. = 7 Ind. Cas. 295.**

(258)—*Ancestral lands—Division and separation of shares amongst co-heirs—Relations to remote degree*—There is no authority for holding that before a Burman can sell his property to others he is bound to offer it first to every one of his relations including those of remote degree. The plaintiff alleged that the lands belonged originally to the plaintiff's grandparents, who were also the great grandparents of the first and second defendants, but it also stated that upon the death of the plaintiff's grandmother over 40 years previously her six children had divided the ancestral property, and that the property, which was the subject-matter of the suit, fell to the share of the grandmother of the first and second defendants. The plaintiff claimed, notwithstanding the division and separation of shares amongst the children of his grandparents, that he was a co-heir with those defendants in respect of the land in suit, and that those defendants were under an obligation to offer the land to him for sale before selling it to strangers. *Held* that upon the division of the property amongst the children of the plaintiff's grand-parents, each child took the particular lot or lots which fell to him or her free from all obligation as regards pre-emption, and *a fortiori* the descendants of each child also took the lot or lots which devolved on them respectively free from such obligation. **SHWE EIK KE v. THA HLA AUNG, 1 L.B.R. 144. [R., U.B.R. 1907, 2nd Qr., Buddhist law—Inheritance—Pre-emption 1; Diss., 14 Bur. L.R. 91.]**

(259)—*Enforcement of right of pre-emption between non-mahomedans.*—The right of pre-emption is entirely a creature of the Mahomedan law. Though everybody is held to know the law the rule of pre-emption is neither a part of the law of the land nor a portion of

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

the personal law which the Courts are bound to administer under the provisions of s. 5 of Act XX of 1875. As between the Mahomedans the rule is enforced. Similarly where a non-mahomedan purchases property clearly understanding that he does so subject to rule of pre-emption he is equitably bound by the rule. But the rule cannot apply in the case of the vast numbers of non-mahomedans who have never heard of such right. **ABDUL RAZAK v. JAGOBA, 7 C.P.L.R. 117.**

(260)—*Re-sale by vendee to vendor, when could affect right of pre-emptor—Sale to stranger of a co-occupant's entire share, effect of.*—In cases to which the Muhammadan law of pre-emption is applicable, it has been held, on the authority of the Hedaya, that, once the right of pre-emption had accrued, no subsequent dissolution of the contract, between the parties to it, could dissolve such right. (13 W. R. 332, R.; 20 A. 100, 21 A. 374, 21 A. 441, 23 A. 247, 26 A. 389, A.W.N. 1884, 169, R.) Further, apart from the Muhammadan Law, the power to defeat the rights of the pre-emptor lasts only up to the institution of the pre-emption suit and *a fortiori* does not last after the passing of the decree in the suit. So, on the passing of such a decree, the right under it cannot be defeated by any subsequent re-sale by vendee to vendor. Also, even before the institution of the suit, it would appear that a stranger-vendee of a co-occupant's entire share cannot defeat the pre-emptor's right by re-conveying the share to the vendor. **GANPATSA MAHADASA v. JOOMABHAI, 2 N. L.R. 150. [F., 5 N.L.R. 136.]**

(261)—*Right of—Re-conveyance to vendor after suit for pre-emption—Whether defeats pre-emptor's right.*—*Held*, that after institution of a suit for pre-emption, the vendee cannot defeat the pre-emptor's right by re-conveying to his vendor who has parted with the whole of his share. **MT. RAJAI v. IRBHAN, 5 N.L.R. 136. (2 N.L.R. 150, F.; 5 A. 110, 7 A. 775, 28 A. 590, 20 A. 100, 23 A. 247, 21 A. 374, 21 A. 441, 26 A. 389, 31 A. 111, 30 A. 130, 30 A. 467, 3 A.L.J. 544, 6 B. H.C. 263, 26 C. 1, 26 C. 39, 6 M.H.C. 26, 21 M. 288, 24 M. 449, 8 C.P.L.R. 45, 11 C.P. L.R. 122, 62 P.R. 1879, 73 P.R. 1898, R.)**

(262)—*Pre-emption—Custom in Gurdaspur—Sale of house—Vicinage—Common wall.*—The custom of pre-emption exists in Gurdaspur. Where two rival pre-emptors have adjoining houses, and one of them has a common wall which forms one of the walls of the house sold, and the other has not, the former has a right superior to the latter without any proof of custom on the point. **KALAN KHAN v. RAM SURAN DAS, 97 P.R. 1880. [Rel. on, 108 P.R. 1886; D., 43 P.R. 1903=92 P.L.R. 1903, 71 P.R. 1905=129 P.L.R. 1905.]**

(263)—*Pre-emption by vicinage—Custom—Samrial, Sialkot tehsil.*—In this suit for pre-emption on the ground of vicinage in respect of

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

a house in the town of Samrial, it was found on the evidence that the plaintiff had failed to prove the existence of a custom that mere proximity gives a right of pre-emption. With reference to s. 11 of the Punjab Laws Act, in such cases, the existence of the right of pre-emption in the particular town must be shown, and it was a local custom which had to be looked to, to ascertain by whom and under what circumstances it could be exercised, and no plea of law and general custom alleged to give such right was therefore admissible. **LABHU v. CHENDRA, 69 P.R. 1884. [R., 17 P.R. 1895.]**

(264)—*Pre-emption—Custom—Wajib-ul-arz—Onus of proof—Owner of isolated plots—Co-sharer.*—A person claiming to be co-sharer by virtue of his holding two revenue fee plots situated in the same *Khevat* as that in which the property sold is situated, is not entitled to claim a right of pre-emption based upon custom, inasmuch as there is no community of interest between him and the vendor. The *wajib-ul-arz* is not the custom. It is merely a piece of evidence to be given due consideration to, in the course of the enquiry. The question is whether by production of the *wajib-ul-arz* in question, without the support of a single instance in which the right has been claimed or exercised, the plaintiff has discharged the onus of proving the existence of a custom of pre-emption giving him as a proprietor of an isolated plot a right to pre-empt. **MAWASI v. MOOL CHAND, 9 A.L.J. 670=14 Ind. Cas. 278=34 A. 434.**

(265)—*Pre-emption—Sale of a house in the city—Subsequent sale—Suit to pre-empt the first sale—Consideration of the second sale greater than that of the first—Question of price.*—A house in the City of Benares was sold for Rs. 1,150. The vendee resold it to the appellant for Rs. 4,000. The plaintiff brought a suit for pre-emption of the first sale offering to pay Rs. 1,150 the consideration of the first sale. Both the first and second vendees were made parties to the suit. The defence of the second vendee, *inter alia*, was that the plaintiff could not dispossess him without paying the amount that he had paid, *viz.*, Rs. 4,000. *Held* that the second sale was subject to the right of pre-emption, and the pre-emptor was only bound to pre-empt the first sale, making the subsequent vendee a party to the suit so as to bind him by the proceedings. **KHETAR CHANDRA BASU MALLICK v. NABINKALI DEVI, 11 A.L.J. 527=20 Ind. Cas. 424=35 A. 385. (32 A. 45, R.)**

(260)—*Ottidar's right of pre-emption—Limitation Act, 1908, art. 120.*—The right of pre-emption, which an Ottidar has, depends entirely on the custom which prevails in the West Coast. The right of the Ottidar consists in a right to elect, when there has been an attempt on the part of the owner of the property to sell

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

it to a third person, whether he will buy it for the same price as that offered by the third person or not. It is obvious that such a right can only be exercised when the Ottidar knows first of all that the property is sold or attempted to be sold to another person, and what the terms are on which it is so proposed to be sold. If he has no knowledge of either fact, he is not in a position to make any election. An Ottidar is entitled to have an opportunity given to him to make the election to which his right of pre-emption entitles him. The right to sue, therefore, does not arise until the Ottidar knows of the sale of the property and the terms of the sale. Art. 120, Limitation Act, applies and time would run only from the date of the Ottidar's knowledge of the sale. Art. 120, Limitation Act, does not make it a condition that the plaintiff should have knowledge of the fact which give rise to the cause of action, before time begins to run. But there can be no doubt that, if the nature of the right imports, as a necessary condition, knowledge of certain facts, then the right to sue cannot be said to arise in such a case unless the plaintiff had the necessary knowledge. **P. MAMABI v. ACHARATH PARAKIT MALIGA PURAYIL CHEREYA KUNHIFEKKI HAZI, 12 M.L.T. 535=23 M.L.J. 607. (5 M. 1898, 7 M. 309, 13 M. 490, 15 M. 480, 20 M. 305, 24 M. 449, 29 M. 336, 30 M. 388, R.)**

(267)—*Pre-emption—Paiki number or recognized division of survey number—Occupants or co-occupants—No right of pre-emption as between—Berar Land Revenue Code, ss. 4, 86, 105, 205—The words 'survey number' in s. 105—Meaning.*—An occupant or co-occupant of a paiki number, *i.e.*, a recognised division of a survey number, has no right of pre-emption over another paiki number in the same survey number. Under s. 86 of the Berar Land Revenue Code, a portion of survey number cannot be recognised as a recognised division of the survey number unless it is itself a holding. It follows that two holders in a recognised division of a survey number are co-occupants with reference to each other, but that an occupant or a co-occupant in a recognised division is not a co-occupant with reference to an occupant or co-occupant in another recognised division of the same survey number, for they do not hold in the same holding and therefore do not come within the definition of co-occupant with reference to each other. When there are recognised divisions of the survey number, the words 'survey number' in s. 105 mean one of such recognised divisions, since each such recognised division is a holding. **MT. GANGU v. CHANDU, 9 N.L.R. 16=18 Ind. Cas. 862.**

(268)—*Pre-emption, Suit for—Contract of sale of property, existence of—Mortgage-deed with stringent terms no evidence of a transaction of sale.*—What a plaintiff in a pre-emption suit

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

has to make out is that there is in existence a contract for sale of property by virtue of which a third person, whose right to acquire the property is inferior to that of the plaintiff, has obtained a right to acquire. (9 O.C. 169, R.) Where the plaintiff sued to enforce his right of pre-emption, alleging that the transaction carried on between the defendants was in reality a sale and that the deed in question had been drawn up fraudulently in the form of a mortgage in order to conceal the real nature of the dealings between the parties and thereby to defeat the plaintiff's right of pre-emption, *held*, that, in the absence of all evidence explaining the nature of the transaction, a Court is not justified in finding that the mortgage-deed furnished evidence of a transaction of sale, merely because its terms were so stringent as to make it highly improbable that redemption would ever take place. **BADRI SINGH v. CHANDIKA SINGH, 15 O.C. 1=14 Ind. Cas. 8.** (3 O.C. 213, 145 P.R. 1906, 45 P.R. 1895, R.)

(269)—*Pre-emption — Pre-emptor not suing bona fide for herself—Maintainability of suit.*—A pre-emption suit not instituted *bona fide* with the object of excluding a stranger from the village is not maintainable. **MAHARANI v. RAM ADHAR, 13 Ind. Cas. 508.** (21 C. 496, 21 I.A. 26, 9 O.C. 331, R.)

(270)—*Sale by vendee to a person entitled to pre-empt—Suit to pre-empt the sale by vendee, maintainability of.*—L sold his property to D on 5th of June, 1909. S had a right to pre-empt the property and was about to bring a suit for it, when, on the 4th of June, 1910, D, the vendee, re-sold the property to him. Thereupon A, who was related to D, brought a suit for pre-emption on the basis of the sale of 4th of June 1910, made by D in favour of S: *Held*, that the suit was maintainable. **ADHARI DUBAIN v. SHEODIHAL PANDE, 13 Ind. Cas. 708.** (7 A. 917, 25 A. 334, R.)

(271)—*Pre-emption, right of — Sale—Permanent lease whether can be treated as sale—Lease, no pre-emption in the case of.*—A deed of permanent lease which gives a right of permanent possession to the lessee in consideration of Rs. 150 as *zar-i-peshgi* and of an annual rent of Rs. 2, cannot be construed as a deed of sale. There can be no right of pre-emption in the case of a permanent lease. **TRILOKI NATH v. SHEO MANGAL, 14 Ind. Cas. 717.** (10 O.C. 348, F.)

(272)—*Pre-emption — Co-sharer — Partition, effect of.*—The sale in respect of which the present pre-emption suit was instituted took place on the 22nd of July, 1909. On the 21st June previously, partition had been made and confirmed with effect from the 1st of July, 1909. Under the partition, the plaintiff and the vendor were co-sharers in the same *mahal* and the vendee ceased to be co-sharer with the vendor. The *wajib-ul-arz*, which was prepared after the partition, was verified on the 2nd of August, 1909. *Held* that the plaintiff had a

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

right to sue for pre-emption. **NAND KISHORE SINGH v. RAM BIRICH RAI, 15 Ind. Cas. 704.**

(273)—*Re-sale of portion of property to person entitled to pre-empt—Suit to pre-empt the second sale, not maintainable.*—A sold his *zemindari* to B, on the 5th of June, 1909. Before the limitation to bring a suit for pre-emption had expired, B, admitting the pre-emptive right of C, re-transferred a portion of the property to him and retained the rest for herself. D, who was a near co-sharer of B, the original vendee, brought a suit to pre-empt the portion of the property re-sold to C. *Held*, that the suit was not maintainable. **SHEO DAYAL PANDE v. ADHARI DUBAIN, 16 Ind. Cas. 409.**

(274)—*Pre-emption—Oudh Laws Act (XVIII of 1876), ss. 9, 10 — Sale to co-sharer—Right of co-sharers inter se—Wajib-ul-arz — Custom—Process and history of development of custom—Statutory law regarding pre-emption.*—The *Wajib-ul-arz* of the village provided:—"No sharer in the village can dispose of his share or any portion of it to any one who is not a co-sharer either by way of sale or mortgage, so long as any co-sharer is willing to accept a transfer of it in the same way." *Held*, (1) that, while the *Wajib-ul-arz* declared a right of pre-emption in favour of co-sharers as against a person outside the co-parcenary body, it did not declare at the same time that no such right existed in cases where one co-sharer sold to another and that, therefore, the *wajib-ul-arz* did not afford evidence of the existence of a custom in conflict with the statutory right of pre-emption between co-sharers; (2) that, in the absence of a well-established custom to regulate the rights of pre-emption of co-sharers *inter se*, the statutory provisions of the Oudh Laws Act stepped in, that s. 9 of the Act laid down a rule of preference to regulate the rights of co-sharers *inter se*, and that the language of s. 10 also indicated that the right of pre-emption could arise, not only on sales to persons outside the village community, but also on sales to the members of the same community; (3) that s. 9 of the Oudh Laws Act must be read along with s. 6 in order to arrive at a true notion of the extent of the right of pre-emption. The process and history of development of the custom and Statutory Law of Pre-emption in Oudh traced. **SHEORATAN SINGH v. UJAG AR SINGH, 16 Ind. Cas. 800=15 O.C. 389.**

(275)—*Rishtadar karibi not co-owner with the vendor—No right to pre-empt.*—The pre-emptive clause in the *zamima khewat* of a village ran as follows:—"When any sharer wishes to transfer his rights, he can transfer first to a near relative (*rishtadar karibi*), after him to a distant relative *ristadar sardi*, and after him to sharers in the village (*shurkanden deh*). In the event of those persons refusing, the transferor shall have power to sell or mortgage to

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

whomsoever he pleases. Sharers (*hissadaran*) and sharers in the village (*shurkain deh*) shall be considered to have preference on condition that they are willing to pay the same price as a stranger is paying :—*Held*, that, under the above clause, a near relative, who was not a co-sharer of the vendor in the same mahal, had no right to pre-empt. **MAHABIR PERSHAD v. RAM LOCHAN TEWARI, 17 Ind. Cas. 521.**

(276)—*Pre-emption—Lis pendens—Benami—Sale in favor of wife—Fact alleged by one and not denied by the other.*—Where a deed of sale is in a Hindu lady's favour, she is to be presumed the owner of the property sold to her thereunder, and the onus of proving that it is a *benami* transaction and the real owner is her husband lies on the person making the assertion, specially when the husband does not claim that property. A decree obtained, by the real owner of the pre-empted property, during the pendency of the pre-emption suit, cancelling the sale against the vendor and the vendee alone, which is based on the title acquired long before institution of the pre-emption suit, is good, and the rule of *lis pendens* does not apply in such a case. A party alleging a fact, which is neither denied nor expressly admitted by the opponent, is not bound to prove it. If a party repudiates his interest in the suit, the Court is bound to accept it. **MUSSAMMAT DHAN DEVI v. BALMOKAND, 101 P.W.R. 1912=131 P.L.R. 1912=16 Ind. Cas. 122.**

(277)—*Decree for pre-emptor—Appeal by vendee—Transfer of property on basis of which pre-emption decreed subsequent to decree—Construction of deed—Sale or mortgage—Criteria—Evidence—Admissibility of oral evidence—Third party—Evidence Act (I of 1872), s. 92, scope of—Punjab Pre-emption Act (II of 1905), s. 4.*—Where after obtaining a decree for pre-emption and during the pendency of an appeal against the decree preferred by the vendee, a pre-emptor parts with the property, on the strength of which he was able to sue for pre-emption, the transfer does not disentitle the pre-emptor to the decree he has already obtained, and the vendee cannot ask the Appellate Court to take away from the pre-emptor the benefit of the decree on the ground of his subsequent transfer (91 P.R. 1909, F.B., 4 Ind. Cas. 337, 161 P.W.R. 1909, 148 P.L.R. 1909, R.) The prohibition in s. 92 of the Evidence Act against going behind a written deed applies only to parties to a deed and not to outsiders (117 P.R. 1890, F.B., 20 P.R. 1899, *Rel. on.*) In order to prove that an ostensible mortgage is really a sale, what has to be shown is (a) that there was a positive understanding between mortgagor and mortgagee that redemption would not be demanded, or (b) that the terms of the mortgage are such that redemption is a virtual impossibility. Onerous conditions in a mortgage are not in themselves sufficient to warrant the decision that it was really a sale. A mortgaged a building site to the nephew of her husband. The site was situated in a town in the heart of

Pre-emption—continued.**—6.—Right to pre-empt—continued.**

a flourishing canal colony where such property was likely in future to increase in value. The mortgage-money was not higher than the market-value of the site. The term of the mortgage was fifteen years. No interest was chargeable on the mortgage-money proper but the mortgagee was entitled to build on the site at will and to charge the expenditure, with 6 per cent. per annum interest, on the house: *Held*, that these circumstances were insufficient to prove that the transaction between the parties was a sale and not a mortgage. **MEGHA RAM v. MAKHAN LAL, 13 Ind. Cas. 667=126 P.L.R. 1912=67 P.R. 1912=225 P.W.R. 1912.** (100 P.R. 1895, 78 P.R. 1904, 19 P.R. 1905, 78 P.L.R. 1905, *Rel. on.*; 145 P.R. 1906, 109 P.L.R. 1907, 20 P.R. 1899, D.)

(278)—*Punjab Pre-emption Act (II of 1905), ss. 12 (b), secondly 14—Pre-emptor and vendee equally related—Pre-emptor also co-sharer in holding—Preferential right—Dismissal of suit in case of equal right—Civ. Pro. Code (1908), s. 148—Extension of time—Pre-emption decree*—Where both the pre-emptor and the vendee are agnates of the vendor, equally related to him, but the pre-emptor is also a co-sharer in the holding, a portion of which is sought to be pre-empted, the pre-emptor is entitled to a preferential right. When both the pre-emptor and the vendee have equal right of pre-emption, the suit of the pre-emptor must fail. *Obiter dictum*:—The purchase money due under a pre-emption decree was to be paid by 10th December. The money was remitted by money order on 5th December but was not paid by the post office until 6th January, 1912: *Held*, (1) that delay was not due to any fault of the decree-holder; (2) that the Court could extend the time under s. 148, Civ. Pro. Code. **NABA v. PATHANA, 53 P.L.R. 1913=72 P.W.R. 1913=60 P.R. 1913=18 Ind. Cas. 86.**

(279)—*Sale—Transfer by virtue of compromise decree in pre-emption suit—Right of pre-emption does not accrue on such transfer.*—A right of pre-emption does not arise upon a transfer effected by virtue of a compromise decree in a pre-emption suit. For the accrual of the right of pre-emption, there must be a person acquiring property by a contractual relation of sale or transfer. **KHEMAN v. ALADAD, 74 P.W.R. 1913=18 Ind. Cas. 957=195 P.L.R. 1913.** (7 A. 917=A.W.N. 1885, 295, 25 A. 334=A.W.N. 1903, 63=1 A.L.J. 247, F.)

(280)—*Pre-emption—Exchange or sale—Question whether exchange or sale—Question of law—When amount of mortgage-charges to be paid by purchaser—No part of purchase-money—A small sum of money paid in a transaction of exchange—Merely adjusting factor does not alter nature of transaction.*—*Held*, that, the question whether a particular transaction purporting to be an exchange of properties was in reality a sale amounts to a question of law, when the contention is that, in the determination of the question, the Court should have

Pre-emption—continued.**—6.—Right to pre-empt—concluded.**

regard to the fact that, one of the properties dealt with being under mortgage, the transferee must be taken to have paid as part consideration to the transferor, or on his behalf to the mortgagee, the amount of the mortgage-charges. The amount which the purchaser of property will eventually have to pay in respect of mortgage-charges upon it cannot be said to form part of the purchase money, when such property is sold for a definite amount. In a transaction of exchange, the mere fact that one of the parties has in addition paid a small sum of money by way of adjusting the value cannot alter its nature. *QAZI v. SHARFA*, 100 P. W. R. 1913=199 P. L. R. 1913=19 Ind. Cas. 301. (97 P. R. 1900, R.)

Co-sharer—Mahomedan parties to suit—Mahomedan, law—See U. P. ACT, XVIII OF 1876, s. 9, cls. (2), (3), 3 O. C. 110.

Usufructuary mortgage by tenant without landlord's consent—Right of landlord to sue for pre-emption. See C. P. ACT XVII OF 1889, s. 38, 9 C. P. L. R. 91.

See BUDDHIST LAW—GENERAL, L.B.R. 1872—1892, 76.

See CUSTOM, 3 Agra 138.

Rights of persons equally entitled to pre-empt—See DECREE—DECREE, FORM OF, 1 A. 291.

See DEED—CONSTRUCTION OF DEEDS, A.W.N. 1881, 6.

See HINDU LAW—WIDOW, 98 P.R. 1868.

See LANDLORD AND TENANT—CHAKDAR, 44 P.R. 1870.

See LIMITATION ACT, 1908, art. 120, 30 P.R. 1893, 87 P.R. 1893, 25 P.R. 1899, 30 P. R. 1892, 11 P.R. 1893.

See MORTGAGE—GENERAL, 20 A. 19, F. B.—A.W.N. 1897, 160.

See MORTGAGE—MISCELLANEOUS, U.B. R. 1897—1901, Vol. II, 511.

Existence of a right of—No defence to a suit for possession—See PLEADINGS, 27 A. 78.

Value of subject matter of suit for pre-emption—Form of appeal, when valuation by plaintiff determines the question of—Appeal—Jurisdiction—Civil Courts Act, s. 18—See VALUATION OF SUIT, 6 O.C. 255.

—7.—Subject of Pre-emption.

See PUNJAB ACT IV OF 1872.

(1)—Act XXIII of 1861, s. 14, claim under, by co-sharer in estate—Pre-emption—Rights of claimant.—Petitioner, who was a co-sharer in an estate, on an interest of another co-sharer being put up for sale in execution of a decree, came and claimed under s. 14 of Act XXIII of 1861 to be declared the purchaser of that interest. The Principal Sudder Ameen entertained the claim and substituted the petitioner

Pre-emption—continued.**—7.—Subject of pre-emption—continued.**

for the actual purchaser. The High Court held that the Principal Sudder Ameen had no authority under s. 14 of the said Act XXIII of 1861 absolutely to substitute the petitioner for the actual purchaser of the interest sold. The party claiming pre-emption under the circumstances stated in the section should, like a claimant for pre-emption in any other case, be left to assert his right in a Civil Court. *SYUD ABDOL JALEEL v. KALEE KOOMAR, DUTT*, 6 W.R. Mis. 3.

(2)—Act I of 1841, s. 2—Pre-emption—Putte-daree tenure.—A right of pre-emption at auction-sale can arise even though the estate is not pure *Putteedaree* but only imperfect within the meaning of s. 2 of Act I of 1841. *SHEIKH KADIR BUX v. RAM TAHUL BHAGUT*, 3 N.W.P. 125.

(3)—Sale of confiscated property by Revenue authorities—Claim for pre-emption against purchaser.—A claim for pre-emption would not lie against the purchaser of confiscated property sold by the Revenue Authorities. *MAHOMED VILLAYAT-OL-LAH KHAN v. AHMED HUSSUN KHAN*, 3 Agra 70.

(4)—*Wajib-ul-arz*—Pre-emption—Government bound by conditions of *Wajib-ul-arz*.—The property of a convict was confiscated by Government and was sold to his mother. Held, (1) that the Government acquired the convict's share in the mouza in the same condition in which the latter held it before his conviction; and (2) that the plaintiff a co-sharer who claimed to pre-empt the sale was entitled to the right of pre-emption subject to the payment of the consideration paid by the vendee to Government. *THE COLLECTOR OF FUTTAHPORE v. SYED YAD ALI*, 1 Agra 88. [F., 1 N.W.P. 93; R., 28 A. 235=25 A.W.N. 259=2 A.L.J. 787.]

(5)—*Kotee and golah*—Proof of local usage and custom.—Exercise of the right of pre-emption was allowed in respect of a *kotee* and *golah* where it was proved that according to local usage and custom such properties were subject to pre-emption. *KESHO RAI v. BINAYAK RAI*, 3 Agra 179.

(6)—Properties with separate numbers in Collector's register—Effect—Pre-emption.—Where certain properties bore separate numbers in the rent-roll of the Collector, and were, therefore, separate estates in the legal sense of the word "estate" held that there was such a separation as would prevent a claim for pre-emption on the ground of co-parcenary. *JOORAY SINGH v. TOOKUN SINGH*, 14 W.R. 476. [D., 35 C. 575.]

(7)—Pre-emption—Claim to pre-empt one of the several properties sold—Decree for that property only.—Three villages were sold together by one sale-deed. The plaintiffs had pre-emptive right in respect of only one of them. Held, that the plaintiffs could not pre-empt the

Pre-emption—continued.**—7.—Subject of Pre-emption—continued.**

other two villages in which they had no interest. The fact that the sale was joint and that the properties and their prices were inseparable did not affect the matter. **MUNSHI MAKUND SARUP v. MUSAMMAT SARVI BEGAM, 2 Ind. Cas. 65.**

(8)—*Mesne profits—Claim due before date of pre-emption right—Subject of pre-emption.*—A claim for mesne profits, due before the date on which the right to pre-emption arose, cannot form the subject of pre-emption. **EMAMOOD-DEEN SOWDAGUR v. ABDOL SOBHAN, 7 W.R. 117. [R., 12 A. 234.]**

(9)—*Right of pre-emption, applicable only to sales—Lease in perpetuity, not a sale.*—Pre-emption applies to sales only, and a lease in perpetuity, however small the reserved rent, is not a sale, and cannot therefore be the subject of pre-emption. The lower Appellate Court, in this case, had rightly treated the transaction between the parties as a lease, which it certainly was, an annual rent of one rupee being reserved, and the contention of the appellant that the transaction was really a sale was not upheld by the High Court. **MOOROOLY RAM v. BABOO HUREE RAM, 8 W.R. 106. [F., 25 W.R. 43; R., 15 C. 184, 136 P.R. 1907.]**

(10)—*Wajib-ul-arz—Pre-emption—Alienation—Lease.*—Where the right of pre-emption was claimed under a clause in the *wajib-ul-arz* which was to the effect that if any sharer wishes to transfer his share by sale or mortgage or in any other way, he should effect the same in favour of his co-sharers, etc., it was held that the meaning of the clause was to give the right of pre-emption, only when something in the nature of an alienation or transfer of *proprietary right* was intended and not merely on every occasion when a sharer might make a lease of his property even though the lease be for a term of 20 years. **RAI MANICK CHUND v. RAI BISHAISHUR BUKSH SINGH, 2 Agra 99.**

(11)—*Wajib-ul-arz—Pre-emption—Transfer upon trust to pay debts of transferor out of profits—Alienation.*—Where, by a deed of arrangement between the parties, certain shares in a mouzah were made over to a manager upon trust to pay out of the profits to the creditors of the transferors and the residue of the profits to the transferors, who bound themselves not to alienate the property so long as the debts remained unpaid, *held* that the deed did not operate to divest the property from the original holders and to vest it in the manager either by way of mortgage or otherwise, and that there was not such an alienation of the property which would confer on the plaintiff the right of pre-emption under the stipulation of the *wajib-ul-arz*. **OUTAR SINGH v. MUSST. ABLAKHEE KOONWER, 2 Agra 328.**

(12)—*Wajib-ul-arz—Chuck tenure—Pre-emption—Alienation—Co-sharer.*—Where the *Wajib-*

Pre-emption—continued.**—7.—Subject of Pre-emption—continued.**

ul-arz, to which the holder of a *Chuck* was not a party, provided for a preferential rights of purchase in favour of the co-sharers in the village on the occasion of the alienation of any share, and the plaintiff, one of the Zemindaree proprietors, claimed this preferential right with respect to a resumed *muafee chuck* which had been alienated by the holder thereof, it was held that such alienation was not an alienation of a share within the meaning of the *wajib-ul-arz*, that the holder of the *chuck* was not, by virtue of his tenure of the *chuck*, a co-sharer, that the co-sharers were the Zemindaree proprietors and that the tenure of the *chuck* would neither confer on its possessor a right of pre-emption, nor subject his estate to such a right in the event of alienation. **SHEO LALL SAHOO v. SHEIK RUMZANEE, 2 Agra 35.**

(13)—*Exchange of share of one village with that of another—Pre-emption—Consideration.*—R and others exchanged their share and their house in mouzah K for the share and house of S and another in mouzah G. Plaintiff who was a co-sharer in the former mouzah sued for pre-emption under the terms of the *wajib-ul-arz*. *Held*, that the transaction, being an exchange of property for property, was a sale, and that the right of pre-emption could only be claimed under the terms of the *wajib-ul-arz* in respect of land, but not of the house of the vendors; that the price payable by the pre-emptor to the vendee should be the estimated value, not of the property in suit, but of the property which was given in exchange for it. **SEWA RAM v. RISAL CHOWDHRY, 1 Agra 144. [F., 1 N.W.P. 93.]**

(14)—*Wajib-ul-arz—Transfer under compromise of suit, whether amounts to sale.*—Where the parties to a suit for pre-emption entered into a compromise by which the plaintiff pre-emptor relinquished his claim to a portion of the property in suit in favour of the vendee, and the latter admitted the plaintiff's claim to the remainder of the property, and a decree was passed in terms of the compromise, *held*, that the compromise and the decree passed thereon did not amount to a sale by the vendee to the plaintiff so as to entitle another co-sharer in the village to bring a suit for pre-emption against the plaintiff on the ground that he was a nearer co-sharer. **HANUMAN RAI v. UDIT NARAIN RAI, 7 A. 917=A.W.N. 1885, 295.**

(15)—*Wajib-ul-arz—"Transfer"—"Sale."*—An agreement by which one person agrees to transfer to another a portion of his share, for which he intends filing a suit in consideration of the latter supplying him with funds for its prosecution, operates to effect such transfer; and a subsequent compromise of the suit, which recites a certain portion only of the share originally intended, as having been transferred to the person supplying the funds, does not

Pre-emption—continued.**—7.—Subject of Pre-emption—continued.**

operate as a fresh transfer, but only as a re-adjustment of the share between the parties to the agreement. Consequently (where the *wajib-ul-arz* of the village granted a right of pre-emption to co-sharers in respect of a share which a sharer wished to transfer) a person who, subsequent to the agreement and before the compromise, has acquired the remaining portion of the property, the subject of suit, cannot claim to pre-empt from the transferor, the portion of the share ultimately transferred to him in virtue of the compromise, for, the transferor's title was complete by the original agreement, and the claimant was not a sharer at the time. *LACHMI NARAIN v. MANOG DAT*, 7 A. 291 = A.W.N. 1885, 47. [R., 43 P.R. 1900, 7 O.C. 158.]

(16)—*Wajib-ul-arz—Decree-holder purchasing at Court-auction—Re-sale to judgment-debtor before confirmation—Effect.*—Where a decree-holder who has purchased the rights of the judgment-debtor in Court-auction in execution of his own decree, and has been put in possession thereof, re-sells the same to the judgment-debtor before the confirmation of sale on receiving the decree amount from him, there is no alienation in the case between the decree-holder and the judgment-debtor, such as is contemplated by the *wajib-ul-arz* in the provisions with respect to pre-emption. *MAHOMED RAZA KHAN v. JAWAHIR SINGH*, 2 Agra 1.

(17)—*Muhammadan law — Pre-emption — Public road.*—Certain zamindari property and two houses were sold. Plaintiff sued only to pre-empt the zamindari property. Defendant pleaded that plaintiff was entitled to pre-empt one house and his suit must be dismissed, inasmuch as he had not claimed pre-emption in respect of the said house. Both the vendor and the pre-emptor were co-sharers in the village, and the house in question was situate in the village and was connected with the house of the pre-emptor by a public thoroughfare. *Held*, that no right of pre-emption arose, as, without going into the question as to the rights of the zemindars in the soil of the land, it was clear that neither the vendor nor the pre-emptor has any right to close the road or to place any obstacle thereon. *MIRZUNNISSA v. FAYAZ HUSAIN*, 6 A.L.J. 539 = 5 M.L.T. 391 = 2 Ind. Cas. 468.

(18)—*Pre-emption, suit for — Reversionary interest, sale of—Possibility of succession not a saleable interest—Persons having possibility of succession not co-sharers with those having similar possibility—Transfer of Property Act, s. 43—Indian Limitation Act, sch. II, art. 10.*—A Hindu widow having sold to the defendant some land inherited from her husband, L.N. and the plaintiff as her husband's reversionary heirs sued her and the defendant for a declaration that the alienation would be invalid against them after the widow's death, and obtained a declaration to that effect. Subsequently on

Pre-emption—continued.**—7.—Subject of Pre-emption—continued.**

the 16th February 1897 L and N who were presumptively entitled to a half share in the land after the widow's death executed a deed in favour of the defendant and certain other persons in respect of that share. In the deed, they stated that they sold the half share which would devolve upon them upon the widow's death, that by virtue of the deed executed by the widow the vendee would continue in possession of the land sold by the widow, during the life-time of the widow, and that on her death they would acquire proprietary possession of the land under the present deed. The widow having died, the plaintiff on the 28th August 1898 instituted a suit against the defendant and others who were parties to the sale-deed of 16th February, 1897, claiming pre-emption of the half-share of L.N. *Held*, that the vendors had at the time of the execution of the sale-deed of 16th February 1897, no saleable interest in the property, that they sold a bare possibility of succession, that persons who had a bare possibility of succession were not co-sharers with others who had a similar possibility, and that s. 43 of the Transfer of Property Act did not apply. *Held*, further, that if the case could be regarded as one in which a widow had transferred her husband's property with the consent of the reversioners and a good title had passed at once to the defendant and a right of pre-emption accrued, the suit would be barred by limitation under art. 10, sch. ii, of the Indian Limitation Act. *BHAIRON BAKHSH v. BALDEO SINGH*, 7 O.C. 98. [R., 8 O.C. 349.]

(19)—*Right of pre-emption—Sale—Mortgage.*—The right of pre-emption applies to permanent transfers of property, and not to cases of mortgages. Whether the right of pre-emption could be claimed at the process of foreclosure if foreclosure should result, was not decided in this case. *GOLAB v. WUZEERA*, 87 P.R. 1867. [R., 98 P.R. 1868.]

(20)—*Hindu widow — Mortgage — How far binding upon husband's relatives—Nature of decree when mortgagor was alive—Pre-emption.*—In a suit by the plaintiffs, reversioners to the estate of a Hindu widow, claiming pre-emption and cancellation of a mortgage executed by her, it was contended that though the plaintiffs' claim for pre-emption cannot lie, as the mortgage by the widow was not a permanent transfer, they were yet entitled to a decree that the mortgage executed by her was not binding upon them at least after her death. *Held* that, so long as the mortgagor was alive, the mortgage made by her was of her life-interest, and must be declared to be valid to that extent, but the reversioners might have a decree declaring their right to succeed to the properties after the death of the widow. *MAN SINGH v. MT. DYDEE*, 98 P.R. 1868. [F., 98 P.R. 1894.]

(21)—*Claim to buy part only of property sold not maintainable.*—Where the vendor and pre-emptor were in joint possession of three out of

Pre-emption—continued.**—7.—Subject of Pre-emption—continued.**

four parcels of land sold by the former and, as between the parties, the claim was not rested on the fact of joint possession as giving rise to the right, but on the general ground of relationship, the pre-emptor should not be allowed to pick and choose what he would take and what he would refuse out of the plots of ground for sale by one vendor under one contract, unless a state of circumstances showing it to be equitable were presented. **MAHOMED DIN v. DINA**, 11 P.R. 1874. [D., 107 P.R. 1882, F.B.]

(22)—*Non-transferable right of occupancy—Pre-emption.*—No custom of pre-emption attaches to a non-transferable right of occupancy. **RUKNA v. KANH SINGH**, 179 P.R. 1888. (196 P.R. 1882, 120 P.R. 1883, Cited.) [D., 136 P.R. 1907.]

(23)—*Mortgagee—Wajib-ul-arz—Hoshierpur tahsil.*—Under the terms of the wajib-ul-arz of Hoshierpur tahsil, the right of pre-emption attaches to mortgages by a proprietor of every description without restriction. **BULAND KHAN v. THAKUR DAS**, 10 P.R. 1887. [R., 11 P.R. 1901=85 P.L.R. 1901; Rel. on, 46 P.R. 1903, Note.]

(24)—*Wazirabad—Custom.*—The custom of pre-emption exists in Mohalla Lakhian in Wazirabad. **KISHEN GOPAL v. SUDH DAS**, 105 P.R. 1887.

(25)—*Guzar Talwar, Lahore—Custom.*—The custom of pre-emption attaches to houses and shops in Guzar Talwar in Lahore. **MIRZA AZAM BEG v. JAIDIAL**, 48 P.R. 1888. [Disappr. 17 P.R. 1895.]

(26)—*Mooltan—Custom—Payment by pre-emptor—mount.*—The custom of pre-emption prevails in Mohalla Marochian in Mooltan. Where property is sold in auction and the auction purchaser re-sells it at an enhanced rate, the pre-emptor is not bound to pay the higher sum but only the amount paid by the auction purchaser. **PANJU RAM v. MUSSAMMAT NIKI BAI**, 165 P.R. 1888. [R., 93 P.R. 1902, F.B., 100 P.R. 1892; Disc. 57 P.R. 1906, 42 P.R. 1906.]

(27)—*Suburbs of Delhi—Varieties of pre-emption.*—Because custom in a sub-division allows pre-emption in the case of dwelling houses, it cannot be extended to cases of shops or big plots extending far and wide away from the property through which pre-emption is claimed. **ANKAR LAL v. BAIJ NATH**, 103 P.R. 1889.

(28)—*Mohalla Sultan Ganj—Custom.*—The right of pre-emption is enforced in Mohalla Sultan Ganj in the suburbs of Mooltan. **Haji ALA DAD v. NUR MUSTAFA**, 170 P.R. 1889. [R., 42 P.R. 1906, 100 P.R. 1892, 16 P.R. 1902=15 P.L.R. 1902; Cited, 17 P.R. 1895; Disc., 57 P.R. 1906.]

(29)—*Custom of pre-emption—Gujarat.*—The custom of pre-emption prevails in Khoja Mohalla in Gujarat. **GANGA RAM v. GANDA MAL**, 13 P.R. 1890.

Pre-emption—continued.**—7.—Subject of Pre-emption—continued.**

(30)—*Pre-emption—Mooltan.*—In Mohalla Bhabrianwalla in Mooltan, there is no custom of pre-emption in the case of mortgages. **KARAM BAKHSH v. POHKAR DAS**, 33 P.R. 180. [R., L.B.R. 1900–1902, 336 and 340.]

(31)—*Cheniot, Jhang District—Shop—Pre-emption.*—It lies upon the plaintiff to prove that the custom of pre-emption exists on Kasha Cheniot and that it exists in respect of shops. The fact that such custom exists in a certain locality is no evidence to show that it exists in respect of shops. **CHAUDHRI NUR AHMAD v. GANGA RAM**, 68 P.R. 1890. [R., 17 P.R. 1895; Cited, 17 P.R. 1895; D., 109 P.R. 1900.]

(32)—*Buzar Sahsilwala—Suburb of Batalu—Custom.*—Property situate in a bazar in a suburb of Batala must be regarded as being situated in a town. **KISHAN DIAL v. ALI BAKSH**, 87 P.R. 1890. [R., 7 O.C. 74, 42 P.R. 1906; Cited, 17 P.R. 1895, 90 P.R. 1907; F., 70 P.R. 1898.]

(33)—*Entry in administrative paper—No evidence.*—The entry of the rights of pre-emption in the village administration paper framed at first settlement is no evidence of the existence of the custom of pre-emption. **JIWA v. MUSSAMMAT BHARI**, 92 P.R. 1892. [R., 64 P.R. 1903=172 P.L.R. 1903.]

(34)—*Mohalla Bhoori in Jagraon—Custom in one sub-division—No pre-sumption in others.*—The custom of pre-emption does not exist in Mohalla Bhoori in Jagraon. The fact that the custom prevails in one sub-division of a town does not raise any presumption as to the existence of such in others. **THAKUR DAS v. MUHAMMAD BAKSH**, 100 P.R. 1892. [R. Appr. and F., 109 P.R. 1900; F., 86 P.R. 1901; R., 44 P.R. 1903=75 P.L.R. 1903.]

(35)—*Sale of shops and houses—Right of pre-emption—Proof.*—Under s. 11 of the Punjab Laws Act, in a pre-emptive suit, it is not sufficient to show that the custom exists in neighbouring mohallas of the town, nor is it sufficient in the case of shops to show that the right extended to houses. A shop in a bazaar cannot be pre-empted as a house merely because there is an upper storey to it which is used as a residence. **RAMAN MAL v. BHAGAT RAM**, 17 P.R. 1895. [F., 58 P.R. 1900, 86 P.R. 1901; Appr. & F., 109 P.R. 1900; R., 67 P.R. 1907=38 P.W.R. 1907, 16 P.R. 1902=15 P.L.R. 1902, 44 P.R. 1903=75 P.L.R. 1903, 42 P.R. 1903=89 P.L.R. 1903, 111 P.R. 1906, 96 P.R. 1910, 81 P.R. 1906, 6 P.R. 1905=19 P.L.R. 1905.]

(36)—*Mohalla Bugh Shitab Rai in Rewari—Custom.*—There is no custom of pre-emption in Mohalla Bugh Shitab Rai in Rewari. **KHUSH-WAKT RAI v. RUP MAL**, 17 P.R. 1896.

Pre-emption—continued.**—7.—Subject of Pre-emption—continued.**

(37)—“*Village*”—*Presumption as to existence of pre-emption.*—Though in the case of an ordinary village community, the presumption as to the existence of pre-emption is strong, it is not so in the case of a mere “paper” village created a few years back solely for administrative convenience and no such custom exists in Mahal Bhagat of Ludhiana. **KADIR BAKHSH v. GHULAM, 74 P.R. 1897.** [R., 21 P.R. 1906, 51 P.R. 1907.]

(38)—*Land once agricultural but now urban—Rules.*—Claim in respect of land once agricultural but now occupied by business premises or shops must be subject to urban rules. **UMAR BAKHSH v. ABDUL KARIM, 70 P.R. 1898.** [R., 42 P.R. 1906, 21 P.R. 1906.]

(39)—*Custom—Ghosi Mohalla in Hansi—Burden of Proof.*—There is no custom of pre-emption in Ghosi Mohalla in Rewari. In every case of pre-emption, the plaintiff must affirmatively prove the existence of the custom in the particular locality in which he claims pre-emption. **SAUDAGAR MAL v. AMAN SINGH, 70 P.R. 1899.**

(40)—*Jahan Numan, Suburb of Delhi—Custom—Proof—Land assessed as garden land—Pre-emption.*—Land situate in Jahan Numan, Suburb of Delhi and assessed as garden land could not be regarded as land of a “village community” within the meaning of s. 12 of Punjab Laws Act. A custom to be valid must have existed from a time “so long that the memory of men runneth not to the contrary” **KARAM ILAHI v. BABUA MAL, 21 P. R. 1900.** [R., 51 P. R. 1907, 21 P. R. 1906, 120 P. R. 1906; *Cited.*, 90 P.R. 1907.]

(41)—*Sale of shop—Pre-emption—Onus—Sufficiency of evidence—Katra Harsu Singh*—There is no custom of pre-emption with regard to shops in Katra Harsu Singh in Amritsar. The fact that pre-emption exists with respect to houses in a certain Katra is no evidence to show that it exists in respect of shops nor is it sufficient evidence to show that the right of pre-emption exists in neighbouring katra or mohallas. **NATHA SINGH v. BILLA SINGH, 58 P.R. 1900.** [R., 16 P. R. 1902=15 P. L.R. 1902, 111 P. R. 1906, 113 P. R. 1906, 99 P. R. 1906, 140 P. R. 1906, 42 P. R. 1903=89 P. L. R. 1903.]

(42)—*Village not held on ancestral shares—Relationship—Entry in Riwajiam.*—The custom of pre-emption based on the ground of relationship does not exist in a village not held on ancestral shares and not divided into tolas or subdivisions nor is an entry in the Riwajiam is a sufficient or satisfactory evidence. **ALLAH DITTA v. ALLAH BAKHSH, 89 P.R. 1900.** [R., 48 P. R. 1909; *Rel. on*, 90 P. R. 1908.]

(43)—*Baghkanpura in Lahore—Vicinage and relationship.*—In Mauza Baghkanpura in Lahore, there is no custom of pre-emption of

Pre-emption—continued.**—7.—Subject of pre-emption—continued.**

house property based on relationship or vicinity. **TAJ DIN v. MUHAMMAD YASIN, 99 P.R. 1900.** (54 P.R. 1884, *Appr.*) [R., 86 P.R. 1903=145 P.L.R. 1903.]

(44)—*Custom—Vicinage—Mohalla Pirzadgun in Umballa—Onus.*—There prevails in mohalla Pirzadgun in Umballa district a custom of pre-emption based on vicinage. If the defendant pleads that the vicinage is not sufficient to give right of pre-emption, the burden lies upon the defendant to prove the same. **ALI MUHAMMAD v. KADIR BAKHSH, 107 P.R. 1900.** (10 P.R. 1886, 108 P.R. 1886, 33 P.R. 1885, 24 P.R. 1887, 83 P.R. 1888, R.) [*Doubted*, 68 P.R. 1906; *F.*, 47 P.R. 1907; R., 47 P.R. 1907; 71 P.R. 1905=129 P.L.R. 1905.]

(45)—*Custom—Pre-emption—Pre-emption on sale of shop—Bazar Chauhatta Mufti Bakar, Lahore City—Punjab Laws Act, 1872, s. 11—Burden of proof.*—*Held*, that plaintiff had failed to prove the existence of a custom of pre-emption in respect of sale of shops in Bazar Chauhatta Mufti Bakar of Lahore City. *Held*, also, that a *barthak* on the top of two shops does not alter the nature of the property, which property could not in consequence be considered a residential house. (The subject of guzars in Lahore city discussed). **HAKIM RAI v. MUHAMMAD DIN, 83 P.R. 1901.** [R., 16 P.R. 1902=15 P.L.R. 1902, 42 P.R. 1903=89 P.L.R. 1903, 6 P.R. 1905=19 P.L.R. 1905, 138 P.R. 1907.]

(46)—*In the town of Nur-Mahal, Jullundur District, Punjab, on sale of house property—Proof of custom as to existence of.*—The question for decision was, whether the right of pre-emption existed in the town of Nur-Mahal, in respect of sale of houses. Six cases were cited, in which the existence of the right in the town was either admitted or assumed. *Held*, the cases cited went no further than the Courts of first instance. Although this weakened the value of the judicial decision, it lent force to the argument that the existence of the custom was generally admitted. There was nothing to show that the admissions of the existence of the right in the cases cited were collusive or not due to the weight of public opinion that the right existed. The history of the town supported the view that pre-emption had been generally allowed. **RAMJAS v. BURA MAL, 42 P.R. 1905=58 P.L.R. 1905.** (16 P.R. 1902, 44 P.R. 1905, R.) [R., 96 P.R. 1910.]

(47)—*Punjab Pre-emption Act II of 1905—Conditional sales of land under deeds of Baibil wafa, whether subject to pre-emption in case of agricultural lands.*—The Punjab Pre-emption Act makes a distinction between mortgages by conditional sale of agricultural land and of other immoveable property, so far as regards their being subject to the exercise of the right of pre-emption. S. 4 of the Act limits the right of pre-emption to sales, in the case of agricultural land, and makes foreclosures also

Pre-emption—continued.**—7.—Subject of Pre-emption—continued.**

subject to pre-emption in the case of other properties. Conditional sales under deeds of *Baibil wafas* executed before Punjab Act II of 1905, relating to agricultural lands could not therefore be properly subject to pre-emption, it being necessary for the mortgagee in such cases to apply for foreclosure. **RAM PERSHAD v. HIRA**, 87 P.R. 1900=65 P.L.R. 1907. [Cited., 90 P.R. 1908; R., 17 P.R. 1908=18 P.W.R. 1908.]

(48)—*Right of, in regard to kothris attached to shops, obtaining in Katra Nihal Singh, Amritsar.*—Suit to pre-empt, by right of vicinage, certain *kothris* attached to shops in the Amritsar city. The chief contest turned on whether the premises were in Katra Nihal Singh or not and as to that the plaintiff's allegation that they lay in Katra Nihal Singh was found correct. On the findings in various prior decisions and on the un rebutted evidence let in by the plaintiffs it was held that a custom of pre-emption, in regard to shops obtained, on the score of vicinage, in Bazar Papran, Katra Nihal Singh, where the shop's property in dispute lay. **ATTAR SINGH v. SANT SINGH**, 113 P.R. 1906=99 P.L.R. 1907, 58 P.R. 1900, R.) [Cited, 9 P.R. 1909, R., 13 P.R. 1907.]

(49).—*Properties used as residence used for business also—Use for business purposes not to alter the character of the property*—A suit for possession by pre-emption, of certain premises, in Delhi. The principal use to which the premises were put happened to be that of residence and it was held that, though business may be the object of such residence, the properties could not for that reason be deemed to have lost their character as residential properties and to have become mercantile property, entirely, for the purposes of pre-emption. Held further, that even if the property were shop property, properly so called, it could not be contended successfully that the right to pre-empt is not exercisable in the case of sales of shops at Delhi. **NAWAL KESHORE v. AMIR KHAN**, 122 P.R. 1906=80 P.L.R. 1907. (81 P.R. 1906, R.) [F., 147 P.R. 1908; R., 116 P.R. 1908.]

(50)—*Immoveable property—Sale by Receiver of, under direction of Court in accordance with Civ. Pro. Code, Act XIV of 1882, s. 356—Nature—Exemption from pre-emption—Punjab Pre-emption Act, 1905, s. 3 (5).*—Held, that a sale of immoveable property by a Receiver under "direction of the Court" under s. 356, Civ. Pro. Code, is a sale in execution of an order of a Civil Court within the terms of s. 3 (5) of the Punjab Pre-emption Act, and consequently not subject to pre-emption. **PIARE LAL v. GANESHI LAL**, 46 P.R. 1909=72 P.L.R. 1909=41 P.W.R. 1909=1 Ind. Cas. 474 (25 C. 757, F.B., 13 A. 224, F.B., 47 P.R. 1873, 78 P.R. 1881, 12 P.R. 1888, 84 P.R. 1901, F.B., 26 P.R. 1902, 33 C. 563, P.C., 43 P.R. 1894, 17 A. 238, R.).

Pre-emption—continued.**—7.—Subject of Pre-emption—concluded.**

(51)—*Pre-emption—Property sold subject to mortgage—Redemption of mortgage by vendee—Pre-emptor Cannot claim to pre-empt equity of redemption only.*—Where property subject to a mortgage has been sold and the vendee has redeemed the mortgage before the institution of a suit for pre-emption, the pre-emptor cannot claim to pre-empt only the equity of redemption. He must pay the whole amount of the purchase-money, including the mortgage money paid by the vendee, before he can be allowed to pre-empt the property. **SHAHBAZ KHAN v. FAZAL DIN**, 43 P.R. 1912=13 Ind. Cas. 430. (93 P.R. 1902, D.)

See SUITS VALUATION ACT, 1887, s. 3, 18 P.R. 1897.

—8.—Miscellaneous.

(1)—*Suit for pre-emption—Practice—Assertion of grounds of contract and custom in same suit.*—In this case, the High Court observed that the practice of the Courts has been to allow claims to pre-emption to be asserted on both grounds, viz., those of contract and custom in one and the same suit, and there could be no objection to it. **NEHCHUL v. THAN SINGH**, 2 N.W.P. 222.

(2)—*Pre-emption, Custom of—Prevalent in town—Different persons owning upper and lower floors of some house—Owner of upper floor having right of way through another's house—Right of pre-emption on sale of upper floor.*—Wherever the custom of pre-emption exists, in towns or amongst Hindus, it has been accepted, until the contrary be shown, that it is based upon the Mahomedan law of pre-emption. Where a person has the upper floor of a house with a way to it, through the house of a third party, the lower floor being the property of another person, and the owner of the upper floor sells it with its right of way, the owner of the house in which the way lies has, under the custom prevalent in the town in which the parties reside, a preferable right to the pre-emption in respect of the upper floor. **GANESHI LALL v. LUCHMAN DASS**, 5 N.W.P. 31.

(3)—*Decree for possession obtained by pre-emptor right of, only to possession of proprietary right in Sir—Act XVIII of 1873, s. 7.*—In this case, the decree-holder obtained as pre-emptor a decree for the possession of the proprietary right in the property which was conveyed by a sale-deed executed in the month of June 1874. The provisions of Act XVIII of 1873 were held to give him, as against the vendors, only the proprietary right in any land that happens to be *sir* in the sense of that term in the Act, and he cannot oust the vendors, although, under the old law, such a decree would have entitled him both as against the vendors and the vendee to possession of the *sir* and the ouster of the old proprietor. **BALDEO PANDEY v. MUSAMMAT JHARI KUAR**, 7 N.W.P. 334.

(4)—*Pre-emption based on contract—Custom*—A plaintiff, who fails in a suit for pre-emption

Pre-emption—continued.**—8.—Miscellaneous—continued.**

based on the administration papers of the current settlement, cannot, in appeal, fall back on any condition of pre-emption entered in the previous administration paper, and claim the same relief on the basis of custom. An entry of the right of pre-emption in a former administration-paper would not necessarily establish, though it may be evidence towards such a custom. *CHADAMI LAL v. MUHAMMAD BAKHSH*, 1 A. 563. (1 B.L.R. S.N. 12=10 W.R. 189, 3 B.L.R. App. 42, R.) [*Expl*, 2 A. 876, F.B., 16 A. 40.]

(5)—*Pre-emption based on agreement—Custom set up in special appeal.*—Where a suit to enforce a right of pre-emption, on the basis of an entry in the administration-paper as a matter of agreement and not of custom, has been tried and investigated; parties cannot be allowed on appeal to set up a custom. A claim based on the administration-paper does not exclude a claim under Mahomedan law. *MARATIB ALI v. ABDUL HAKIM*, 1 A. 567. (1 A. 563, R.)

(6)—*Mortgage by conditional sale—Suit for pre-emption—Cause of action.*—The cause of action for a suit for pre-emption in the case of a conditional sale, arises on foreclosure of the mortgage; and the mortgage is foreclosed when the year of grace has expired without the payment by the mortgagor of the mortgage amount. At the expiration of such period, the mortgagee acquires a proprietary title to the property. The pre-emptor need not wait till the mortgagee obtains physical possession of the property. *HAZARI RAM v. SHANKAR DIAL*, 3 A. 770 = A.W.N. 1881, 66. [R., 14 A. 405, F.B.]

(7)—*Conditional decree—Finality of decree—Appeal.*—A decree for pre-emption dated 28th September 1880, and drawn up in the terms of s. 114, Civ. Pro. Code, directed that the amount of purchase money should be paid into Court "within one month from the date the decree became final." It appeared that in consequence of delays in the preparation of copies of the decree and judgment which had been applied for by the defendants and the intervention of holidays, the period within which the defendant might have appealed expired on the 16th December 1880. Neither of the parties to the suit appealed from the decree. On the 16th December 1880, the defendants applied for execution of the decree for costs, on the ground that the plaintiff had failed to comply with the condition of the decree. On the same date, the plaintiff appeared in Court and expressed himself ready to comply with the conditions of the decree. Held that the decree in question not having been appealed against became final on the 29th October, 1880, and the plaintiff could not be allowed to comply with the conditions of the decree. *DISA SINGH v. JUALA SINGH*, A.W.N. 1881, 165.

(8)—*Pre-emption—Sale consideration—Onus.*—Where a pre-emptor alleged that the sale consideration was less than the amount mentioned

Pre-emption—continued.**—8.—Miscellaneous—continued.**

in the sale-deed to the vendee, and the vendor produced, in order to substantiate his allegations, the sale-deed, an old bond which was discharged by the transaction, and one witness to prove cash payment, held that it rested with the pre-emptor to rebut the case which the defendant had established. The pre-emptor in effect averred that the bond and receipt were fictitious and imputed fraud to the defendant. It is for him to prove fraud, or at least to show facts sufficient to throw suspicion on the evidence of the appellants. *ISRI RAI v. HANWANTA MISRAIN*, A.W.N. 1882, 16.

(9)—*Claiming one portion by inheritance and another by pre-emption—Right of inheritance found against—Suit, whether maintainable.*—The plaintiff claimed a portion of the property in dispute as their own by right of inheritance, and the remainder by right of pre-emption. It was found that he had no right of inheritance in respect of any portion. Held that the whole suit must fail, as a suit for pre-emption could not be brought in respect of a portion of the property sold, and the plaintiff could not, in second appeal, after the grounds of his claim so as to claim the whole property by pre-emption. *ARZANI BAKHSH v. SHERE ALI*, A.W.N. 1882, 79.

(10)—*Suit for pre-emption—Non-joinder of vendor—Objection in second appeal.*—Where, in a suit for pre-emption, the objection was taken by the defendant (in this case, the mortgagee) for the first time in second appeal, that the mortgagor not having been impleaded as defendant, the suit was not maintainable, held, that, whether such omission renders a suit unmaintainable or not, as it had not prejudiced the mortgagee-defendant in this case, the objection coming at such a late stage of the case could not be allowed. *HIRA LAL v. RAMJAS*, 6 A. 57 = A.W.N. 1883, 206. [F., A.W.N. 1903, 239, 26 A. 549 = 24 A.W.N. 130 = 1 A.L.J. 278; R., 10 O.C. 49, F.B., 1 Ind. Cas. 130 = 9 C.L.J. 623, 6 A.L.J. 926.]

(11)—*Sale to stranger—Resale to vendor—Right of co-sharer of vendor—Equity.*—A co-sharer sold his property to a stranger in April, 1881 for Rs. 1,250. Two other co-sharers, A and B objected to the sale and claimed the share upon payment of Rs. 1,000. In 1882, the stranger sold the property to co-sharer A for the same sum of Rs. 1,250. Then the other co-sharer B sued to enforce his right of pre-emption against A. Held that the plaintiff was not entitled to obtain any portion of the share from the defendant because he did not take any steps to assert his claim to pre-emption till the defendant had obtained the recognition of hers under a private arrangement, and because he still asserted Rs. 1,000 to be the original purchase-money. But the Court gave the plaintiff a decree for a moiety of the share on the ground that he and the defendant had equal rights of pre-emption. The Court observed when passing the decree that such cases must more or less be determined upon

Pre-emption—continued.**—8.—Miscellaneous—continued.**

principles of equity or good conscience. *MUNNA LAL v. LAL BAHADUR*, A.W.N. 1883, 219.

(12)—*Pre-emption—Joint Hindu family—Co-sharer—Wajib-ul-arz.*—In this case, the principle laid down in *Janak Singh v. Ganga Bishan* (4 A.W.N. 13) was followed. *MAHADEO SINGH v. NANDA SINGH*, A.W.N. 1884, 100. (A.W.N. 1884, 13, F.)

(13)—*Contract—Transfer of land—Agreement by transferee that land shall not be saleable in execution of decree—Reservation by transferor of right of pre-emption.*—A previous suit between the present plaintiff and one S, was adjusted, the former transferring to the latter certain lands with the stipulation that they should not be saleable in execution of decree at the instance of any creditor of S, and that the plaintiff should have a right of pre-emption at a certain price per *bigha*. One of the creditors of S attached these lands in execution of his decree. The plaintiff then brought the present suit against S and the attaching creditor for a declaration that the property was not saleable or at any rate for pre-emption. *Held* that the attaching creditor had a right to enforce his decree by legal process against the property of his judgment-debtor, and cannot be prevented from doing so by any stipulations made between the plaintiff and S, which can have no effect to stop the course of the law, nor could the right of pre-emption which the above said agreement had given to the plaintiff be extended to the case of auction-sales in execution of decrees, it being applicable only to the case of a private sale. *MOTI LAL v. SADANAND*, A.W.N. 1884, 121.

(14)—*Suit for pre-emption—Defence that sale is ostensible—No estoppel—Costs granted to unsuccessful party.*—In a suit for pre-emption based on the Mahomedan law, it was found that the vendor and vendee were father and son and that the sale-deed was only nominal in favour of the son, the real owner still being the vendor himself. *Held* that it was competent to the defendants to raise the defence that no sale had taken place out of which the plaintiff's claim for pre-emption could arise; and that, whatever estoppel there was as between the defendant-vendor and the defendant-vendee, there was none to debar the defendants from putting forward this plea against the maintenance of the suit. [R., 4 Ind. Cas. 488.] Although the plaintiff's case was dismissed, still costs were awarded to him, on the ground that he had been unnecessarily dragged into litigation. *MAN SUR ALI v. HAIDAR HUSSAIN*, A.W.N. 1884, 128.

(15)—*Pre-emption—Conditional decree—Purchase-money—Costs.*—Where a conditional decree in a pre-emption suit directed that the plaintiff should obtain possession with costs of suit on payment of the purchase-money within a fixed time, and that, on default of such payment, the suit should stand dismissed, the plaintiff could set off the costs awarded to him,

Pre-emption—continued.**—8.—Miscellaneous—continued.**

and claim possession on payment of the purchase-money less such costs. *ISHRI v. GOPAL SARAN*, 6 A. 351=A.W.N. 1884, 25. (9 W.R. 230, 13 W.R. 106, 4 C. 742, R.) [F., 3 O.C. 323, 6 O.C. 23, 28 A. 676=3 A.L.J. 804=A.W.N. 1906, 198; *Appr.*, 23 M. 121; R., 10 A. 389, 10 C.P.L.R. 83, 16 C.P.L.R. 73, 8 O.C. 57.]

(16)—*Pre-emption, Suit for—Valuation of suit—Jurisdiction—Mahomedan Law—Wajib-ul-arz—"Immediate demand"—Estoppel—Talab-i-musabat—Relinquishment of pre-emptive right when takes place.*—The plaintiff R was a shareholder of a certain village, and held a decree against S who owned some share in the village. The plaintiff having taken out execution of his decree against S, the latter executed a sale-deed on 10th October 1880, conveying his share to his wife in lieu of Rs. 400 said to be the dower of the lady. The plaintiff subsequently attached the share so conveyed, and the wife's objections to the attachment being disallowed, she executed a deed of sale on 5th December, 1881, purporting to convey a portion of this share to the present defendant for Rs. 1,500, out of which the plaintiff's decree was satisfied. The present suit was by R to enforce his right of pre-emption under the terms of the *wajib-ul-arz* in respect of the sale of the 5th December, 1881, on the allegation that the price stated in the sale-deed was false, and the actual consideration was Rs. 750. The defendant-vendee contended that he himself being a sharer in the village, the plaintiff had no superior right of pre-emption; that Rs. 1,500 was the actual price paid; that the amount was in accordance with the market-value of the property; that the Court of first instance (Munsiff) had therefore no jurisdiction to try the suit; that the plaintiff had refused to purchase when the share was offered to him; and that the suit was instituted in collusion with the vendor. The lower Court, without considering the question of jurisdiction or determining the actual value or price of the share sold, dismissed the suit on the merits. *Held* (1) that the lower Court ought to have decided as to the value of the property in suit or the actual amount of the consideration under the sale-deed, as the whole case of the plaintiff was that the property was actually sold for half the amount, viz., Rs. 750, and that the property was really worth only the latter amount; and because as such, the question related to the merits as much as to the question of jurisdiction; (2) that the suit being based on the *wajib-ul-arz* and not on the general Mahomedan law, "immediate demand" was unnecessary; (3) that the offer made by the plaintiff to purchase the property from the wife and the refusal by her to sell, did not estop the plaintiff from maintaining the present suit, as the present claim related to the sale of 5th December, 1881, a transaction wholly independent of and irrespective of the antecedent offer and refusal;

Pre-emption—continued.**—8.—Miscellaneous—continued.**

(4) and that the action of the plaintiff in realizing the money due on his decree against S did not preclude him from suing for pre-emption, because his acceptance of the money which the wife chose to pay did not involve any acquiescence in the sale. The case was accordingly remanded to the lower Court for disposal on the merits. The rule as to immediate demand (*Talab-i-muasabat*) as applied to the right of pre-emption, is one which exists in the Mahomedan law and is no doubt applicable to cases where the right is claimed solely as a rule of the personal law of the Mahomedans. But the ceremony of the "immediate demand" is not applicable to cases, like the present, in which the right of pre-emption is claimed entirely on the basis of the contract contained in the *wajib-ul-arz*. [R., 9 A. 513=7 A.W.N. 146.] It is a well-recognised rule of pre-emption that the right of pre-emption is not relinquished expressly or impliedly unless such relinquishment is made contemporaneously with, or subsequent to, the transfer which gave rise to the pre-emptive claim. *RAMDIAL v. BUDH SEN*, A.W.N. 1884, 123.

(17)—*Pre-emption—Conditional decree—Finality of decree—Limitation Act, 1877, s. 5, sch. II, No. 156.*—Where the decree in a pre-emption suit directed that the purchase-money should be paid in Court within a fixed time after the decree became final, and the period of limitation prescribed for an appeal from such decree expired on a holiday, the decree did not become final before the day the Court re-opened. *RAMSAHAI v. GAYA*, 7 A. 107=A.W.N. 1884, 224. (1 A. 132, F.) [R., 11 A. 346, 5 A.L.J. 136=A.W.N. 1908, 13.]

(18)—*Whether right can be set up as a defence.*—In a suit for possession by the vendee of the rights and interests of a co-sharer, another co-sharer, who is in possession, cannot plead his right of pre-emption in respect of such sale as a defence to the suit. *AJUDHIA BAKHSH SINGH v. ARAB ALI KHAN*, 7 A. 892=A.W.N. 1885, 291. [F. 27 A. 78=24 A.W.N. 165=1 A.L.J. 426; R., 26 A. 61, F.B.=A.W.N. 1903, 106; D., 13 M. 490.]

(19)—*Ex parte decree foreclosure in favour of conditional vendee—Suit for pre-emption—Ex parte decree, set aside—Decree for redemption in favour of vendor—Pre-emption suit should be dismissed.*—An *ex parte* decree for foreclosure was made in favour of the conditional vendee. The vendor applied to have the *ex parte* decree passed against him set aside and the case tried on the merits. While this application was pending, the plaintiff in this case, in January 1884, instituted the present suit for pre-emption against the conditional vendor and vendee, his cause of action being the *ex parte* decree of December 1882. In February 1884, an order was made setting aside the *ex parte* decree, and ultimately in April 1884, an ordinary decree was passed in the ordinary way in favour of the vendee. The decree was

Pre-emption—continued.**—8.—Miscellaneous—continued.**

drawn upon the terms laid down by the Transfer of Property Act, and by it the vendor was allowed an opportunity of redeeming the property by payment within six-months of the amount of Rs. 577-5-7 and interest. As a matter of fact in July 1884, the sum was deposited by the conditional vendor in satisfaction of the amount due for redemption of the property conditionally sold. *Held* that the effect of the payment was to extinguish the decree and to leave the vendor in unincumbered proprietary possession of the estate, that the sale upon the basis of which the plaintiff had brought his suit therefore came to an end, that no sale had in fact taken place upon which his right of pre-emption arose, that, though in January 1884, when the plaintiff brought his suit for pre-emption, there was an *ex parte* decree, plaintiff must be taken to have known that the decree was capable of being set aside, that at the time he brought this suit there was an application pending in the Court in which he instituted it, for the setting aside of the *ex parte* decree, and that therefore the plaintiff's suit should be dismissed. *KARAN SINGH v. GANESH RAM*, A.W.N. 1886, 67.

(20)—*Suit by rival pre-emptors—Alternative decree.*—Where A and B sued separately to enforce their right of pre-emption in respect of the same property in a Court of first instance, which dismissed A's suit and decreed B's and on appeal by A, the appellate Court dismissed the appeal on the ground that B having been decreed a preferential right over A, nothing remained of the appeal to be decided, *held* that the appellate Court took an erroneous view of the appellant's rights and that it must have heard the appeal and given the appellant an alternative decree. *LEKHRAJ SINGH v. SRIPAT DIAL*, A.W.N. 1885, 329.

(21)—*Decree for pre-emption—Civ. Pro. Code, s. 214—Effect of default of payment within time—Appeal—Execution of decree.*—A decree for pre-emption was silent as to the effect, under s. 214 of the Civ. Pro. Code, of non-payment within the time fixed in the decree, and the execution of the same by the decree-holder, after the appeals by both parties were dismissed, was refused on the ground of failure of payment of the pre-emptive amount within time; but this order was reversed by the appellate Court. In second appeal, it was contended by the decree-holder that the decree was, in the absence of express provision as to the effect of non-payment, governed by the ordinary rule of limitation of three years, but it was *held* that such a result was not contemplated by the law and the order of the Court of first instance was upheld. *CHIDDA v. IMDAD HUSAIN*, A.W.N. 1888, 4. [Expl., 13 A. 189, F.B.; D., 13 A. 376, F.B.]

(22)—*Suit for pre-emption—Defence of vendee being co-sharer—Judgment in former suit as to vendee's status—Evidence.*—In a suit for pre-emption, the defendants contended that they

Pre-emption—continued.**—8—Miscellaneous—continued.**

were co-sharers according to the decision in a former case between the present plaintiff and some of the defendants in this suit, who were the mortgagees of the other defendants. This former suit had been first decreed in favour of the defendants-mortgagees in the original Court but was reversed in the first appellate Court, whose decree was in turn set aside by the High Court. The present suit was brought at the time when the decree of the lower Court in the former suit was reversed in the first appellate Court. It being contended by the plaintiff that the present suit having been brought at the time when the defendants-mortgagees had lost their status by the decision of the first appellate Court, the defendants could not raise the plea of being co-sharers. *Held* that the judgment of the first Court in the former litigation in favour of the defendants-mortgagees was itself sufficient evidence in this suit to declare them as co-sharers. **AMMAN BIBI AND OTHERS v. MURARI DAS, A.W.N. 1888, 212.**

(23) — *Amount paid by pre-emptor into Court and drawn by vendee — Amount reduced on appeal — Refund — Interest.* — Where a pre-emptor paid the amount due under his decree into Court and appealed against the decree, and the appellate Court reduced the amount, *held* in a suit by the pre-emptor for refund of the difference in amount with interest, that plaintiff was entitled to the amount sued for with interest only from the date of refusal by the defendant to pay the amount on demand, as there was no contract between the parties to make interest payable by the vendee to the vendor, nor did the former hold the latter's money under circumstances from which a contract to pay interest should be implied. **HATTI PRASAD v. CHATARPAL DUBEY, A.W.N. 1888, 287.** [*Diss.*, 18 A. 262 = 16 A.W.N. 42; R., 20 A. 430 = A.W.N. 1898, 100.]

(24) — *Pre-emption—Wajib-ul-arz—Right of pre-emptor to exclude part of property sold from his claim on ground that vendor's title to such property is defective.* — A person claiming pre-emption cannot, except under very special circumstances, exclude a portion of the property sold from his claim, and if he does so, on the ground, that the vendor's title is defective, he must prove conclusively that the vendor has no title to the portion which he seeks to exclude. **DADRI PRASAD v. KHWAJA MUHAMMAD HUSEN, A.W.N. 1891, 44.**

(25) — *Pre-emption — Wajib-ul-arz — Village originally one divided into two mahals—Effect of partition.* — Where the *wajib-ul-arz* of a village consisting of a single mahal contained the following provision, *viz.* — "Every co-sharer may transfer his property either wholly or in part having regard to the right of pre-emption *bolehas haqq (shafa)*;" and the village was subsequently partitioned into two mahals; *held* that the partition of the village did not render

Pre-emption—continued.**—8—Miscellaneous—continued.**

the previously framed *wajib-ul-arz* inapplicable. **ABBAS ALI v. GHULAM NABI, A.W.N. 1891, 137.** (7 A. 772, A.W.N. 1889, 17, R.) [R., 22 A. 1, F.B. = 19 A.W.N. 111, 32 A. 265 = 7 A.L.J. 133 = 6 Ind. Cas. 17.]

(26) — *Holder of decree for pre-emption, suit not maintainable by, against judgment-debtor—Co-sharer for rents collected by, lambardar.* — Plaintiff, a co-sharer in a village, had obtained a decree for pre-emption against the defendant, a vendee of a fractional share in the village from another co-sharer. Certain profits which had accrued due in respect of the plaintiff's pre-empted share happened to be collected by the lambardar of the village. The present suit instituted against the defendant for such profits, was held to be not maintainable on the ground that it cannot be said that rents received by a lambardar and not paid out by him are held under circumstances which would make a co-sharer liable for any misfeasance of the lambardar in the deposit on of such rents. There is no rule of law that an unsuccessful defendant in a suit is bound to act as the agent of the successful plaintiff to collect what the plaintiff may himself be entitled to collect. The present defendant was therefore under no obligation to have collected the profits in question on behalf of the plaintiff, the successful pre-emptor. Nor could it be said that the lambardar was such an agent of the co-sharers as to cause the possession of the profits by him to amount in law to such possession by the co-sharers themselves. **SRI KISHEN LAL v. ATMA RAM, 19 A. 261, F.B. = A.W.N. 1897, 45.**

(27) — *Pre-emption—Custom—Wajib-ul-arz—Rules of the board of Revenue for the settlement of the Gorakhpur and Basti districts (B.E.C. 8—1, s. 38).* — Under the rules framed by the Board of Revenue for the settlement of Gorakhpur and Basti districts, a settlement officer is, with regard to mahals which belong to Muhammadan proprietors, not only authorized but required to record in the memorandum of village customs a note of any custom or constitution peculiar to the mahal, including a custom of pre-emption. **RAMZAN CHAUDHRI v. ABDUL GHANI, A.W.N. 1901, 115.**

(28) — *Pre-emption on mortgage — Covenant in mortgage-deed who is entitled to—Mortgagee amount fraudulently over-stated — Claim of pre-emptor decreed for lower sum—Suit by mortgagees against mortgagor to recover difference.* — Where there was a covenant in a mortgage-deed, to the effect that if the mortgage-money due to the mortgagees was in any way jeopardized, the mortgagees would be entitled to realise it with interest at 9 per cent. per annum, and such mortgage land was pre-empted afterwards, the covenant in the mortgage-deed was held to enure in favour of the pre-emptor who had stepped into the shoes of the mortgagee, and the mortgagee could not enforce it. Where the mortgagor and the mortgagee

Pre-emption—continued.**—8.—Miscellaneous—continued.**

joined together in fraudulently representing that the consideration for the mortgage was Rs. 904, while in fact it was found to be only Rs. 525, and the mortgage was pre-empted by order of Court for the lower sum, *held* that the mortgagee was not entitled to recover the balance from the mortgagor, because he cannot be allowed to take advantage of his own wrong. **BALBHADDAR NATH v. SHEODIHAL**, 24 A. 514 = A.W.N. 1902, 149.

(29)—*Assignment of mortgage-debt—Loss of right after decree—Pre-emption, suit for—Property coming into hands of co-sharer before institution of suit—Effect.*—Where, according to the village *wajib-ul-arz*, only the transfer of the "*haqqiyat*" gives rise to a right of pre-emption, *held*, that an assignment to a stranger of a mortgage debt by a co-sharer mortgagee in possession, does not give rise to any pre-emptive right, as the mortgage debt is no part of the "*haqqiyat*." (20 A. 19, F.) [*R.*, 90 P.R. 1909, F.B.=147 P.L.R. 1909=4 Ind. Cas. 179, A.W.N. 1907, 110.] Where whatever pre-emptive right the plaintiff pre-emptor may have possessed at the date of the institution of the suit, has continued to be possessed by him unimpaired at the date of the decree, *held* that the loss of that right at the date of the hearing of the appeal from the suit by the High Court, cannot defeat his claim for pre-emption. (21 A. 441, D.) [*R.*, 11 O.C. 290, 12 O.C. 229=3 Ind. Cas. 546, 91 P.R. 1909, F.B.=148 P.L.R. 1901=161 P.W.R. 1909=4 Ind. Cas. 337, 31 A. 530=6 A.L.J. 99.] Where a share has, in violation of the provisions of the *wajib-ul-arz*, been sold to a stranger, if that share has found its way into the hands of a co-sharer whose rights of pre-emption as such are equal to those of the plaintiffs in a suit for pre-emption subsequently instituted, then the pre-emptor's suit will fail. **BHAGWANDAS v. MOHAN LAL**, 25 A. 421 = A.W.N. 1903, 82. (20 A. 100, R.) [*F.*, 29 A. 125=3 A.L.J. 794 = A.W.N. 1907, 313; *R.*, 134 P.W.R. 1908, 7 A.L.J. 77, 7 A.L.J. 344; *D.*, 28 A. 642=3 A.L.J. 426 = A.W.N. 1906, 164, 4 A.L.J. 351.]

(30)—*Pre-emption—Wajib ul-arz—Evidence—Act XIX of 1873, s. 91—Regulation VII of 1822, s. 9.*—*Held* that previous to the coming into force of Act XIX of 1873, the record of a village custom entered in the village administration papers had not the same effect as evidence as that which was given to such record by s. 90 of Act XIX of 1873. **KAMTA PRASAD v. CHATURBHUI SAHAI**, A.W.N. 1904, 117. [*Overruled*, A.W.N. 1904, 128, 26 A. 549.]

(31)—*Act XLV of 1860 (Indian Penal Code), ss. 417, 420—Cheating—Definition—Pre-emption—Failure to disclose existence of mortgage subsequent to purchase.*—The vendee defendant in a suit for pre-emption compromised the suit, the plaintiff agreeing to pay a certain sum in cash and to discharge certain incumbrances on the property in suit. It was subsequently dis-

Pre-emption—continued.**—8.—Miscellaneous—continued.**

covered that the vendee had, after his purchase but before suit, mortgaged the property which was the subject of the suit for pre-emption. *Held* that the vendee could not, on account merely of his omission to disclose the existence of this subsequent mortgage, be held guilty of the offence of cheating. **GENDAN LAL v. ABDUL AZIZ KHAN**, A.W.N. 1904, 265 = 27 A. 302.

(32)—*Condition of wajib-ul-arz—Violation of—Pre-emption—Right of pre-emptor.*—It is incumbent on any share-holder, who desires to alienate, to fulfil the conditions of the *wajib-ul-arz* and if he does not fulfil, then any other share-holder whose preferential rights are affected may call upon the Court to enforce compliance with the conditions broken. **ABDOOLLAH KHAN v. AMEERUN**, 1 Agra 274.

(33)—*Suit for—Re-sale of property after the institution of suit, but before the service of summons—Second vendee impleaded in the suit—Issues raised and determined as to his rights—Pre-emptor estopped from raising the question of lis pendens.*—After the institution of a suit for pre-emption, but before the service of summons, the property claimed by the plaintiff was re-sold to a third party. With the leave of the Court, the plaintiff amended his plaint and added the second vendee as a defendant, and inserted, in the body of the plaint, two paragraphs, in which he impeached the re-sale as being collusive and also set up his right of pre-emption as against the second vendee. The latter filed a written statement and contended that he had a preferential right to pre-empt and that the sale to him was genuine. On these points, issues were raised and were decided in plaintiff's favour by the lower appellate Court. *Held*, by the Full Bench, that, having regard to the fact that the plaintiff on his own invitation amended the plaint and added the second vendee as a party and caused the question, as to the second vendee's preferential rights to pre-empt, to be determined, he was estopped from raising the question of *lis pendens* as a bar to the defendant's (second vendee's) claim. **MANPAL v. SAHIB RAM**, A.W.N. 1905, 94 = 27 A. 544, F.B. = 2 A.L.J. 428. (23 A. 247, D.)

(34)—*Decree—Mortgage—Costs—Set off.*—A judgment, dated the 24th September, 1904, in favour of the pre-emptor under a foreclosure decree directed payment within two months of Rs. 2,100 together with the costs, if any, incurred by the purchaser in obtaining the order absolute. The corresponding decree contained the words "together with the costs of the purchaser in the foreclosure case, if any." The decree also awarded the plaintiffs a sum of Rs. 117-4-0, as costs. The Rs. 2,100, was paid within the time fixed. On the 24th February, 1905, the judgment-debtors claimed that they were entitled to be restored to possession and that the suit must be deemed to have been dismissed, inasmuch as the costs, amounting to Rs. 25-12-0, of the proceedings

Pre-emption—continued.**—8.—Miscellaneous—continued.**

relative to the order absolute had not been deposited. *Held*, that the Rs. 117-4-0, could be set off against the Rs. 25-12-0; that the Rs. 2,100 deposited was therefore in excess of the actual sum payable under the decree and that the judgment-debtors' claim failed. **PERMANAND RAOT v. GOBARDAN SAHAI, A.W.N. 1906, 198=3 A.L.J. 804=28 A. 676.** (18 A. 223, R.)

(35)—*Vendee declaring sale fictitious—Decree by first Court declaring right of pre-emption—Right of appeal—Sufficient interest.*—W obtains from the Court of first instance a decree declaring his right to pre-empt in regard to a sale deed, by which S purported to transfer lands and houses to his wife, N, in lieu of part of her dower. N's defence was that she and her husband were on bad terms and that the sale-deed was fictitious and intended to defraud her of her dower. N appealed and the lower appellate Court allowed the appeal, holding that the sale was fictitious. *Held*, that N had an interest entitling her to appeal. **WASIUZ-ZAMAN v. NASIRAN BIBI, A.W.N. 1906, 160=3 A.L.J. 843.** (6 N.W.P. 412, D.)

(36)—*Mortgage—Unregistered deed—Sale of property hypothecated—Purchaser having notice of the mortgage—Property pre-empted by the defendant—Whether notice to pre-emptor necessary.*—A right of pre-emption is not a right of re-purchase, but is simply a right entitling the pre-emptor to be substituted for the vendee as purchaser, and to stand in his shoes in respect of all the rights, and obligations arising from the sale under which he derives his title. He can only get what the vendee bargained for. S. 50 of the Registration Act (III of 1877) does not protect a purchaser who purchased with knowledge of an unregistered encumbrance. Where, therefore, a vendee purchases with notice of a prior unregistered encumbrance and the property is pre-empted, the pre-emptor takes subject to that mortgage even if the existence of that mortgage was concealed from him. **TEJPAL v. GIRDHARI LAL, 5 A.L.J. 112=A.W.N. 1908, 42=3 M.L.T. 223=30 A. 130.** [R., 5 N.L.R. 136, 1 Ind. Cas. 528, 32 A. 45=6 A.L.J. 966=3 Ind. Cas. 782.]

(37)—*Refusal to purchase—Property offered to pre-emptor before completion of agreement with vendee.*—*Held* that, in order to debar a person entitled to pre-empt a sale from exercising his right, an opportunity must be given to him to purchase when a definite agreement to purchase at a fixed price has been entered into with a stranger: it is not enough to offer the property to a person entitled to pre-empt before an agreement to sell has been entered into with a third party. **MUNAWAR HUSAIN v. KHADIM ALI, A.W.N. 1908, 93=5 A.L.J. 331.** (27 A. 670, F.)

(38)—*Plaintiff dead—Representatives can carry on suit based on custom—Rule of Maho-*

Pre-emption—continued.**—8.—Miscellaneous—continued.**

medan Law—Pre-emptor's right—Subsisting on date of decree—Second purchase by vendee—No suit for pre-emption—Vendee's title absolute—Burden of proof.—The representative of the pre-emptor in a suit based upon the *wajib-ul-arz* is a co-sharer and can carry on the suit which his predecessor in title instituted. The principle of Mahomedan Law does not apply to a case of pre-emption based on custom. A plaintiff claiming pre-emption is not entitled to a decree unless his right subsists upon the date of the decree. Where the vendees purchase a second share in the property and no suit for pre-emption is brought in respect of that share within one year, they are entitled to retain the share formerly purchased and in respect of which a suit for pre-emption had been instituted. It is for the plaintiff pre-emptor, to show that a suit for pre-emption in respect of the second purchase had been instituted. **MALKHAN SINGH v. KASHI PRASAD, 5 A.L.J. 752.**

(39)—*Pre-emption—Vendee stranger at the date of sale—Subsequent acquisition of share by vendee—Cause of action.*—In a suit for pre-emption, the crucial date for a pre-emptor to succeed is the date of the institution of the suit, and if he is able at that time to fulfil the conditions necessary to entitle him to a decree, a decree ought to be made in his favour. Hence, where a suit for pre-emption was dismissed for deficiency of Court-fees in both the Courts below, which decree was subsequently reversed by the High Court and the case remanded, and the vendee in the meantime acquired the status of a co-sharer, *held*, that the suit could not be dismissed, the pre-emptor having been entitled to a decree at the date of the institution of the suit. *Held*, further, that, even if the date of decree be looked to, that date must be when the decree ought to have been made in the plaintiff's favour, and not a later date. **ROHAN SINGH v. BAHU LAL, 6 A.L.J. 699=3 Ind. Cas. 42=31 A. 530.** [D., 7 A.L.J. 344.]

(40)—*Civ. Pro. Code (Act XIV of 1882), ss. 44, 45—Misjoinder—Joining of vendor and vendee in a pre-emption suit—Several sales—Same vendee—Joining all causes of action in one suit—Effect of.*—The vendors are not necessary parties to a suit for pre-emption. Claims for pre-emption in respect of more sales than one, by different vendors, can be joined together against the same vendee. Where, therefore, several vendors executed several sale-deeds in favour of the same vendee, and the pre-emptor brought one suit for pre-emption of all the sales, joining the vendors as defendants, *held*, that the suit was not bad for misjoinder of parties and causes of actions, the joining of the vendors being superfluous. **HARBANS TEWARI v. TOTA SAHU, 6 A.L.J. 926=32 A. 14=3 Ind. Cas. 735=6 M.L.T. 300.**

(41)—*Pre-emption, suit for—Custom or contract—Partition of village—Separate wajib-ul-arz—Change in the language.*—In the beginning

Pre-emption—continued.**—8.—Miscellaneous—continued.**

there was one village, which was subsequently formed into three mahals with a separate *wajib-ul-arz* for each, the pre-emptive clause in which conferred the right on (1) *ek jaddi* co-sharers, (2) other co-sharers, (3) co-sharer of the mahal, (4) strangers. Subsequently one of the three mahals was sub-divided and a separate *wajib-ul-arz* was framed for each mahal, of which the pre-emptive clause gave the right to (1) near relatives, co-sharers, of the zemindari, (2) owners of the mahal, (3) owners of other mahals, (4) strangers. Prior to the suit, another of the three original mahals was again sub-divided, but no *wajib-ul-arz* was prepared. *Held* that there was no custom of pre-emption but that the right was the creature of a contract which had expired with the settlement. **PARAN SUKH v. SALIG RAM, 7 A.L.J. 314 = 5 Ind. Cas. 267 = 32 A. 261.**

(42)—*Pre-emption, suit for—Sale to stranger who before suit becomes co-sharer.*—The defendants, vendees, in a suit for pre-emption, purchased certain shares in eight villages on June 11, 1907. They were then admittedly strangers. A suit to pre-empt that sale was instituted on October 5, 1907. Before this suit was instituted, namely, on August 21, 1907, the vendees purchased shares in five out of the eight villages. A suit to pre-empt this sale was brought and decreed. The pre-emptors however, failed to deposit the price within time and their suits stood dismissed. The defendants thus became, by virtue of their purchase, indefeasible owners and co-sharers. *Held* that they could not be ousted from the five villages purchased by them. **MATHURA PRASAD v. USUF HUSAIN, 7 A.L.J. 344 = 6 Ind. Cas. 566.**

(43)—*Pre-emption—Price—Principle of settlement—Custom recorded—Reasonable or otherwise.*—A *wajib-ul-arz* recorded that, in case there was a dispute between the vendor and the pre-emptor regarding the price, it will be settled on the basis of Rs. 200 a biswa. *Held* that the custom was not reasonable and could not be enforced. *Held* also that, there being no dispute as to the price between the vendor and the pre-emptor, the provisions of the *wajib-ul-arz* did not apply. **MAHTAB RAM v. BHAWANI SINGH, 7 A.L.J. 504 = 6 Ind. Cas. 118.**

(44)—*Pre-emption—Mahomedan Law—Right of vicinage—One plot intervening—Right to pre-empt—Principle of pre-emption.*—Plots 833, 834 and 836, which belonged to defendant No. 2, were sold to defendant No. 1. The plaintiff was the owner of plot No. 837 which adjoined a portion of No. 836. *Held* that the subject-matter of sale was a compact parcel of land adjoining the land of the plaintiff. *Held* further that, the subject-matter of sale being the entire parcel of land made up of three plots and this parcel adjoining the plaintiff's land, the plaintiff was entitled to pre-empt, by right of vicinage, the entire subject-matter, and not only a part. **ABDUL SHAKUR v. ABDUL GHAFUR, 7 A.L.J. 641 = 6 Ind. Cas. 358.**

Pre-emption—continued.**—8.—Miscellaneous—continued.**

(45)—*Pre-emption — Purchase in execution by plaintiff—Suit in respect of sale of another share before confirmation of plaintiff's purchase—Hissedar—Civ. Pro. Code (Act XIV of 1882), s. 316—Act V of 1908, s. 65—Alteration in law.*—Plaintiff purchased a share in a village in execution of a decree on 20th June. The sale was confirmed on 24th July. On 23rd July, defendant purchased another share in the same village. On a suit for pre-emption being brought by the plaintiff to pre-empt the latter share, *held* that the plaintiff did not become a *hissedar* of the mahal until the date when the sale became absolute, and his right to pre-empt could not arise until the sale had been confirmed in his favour. A Court acting under s. 316 does not guarantee title. All that it does is to convey the right, title and interest in the property of the parties to the suit before it. So far as the parties are concerned, it guarantees that the judgment-debtor shall not recover back the property sold, and that from the date entered in the certificate the purchaser becomes entitled to whatever interest the judgment-debtor was possessed of on the date of sale. S. 65 of Act V of 1908 has altered the law. **HASSAN ALI v. MIAN JAN KHAN, 7 A.L.J. 893, = 7 Ind. Cas. 409.**

(46)—*Pre-emption — Joint purchase by two persons—Suit against both vendees — One of them not properly described—Addition of other purchaser as defendant after limitation—Suit barred.*—M, on the 27th of February, 1909, instituted a suit against H and J, claiming to enforce a right of pre-emption in respect of the sale of property made to them jointly under an instrument of sale, dated the 3rd of April, 1908. It appeared that the name of one of the purchasers was S and not J, and on the 8th of April, 1909, S was made a defendant to the suit. *Held*, that S could not be deemed to have been a party to the suit prior to the 8th of April, 1909, and the suit as against him was barred by limitation. *Held*, further, that, as the sale was joint in favour of H and S, the suit was barred as against both. **MAMRAJ SINGH v. HIRDAY RAM, 8 A.L.J. 814.**

(47)—*Pre-emption, suit for—Limitation of one year, when commences.*—Plaintiff had originally sued under an alleged right of pre-emption, basing his claim on co-parcenership in the estate sold. He was not then in possession of the share of the estate his alleged title, to which formed the basis of his claim. He therefore subsequently sued for possession of his share in the estate, and having obtained a final decree, instituted the present suit claiming the right to pre-emption of the share purchased by the defendant many years before 1857. This the High Court *held* he was unable to do under the limitation provided by cl. 1 of s. 1 of Act XIV of 1859, according to which the suit must be brought within the period of one year from the time the purchaser has taken possession under the sale impeached. **SHAH MOHSUN ALI v. NEKHNAM SINGH, 6 W.R. 131.**

Pre-emption—continued.**—8.—Miscellaneous—continued.**

(48)—*Suit for pre-emption—Limitation—Act IX of 1871.*—The limitation laid down in sch. II of Act IX of 1871, art. 10, provides that the period of limitation will run adversely against a party suing to enforce a right of pre-emption from the time when the purchaser takes actual possession under the sale sought to be impeached, and the period is one year. The law does not lay down that a plaintiff claiming a right of pre-emption is bound, on hearing of a sale, to wait until the year has expired. *NOZIBA KHATOON v. MAHOMED JOHUR*, 25 W.R. 67.

(49)—*Suit for pre-emption, valuation of—Bengal Civil Courts Act (VI of 1871), s. 20.*—In a pre-emption suit, the subject-matter is the right of pre-emption, the value of which, and not that of the property itself, determines the question of jurisdiction under s. 20 of the Bengal Civil Courts Act. *NAUN SINGH v. RASH BEHARI SINGH*, 13 C. 255. [R., 6 O.C. 255.]

(50)—*Covenant in deed of partition—Proper sale price, meaning of.*—A right of pre-emption reserved in a partition deed is valid as between the co-owners themselves. The *ekrarnamah* contained the following clause:—Any one of the parties desirous of selling.....shall sell the same to the other party willing to buy the same at the proper sale price. *Held*, that the proper sale price would be the market value. *KALIMUDDIN BHUYAN v. REAZUDDIN AHMED*, 14 C.W.N. 295=10 C.L.J. 626.

(51)—*Right of vendee to transfer property before pre-emption suit.*—Before a suit for pre-emption is instituted, the vendee can deal with the property he has bought, in any way he likes. *MOHAR BHAGAT v. KAMTA PRASHAD*, 1 Ind. Cas. 528. (20 A. 100, 21 A. 374, F.B., F.; 23 A. 247, 30 A. 130, 7 A. 775, R.)

(52)—*Pre-emption—Zamima khewat, entry in—Land, Government property at the time of entry—Entry neither evidence of custom nor of contract.*—An entry as to pre-emption was made by the Settlement Officer in *zamima khewat* in 1884. At the time when this entry was made, no *zamindari* was in existence. *Held*, that the entry could neither be evidence of custom nor of contract. *JAGMOHAN SINGH v. SARJU MAL*, 3 Ind. Cas. 40.

(53)—*Sale of sir land—Sir-holder not full owner of the plot—No right of pre-emption.*—Where a sir-holder is a mere sir-holder and not the full owner of the plot or of a share thereof, no right of pre-emption arises on a sale of such sir. *MATA DIN v. KASHI NATH*, 3 Ind. Cas. 461. (12 A. 426, 28 A. 124, A.W.N. 1905, 219, 2 A.L.J. 612, A.W.N. 1888, 182, 7 A. 633, A.W.N. 1904, 118, A.W.N. 1884, 103, A.W.N. 1886, 144, 16 A. 412, R.)

(54)—*Civ. Pro. Code (Act XIV of 1882), ss. 32, 34—Suit against a benamidar—Real owner made party—Nature of suit not changed*

Pre-emption—continued.**—8.—Miscellaneous—continued.**

—*Objection as to non-joinder after the first hearing—Earliest opportunity—Waiver—Evidence Act (I of 1872), s. 115—Estoppel—Intention an essential element—Benami purchase—Real owner not estopped against pre-emptor—Pre-emption.*—H purchased a share in a village *benami* in the name of his wife S. H was a co-sharer in the village, but S was not. I instituted a pre-emption suit against S. S filed a written statement that she was not the real purchaser, it was her husband who had really purchased the property. On the same day H applied to be made a party and to put in a written statement to the effect that, as he was a co-sharer in the village, the plaintiff had no right to pre-empt. His application was granted. *Held*, that H was rightly made a party to the suit. When a suit is instituted, and the defence is that the defendant is a benamidar, the presence of the real owner before the Court becomes necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit (2 A. 738, D.; 5 C.L.R. 102, 24 C. 34, R.) Where an objection as to non-joinder of parties does not exist at or before the first hearing, and is made at the earliest possible opportunity after it comes into existence, it cannot be said to have been waived within the spirit of s. 34, C.P.C., 1882. (5 B. 609, R.) In a pre-emption suit against a benami purchaser, the adding of the real purchaser as a party to the suit does not convert the suit from one character into another. In a pre-emption suit, the real purchaser is not estopped from setting up the fact of his being a co-sharer in the village as a defence to the suit, merely because he caused a benami purchase to be made in the name of his wife who was not a co-sharer in the village. In order to constitute an estoppel within the meaning of s. 115 of the Evidence Act, 1872, the intention of the person, against whom the estoppel is sought to be used, that his representation should be acted upon by the person to whom it is made, must be proved. *SHEIK MUHAMAD ISMAIL v. SHEIK ABDUL GAFOOR*, 4 Ind. Cas. 488. (11 B.L.R. 46, 18 W.R. 166, I.A. Sup. Vol. 40, 20 C. 296, 19 I.A. 203, A.W.N. 1884, 128, R.)

(55)—*Muafi land—Custom of pre-emption prevailing among owners of khalsa land—Owner of khalsa land cannot pre-empt Muafi land.*—A custom of pre-emption, which appertains to the *khalsa* land, does not give a co-sharer in the *khalsa* land, any right of pre-emption over a *muafi* land in which he has no interest. *SANT BAKAS SINGH v. MUSSAMMAT DHANESH KORE*, 6 Ind. Cas. 167.

(56)—*Pre-emptor not entitled to mesne profits in execution of decree—Appeal—Decree—Civ. Pro. Code (Act V of 1908), ss. 2, 47.*—An order, declaring that a decree-holder is entitled to get mesne profits from the judgment-debtor, is a decree within the meaning of s. 2 of Act V of 1908, and as such is appealable even before the exact sum to be paid to the former by the

Pre-emption—continued.**—8.—Miscellaneous—continued.**

latter is ascertained. The question, whether mesne profits should be allowed to a plaintiff in a pre-emption case for the period between the institution of his suit and the final obtaining of his decree on appeal is not included in the words "relating to the execution, discharge or satisfaction of the decree," and can be disposed of only by a separate suit. *HOA RAM v. RANA PALEYA*, 6 Ind. Cas. 648.

(57)—*Pre-emption—Benami purchase—Suit against ostensible purchaser—Real purchaser not made party—Suit not maintainable.*—B purchased a property in the name of his wife D. H. brought a suit for pre-emption against D, the ostensible purchaser and did not make B a party to the suit. If the suit had been brought against B, it would have been dismissed, as B was a co-sharer against whom H had no right of pre-emption. *Held*, under the circumstances, that the suit as brought against the ostensible purchaser was not maintainable. *HARASARAN v. DILRAJI*, 8 Ind. Cas. 527.

(58)—*Pre-emption suit—Jurisdiction of Court to be decided by valuation of plaint and not by the amount mentioned in the sale deed.*—In a pre-emption suit, the jurisdiction of the Court is to be decided by the valuation set forth by the plaintiff in the plaint, and not by the price set out in the sale deed upon which the suit for pre-emption is based. *BABU BALDEO PRASAD v. HAR RATAN*, 9 Ind. Cas. 414. (12 O.C. 31, 1 Ind. Cas. 687, *Not F.*; 6 O.C. 255, *F.*; 10 A. 524, 13 A. 320, 16 A. 286, *Appr.*)

(59)—*Costs to be set off.*—In a suit for pre-emption where the pre-emptor, obtaining a decree conditional on payment of a certain sum within a certain time, paid the amount within that period, but attached a part of the amount on account of costs due to him under that decree, *held*, that there is no specific provision in the Code of Civil Procedure applicable to the case, but that under the rule of justice, equity and good conscience, the decree-holder was entitled to an equitable set off. *BALDEO PARSHAD v. BALDEO SINGH*, 3 O.C. 323. [*F.*, 6 O.C. 23.]

(60)—*Pre-emption, suit for—Estoppel against right of pre-emption in absence of written notice of proposed sale to plaintiff.*—In a suit for pre-emption the evidence of one of the defendants' witnesses K was to the effect that 20 days or a month before the execution of the sale-deed he met the plaintiff and told him that B was executing a sale-deed, that if the plaintiff wished to buy he should do so and that the plaintiff then said "you may get a sale executed, I do not wish to do so," the question was whether this evidence being accepted as true the plaintiff was estopped from claiming pre-emption. It was proved that K with whom the plaintiff conversed was not the accredited agent either of the vendors or of the vendee. The price at which the vendors proposed to sell was not mentioned to the plaintiff and in fact the name of only one of the vendors was

Pre-emption—continued.**—8.—Miscellaneous—continued.**

mentioned. *Held* that the plaintiff was not estopped from claiming pre-emption. In a case for pre-emption although notice in writing is not given by the vendor the plaintiff may be estopped from claiming pre-emption if it is proved that the property was offered to him at a certain price, that he refused to purchase at that price and that he expressly consented to the purchase of the property by the defendant. *BHAGWAT SINGH v. SAIYAD NAZIR HUSAIN*, 5 O.C. 393. [*R.*, 10 O.C. 257.]

(61)—*Pre-emption, suit for—Holders of separate holdings and paying rents separately—Co-sharers of mahal—Oudh Laws Act, s. 9, cls. (2) and (3).*—In a suit for pre-emption it was common ground between the parties that the would-be pre-emptor, the vendor and the vendee were all members of the same "village community" within the meaning of cl. 3, s. 9 of the Oudh Laws Act, but the pre-emptor contended that they were also "co-sharers of the whole mahal" within the meaning of cl. 2 of that section. The village in which the land in suit was situated consisted of two proprietary mahals one of which was called mahal Madho Singh. In 1883 the parties to the suit and several other persons sued for under proprietary rights in mahal Madho Singh. The suit was settled by a compromise which was incorporated in the decree. Each of the then plaintiffs thereby obtained under-proprietary rights in separate and specific plots of land. It was admitted that each plaintiff obtained a separate holding and was responsible only for the rent payable in respect of that holding. The existence of one mahal only was disclosed by the evidence in the case and that was a mahal which was the property of the superior proprietor who had no co-sharers. *Held*, that the parties to the suit were not co-sharers in a tenure of any description but were the members of the same village community and as such were equally entitled to pre-emption. *BADRI v. ABLA DIN*, 5 O.C. 399.

(62)—*Pre-emption, suit for—Oudh Laws Act, 1876, s. 8—Town, meaning of—Interpretation—Urban land included within the limits of a Municipality.*—When a word is not expressly defined in an Act it must be read in its popular, natural, and ordinary sense unless there is reason upon the face of it to believe that it was not intended to bear that construction. The meaning of the word "town" in s. 8 of the Oudh Laws Act discussed. *Held*, that the question whether any particular piece of land is situated within a "town" or not depends on whether it is part of an urban area or not, and it is a question of fact which has nothing to do with the contingency of its being included within the limits of a Municipality for administrative purposes. *JANKI PERSHAD v. SAHEB-UN-NISSA*, 7 O.C. 74. [*R.*, 12 O.C. 1.]

(63)—*Pre-emption, suit for—Sale of property more than that entered in the notice—U.P. Act*

Pre-emption—continued.**—8.—Miscellaneous—continued.**

XVIII of 1876, ss. 10 and 11.—The appellants purchased certain land and house property from the respondent's brother M. Previous to the sale M gave the respondent a notice under s. 10, Act XVIII of 1876, to the effect that he was going to sell his zamindari share for Rs. 6,865, excluding from the sale his dwelling-house and two orchards. The respondent refused to take the property at the price named and then his brother sold that property plus one of the orchards and his dwelling-house, etc. The respondent claimed pre-emption on the ground that the property sold was more than that entered in the notice. *Held* that the notice on the respondent was not a good notice and the respondent did not lose his right of pre-emption through s. 11, Act XVIII of 1876. **NASILUL-RAHIMAN v. NAWAB ALI, 7 O.C. 237.**

(64)—*Consideration, suit for recovery of a portion of—Res Judicata—Fraud—Pre-emptor, rights and liabilities of—Vendor and vendee, relations of.*—One P. J. executed a sale-deed in favour of the respondent for Rs. 2,500. A suit for pre-emption was brought, to which both P. J. and the respondent were parties. The pre-emptor claimed the property on payment of Rs. 1,400, which he alleged was the true consideration for sale. P. J. in her defence stated that the sum of Rs. 2,500 entered in the deed was the true consideration and that she had received the entire amount. The pre-emptor, however, got the decree on payment of Rs. 1,400 only. Subsequent to the decree, P. J. brought the present suit for recovery of Rs. 1,000 the balance of the consideration stated in in the deed after giving credit for Rs. 100, her share of expenses in the pre-emption case. *Held*, that the question what P. J. had received and what she was entitled to was *res-judicata* between her and the respondent. The finding in the pre-emption case that P. J. had received Rs. 1,400 which was the true consideration for the sale deed barred the present suit. *Held*, further, that after the decree in the pre-emption case, the pre-emptor became the purchaser and took over all the rights and liabilities of the vendor and the present suit brought by P. J. for recovery of a portion of the alleged consideration against the respondent was not maintainable. **AGHA HOSSAIN v. WAZIR KHAN, 8 O.C. 283. [R. and Rel. on, 9 O.C. 308.]**

(65)—*Deed purporting to rectify some mistakes regarding members and plots of land sold under a previous deed, but stating no consideration for rectification, suit for pre-emption of new plots entered in—Limitation.*—On the 5th June 1895, the vendor executed a deed of sale of certain plots of land in favour of the vendee. Certain numbers with areas were given as those of the plots sold. Subsequently, on the 18th July, 1902, the vendor executed another document, in which it was stated that a mistake had been made in the deed of 5th June, 1895, which did not contain the exact area and

Pre-emption—continued.**—8.—Miscellaneous—continued.**

particulars of the land which had been actually sold and purported to give the actual numbers and areas. The plaintiff claimed the right of pre-emption in respect of the plots, which were entered in the latter document, but not referred to in the former. It was not stated that there was any consideration for the execution of the second document. *Held*, that the deed of 18th July, 1902, was not a sale-deed as it did not purport to transfer anything to the vendee for a price, and that the suit was barred by limitation. **HARPAL SINGH v. BAJRANG BAHADUR, 8 O.C. 288.**

(66)—*Jurisdiction of sale officer to sell in contravention of the order passed by the Court executing the decree—Invalid sale in execution of decree—Sale in spite of the order staying the sale, effect of, on right of co-sharer to claim pre-emption.*—The plaintiff claimed pre-emption on the ground that he was a co-sharer in the mahal, in which the share sold was situate. The defence was that the whole share of the plaintiff having been previously sold up, in execution of a decree against him, he was not a co-sharer and as such entitled to pre-empt. It was found that the officer conducting the sale had wrongly sold up the entire share of the plaintiff, in ignorance of an order of the Court executing the decree, staying the sale of the whole share and directing only a portion thereof to be sold. *Held*, that the sale of the entire share was invalid, the officer conducting the sale having no jurisdiction to sell in contravention of the order of the Court executing the decree and, therefore, the plaintiff was still a co-sharer in the mahal and, as such, entitled to claim pre-emption. **RATAN SINGH v. DULAR SINGH, 9 O.C. 289. (12 A. 96, F., 21 A. 140, 21 C. 66, P.C., R.)**

(67)—*Property sold not in actual possession of vendors—Law suit, sale of a share in a—Sale for purposes of litigation—Oudh Laws Act (XVIII of 1876), Chapter II.*—By a sale deed, the vendors purported to sell to the vendees a right to prosecute a law suit on their behalf in order to recover actual possession of the share inherited by them from their mother. A portion of the consideration money was paid in cash but the greater portion was left with the vendees to carry on litigation in different Courts between the vendors and one J who was in actual possession of the property. *Held*, that this being the case of a sale of property not in actual possession of the vendors, it was not such a sale of immovable property which could be the subject of pre-emption as contemplated in Chap II of the Oudh Laws Act. **KHURSHAD ALI v. RASHID HUSAIN, 9 O.C. 331. (21 C. 496, 2 O.C. 9, 9 O.C. 86, R.). [R. and D., 10 O.C. 273.]**

(68)—*Suit for—Ostensible owner, decree for foreclosure, on a mortgage by—Transfer of Property Act, s. 41.*—*Held* that, where a mortgagee foreclosed a share mortgaged to him by

Pre-emption—continued.**—8.—Miscellaneous—continued.**

one who was merely an ostensible owner, a suit for pre-emption brought by a co-sharer against such a mortgagee could not be defeated on the ground that the mortgagor was not the real owner of the share mortgaged and that the mortgagee had succeeded only by availing himself of the provisions of s. 41 of the Transfer of Property Act. **SITA RAM v. SHEO PRASAD, 11 O. C. 26.**

(69)—*Suit for—Limitation in suits based on foreclosure—Order absolute, time to begin from—Suits for pre-emption based on a foreclosure decree passed on a compromise, maintainability of—Oudh Laws Act, 1876, Chap. II—Limitation Act, 1877, sch. II, art. 120—Transfer of Property Act, ss. 86, 87 and 93.—Held, that pre-emption could be claimed in the case of a decree for foreclosure passed on a compromise, made in a suit, brought for sale of the mortgaged property on the basis of a simple mortgage. Held, further, that the limitation for a pre-emption suit brought on the basis of foreclosure decree is to be reckoned from the date when the decree is made absolute. ARJUN SINGH v. PANDIT IQBAL NARAIN, 10 O.C. 374. (14 A. 405, 24 A. 17, P.C., R.) [R., 12 O.C. 314.]*

(70)—*Pre-emption—Gazetted holiday, period fixed for payment expiring on—Delay due to official oversight—Question of compliance with the decree, right of appeal—Power of Court to extend period of payment—Appeal treated as revision—Civ. Pro. Code, ss. 214, 244 and 622.—Held, that, where the last day of the period fixed for payment into Court of the pre-emptive price expired on a Gazetted holiday, the payment could be made when the Court opened. (2 N.W.P. 112, 3 A. 850, R.) Held, further, that the rights of a decree-holder are not affected by a delay arising from official oversight. Held, also, that a question of payment or non-payment of pre-emptive price in compliance with a decree in the terms of s. 214, Civ. Pro. Code, is not a question of execution open to appeal under s. 244 of the Code (4 A. 420, R.). Held, also, that a High Court in revision has the power vested in a Court of appeal, to fix a fresh date for the deposit of the purchase-money. (2 A. 744, 13 A. 376, R.) The Court in this case treated the appeal before it as an application for revision, set aside the decree of the District Judge as without jurisdiction and substituted a similar order in the exercise of its revisional powers. GANGA DHAR v. ANRUDH SINGH, 11 O.C. 144.*

(71)—*Plaintiff's title at the time of institution of the suit—Title acquired by purchaser subsequent to the cause of action.—Held that the plaintiff in a pre-emption suit must be able to show a valid and subsisting title at the time when he brings his suit into Court. Held, further, that a purchaser may use a title acquired by him subsequently to the origin of the cause of action as a defence against a pre-emption suit*

Pre-emption—continued.**—8.—Miscellaneous—continued.**

instituted after his acquisition of the said title. **TAHAWWAR KHAN v. MADHO RAM, 11 O.C. 290. (26 A. 389, R.) [R., 12 O.C. 229.]**

(72)—*Plea that a sale was in reality a gift—Estoppel, belief in the representation necessary for.—Where it was contended that the parties to a sale-deed were estopped from proving as against the person suing for pre-emption, that the transaction was in reality different from what it appeared to be, held, that before the plea of estoppel could be maintained it must be proved that the plaintiff believed the representation and brought his suit in consequence of that belief. NAWAB BEGAM v. HAMID ALI, 11 O.C. 176. (1 O.C. 75, 20 C. 296, R.)*

(73)—*Valuation of suit for pre-emption where property of greater value than sale consideration.—Where pre-emption is claimed on payment of the sum stated as the consideration in the sale-deed, and it is at the same time stated that the value of the property is greater, the value of the suit should be measured by the consideration stated in the deed, which is prima facie the value of the pre-emptive right which the plaintiff asserts. KISHEN DAYAL v. RAJA-SINGH, 12 O.C. 31=1 Ind. Cas. 687. (6 O.C. 255, R.)*

(74)—*Decree of Settlement Court granting right of pre-emption—Oudh Laws Act, effect of, on previous settlement decrees—Oudh Laws Act, s. 9.—On 28th February, 1873, the Settlement Court on a dispute between A, the mother of the vendor-respondent, and B, the father of the rival pre-emptor respondent, held A entitled to the proprietary rights in dispute, but, at the same time, provided that B should have a hereditary right of pre-emption in respect of the said property. Held, that, since the enactment of the Oudh Laws Act, previous decrees of the settlement or other Courts cease to be of value as against members of the village community not parties thereto, unless they could be appealed to as evidence of custom. The statutory right of the appellant pre-emptor is, therefore, in no way affected by the older settlement decree to which he was not a party. GHARIP SAHEP v. DAYAL SINGH, 12 O.C. 220 (B.)=3 Ind. Cas. 665. (44 P.R. 1892, R.)*

(75)—*Pre-emption—Decree for foreclosure—Notice to persons having right of pre-emption, time for issuing—Oudh Laws Act, ss. 10 and 12.—Held, that a mortgagee, in order to safeguard himself against a future suit for pre-emption, must issue the notice referred to in s. 10 of the Oudh Laws Act, either at the time when he files his suit for foreclosure, or with such reasonable promptitude thereafter that the three months' grace allowed by s. 12 may expire before the decree absolute is passed. When such decree absolute has once been passed, without the persons possessing the right of pre-emption having been allowed the option given them by s. 12, there has been a completed transfer in*

Pre-emption—continued.—8.—**Miscellaneous**—continued.

violation of the said right of pre-emption, and a right to sue has accrued in favour of persons possessing such rights with effect from the date of the decree. *RAM SAHAE v. TANKI PRASAD*, 12 O.C. 314=4 Ind. Cas. 156. (10 O.C. 179, 10 O.C. 374, R.)

(76)—*Pre-emption—Sale in favour of one of several persons equally entitled to pre-empt—Pre-emption of part of the property sold—Oudh Laws Act, s. 9.—Held*, that the last clause of s. 9 of the Oudh Laws Act is applicable, not only where there are persons equally entitled to buy a property and the property has been sold to a stranger or to a person whose right to acquire it is inferior to that of the persons who are equally entitled to pre-empt, but is applicable also to cases where two or more persons are equally entitled to buy the property and one or more of them has or have acquired it. *Held* further, that a person seeking pre-emption must sue to pre-empt all the property included in the conveyance of which he claims the benefit in respect of which his right of pre-emption exists, whether such right is a superior one giving him a preferential right of purchase or only an equal right to be exercised by the drawing of lots. Where several properties were conveyed under the same sale-deed and the plaintiff brought a suit for pre-emption in respect only of the properties in which he had a preferential right of purchase, but did not claim pre-emption of the properties in which he had an equal right of purchase with the vendee, *held*, that the suit must be dismissed. *MAHABIR PRASAD v. RAM JIVAN LAL*, 13 O.C. 260=8 Ind. Cas. 272.

(77)—*Purchase by malguzar absolute occupancy holding subject to mortgage—Malguzar takes holding subject to mortgage.—When a malguzar buys by the exercise of his right of pre-emption an absolute occupancy holding which is subject to a mortgage he takes the holding subject to the mortgage.* *BANOABI v. UTTAMCHAND LAKHMICHAND*, 1 C.P.L.R. 79. [R., 9 C.P.L.R. 30.]

(78)—*Interest of co-occupant in survey number sold by auction to satisfy mortgage decree against it—Whether co-occupant can claim pre-emption regarding such property.—The plaintiff was joint sharer in certain survey numbers in Berar. His co-sharers mortgaged the fields (including his shares) and the mortgagees got a decree for sale of the mortgaged property, and brought it to sale. The plaintiff sued to enforce his right of pre-emption in respect of the shares, other than his own, which had been so sold by auction. Held*, that the lower Court was right in holding that the suit did not lie, as it can lie only under Chapter XVIII of the Berar Land Revenue Code, since in Berar pre-emption is a right created by statute, and as it did not appear that any provisions of the Code were applicable to the present case. *MAIDABI v. TEJABAI*, 4 N.L.R. 138.

Pre-emption—continued.—8.—**Miscellaneous**—continued.

(79)—*Registered occupant of holding in Berar—Relinquishment of holding, a surrender—Co-sharer's rights of pre-emption—Failure to exercise the right, effect of—Practice—Legal effect of a transaction ignored by the parties and the judges in lower Courts—Right of appellant to press the view in second appeal.—Held* (1) The right of a registered occupant of a holding in Berar is a tenant-right, and not a proprietary one. (2) A relinquishment by the registered occupant amounts to a surrender and terminates the tenancy. (3) If a particular holding is relinquished by the registered occupant in favour of a specified person for valuable consideration, then the co-sharers will have their right of pre-emption, but if they fail to assert their right and to challenge the surrender, they cannot afterwards ignore the surrenders and treat as trespassers persons, who have come into possession in a manner expressly authorized by the law. (4) Where the legal effect of a transaction is a question of law, the fact that neither the appellants, their advisers in the lower Courts, nor the Courts themselves, took the right view of their effect, does not prevent that view being taken in second appeal. *BALIRAM v. MAROTI*, 6 N.L.R. 78=6 Ind. Cas. 824.

(80)—*Co-occupant of land in Berar—Mortgagee acquiring full ownership of a share in land by foreclosure of his mortgage, position of—When a co-sharer loses his right of pre-emption.—A man, once a "co-occupant," remains such, until he is shown to have lost his right by the effect of limitation or otherwise. A mortgagee, who acquires full ownership of a share in a village by foreclosure of his mortgage, becomes a "co-sharer" with the persons holding the remaining share or shares. A co-occupant of a holding in Berar is, so long as his right to claim possession of his share of the land subsists, entitled to claim also the right of pre-emption under s. 205 of the Berar Land Revenue Code, though he may not be actually in possession of any part of the land and though the vendor and vendee may deny his title to a share in the land.* *TAPAJI v. SAYAJI*, 6 N.L.R. 86=6 Ind. Cas. 930.

(81)—*Mortgage, usufructuary—Right of redemption—Whether capable of physical possession—Suit for pre-emption—Limitation.—In the case of a usufructuary mortgage, the right of redemption is an incorporeal right which does not admit of physical possession (9 A. 234, R.). And for a suit for pre-emption, based on the sale of such right of redemption, time runs from the date of registration of the sale-deed.* *NGA SHEVE DO'K v. NGA NU*, U.B.R. (1909), First Quarter, Limitation, 7.

(82)—*Punjab Civil Code, s. 13, cl. 2—Pre-emption—Limitation—"Transaction."—The law of limitation applicable to a suit to enforce the right of pre-emption is contained in Punjab Civil Code, s. 13, cl. 2, which directs that when a sale by one of a joint community takes place without the option of purchase being given, any*

Pre-emption—continued.**—8.—Miscellaneous—continued.**

member of such community may, within 3 months from the date of the transaction, bring a suit for rescinding the same. *Held*, also that the contract of sale must be regarded as being "the transaction" from which limitation is to be computed. **MEHTAB SINGH v. MUL SINGH, 22 P.R. 1870.**

(83)—*Pre-emption, Suit for—Limitation—Act XIV of 1859, s. 3.*—The provision in s. 3 of Act XIV of 1859, does not apply to cases where, by the general law of limitation previously in force, a shorter period of limitation was fixed than that prescribed by the Act. Accordingly, suits for pre-emption must be regulated as to limitation by the provisions of Act XIV, and must be brought within one year from the date the purchaser took possession. **GOORDIT SINGH v. MUSSUMAT JUSSEE, 27 P.R. 1870.**

(84)—*Pre-emption—Duty of vendor.*—In this case, after completion of a sale, the plaintiff sued and obtained a decree for pre-emption. The original sale out of which the suit for pre-emption arose was completed and plaintiff's claim throughout had been for pre-emption. *Held* that it was not competent to the vendor to withdraw from the sale by way of defeating the pre-emptor's decree. The property had passed from the vendor to the vendee, and the effect of the decree was to transfer it from the vendee to the pre-emptor on his paying the price. Where a sale has been completed, the seller cannot withdraw from the sale. **THURMAN SINGH v. JHABA MULL, 34 P.R. 1870.**

(85)—*Pre-emption — Limitation — Date of possession under contract of sale.*—Where there was actual possession on the part of the purchaser when he paid the money under a sale, but he was afterwards dispossessed by the vendor and was obliged to go into Court and get a decree and obtain possession in execution of that decree, it was held that a suit by a third party to enforce his right of pre-emption against the vendor and vendee was barred by limitation, as it was not brought within one year from the date when the vendee took possession under the contract of sale. **RAMSHOOKH v. NANO, 34 P.R. 1871.**

(86)—*Suit for pre-emption—Bona fide offer for price—Onus on pre-emptor refusing to buy, to prove want of good faith.*—A person alleging rights of pre-emption cannot be permitted to upset a transaction (after rejecting an offer) unless he can show—the burden being on him—that the offer was not made in good faith. But he would sufficiently discharge this burden if he showed that the land was offered to him at one price, and then actually sold at another and a lower one; or, if he showed that the price at which the land was sold, though identical with that asked from him was a fictitious price, not representing the real value of the land. **SHAMBU MAL v. JAMNA DAS, 38 P.R. 1875.**

(87)—*Pre-emption suit—Vendor whether necessary party.*—Generally the vendor is not a

Pre-emption—continued.**—8.—Miscellaneous—continued.**

necessary party in a suit for pre-emption; if the case could not be decided without his being made a party, then, he may be a necessary party. No hard and fast rule can be laid down and each case will depend upon its own circumstances. **UDDHAM MAL v. GANDA MAL, 134 P.R. 1889.** (80 P.R. 1888, F.; 7 A. 169, 775, 11 A. 164, R.) [R. & cited, 10 O.C. 49.]

(88)—*Right plaintiff joining with a wrong plaintiff—Effect on his rights.*—Where two persons of which one had and the other had not a right of pre-emption jointly sue for pre-emption, the suit as regards the wrong one may be dismissed but not as against the other who has a right to maintain the suit alone in his own name after his co-plaintiff's name is struck off. **SHARF v. PIR BAKHS, 83 P.R. 1893.** (5 A. 197, Diss; 4 P.R. 1884, D.) [R., 94 P.R. 1895.]

(89)—*Suit for pre-emption—Vendor's representatives suing vendee—Compromise—Pre-emptor added as defendant and then his name struck off—Legality.*—While a suit for pre-emption was pending the vendor died, and his representatives brought a suit for cancellation of sale against vendees in which the pre-emptor was made a party. The plaintiffs and the vendees compromised the suit, and on the application of the former, the pre-emptor's name was struck off the record. *Held*, that the Court ought to have decided the question whether the pre-emptor was a necessary party and the order striking off his name was illegal. **ILAH BAKSH v. MUSSAMMAT NISHABA BEGAM, 75 P.R. 1899.**

(90)—*Suit to enforce—Payment within time—Court-fee.*—As a decree in a pre-emption suit is appealable within a prescribed period, the fact of non-payment of the amount within the time fixed by the Court when the appeal is presented would not make the decree null and void. Where the subject-matter of a suit is land, the value of suit for purposes of Court-fee is five times jumma value of the land in suit. **HAZARI SINGH v. PIRAN, 92 P.R. 1900.** [R., 48 P.R. 1906 = 104 P.L.R. 1906.]

(91)—*Pre-emption—Cancellation of the sale in dispute—Striking off defendant's name after the first hearing—Material irregularity—Civ. Pro-Code, 1822, ss. 32 and 578.*—*Held*, that the name of a defendant cannot be summarily struck off the record after issues have been framed and evidence has been tendered. When during the pendency of a suit for pre-emption, the vendor sued the vendees for cancellation of the sale in dispute and the pre-emptor's name was added as a defendant, *held*, it was irregular on the part of the Court to strike off his name after the first hearing and the irregularity affected the merits of the case. **ILAH BAKSH v. MUSSAMMAT NOSHABA BEGAM, 15 P.L.R. 1900, Notes of Judgments.**

(92)—*Custom—Pre-emption—Mohalla Kaziwala, Dera Ismail Khan—Burden of proof.*—*Found*, that plaintiff has failed to prove the

Pre-emption—continued.—8.—**Miscellaneous**—continued.

existence of a custom of pre-emption in Mohalla Kazianwala, Dera Ismail Khan. In suits for pre-emption in respect of property situate in a town, where the custom is not universal, it is necessary for the plaintiff to prove that it exists in the particular mohalla in question or throughout some larger area of which it forms a part. **TAGGA v. ALLAH BAKHSI, 69 P.R. 1901.**

(93)—**Pre-emption**—*Bona fide claim—Pre-emptor agreeing to transfer a share of the property.* *Held*, that a suit for pre-emption is not liable to be dismissed merely by reason of the fact that the pre-emptor has entered into an agreement with third parties to give them a share in the property in suit, in the event of a decree being passed in his favour, on their paying a proportionate share of costs and purchase-money. **JIVAN SINGH v. SHER SINGH, 172 P.L.R. 1901, = 10 P.R. 1902.** (87 P.R. 1896 and 19 P.R. 1898, R.) [R., 34 P.R. 1903 = 64 P.L.R. 1903].

(94)—**Custom—Pre-emption—Kasur, District Lahore—Village Community—Punjab Laws Act, 1872, ss. 10, 12.**—The land in respect of which pre-emption was claimed was situated in Kasur, District Lahore. In the Settlement of 1856 Government was recorded as the proprietor of the whole village, which was leased to certain persons for the term of the settlement. At that time there were about 280 occupancy tenants whose possession extended over a hundred years. In the Settlement of 1874 plaintiff's father and others were declared by Government to be proprietors of the land in their possession. In the Settlement of 1892 the number of khatahs was increased from three in 1874 to seven, of which five belonged to the Pathans, one to the Government and one to the Khattris. The first Court found that these facts were sufficient to show that Kasur was a village community within the meaning of s. 10 of the Punjab Laws Act, 1872. The Divisional Judge disagreed with the finding of the first Court and dismissed the plaintiff's suit, on the ground that the custom of pre-emption could not be presumed to exist. *Held* that the numerous occupancy tenants who had held land in Kasur for long periods and the descendants of the grantees of 1874 formed a village community within the meaning of s. 10, cl. (a) of the Punjab Laws Act, the village having passed as regards the portion not held in proprietary rights by Government from a zemindari to a complete *bhaichara* tenure, and that therefore the right of pre-emption must be presumed to exist in the village as regards the portion not held in proprietary right by Government. **GHULAM HUSSAIN KHAN v. SHEIKH FAZEL DIN, 40 P.R. 1902.**

(95)—**Pre-emption—Pre-emptor's liability—Payment of purchase-money into Court—Withdrawal by vendees.**—Suit by incumbrancer for a declaration that the property which had been mortgaged to him by the vendee was subject to his mortgage. Where the holder of a decree for pre-emption duly deposited price in the

Pre-emption—continued.—8.—**Miscellaneous**—continued.

Court as directed, and obtained possession of the land in dispute and subsequent to the withdrawal of the money so paid in by the vendee, a suit was filed by a mortgagee for a declaration of his incumbrance made on the property by the vendee. *Held*, by a majority (Clark, C. J., dissenting), that as the pre-emption decree transfers to the pre-emptor the subject matter of sale as it subsists at the time of sale, the mortgage was not a valid charge against the land in the hands of the pre-emptor. **BOGHA SINGH v. GURMUKH SINGH, 93 P.R. 1902, F.B.** (68 P.R. 1897, 30 P.R. 1893, 55 P.R. 1899, 56 P.R. 1896, 7 A. 775, 12 A. 234, F.B., 9 A. 256, 21 P.R. 1902, 165 P.R. 1888, 67 P.R. 1881, 19 A. 256, 14 P.R. 1902, 32 P.R. 1902, R.) [R., 106 P.R. 1907, 141 P.R. 1907 = 57 P.L.R. 1908 = 93 P.W.R. 1907, 25 P.R. 1903.]

(96)—**Pre-emption—Rival claimants—Each claimant made defendant in the other suit—Suits tried together but decided by separate decrees—Decree allowing pre-emption in one case only on condition of default by other pre-emptor—Finality of decree in superior pre-emptor's suit—Appeal by inferior pre-emptor in his own suit—Res judicata.**—"T" instituted two suits for pre-emption with respect to two sales of land. Four days after, one "G" instituted two similar suits on the same sales. Eventually each pre-emptor was made a defendant in the other's suit. The Court framed similar issues and heard one set of witnesses in all four cases and disposed of all the cases by one judgment. "T" was held to have a preferential right to "G" and similar decrees were drawn in all the cases, by which "T" was directed to pay the price within a certain time, and on his default "G" was to get the property on payment of the prices within another fixed time. "G" appealed only in the two cases in which he was plaintiff. *Held*, that the omission to appeal against the decree of the rival claimant was a fatal defect, which having become final and binding, operated as *res-judicata* between the two pre-emptors. **GURMUKH SINGH v. HARI CHAND, 8 P.R. 1904.** (A.W.N. 1887, 301, 83 P.R. 1888, Cited.) [Overruled, 85 P.R. 1905 = 151 P.L.R. 1905.]

(97)—**Pre-emptor—Fraudulent concealment of sale—Limitation Act, 1877, s. 18—Burden of proving when fraud first became known to the plaintiff.**—Where an original transaction is tainted by fraud it lies on the party against whom fraud is found to prove that the want of knowledge was not caused by fraud or that the plaintiff had a clear and definite knowledge of the fraud for more than the period of limitation allowed. **GORDHAN DAS v. AHMAD, 34 P.R. 1904.** (12 P. R. 1898., Cited.)

(98)—**Pre-emption—Sale by one traddadkar of his rights to proprietor—Suit by other traddadkar—of his rights to proprietor—wajib-ul-arz—Custom—Mauza Haveli Diwan, Jhang District.**—A person holding as *traddadkar*

Pre-emption—continued.**—8.—Miscellaneous—continued.**

certain land in the Jhang tahsil sold his rights to one of the proprietors in the joint holding. The plaintiff, a traddadkar with the same rights as the vendor, sued the vendee for pre-emption on the ground that, as traddadkar, he had a right to the pre-emption of the traddadkari land preferential to that of the vendee. *Held*, that as the traddadkari tenure in question conferred on the traddadkar full proprietary right to half of the land with half share in the well jointly with the original proprietors, the plaintiff's title was that of a co-sharer in joint holding with vendor and vendee, and that the burden of proving a special custom conferring on the plaintiff a superior right was on him. *Held*, further, that this burden had not been discharged. **GANGA RAM v. WARYAM, 40 P. R. 1904. (72 P. R. 1897, 61 P. R. 1876, 67 P. R. 1874, Distgd.)**

(99)—*Chaks not constituting villages, Presumption as to the existence of right of pre-emption upon sales of land in—The term village in Punjab Law's Act, meaning of.*—The presumption under s. 10, Punjab Laws Act, in favour of the existence of a right of pre-emption upon sales of land in a *chak* cannot arise unless the *chak* constitutes a 'village' and the persons living in it and owning property in it can be called a 'village community.' A village or village community, under the above Act, cannot of course be restricted to mean only a village of one of the well-defined types *e.g.*, zamindari, pattidari, bhayachara, etc., but this does not imply that, when the Government demarcates an area with the intention of perhaps some day making it a village, that area becomes a village immediately Government begins to allot lands in it. When Government finally settles it and draws up a separate record-of-rights for it, assessing the *chak* as an 'estate' to land revenue, it may become a village community; till then the *chak* is not a village nor is there any village community and there can be no presumption, therefore, in favour of the existence of the right of pre-emption in the area. **RAM NARAIN SINGH v. SEWAK RAM, 21 P. R. 1906. (27 P. R. 1897, 66 P. R. 1903, 30 C. 635, R.) [R., 27 P. R. 1907, 89 P. R. 1910.]**

(100)—*Punjab Laws Act, 1872, s. 12 (b)—Meaning of expression 'order of relationship,' as referring to order of succession under customary law.*—In this case, the question was referred to the Full Bench, whether the expression 'in the order of relationship' in s. 12 (b) of the Punjab Laws Act, should be interpreted literally or with reference to the meaning, it should bear in cases of succession to landed property, under the customary law of the Punjab; that is to say, whether the expression should be held equivalent 'to' in the order of succession' and to connote recognition of the right of, representation in calculations of relationship in cases of pre-emption and it was held, agreeing entirely with the judgment of the Division Bench, that the words really mean "in the order of succession" as heir. Such interpretation alone

Pre-emption—continued.**—8.—Miscellaneous—continued.**

would accord with the law as it has prevailed among the agricultural population of the Punjab. In construing the expression 'in the order of relationship,' used in the above Act applicable to the Punjab, it must be borne in mind that, their degrees of propinquity to the same common ancestor, are regarded as of no moment and it is therefore no twisting of the meaning of the language to treat 'relationship' as not synonymous with 'propinquity' and 'order' with 'degree.' On the other hand, if the other and literal interpretation be adopted, it would result in the introducing of females (the wording not being 'agnatic relationship'), destroying the whole fabric of customary law relating to land-holding among agriculturists in Punjab and doing away with the very foundations of the law of pre-emption. **KARIM BAKHSI v. JEHANDAD KHAN, 74 P. R. 1906 = 137 P. L. R. 1906. (52 P. R. 1896, 98 P. R. 1894 R.; 65 P. R. 1878, 117 P. R. 1882, Overruled.; 27 P. R. 1893, D.) [R., 29 P. R. 1908 = 71 P. W. R. 1907 = 61 P. L. R. 1907.]**

(101)—*Suit for pre-emption in a bhayachara village on ground of relationship—Proof of special custom—Value of chakwar--wajib-ul-arz—Document containing custom of whole Tahsil tribe by tribe—Earlier and later wajib-ul-arz, conflict between—Ss. 31 (2) (b) and 44, Act XVII of 1887 (Punjab Land Revenue).*—In a suit for pre-emption of land in a *bhayachara* village, the grounds being the agnatic relationship of the plaintiff to the vendor and his being a *jaddi malik*, whereas vendee is a *malik* by purchase, plaintiff, in order to prove that relationship helps him, should prove a special custom to that effect. The *chakwar wajib-ul-arz* is not, properly speaking, part of the settlement record, which is a village record, and, therefore, no presumption of correctness attaches to it under s. 44 of the Act. (87 P. R. 1905, R.) Even if it be taken to form part of the settlement record, the circumstance that it states the custom of pre-emption as *tribal*, whereas pre-emption is peculiarly a *local* custom, deprives the entry of all its presumptive value. (26 C. 81, P. C., R.) Where a village *wajib-ul-arz*, states no custom, but does not exclude it, the party alleging a special custom must prove it. A document, in which customs are stated for a whole Tashil, tribe by tribe, inasmuch as it does not deal with rights and liabilities "in an estate," cannot be said to fall within s. 31 (2), cl. (b). Having, therefore, no presumptive value, it only helps to prove them, and serves as a guide to enquiry, but actual instances of enforcements of the customs stated are necessary. The value of even a genuine *wajib-ul-arz*, favouring relatives in the matter of pre-emption and standing unsupported by actual proof of custom, followed by a later *wajib-ul-arz*, in which the "law" of Act IV of 1872 is stated to contain the rule of pre-emption, is so small as to be virtually *nil*. Technically, the value is not *nil* (52 P. R. 1896, 35 P. R. 1905, R.) but even negative indications, the other way, are sufficient

Pre-emption—continued.**—8.—Miscellaneous—continued.**

to reduce its value to nothing. *GULDAD KHAN v. GUL KHAN*, 44 P.R. 1907=82 P.L.R. 1908=111 P.W.R. 1907. (27 P.R. 1893, 98 P.R. 1894, F.B., 52 P.R. 1896, 78 P.R. 1904, 35 P.R. 1905, 70 P.R. 1905, R.) [R., 73 P.R. 1908.]

(102)—*Purchaser having equal right to pre-empt with plaintiff joining in purchase with one having inferior right—Plaintiff's right of pre-emption.*—Where a purchaser of land and houses, who has equal right of pre-emption with that of the plaintiff, joins with himself in the purchase a person who has an inferior right, the plaintiff is entitled to take over the whole bargain, the sale being one and indivisible. *ACHHRU v. LABHU*, 48 P.R. 1907=81 P.L.R. 1908=107 P.W.R. 1907, Sup. (10 P.R. 1884, 94 P.R. 1895, 66 P.R. 1896, F.; 19 A. 148, F.B., Diss.)

(103)—*Price to be paid in pre-emption suits—Market value—Good faith.*—Before a Court proceeds to assess market value in pre-emption cases and to call upon a plaintiff to pay that, it must satisfy itself that the price stated in the deed was not fixed in good faith. But, where the debt is genuine, though most of it is made up of interest, and the land, which is the subject of the suit, is not the vendor's only asset, and he is not insolvent, and there has been a sort of adjustment of value, in a manner to suit vendor and vendee, and not a wholesale wiping out of all vendor's liability to vendee, there is no pre-sumption as to the bad faith of the price fixed. *AJUDHIA PERSHAD v. AHSANULLAH*, 56 P.R. 1907=91 P.W.R. 1907=53 P.L.R. 1908 (75 P.R. 1901, 68 P.R. 1902, F.; 77 P.R. 1901, D.)

(104)—*Vendee assigning the property before suit for pre-emption—Transferees not made parties—Fresh suit against transferees—Limitation Act, art. 10—Applicability.*—A pre-emptor instituted a suit against the vendor and vendee for pre-emption and obtained a decree. Before the suit, the land had been assigned by the vendee to certain persons. Held, that the pre-emptor, in order to bind the transferees, should have impleaded them in the previous suit, or should institute a fresh suit. Such a suit against the transferees would be a pre-emption suit and should be brought within the period of limitation prescribed in art. 10 of the Limitation Act. *RAUSHAN v. MAKHAN* 106, P.R. 1907=75 P.L.R. 1908. (25 P.R. 1903, 93 P.R. 1902, 46 P.R. 1902, R.)

(105)—*Personal covenant for title by vendor in favour of vendee—Right of pre-emptor to enforce the covenant.*—A condition in a deed of sale, in which the vendor guarantees his title in the land, solely to the original vendee, and in which he agrees to compensate the vendee if disturbed, is purely a personal covenant by the vendor in favour of the vendee, and does not, therefore, enure for the benefit of the pre-emptor who succeeds in obtaining a decree for

Pre-emption—continued.**—8.—Miscellaneous—continued.**

possession by pre-emption. *SANDHE KHAN v. BHANA*, 141 P.R. 1907=93 P.W.R. 1907=57 P.L.R. 1908. (30 P.R. 1893, 55 P.R. 1899, 46 P.R. 1902, 24 P.R. 1901, 93 P.R. 1902, 96 P.R. 1906, 8 A. 775, 8 A. 86, 3 A. 688, R.)

(106)—*Vendee's re-selling the property to one of the vendors before pre-emption suit—Right of pre-emptor, when the re-sale is to a third party having superior right and when it is in favour of the vendor himself.*—Held, that, whenever a pre-emptor sues for pre-emption upon a sale, and it is found that before his suit the vendee has transferred the property to a third party, the test is whether the pre-emptor has a superior right of pre-emption in regard to the first sale as compared with the transferee, and that where it is re-conveyed to the original vendor, the pre-emptor must succeed as the former cannot have any right of pre-emption whatever in regard to the sale which he himself made. *LACHHU v. MAHESHU*, 134 P.W.R. 1908. (80 P.R. 1888, 62 P.R. 1879, 138 P.R. 1884, F.; 27 P.R. 1874, 69 P.R. 1898, 73 P.R. 1898, 93 P.R. 1902, 20 A. 100, 25 A. 421, R. & D.)

(107)—*Rival claimants for pre-emption—Pre-emptive rights equal—Right of claimants suing subsequently to defeat claimant suing first by obtaining consent decree during pendency of the first suit—Limitation for suits against rival pre-emptor's—Limitation Act, Sch. II, Art. 120—Superior diligence, effect of.*—Where a rival claimant of the right of pre-emption obtained a consent decree in a suit to which plaintiff, the first claimant, was not made a party, and the suit in which the rival claimant obtained the consent decree was instituted subsequently to the suit instituted by the plaintiff, the first claimant. Held, that, the plaintiff having first filed his suit and thus shown superior diligence, the fact that the rival claimant obtained the consent decree did not place the plaintiff in a worse position than that which he occupied when he filed this suit and that the plaintiff was entitled to a decree. Superior diligence in suing constitutes superior claim to pre-emption. (83 P.R. 1888, F.) Held, also, that art. 120 of the Limitation Act governed suits against rival pre-emptors impleaded after suit filed (11 P.R. 1893, F.) and that one pre-emptor may implead another as a co-defendant within the period prescribed by art. 120. *RAM PARSHAD v. GANGA DATT*, 20 P.R. 1908.

(108)—*Vendees becoming by right of purchase landholders in village entitled to pre-empt. Other property in village purchased subsequently—Land bought first lost in suit by pre-emptor with superior right—Effect of decree in suit on vendees' position—Whether land subsequently purchased can be retained by such vendees.*—Certain vendees became landholders in a village by reason of a purchase made by them on the 27th July, 1896. They also made a subsequent purchase in the village on the 8th November, 1900. The plaintiff brought a suit

Pre-emption—continued.**—8—Miscellaneous—continued.**

for pre-emption in respect of the sale of the 27th July, 1896, which was decreed on 8th January, 1904. The present suit was instituted by the plaintiff, on the 29th October, 1901, for pre-emption in respect of the sale of 8th November, 1900. *Held* that the effect of the pre-emption decree of 8—1—04 was to divest the present vendees of their alleged ownership of land under the sale of 27—7—1896 and to vest the same in the plaintiff pre-emptor as from the date of the said sale (30 P.R. 1893, *note*, *F.*; 46 P.R. 1902, 93 P.R. 1902, *R.*; 44 P.R. 1903, *D.*), that at the time of the sale in dispute the vendees were not landholders in the village in which the land was situate, and that consequently the plaintiff had a superior right of pre-emption. **KEHR SINGH v. MAHMAN SINGH, 25 P.R. 1908=51 P.W.R. 1908=128 P.L.R. 1908. [R., 91 P.R. 1909.]**

(109)—*Sale of property subject to pre-emption—Suits for pre-emption—Sale by original vendee during pendency of suits to pre-emptor having superior rights—Lis pendens—Applicability of doctrine.*—A certain property subject to pre-emption was sold to M. After the sale, two persons claiming a right of pre-emption separately sued to enforce their rights. During the pendency of those suits, K, a person having a right of pre-emption superior to that of the two former pre-emptors, also brought a suit for pre-emption. His claim was admitted and a registered sale deed executed by M in his favour. K allowed his own suit to be dismissed in default and applied to be, and was, admitted as a defendant in the former two suits. The Lower Courts decreed against K on the ground that the sale to him was made *pendente lite*. *Held* that the doctrine of *lis pendens* cannot be called in to defeat the claims of another claimant whose right to pre-empt existed before the suits of the other claimants were filed (7 P.R. 1906, *R.*). A pre-emptor is in no worse position when asserting his right privately than when he asserts it by suit (138 P.R. 1884, 20 A. 100. 73 P.R. 1888, *R.*). In claims for pre-emption, the right of any particular claimant is not prejudiced, *qua* own right by the assertion by another claimant of his own pre-existing rights. The doctrine of *lis pendens* forbids the creation of new rights over property already the subject of suit *pendente lite* which are calculated to injure the rights of the claimant. It does not, and could not, apply to the assertion of rights which existed prior to the institution of the pending suit (*c.*). **MAHMUD KHAN v. KHUDA BAKHSI, 26 P.R. 1908=39 P.W.R. 1908=145 P.L.R. 1908. [R., 91 P.R. 1909, 31 P.R. 1908, 7 P.R. 1909, 7 P.R. 1910; *Expl.*, 7 P.R. 1910.]**

(110)—*Suit for Sale of a residential house in Mohalla Dassan, Delhi City—Custom of pre-emption—S. 11, Punjab Laws Act (1872).*—In a suit for pre-emption in respect of the sale of a residential house situate in Mohalla Dassan, Delhi City, *held*, that the custom of pre-emption does exist in Mohalla Dassan, which is a

Pre-emption—continued.**—8—Miscellaneous—continued.**

portion of a sub-division which is called sometimes *mohalla* Billimarain. **BHAGWANTI v. SOHAN LAL, 116 P.R. 1908. (64 P.R. 1887, 44 P.R. 1903, 88 P.R. 1905, 81 P.R. 1906, 120 P.R. 1906, 122 P.R. 1906, 75 P.L.R. 1906, *Rel. on.*)**

(111)—*Custom—Pre-emption—Punjab Pre-emption Act (II of 1905), s. 28—Limitation Act (XV of 1877), sch. II, arts. 10, 120—Limitation—Oral sale of undivided share of land—Further appeal—Question raised for the first time on further appeal—Sale of land on Sidhani Canal leased by Government—Condition overriding provisions of Pre-emption Law.*—On further appeal, it was contended (1) that the suit was barred by limitation as it was brought more than one year after the sale; (2) that the land was situated in an "estate" as defined in Act XVII of 1887; (3) that, according to clause XV of the original lease of the land by Government to the vendor, no right of pre-emption arose in respect of a sale of it. *Held*, (1) that, as an undivided share of joint property, *viz.*, half a square of land, was sold, and as there was no registered sale deed, but merely an oral transfer with mutation, art. 10, Limitation Act, did not govern the case, and since the plaintiff's cause of action arose before the passing of the Punjab Pre-emption Act, and he brought his suit within a year of the passing of it, the suit was within time under s. 28 of the Act; (2) that it could not be urged for the first time on further appeal that the land in suit was an "estate" as defined in Act XVII of 1887; and (3) that, under the Punjab Pre-emption Act, the right of pre-emption arises in respect of all sales of agricultural land, and the plaintiff was not bound by the condition of the lease; for such condition cannot override the provisions of an Act of the Legislature. **GHULAM SARWAR v. LAHI BAKHSI, 92 P.L.R. 1909=124 P.W.R. 1909.**

(112)—*Res judicata—Estoppel—Admission of, and decree against father binding on son, Pre-emption—Mortgage—Sale—Pre-emptor competent to prove a mortgage is a sale—S. 11 of Civ. Pro. Code, V of 1908—Indian Evidence Act, I of 1872, s. 92 (1).*—*Held*, that, where a pre-emption suit has been decreed on the ground that an ostensible mortgage is in reality a sale, the decision is *res judicata* in a subsequent suit brought by the vendor's sons and nephews against the vendee or impugn the alienation, and that they are also estopped from urging against their father's own admission therein; and that they are not entitled to get the sale set aside, if nearly whole of the consideration is for necessity. *Held*, also, that under s. 92 of Act I of 1872 read with its proviso (i), it is open to a pre-emptor to show that a transaction is really one of sale and is fraudulently made to appear as one of mortgage. Found, that the terms of mortgage-deed in this case clearly indicate that a sale was

Pre-emption—continued.—8.—**Miscellaneous**—continued.

intended from the very first by the parties thereto. *ATRA v. BASANT SINGH*, 157 P.W.R. 1909.

(113)—*Sale of several houses adjoining one another, simultaneously*—*Right of pre-emption*—*Competency of vendee to set up legal rights with pre-emptor*—*Punjab Pre-emption Act* (II of 1905), s. 13 (7)—“*Adjacent*”—*Meaning of*.—S, owner of house A, sued to pre-empt house B adjoining house A. House B, and the next adjoining house C were sold simultaneously under the same deed to the vendee. *Held*, by the Full Bench (*Chevis, J., dissenting*) that, when two houses which adjoin one another are sold jointly, the right of pre-emption of the owner of a house which adjoins only one of the two houses, extends only to that one of the houses, which adjoins it and not to both of the houses. *Meaning of the word “adjacent” in the Punjab Pre-emption Act, 1905, s. 13, cl. 7, discussed.* *Held*, by the Full Court (*Robertson and Rattigan, JJ., dissenting*) that, where, on a sale of two adjoining houses under the same deed simultaneously, the owner of the adjoining house sues for pre-emption in respect of one of the two houses sold, to which his right extends, the vendee cannot be heard to say that, by reason of his having, under the same sale deed, become owner of the other house, he stands on an equal footing with the plaintiff (both being owners of the adjoining houses), and that the plaintiff is not competent, therefore, to pre-empt the house adjoining his own. *SANWAL DAS v. GUR PARSHAD*, 90 P.R. 1909 (F.B.) = 159 P.W.R. 1909 = 4 Ind. Cas. 179 = 147 P.L.R. 1909. (25 A. 421, 26 A. 389, Diss.; 124 P.R. 1907; *overruled*, 112 P.R. 1907, *Appr.*, 27 A. 670, 21 A. 374, R.) [R., 91 P.R. 1909]

(114)—*Pre-emption*—*Punjab Laws Act* (IV of 1872)—*Punjab Pre-emption Act* (II of 1905)—*Party not having right at the date of sale cannot subsequently maintain suit*—*Agricultural tribe*—*Lis Pendens*.—K.D. sold his land to MBKB and A B brought suits for pre-emption. Pending these suits, M K filed another suit for pre-emption and afterwards took a sale-deed of the property from M B. *Held* that, inasmuch as K B, being a *Kureshi*, was not a member of a notified agricultural tribe under Act XIII of 1900 at the date of suit, cannot sue for pre-emption of agricultural land at all. *Held* also that the exclusion of persons, who are not members of agricultural tribes, from suing for pre-emption, is an absolute exclusion not depending on the pleadings of the defendants. (See s. 20, Act II of 1905, Punjab). *Held* further that as A B, was a landlord in the village, as also M K, both had equal rights and were entitled each to half. The fact that M K, was also a collateral of K D, will not help him, in the absence of a special custom, as pre-emption is a village custom, not a triable one, and the existence of a special custom of pre-emption in one village of Gujars is not even

Pre-emption—continued.—8.—**Miscellaneous**—continued.

prima facie proof of its existence in another Gujar village. *MUHAMMAD KHAN v. SARDAR AND OTHERS*, 7 P.R. 1910 = 14 P.W.R. 1910 = 5 Ind. Cas. 249 = 49 P.L.R. 1910.

(115)—*Civ. Pro. Code* (Act V of 1908), s. 105 (2), O. 43, r. 1 (u)—*Appeal*—*Remand*—*Power of Chief Court on appeal against order of remand*—*Waiver of right*—*Pre-emptor taking active part in negotiations for sale in favour of vendee*.—The Chief Court is competent, on an appeal against an order of remand, to go into questions of fact decided by the lower appellate Court. When it was found that the pre-emptor had taken active part in the negotiations for sale that he brought his suit for pre-emption only about a week before the expiry of the period of limitation prescribed for the suit, and that he was present when mutation was effected in favour of the vendees and raised no objection: *Held*, that the pre-emptor must be deemed to have waived his right, and his suit must be dismissed. *RAM RATTAN SHAH v. KIRPA RAM AND HIRA NAND*, 86 P.L.R. 1910 = 8 Ind. Cas. 246.

(116)—*Sale of land for purpose of constructing a church*—*No stipulation for avoidance of sale on default*—*Pre-emptor, whether bound to carry out purpose*.—Where there has been a sale of a plot of land by J to N, and the sale-deed states that it is purchased by the latter for the purpose of erecting a Church or School, but there is no stipulation for avoidance of sale if no such building should be erected, *held*, the pre-emptor has a right to pre-empt without agreeing to erect a Church or School, but ignoring the expression in the deed of a sale of intention to build a Church or School. *HAZARA SINGH v. GANDA*, 33 P.R. 1910 = 52 P.W.R. 1910 = 6 Ind. Cas. 658 = 180 P.L.R. 1910.

(117)—*Custom* (Punjab)—*Pre-emption*—*Existence of custom in Kunjah, Gujrat District*—*Value of precedents where claim is admitted on such questions*—*Building whether serai or not*—*Question of law*—*Occasional occupation by chance visitors*—*Effect*—*Appeal*—S. 70 (1) (b), *Punjab Courts Act*.—A custom of pre-emption prevails in the town of Kunjah, Gujrat District. Precedents, where the custom was admitted or assumed, are not altogether valueless. The word *serai* is not defined in the Pre-emption Act. The question whether a certain building, on the facts found, is a *serai* or not, is one of law and of sufficient importance to justify the admission of appeal under s. 70 (1) (b), *Punjab Courts Act*, 1884. The mere fact that some of the rooms are rented out to more or less permanent tenants, and others to chance visitors occasionally, does not convert what was originally a *tawela* into a *serai*. *FEROZE-UD-DIN v. RAHIM BAKH*, 96 P.R. 1910 = 192 P.L.R. 1910 = 8 Ind. Cas. 356.

(118)—*Pre-emption*—*Person entitled to ownership of property during another's life*—*Right to sue for pre-emption, whether exists*—*Pre-emptor suing for possession as mortgagee*—*Failure to*

Pre-emption—continued.**—8.—Miscellaneous—continued.**

set up right of pre-emption — Waiver—Civ. Pro. Code, 1882, s. 43 (=O. 2, r. 2, Civ. Pro. Code, 1908).—A person, who is the owner of a property only during the lifetime of another, has, as such owner, a right to sue for pre-emption during the lifetime of that person. Where a person, in a prior suit, sued for his mortgage rights over a property and kept back his right to sue for pre-emption of the equity of redemption: *Held* that there was no waiver of rights on his part and that s. 43, Civ. Pro. Code, 1882, had no bearing, as the cause of action in the suit for possession as mortgagee was manifestly different from that in the pre-emption suit. **ROSHAN DIN v. KHUDA BAKSH, 99 P.R. 1910.**

(119)—*Guardian and minor—Guardian transferring land of minor agreeing to give his own land if minor should object—Guardian compelled by suit to give his land—Pre-emption suit by sons of guardian not maintainable—Sale in execution of decree.*—The guardian of a minor, when selling the share of the minor along with his in land held by him and the minor jointly, agreed that, if the minor should object, he would transfer to the vendee his other land equal to the share of the minor. The vendee afterwards obtained a decree to enforce the condition and obtained possession of land belonging to the guardian in execution of the decree. The sons of the guardian claimed the land by right of pre-emption. *Held*, that the claim was not valid, for there was no sale within the meaning of Pre-emption Act, and even if it was, it being a sale completed by the execution of a decree, was not subject to a claim for pre-emption. **NAWAB v. JAWAYA, 203 P.L.R. 1910 = 8 Ind. Cas. 777.**

(120)—*Pre-emption—Estoppel—Vendee purchasing property at the request of the pre-emptor.*—A pre-emptor is not entitled to claim property by right of pre-emption, when the vendee has purchased the same at the pre-emptor's request. **CHAITU v. MUSSAMMAT NIAZ BEGAM, 203 P.L.R. 1910 = 8 Ind. Cas. 780.**

(121)—*Effect of not paying pre-emption money within the time allowed by the decree—Tender to Nazir after Court hours not sufficient—Incompetency of Court to extend time—S. 148, C.P.C., 1908—Ultra vires.*—*Held*, that a pre-emption suit stands dismissed, if the pre-emptor fails, even by mistake, to deposit whole of the pre-emption money payable under the pre-emption decree into Court within its usual working hours on the day fixed for its payment by the said decree; and that neither the first nor the Appellate Court has power to extend the time—S. 148 of Act V of 1908 does not apply in such a case. A tender in whole or part of the pre-emption money to the Court Sheriff after its usual working time is not sufficient to save the decree. **MUHAMMAD v. CHARAG, 140 P.W.R. 1910 = 8 Ind. Cas. 812 = 22 P.L.R. 1911.**

(122)—*Lis pendens—Sale by vendee to person having equal right with the pre-emptor on latter*

Pre-emption—continued.**—8—Miscellaneous—continued.**

filing suit—Punjab Pre-emption Act (II of 1905), s. 14—Vendor's right to select pre-emptor.—Where, on a pre-emptor filing a suit for pre-emption, the vendee sells the property to a person who possesses equal right of pre-emption the doctrine of *lis pendens* does not apply, if the right of the subsequent vendee subsists at the date of sale to him, for no new right is created by the sale. In such cases the provisions of s. 14 of the Punjab Pre-emption Act may be used by the Court trying the case. **KARAM ILAHI v. HIRA, 74 P.L.R. 1911. (26 P.R. 1908 = 145 P.L.R. 1908. F.; 29 A. 339, Not F.)**

(123)—*Custom—Sindh Jats—Childless proprietor, sale of land by—Whether valid in presence of nephews—Pre-emption.*—There is no custom among the Sindh Jats of Moga Tahsil, Firozpur District, prohibiting a childless proprietor from selling his land for a *bona fide* consideration, in the presence of male collaterals so nearly related to him as nephews, the only restrictions being those imposed by the law of pre-emption. **NIHAL SINGH v. SAHIB SINGH, 77 P.R. 1880. [F., 107 P.R. 1885; Appl., 16 P.R. 1883, 120 P.R. 1886, 103 P.R. 1884; D., 137 P.R. 1884]**

(124)—*Right of pre-emption—Pre-emptor buying part of property from vendee—Rival claim to pre-empt whole property waiver—Priority.*—The right of pre-emption is a right to take over a sale-bargain in its entirety, and if a pre-emptor suffers another person to purchase, and is content to accept a derivative title from him with respect to a portion only of the premises sold, being unwilling to buy the rest, he must be held to abide the consequence of losing even that portion, if another person, having a superior right to that of his vendor claims to assert his right to take over the original bargain as a whole; and the sub-purchaser bringing himself within the principle laid down in 48 P. R. 1878, must be held to be estopped from asserting the right he has once waived of acquiring the property sold, against another person whose claim to pre-emption, though inferior to his own, is still superior to that of the first purchaser. **FATTEH CHAND v. NIHAL SINGH, 106 P. R. 1880. [F., 25 P. R. 1903 = 74 P.L.R. 1903; R., 107 P.R. 1882; D., 133 P. R. 1884; Cons., 69 P. R. 1898.]**

(125)—*Pre-emption—Mortgage by vendee after sale—Pre-emptor not bound by mortgage—Parties—Mortgagee not a necessary party in a pre-emption suit—Mortgagee bound by decree against vendee.*—*Held*, that a pre-emptor is not bound to pay anything more than the amount which is fixed in a pre-emption decree as the price at which the sale took place. A pre-emptor is not bound by a mortgage effected by the original vendee after the sale. The mortgagee in such case must look to his mortgagor alone. *Held*, also, that such a mortgagee is not a necessary party in a suit for pre-emption. As he holds the property under the vendee he is bound by a decree for pre-emption

Pre-emption—continued.**—8. —Miscellaneous—continued.**

passed against the vendee. *DEO RAJ v. GOVIND PARSHAD*, 55 P.W.R. 1912=91 P.L.R. 1912=13 Ind. Cas. 647. (93 P.R. 1902, F.)

Effect of partition on the application of a vendee on the right of pre-emptor—*See* PUN. ACT IV OF 1872, s. 12 (a), 30 P.L.R. 1902=32 P.R. 1902.

Sub divisions of village—Zails of Pheru Shahr village in Ferozepur Tehsil—*See* PUN. ACT IV OF 1872, s. 12 (c), 142 P.L.R. 1905.

Vendee owning small bit of agricultural land used as building site—Whether confers right of pre-emption—*See* PUN. ACT IV OF 1872, ss. 12 and 15, 109 P.L.R. 1903=78 P.W.R. 1903.

See PUN. ACT XVI OF 1887, s. 53, 22 P.R. 1901.

Successful pre-emptor when becomes owner of pre-emption property—*See* PUN. ACT II OF 1905, ss. 11, 12 (c), thirdly 1, 20 (b), 1 Ind. Cas. 460=26 P.W.R. 1909.

Agricultural land given to daughter—Sale of such land by her descendant—Other of her descendants not claiming pre-emption of such land—Heirs of donor entitled to do so—*See* PUN. ACT II OF 1905, s. 12 (a), 131 P.R. 1908.

Suit for—Share in a law suit sold—Sale of a doubtful right—*See* U.P. ACT XVIII OF 1876, 9 O.C. 86, B.

Suit for—*See* U.P. ACT XVIII OF 1876, ss. 8, 9, 9 O.C. 211.

Against under-proprietor, proprietor's suit for—Under-proprietor not residing in the village—Residence in village—Village-community, member of—*See* U.P. ACT XVIII OF 1876, s. 9, cl. 5, 9 O.C. 271, B.

Sale-deed executed before expiry of period fixed for tender—Effect on right of—*See* U.P. ACT XVIII OF 1876, ss. 10, 11, 14 O.C. 1=9 Ind. Cas. 333.

Decree for, not prescribing payment into Court—Payment of purchase money out of Court—Validity—*See* U.P. ACT XVIII OF 1876, s. 15, 14 O.C. 85.

Exchange of parts of property liable to—During suit for—Binding nature of exchange on pre-emptors—*See* U.P. ACT III OF 1901, s. 233, 10 O.C. 363.

Order allowing mesne profits to pre-emptor—Decree—Appeal—*See* CIV. PRO. CODE, 1908, ss. 2, 47, 144, 44 P.L.R. 1910.

Decree for—Money not deposited within time fixed—Obligation or liability incurred—No vested right in procedure—*See* CIV. PRO. CODE, 1908, O. XX, r. 14, 6 A.L.J. 647=3 Ind. Cas. 497.

Decree in pre-emption suit—Lower Court fixing price to be paid and allowing costs to be deducted—Payment of decree amount after deducting costs—Appellate Court raising the price to be paid and reversing order as to costs—Payment of difference without costs previously recovered, whether sufficient compliance with

Pre-emption—continued.**—8.—Miscellaneous—continued.**

decree in appeal—*See* CIV. PRO. CODE, 1908, O. XX, r. 14, 56 P.R. 1910=6 Ind. Cas. 954=133 P.L.R. 1910.

See CIV. PRO. CODE, 1908, O. XXI, rr. 88, 90, 5 A. 42=A.W.N. 1882, 146.

See COMPROMISE—NON-PERFORMANCE OF, 44 P.R. 1875.

Suit for—In respect of a definite share in a Bhaiyachara village—Court-fees—*See* COURT-FEES ACT, 1870, s. 7, sub.s. V, cl. (b), 3 A.L.J. 511=A.W.N. 1906, 195.

Suit for—Of land not paying Government revenue, valuation of—*See* COURT FEES ACT, 1870, s. 7, sub-ss. V, VI and 12, A.W.N. 1906, 66=3 A.L.J. 244=28 A. 411.

Suit for, on sale of equity of redemption—*See* COURT FEES ACT, 1870, s. 7, para 6, 6 A.L.J. 905, F. B.=6 M.L.T. 311=3 Ind. Cas. 562=32 A. 19.

Custom of—Whether prevalent in Tarai-Ravi, Sub-division of Multan City—*See* CUSTOM, 42 P.R. 1906.

Pre-emptors—Consideration unreal and in fraud of—Sale—Effect—*See* CUSTOM—PUNJAB—ALIENATION, 27 P.R. 1909=46 P.L.R. 1909=33 P.W.R. 1909=1 Ind. Cas. 888.

Land pre-empted with money raised by mortgage of ancestral property is not ancestral—Right of reversioner—*See* CUSTOM—PUNJAB—INHERITANCE, 2 P.R. 1910=4 P.W.R. 1910=5 Ind. Cas. 232=156 P.L.R. 1910.

Custom of—By vicinage in respect of houses—*See* CUSTOMS—PUNJAB—PRE-EMPTION, 75 P.L.R. 1906.

Custom of, by right of vicinage—*See* CUSTOMS—PUNJAB—PRE-EMPTION, 38 P.R. 1906, 89 P.L.R. 1906.

Custom of—In relation to houses—Vicinage—Joint ownership—*See* CUSTOMS—PUNJAB—PRE-EMPTION, 129 P.L.R. 1905=71 P.R. 1905.

Sale to a person not a co-sharer in the joint-holding—Sale by vendee to a co-sharer before suit—Rights of other co-sharers—*See* CUSTOMS—PUNJAB—PRE-EMPTION, 47 P.L.R. 1905.

Custom of—In respect of house property in Katra Moti Ram in the city of Amritsar—*See* CUSTOMS—PUNJAB—PRE-EMPTION, 99 P.R. 1906=130 P.L.R. 1906.

Houses—Mohalla Mashad in Sonapat town in Delhi District—*See* CUSTOM—PUNJAB—PRE-EMPTION, 85 P.L.R. 1906.

See DECREE—DECREE, CONSTRUCTION OF, 1 A. 293.

Pre-emption—Sale to minor—Estoppel—*See* ESTOPPEL—ESTOPPEL BY DEEDS, 4 A. 37=A.W.N. 1881, 129.

Right of pre-emptor to let in evidence showing the real nature of the transaction—*See* EVIDENCE ACT, 1872, ss. 92, 99, 8 Ind. Cas. 501.

Pre-emption—continued.**—8.—Miscellaneous—continued.**

Suit for—Transaction, whether sale or mortgage—Transaction alleged to be controlled by some agreement—Agreement may be fraudulent and collusive—Effect—Extrinsic evidence—See EVIDENCE ACT, 1872, ss. 92, 99, 4 N.L.R. 115.

Money borrowed by father for pre-empting—Liability of son—See HINDU LAW—DEBTS, 7 A.L.J. 1182=8 Ind. Cas. 836.

See LIMITATION ACT, 1908, s. 22, 4 A. 145 = A.W.N. 1881, 153.

See LIMITATION ACT, 1908, art. 10, 4 A. 179=A.W.N. 1881, 176.

Suit for—Calculation of limitation—See LIMITATION ACT, 1908, art. 10, 9 Ind. Cas. 309=9 M.L.T. 292=21 M.L.J. 454.

Suit for—Property in possession of tenant, whether capable of physical possession—See LIMITATION ACT, 1908, art. 10, 63 P.L.R. 1908, F.B.=1 P.W.R. 1908=49 P.R. 1908.

Property capable of physical possession—Applicability of art. 10—See LIMITATION ACT, 1908, arts. 10, 120, A.W.N. 1905, 88=2 A.L.J. 350=27 A. 540.

Property transferred to pre-emptors having right inferior to plaintiff—Sale or substitution—See LIMITATION ACT, 1908, arts. 10, 120, 86 P.L.R. 1905.

Suit for—In respect of a sale under a clause of conditional sale by foreclosure of a mortgage—Limitation—See LIMITATION ACT, 1908, art. 120, 112 P.L.R. 1906.

See LIMITATION ACT, 1908, art. 120, 8 A. 54 = A.W.N. 1885, 330.

See LIMITATION ACT, 1908, arts. 120 and 10, 4 A. 218, F.B.=A.W.N. 1882, 28.

Pre-emption suits—Rival claimants—Execution of decree—Compromise—Appeal—See LIMITATION ACT, 1908, art. 182, 81 P.L.R. 1909=87 P.W.R. 1909=4 Ind. Cas. 629.

Mahomedan widow being in possession of her share recorded as in possession in lieu of dower, effect of, as regards—See MAHOMEDAN LAW—PRE-EMPTION—NATURE AND EXTENT OF RIGHT, 2 A.L.J. 775.

Partner—Partition during pendency of suit for—Effect—See MAHOMEDAN LAW—PRE-EMPTION—NATURE AND EXTENT OF RIGHT, 6 Ind. Cas. 426=7 A.L.J. 715=32 A. 566.

What words enough—See MAHOMEDAN LAW—PRE-EMPTION—NECESSARY FORMALITIES, 6 A.L.J. 15=1 Ind. Cas. 85.

Necessity for making reference to the *talab-i-mawasibat*, when making the *talab-i-istishhad* the witness to both the demands being the same—See MAHOMEDAN LAW—PRE-EMPTION—NECESSARY FORMALITIES, 27 A. 160 = A.W.N. 1904, 201=1 A.L.J. 569.

Pre-emption—concluded.**—8.—Miscellaneous—concluded.**

Otti holder—Right of—See MALABAR LAW—MORTGAGE, 3 M. 74.

See MALABAR LAW—MORTGAGE, 7 M. 309.

Waiver of right of—See MORTGAGE—GENERAL, 9 M.L.T. 495.

Court's power to extend time fixed in decree in pre-emption cases—See MORTGAGE—GENERAL, 7 Ind. Cas. 36.

See MULTIFARIOUSNESS, 4 A. 163, 6 A. 106 = A.W.N. 1883, 229.

Pre-emption—Town—Village—Inconsistent pleadings—See PLEADINGS, 15 P.L.R. 1911 = 2 P.W.R. 1911=9 Ind. Cas. 36.

Pre-emptor must pre-empt the whole of the bargain between vendor and vendee or not at all—Must take pre-empted property subject to vendor's liability—See PRE-EMPTION—MISCELLANEOUS, 5 A.L.J. 112=A.W.N. 1908, 42=3 M.L.T. 223=30 A. 130.

Custom of pre-emption, recorded in *wajib-ul-arz*, in respect of the transfer of a *haqiat* of a *hissedar* applies only to co-parceners, and no claim can be maintained in respect of the sale of *arazidari* land—See PRACTICE AND PROCEDURE, 5 A.L.J. 447, F.B.=A.W.N. 1908, 195=4 M.L.T. 162=30 A. 479.

Agreement conferring right of—Agreement embodied in petition of compromise—Registration—See REGISTRATION, 13 O.C. 241.

Compromise recording contract of—Not embodied in decree—Not admissible without registration—See REGISTRATION ACT, 1908, ss. 17, 49, 7 A.L.J. 206=32 A. 206=5 Ind. Cas. 234.

Pre-emption—Jirga - Resolution—See PUN. REG. IV OF 1887, 26 P.R. 1909=48 P.L.R. 1909=35 P.W.R. 1909=1 Ind. Cas. 877.

See RES JUDICATA—ADJUDICATION, 109 P.R. 1868, 48 P.R. 1871.

Decision in pre-emption suit that no real sale took place—Whether bars adjudication upon that point in subsequent suit by vendee for possession against vendor—See RES JUDICATA—CAUSE OF ACTION, 42 P.R. 1912.

See RE-TRIAL, A.W.N. 1881, 26.

See VALUATION OF SUITS, 54 P.R. 1878, F.B.

Decree against purchaser in suit by pre-emptor—Vendee's right and vendor's liability—Covenants by vendor—See VENDOR AND PURCHASER—GENERAL, 111 P.R. 1908.

Right to—Arises in respect of an exchange—See WAJIB-UL-ARZ, 6 A.L.J. 735=31 A. 539 = 3 Ind. Cas. 903.

Wajib-ul-arz—Interpretation of document—Inconsistent clause to be rejected—See WAJIB-UL-ARZ, 6 A.L.J. 652=3 Ind. Cas. 496.

Pre-emption, Punjab. A. L. J. B.

See PUN. ACT II OF 1905.

END OF VOL. VII.

PRINTED AT THE LAW PRINTING HOUSE, MOUNT ROAD, MADRAS.

Acc No

Date 25.2.70.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)



W. N. D. A. M. S. L. L. S. L.
V. K. H. H. S. L. L. S. L.
RINAGAR (Kashmir)

U. N. D. A. N. S. A. L. L. E. S.
VAKIL HUKUM GUYA
SINGAPORE (Kashmir)